

The Battle for Rule of Law in Thailand: The Constitutional Court of Thailand

Dr. James R. Klein ¹

INTRODUCTION

At the heart of democratic governance are laws and administrative procedures which protect individual liberties, promote citizen participation, restrict the power of the state to infringe on individual rights, and hold leadership accountable to the public. Central to this tradition is the supremacy of constitutional law over all other laws, decrees and administrative rules and regulations, or the actions of any official. Under the concept of separation of powers, judicial review, the authority to adjudicate the constitutionality of law, is removed from the political sphere and vested in an independent judicial body.

Prior to promulgation of the Constitution of the Kingdom of Thailand (1997), Thailand had never had a tradition nor legal precedent for an independent agency to rule on political and legal issues. In practice, Thailand's fifteen previous constitutions had been subservient to code and administrative law designed by the bureaucracy to regulate individuals in society by restricting their fundamental rights and liberties proclaimed in the various constitutions. Thai politicians, the military and senior civilian bureaucrats had always reserved for themselves the power to interpret the meaning of law and the intent of the constitution. The 1997 Constitution seeks to remedy these problems by reversing the course of Thai constitutional law. It establishes the constitution as the basis for all law, thereby reducing the power of politicians and bureaucrats to subvert constitutional intent. Second, it establishes a judicial review process independent of the executive, legislative, and judicial branches, thereby enhancing government accountability and the protection of civil liberties.¹ The central mechanism for these reforms is the Constitutional Court.

The Constitutional Court, established on April 11, 1998 under Chapter VIII, Part 2 of the 1997 Constitution, is the most critical element of Thailand's political reform process. The power to enforce adherence to constitutional reforms rests in the hands of its 15 justices. If they falter in the execution of their duties, if they allow political pressure to interfere with a faithful interpretation of the constitution, or if they subvert the supremacy of the constitution to organic or any other subservient law, the 1997 Constitution will fail to function as the foundation for a political system premised on accountability, transparency, and the rule of law.

During the first five years of the Constitutional Court's existence, there has been remarkable government and public acceptance of the authority of the Court to rule on political and legal issues. This does not mean, however, that there is widespread acceptance of all the Court's decisions. Premised on the written decisions of justices, rule of law advocates fear

¹ The views expressed herein are those of the author and do not necessarily represent those of The Asia Foundation. This paper is a draft and may include inaccurate information or other errors. Please send corrections, clarifications and comments to the author via e-mail at jklein@taf.or.th.

certain justices are intent on subverting the constitution and the rule of law in favor of the status quo tradition of rule by law, wherein any law is considered to take precedent over the letter or intent of the constitution. Others are concerned that the Court is facing increasing political pressure to the degree that decisions could be influenced. The Court, still in its infancy, must proceed with caution as it is unable to hide behind Thailand's stringent contempt of court tradition. The Constitutional Court is accountable to the public for its decisions and actions. Indeed, in response to a petition of 50,000 citizens to the President of the Senate, four justices are under investigation by the National Counter Corruption Commission for conduct unbecoming a judicial official.

This paper seeks to provide an overview of the development of the Constitutional Court from the inception of the idea for a Court during the constitutional drafting process, through the selection of the first justices, and a preliminary analysis of the Court's decisions during its first years of existence. This paper is not comprehensive in providing an in-depth analysis of every case or even of every major category of cases. However, it does go into some detail concerning categories that are of particular importance to the unfolding of the political and administrative reforms embodied in the Constitution of the Kingdom of Thailand (1997). These critical areas include electoral reforms, counter-corruption, and the battle for suppression of Thailand's rule by law legal tradition in favor of the rule of law model embodied in the Constitution.

ESTABLISHMENT OF THE CONSTITUTIONAL COURT OF THAILAND

The Concept of a Constitutional Court in the Constitutional Drafting Assembly

The creation of the Court was the subject of intense debate during the constitution drafting process. The concept was opposed most vocally by senior judges on the grounds constitutional and judicial review should remain the prerogative of the Supreme Court. They argued the institution would create a fourth branch of government more powerful than the judiciary, legislature, or executive. Judges also feared political interference in the selection and impeachment of judges. After five months of debate, the CDA confirmed the creation of the Constitutional Court but made important concessions to judicial opponents over the composition and powers of the Court. These concessions would subsequently be the source of many concerns among advocates of constitutional reform and the proponents of a nation governed by the rule of law.

In the first of these concessions, the CDA decided the Court would not have the power to overrule a final judgment of the Supreme Court. If an affected party, or a court, believed a case involved a constitutional issue, the court could request an opinion from the Constitutional Court. The court would stay its trial and adjudication until the Constitutional Court issued its decision. Thus, a defendant may make an appeal to the Constitutional Court at any point during the adjudication of a case but once the Supreme Court has issued a final ruling on the case, there is no recourse to the Constitutional Court to overrule the Supreme Court. Nevertheless, this would not prevent the Court from considering the same point of law in a subsequent case. All courts would be bound by Constitutional Court decisions, although the Court's rulings would have no retroactive effect on previous decisions of the regular courts.² The CDA also removed the original draft Section 264 which would have empowered the Constitutional Court to rule on any case in which the constitution did not specifically delegate an agency the power to adjudicate, thus leaving such cases to the regular judicial system for review.³

There were critics who feared that the regular courts would be unwilling to stay a trial to submit an issue to the Constitutional Court for a ruling. Although cases concerning the constitutionality of law represent over half of all Court judgments through October 10, 2002, and although Section 264, para 1 of the Constitution appears to provide judges with no discretion on whether or not to submit applications to the Constitutional Court, lawyers have begun to notice a trend whereby some judges are rejecting objections raised by parties to the case and refusing to submit applications to the Constitutional Court.⁴ More problematic, however, has been convincing the Constitutional Court to assess the constitutionality of rules and regulations the bureaucracy has created to implement law. All too often within the Thai context, a law itself may not be unconstitutional; instead, the problem lies with the implementing rules and regulations.

Second, the CDA compromised to reduce the potential for political interference with the Constitutional Court. The CDA removed the original draft Section 260 which would have enabled 10 per cent of the combined House and Senate to call for a vote of impeachment against a justice, and a vote of three-quarters of the combined legislators to dismiss a justice. Although the CDA Scrutiny Committee initially rejected Amara Raksasat's proposal that the impeachment of Court justices fall under Chapter X, Part 3 of the Constitution on the removal of other officials from office, the CDA eventually accepted this method of dismissal.⁵ In an important concession to democracy advocates, this compromise grants 50,000 eligible voters, or a quarter of the members of the House the right to request the Senate to initiate impeachment proceedings. A vote of three-fifths of the Senators is required for impeachment. To date, there has only been one instance in which 50,000 voters have filed a petition to impeach; that is, the current motion before the National Counter Corruption Commission against the four justices in the Thaksin Shinawatra case who ruled Section 295 was not applicable to Thaksin.

Third, to placate the judiciary, the CDA revised the selection process to ensure that the judicial branch had a stronger influence over the composition of the Constitutional Court. Originally the Court was to have nine judges comprising six legal experts and three political science experts. A seventeen person panel would propose eighteen names from among which Parliament would elect the nine judges. Although an *ex-officio* member of the panel would have been the President of the Supreme Court, the panel also would have included four representatives of political parties in parliament.⁶ One method considered to strengthen the influence of the Courts was to include on the bench *ex-officio* members from the Supreme Court and the Administrative Court, as well as to include other judicial officials on the Court.⁷ However, this concept ran counter to the principle that the Court would be an independent agency and a full-time job for its justices.

The CDA eventually agreed to increase the number of Court justices from nine to fifteen, with the stipulation that seven of the justices would come from the judiciary itself. Five justices would be elected by the secret ballot of Supreme Court Judges from among nominees holding a position not lower than judge of the Supreme Court. Another two justices would be elected by the new Supreme Administrative Court. In the selection of the other eight justices, the CDA reduced the number of law experts to five and political science experts to three. They also eliminated Senate representation on the selection panel but granted the Senate sole authority to elect the justices from among the law and political science nominees. Previously, the election would have been through a joint sitting of the House and Senate.⁸

This compromise to allow the courts to directly nominate Constitutional Court justices would prove to be problematic on two fronts: the predilection of judges to premise their

decisions on rule by law philosophies, and the general qualifications of court nominees. Opponents of this compromise feared that justices with long experience sitting on the bench would be influenced by their tradition of issuing decisions premised on points of law and would therefore fail to promote constitutional supremacy and the principle of rule of law. Within the Court=s first year, a number of decisions demonstrated the reality of this apprehension. Second, the Thai courts took the position that their nominees were not subject to the advice and consent of the Senate. Since the courts have had a strong tradition of protecting and promoting their peers, there were apprehensions that the courts might overlook issues that could disqualify a nominee and the Senate would be powerless to prevent the individual from assuming office. This apprehension came to pass in the very first list of nominees prepared by the Supreme Court, creating a major confrontation between the judiciary and the Senate.

Selection of the First Constitutional Court Justices

Once the 1997 Constitution had been promulgated, the next major hurdle for the Court was the appointment of justices. This process was the source of a four-month controversy pitting the Senate against the Supreme Court and democracy advocates. After receiving the Supreme Court=s list of nominees, the Senate created a committee to review the nominees= credentials and background. On November 24, 1997, the Senate voted to remove the name of Supreme Court Vice President Amphorn Thongprayoon, reasoning that Amphorn=s credentials were dubious, and he was involved in a financial dispute in which he was alleged to have defaulted on a three million baht debt. Senate Speaker Meechai Ruchaphan proclaimed the Senate had the right and a duty to ensure that only suitable individuals were on the list of nominees submitted to the King.⁹

The Supreme Court was furious, arguing the Constitution did not empower the Senate to check the records or to reject Supreme Court nominees. The Supreme Court requested a ruling from the Constitutional Tribunal chaired by Parliamentary President, House Speaker Wan Muhammed Nor Matha.¹⁰ On January 7, 1998, in a 6:3 vote,¹¹ the Tribunal ruled the Senate did not have the power to appoint a committee to examine the background of judicial nominees, nor did it have the power to reject individuals elected by the Supreme Court. The Senate=s review powers were limited to examining the records of law and political science nominees and electing half of those nominees for appointment to the Constitutional Court.

Immediately after the Supreme Court had filed its request to the Tribunal, Justice Amphorn had withdrawn his name, stating he did not want to be caught in the middle. Therefore, satisfied with the Tribunal=s ruling, the Supreme Court elected Justice Jumpol na Songkhla on January 9, 1998 to replace Amphorn. Nevertheless, the Senate ignored the Tribunal=s ruling and proceeded to review Jumphol=s background and delayed a vote to accept his nomination for seven days so that Senators could have time to form an opinion about Jumphol. Finding no problems, the Senate proceeded to acknowledge his appointment to the Court on January 23, 1998.¹²

Although the selection of court nominated justices had been resolved, the case of Justice Amphorn prompted wider debate on the composition and qualifications of Constitutional Court justices. This debate led to the removal from the Court of former Senate and Parliament President Ukrit Mongkolnavin, even before he was sworn in as a justice. The Senate had elected Ukrit from the list of ten legal specialists nominated by the selection panel. Ukrit, known for his conservative views, was controversial. In competition with public-favored former Prime

Minister Anand Panyarachun, Ukrit had lobbied heavily to have himself elected as chairman of the Constitution Drafting Assembly. Intensive public criticism of his legislative record, however, led him to voluntarily resign from the CDA.¹³ Even before his election to the Court, there had been speculation that Ukrit would seek election as President of the Constitutional Court. Democracy activists, however, claimed Ukrit was unqualified to guard the constitution because he had served dictators while President of Parliament under the National Peacekeeping Council's administration. Nevertheless, the Senate disregarded these protests and proceeded to elect Ukrit.

Stung by both the Senate's handling of the Supreme Court's nominees and the controversy surrounding Ukrit, two Bangkok Civil Court Judges, Sriampron Salikhup and Pajjapol Sanehasangkhom, filed a petition requesting the Tribunal to rule on the Senate's election of Ukrit. Strategically ignoring the moral debate of democracy activists, the judges premised their argument on a legal technicality. They argued Ukrit only had an honorary professorship at Chulalongkorn University, while the Constitution specifically states a nominee, who did not meet other criteria, must be at least a professor. Moreover, adopting a Senate argument against Judge Amphorn, they alleged Ukrit was involved in a multi-million baht law suit over a golf course. On January 10, 1998 the Tribunal ruled the judges were not the affected parties and therefore they had no right to request a ruling. Nevertheless, Parliament President Wan Muhamed Nor invoked his power as chairman of the Tribunal to ask the Senate to reconsider Ukrit's nomination.

On January 19, the Senate and the nominators of Ukrit reaffirmed his constitutional qualifications noting that his professorship was special only because he was not a government official. Under Chulalongkorn's regulations, he had the academic status of a full professor. This position only inflamed activists and prompted Wan Muhamed Nor on January 21 to invoke his authority under Article 266 of the Constitution to order the Constitutional Tribunal to consider the issue. On February 8, in a 4:3 vote¹⁴ the Tribunal ruled Ukrit's special professorship did not qualify him for a seat in the Constitutional Court. The Tribunal noted Chulalongkorn used a different set of criteria for the appointment of Ukrit as a "special professor" rather than as an academic professors as intended by the Constitution. The selection panel then nominated two former Attorneys-General, and the Senate elected Komain Patarapirom to replace Ukrit.¹⁵

As a result of the Judge Amphorn incident, there are those who suggest a constitutional amendment is needed to empower the Senate to have advice and consent over judicial nominees; that is, the power to review their background and to accept or reject a nominee deemed inappropriate or unqualified. Others point out that there is no need for an amendment because the opinions of both the regular courts and the Constitutional Tribunal are a misinterpretation of the Constitution.¹⁶ Pro-amendment forces have focused, as did the Constitutional Tribunal, on Section 257 of the Constitution that specifies the nomination and election process of law and political science specialists. They contend there is nothing in the Constitution about the election of court nominees by the Senate and therefore the charter must be amended to authorize this. However, both proponents of an amendments and opponents of advice and consent fail to take into account Section 255, para 1 of the Constitution that clearly states the Constitutional Court is to consist of justices appointed by the King "upon the advice of the Senate". Since the Senate must be accountable to the King, they must have the authority to review the backgrounds of judicial nominees to determine whether or not they will submit the names of the nominees to the King. That is, although the Constitution does not grant the Senate the power to "elect" judicial nominees, Section 255 does grant the Senate full authority to accept or to reject judicial

nominees.

By allowing Senators to review the background of Judge Amphorn's replacement, Justice Jumpol, the old appointed Senate had refused to be bound by the Constitutional Tribunal's ruling that the Senate had no power to reject a judicial nominee. In sharp contrast, Thailand's first elected Senate quietly relinquished its power of appointment by a vote of 169:24, and abandoned its duty to advise the King, when it passed the two nominees of the Supreme Administrative Court on August 8, 2000.¹⁷ The Senate reaffirmed its position in 2002 when it conceded to the demands of the five justices nominated by the Supreme Court that they serve a full nine year term. The justices had argued that since the Senate had no power over their appointment, they were not subject to Section 322 of the Constitution that limits to a half term all members of independent agencies elected by resolution of the old appointed Senate.

This issue will arise again as a constitutional debate in May 2005 when Justice Kramol Thongthammachat, an Administrative Court nominee, retires. The debate, or lack of debate, on his replacement will then set the stage for a final showdown and resolution of this issue in April 2007 when the terms of all five Supreme Court nominees expires and all 200 senators have been replaced through the March 2006 senate elections.¹⁸

Record Overview of the Constitutional Court

With the selection of judges complete, (See Appendix 2), the Constitutional Court was formally established on April 11, 1998. The Constitutional Court is to have a President and fourteen justices. Initially, there were only thirteen members because the Constitution requires the Administrative Court, which had yet to be established, to nominate two of the judges.¹⁹ The first thirteen judges of the Constitutional Court elected career diplomat Chao Saichua as their President, and Deputy Cabinet Secretary General Noppadol Hengcharoen to serve as Secretary General of the Office of the Constitutional Court.

To inform the public of the Court's operations, the Office of the Constitutional Court began issuing a quarterly journal, *Warasan Rattathanun* [Constitutional Court Journal] in January 1999. The journal provides an overview of select cases and a series of documents and academic articles on constitutional law issues. The Court also opened a website at www.concourt.or.th.²⁰ The written decisions of the Court and the individual written opinions of each justice are published in the Government Gazette. In addition, all decisions are published annually in *Ruam Khamwinichay San Rattathanun* [The Collected Decisions of the Constitutional Court].

These sources would appear to provide the researcher with a wealth of primary source information. However, there are some problems. Initially, the Court was very slow in posting its decisions on its website, although they are now only about one month behind schedule. More problematic, the website only posts the central, or the "Court Decision" as distinguished from the written decisions of the individual justices. One must have access to the Government Gazette or wait for the publication of Collected Decisions before seeing the details of individual decisions. The problem is there is a significant backlog of cases to be printed in the Gazette, and there is currently a two-year delay in the printing of Collected Decisions. As one step in resolving this problem, the Court has recently produced a CD with the complete text of all decisions for the period 1998-2001. Nevertheless, several constitutional law researchers have suggested that the delay in publishing and allowing the public to quickly access the decisions may be a violation of Section 269 para 2 of the Constitution that stipulates the Court's procedures must include

guarantees with regard to “the opportunity to challenge the judge of the Constitutional Court and the reasoning of the decision or order of the Constitutional Court”.

Another problem facing the researcher of the Constitutional Court is that since all fifteen justices are required by the Constitution to write their own decisions, in addition to jointly preparing a central written decision, many cases run into hundreds of pages. For example, the case against Prime Minister Thaksin Shinawatra is 988 pages. It is therefore very difficult for jurists, let alone law students or the average citizen to read and digest every case. To address this problem, with support from The Asia Foundation, a group of legal researchers led by Dr. Wirat Wiratniphawaan has begun the process of summarizing the key elements of each case, including the key arguments in each of the justices’ individual written opinions.²¹ To date, however, Dr. Wirat and his team have published only the first 101 of nearly 300 decisions.

There are timing, standing, and subject limitations which determine when a Court appeal can be sought, who can file motions, and the specific issues which the Court has the jurisdiction to accept. The Court=s jurisdiction is limited to only those issues which are designated in the Constitution and laws. Such cases fall under six broad categories: 1) the constitutionality of parliamentary acts, 2) the constitutionality of royal decrees, 3) the authorities of constitutional mechanisms, 4) the appointment and removal of public officials, 5) political party issues, and 6) the constitutionality of draft legislation. Details on the Court=s timing, standing, and subject limitations are more fully described in Appendix 1: Judicial Review: Jurisdiction and Limitations of the Constitutional Court of Thailand.

From the inception of the Constitutional Court in 1998, through October 10, 2002, justices have issued rulings on 237 motions. As demonstrated in the chart below, more than half of the cases have concerned the constitutionality of laws. Political party issues and the removal of officials from office comprise another 27% of the motions on which the Court has ruled. The fewest rulings are for the constitutionality of parliamentary acts and for the governance of constitutional mechanisms.²²

RULINGS BY THE CONSTITUTIONAL COURT

Constitutionality of Parliamentary Acts	18	7.6%
Constitutionality of Laws	132	55.7%
Governance of Constitutional Mechanisms	23	9.7%
Political Party Deregistration	39	16.5%
Vacation of Office	25	10.5%
Total	237	100.0%

The Philosophical Divide in the Post-1997 Thai Environment

Before examining the rulings of the Constitutional Court, it is important to consider the context in which it has made decisions. The 1997 Constitution represents a key benchmark in a reform process that began in earnest after Thailand=s last military coup in 1991. This is a process that is unfolding in response to a variety of changes in Thai political, economic and social culture that have been evolving over the past three decades, and continue to evolve. Due to these changes, to understand the process underway in Thailand, and to better understand the rational behind the decisions of individual justices of the Constitutional Court, the classical perspectives of Thai political culture must be modified. Deference to hierarchy, reliance on

patron-client relations, politics dominated by class-driven, urban versus rural divisions remain important elements; however, they no longer are sufficient to adequately explain how philosophical perspectives influence the way in which events are unfolding.

In the post-1997 Thai environment, the terms pro-reform and anti-reform have been used by the media and most analysts to label individuals, cliques, and parties. With the emergence of Mr. Thaksin and the Thai Rak Thai, the term populist has emerged as yet another label. Such terms, however, do little to clarify the underlying philosophies of individual decision makers or help to explain the context of debates that have arisen over public policy decisions. For many, the terms are value-laden, suggesting merely that reformers are for change and are presumed to be good, while anti-reformist elements are against change and are therefore bad. The question that begs is reform of what. Reform could simply mean making changes to improve the effectiveness and efficiency of the current system; in sharp contrast, reform could mean replacing current systems and structures.

Thai citizens are clearly divided in their philosophical points of view; nevertheless, pro-reform and anti-reform do not accurately describe this divide. A more useful terminology set to define the contending perspectives within Thai society is perhaps conservative and liberal. This dichotomy is more useful in explaining why some reformers reject certain issues and why some alleged anti-reformers are surprisingly receptive to other issues. This distinction is important because it is reflected among the members of every new mechanism created by the 1997 Constitution, such as the Election Commission of Thailand, the National Counter Corruption Commission, the National Human Rights Commission, the Ombudsman, the Administrative Court and the Constitutional Court. The very diversity of views within these bodies represents a balance of power that has prevented conservatives from implementing policies which would have severely weakened the reform movement, as well as curbed liberal policies which would have been too progressive to effectively implement.

The Table 1 is an initial attempt to define the issues underlying the thought of Thai conservatives and liberals.²³ As the table demonstrates, the philosophical divide in Thailand should be further refined between a legal/judicial perspective and a political/administrative perspective. In general, those Thai who are against reform fall into the conservative category, preferring to maintain the political and administrative systems and structures that have evolved since 1932 to ensure a strong state and the capacity of officials to direct and regulate citizen behavior. However, a similar simple generalization is not easily made about pro-reform elements. While all liberals are reformers from a political/administrative perspective, a surprising number are conservative from a legal and judicial perspective. At the same time, there are many political and administrative conservatives who consider themselves in the forefront of the reform movement from the liberal legal and judicial perspective. It is in an appreciation of the complexity of the conservative/liberal dichotomy, particularly among pro-reform elements, that helps to best explain how Thailand 1997 Constitutional reforms have been unfolding over the past five years and the tensions that will direct how this process continues over the next decade. It also helps to explain the philosophy underlying the reasoning of individual Constitutional Court justices, and thereby an insight into the rationale for their individual rulings on motions brought before the Court.

TABLE 1		
The Philosophical Divide in Thailand As It Relates to the Constitution of the Kingdom of Thailand, 1997		
Philosophical Type	Legal and Judicial Perspective	Political and Administrative Perspective
Conservative	Emphasize the letter of the law, rules, and decrees; emphasize weight of private law and promote legal authority of rules and decrees; narrowly interpret the letter of the law; uphold precedents and avoid overturning precedents; promote rule by law.	Protect the rights of the state and promote the authority of the state and state officials; support centralization of authority; promote interests of the upper class and the administrative class.
Liberal	Emphasize the intent of public law; repeal rules and decrees that contradict the intent of the law; broadly interpret the law; ignore narrow interpretations of precedents and adjust the law in accordance with prevailing social developments; promote the rule of law.	Support the sovereign authority of the people, the constitution, and the democratic system; expand the rights of citizens; support decentralization, participation, community rights, and the environment.
Populist	Interpret the law and issue judgments in accordance with the prevailing arguments and apparent will of the people.	Flow with the current. Support change, reform, and people's power in administration and management.

RULINGS OF THE CONSTITUTIONAL COURT OF THAILAND

CONSTITUTIONALITY OF PARLIAMENTARY ACTS

Among the more important tasks of the Constitutional Court is to determine the constitutionality of parliamentary acts, both the text of the legislation passed as well as the process the legislators followed. This accountability process ensures that no new legislation will include provisions in violation of the intent of the constitution. Equally important, it ensures that the rules for adopting new legislation outlined in the constitution are followed in a transparent manner so that the government does not attempt to pass legislation without proper legislative accountability.

Although every Court decision is itself significant, there are several rulings worth noting. In its very first decision, (1/2541), the Court ruled on the constitutionality of four emergency executive decrees issued by the Chuan Administration to deal with the economic crisis. In an effort to contain economic instability, the government had issued the decrees in early May 1998 to expand the role of the Financial Restructuring Authority and the Assets Management Corporation, to settle debts of the Financial Institutions Development Fund through the issue of 500 billion baht in bonds, and to authorize the Ministry of Finance to seek 200 billion baht in overseas loans. After two days of intense debate in the House of Representatives, the opposition New Aspiration Party knew it did not have the votes to defeat the bills. Therefore, in a surprise move, just before the late-night vote, the NAP invoked Article 219 of the constitution which grants 1/5th of either house the privilege to question the constitutionality of an emergency decree under Article 218.

The NAP=s written complaint was technically flawed. The NAP argued that since there was no emergency nor necessary urgency (Article 218(2)), the government could not issue any emergency decrees. Article 219, however, specifically notes the constitutionality of an emergency decree can be questioned only on Article 218(1) concerning the maintenance of national or public safety, national economic security, or to avert public calamity. The government, fearing further delay in approval of the decrees, voiced opposition to the Court accepting the complaint as the opposition clearly had failed to cite the proper constitutional clause. The Court wished to set a precedent, however, demonstrating it would accept petitions under Article 219, even if technically inaccurate. Within a day it issued its decision that it was obvious to the general public that the nation was in an economic crisis and the decrees were designed to assist with national economic security in accordance with Article 218(1). Once the Court ruled the decrees were constitutional, they were quickly approved by Parliament.²⁴

NAP=s credibility, particularly within the business community, was seriously damaged by its last-minute parliamentary trick. As a result, in the future it is unlikely that Article 219 will be invoked unless there is a credible issue and the issue is raised and discussed at the beginning of debate, rather than at the last-minute before a vote. On the other hand, a precedent was established by the Court that it would accept all petitions under Article 219 to preserve parliament=s right to question the constitutionality of emergency executive decrees.

The NAP=s attempt to bring down the government blocked by the Court, the party filed impeachment proceedings with the Counter Corruption Commission against the Prime Minister and the Minister of Finance for violation of the constitution. The opposition argued the IMF letters of intent that the government had signed to secure emergency financial support were treaties. Article 224 of the Constitution stipulates the government must receive the prior consent of Parliament to enter a treaty. The Commission determined the issue concerned a constitutional interpretation and petitioned the Constitutional Court to provide an opinion. The Court ruled the IMF letters were not treaties, as internationally defined, because they were unilateral documents from the Thai government with no rules for enforcement or provisions for penalty review. Moreover, the IMF itself had devised special wording to indicate that its correspondence with member states were not contractual agreements.²⁵

The Court has also ruled against the government. On November 2, 1998, in Opinion 13-14/2541, the Court ruled 12-1 that the Cooperatives Bill and the State Enterprise Labor Relations Bill were unconstitutional because the House had added a substantive article to the bills without referring the changes for Senate approval. The two bills had passed the three readings of both

the House and the Senate. However, there had been controversy on the placement of a constitutionally-mandated statement on the affect the bill would have on public liberty and freedom. The statement had not been included in the original draft which passed the first House reading. However, during bill scrutiny prior to the second reading, the House Committee had added the statement as a section in each of the bills. The Senate disagreed and voted to place the statement in the preamble to the bills. A joint House-Senate committee formed to resolve the dispute confirmed the Senate=s decision. The House refused, however, to accept the joint committee=s resolution and voted to revive the original draft and include the statement as a new section in each bill. The Court ruled the House could only revive an original draft, it could not add a substantive section without Senate approval.²⁶ Although the theoretical dispute between the House and Senate was over a minor issue, this was an important ruling because it established a precedent prohibiting the government from using its strength in the House to by-pass the Senate in order to modify the substance of a bill.

Although the Court has ruled on relatively few cases on the constitutionality of parliamentary acts, two generalizations might be made. First, the Court carefully considers how new legislation conflicts with the Constitution, adopting a literal interpretation. Second, when considering legislative procedures defined in the Constitution, the Court has applied a literal interpretation to ensure that procedures are faithfully followed. This generally conservative legal and judicial perspective on the constitutionality of parliamentary acts carries over into the Court’s perspective on the constitutionality of laws.

CONSTITUTIONALITY OF LAWS

Nearly 56% of the motions filed with the Constitutional Court during its first four years have concerned the constitutionality of a law already in force. These motions have been filed primarily by the Civil, Criminal and Provincial Courts at the request of parties involved in a variety of suits. Section 264 of the Constitution authorizes a court to stay its trial and adjudication to submit a motion to the Constitutional Court “if the Court by itself is of the opinion that, or a party to a case raises an objection that”, the provisions of any law are contrary to Section 6 of the Constitution. Section 6 states: “The Constitution is the supreme law of the State. The provisions of any law, rule or regulation, which are contrary to or inconsistent with this Constitution, shall be unenforceable.” To strengthen this precedent in Thai constitutional law, Section 29 stipulates that the only allowable legal restrictions on the rights of citizens are those specified in the Constitution. To ensure that the bureaucracy does not subsequently subvert this process with restrictive rules and regulations, Article 29 para 3 further stipulates that administrative rules and regulations issued by virtue of the provisions of the law must also be in accordance with the constitution.

A significant body of Thai law, and in particular the administrative rules and regulations bureaucrats created to govern the implementation of such law, fails to meet the standards of the 1997 Constitution. Therefore, Transitory Provision Section 335(1) acknowledges that Article 29 cannot be implemented immediately and all laws enacted before promulgation of the Constitution, remain in force. However, in the view of some liberal reformers, Section 335(1) also clarifies that if a single amendment is made to a law, or to the rules and regulations issued by virtue of the law’s provisions, all aspects of the law and related rules and regulations must be amended to comply with Article 29.

With this background, many liberal reformers believed the most common type of motion to be filed with the Court would concern the constitutionality of laws already in force. Indeed,

prior to the establishment of the Court, many civic sector organizations were already developing strategies to overturn all unconstitutional laws, rules and regulations within a decade. However, the campaigns of liberal reformers were soon frustrated when they began to understand that the Court did not share their liberal interpretation of the constitution.

In the first case of this nature, (5/2541: August 4, 1998), brought by Mrs. Ubol Bunyachalothorn, the Court established its first precedent to frustrate the plans of civil society. In this case, Mrs. Ubol sought to challenge the constitutionality of the Nonthaburi Prosecutor's refusal to submit evidence she had requested in her murder trial, and the refusal of the Nonthaburi Provincial Court to submit her motion to the Constitutional Court. The Court dismissed the motion 9/3, ruling that Section 264 did not authorize citizens to submit motions directly to the Court; the justices concluded motions could be submitted only by regular courts.²⁷

The impact of this ruling is that any lower court judge may subjectively block a defendant's request to have the Constitutional Court assess the constitutionality of a law. Although regular courts would appear bound by the Constitution to submit all petitions to the Constitutional Court, attorneys indicate there is a growing trend among judges to reject petitions based on their own legal reasoning. Currently there is little recourse for petitioners to force judges to submit petitions. A landmark decision may be required by the Judicial Commission of the Courts of Justice to halt this trend.

Of greater significance, however, was the motion filed by the Songkhla Provincial Court on behalf of defendant Kriangsak Saelao (4/2542: April 1, 1999). Kriangsak's lawyers argued that the Maximum Interest Rates Announcement of the Siam Commercial Bank, issued under Bank of Thailand regulations, was unconstitutional. The Court dismissed the motion in a 12/1 ruling. Only one justice, Chai-anan, agreed that the Announcement was covered by Section 264; only three justices, (Komain, Chai-anan and Ura), found the Bank of Thailand Regulations were covered by Section 264.²⁸ This was the first indication that the Court viewed its powers of review under Section 264 to be limited to parliamentary acts rather than the rules and regulations issued by virtue of parliamentary acts. This became clearer in a motion filed by the Ayutthaya Provincial Court questioning the constitutionality of a Prime Ministerial Order issued under the provisions of the Environmental Protection Act of 1992 (14-14/2543: April 4, 2000). The Court dismissed the motion 12/1, (Chai-anan again being the lone dissenter), ruling that the order was issued by an administrative unit rather than a legislative organ. Thus, the order did not fall under the Court's jurisdiction as defined by Section 264.²⁹

In addition to applying a narrow interpretation to Section 264, the Court also has demonstrated a lack of interest in enforcing the rights of citizens mandated by the constitution when those rights are infringed by law, rules or regulations. The most glaring example of this, and one for which the Court received considerable public and media criticism, was the motion submitted by the Ombudsman on behalf of Sirimit Boonmul and Boonjuti Klubprasert (16/2545: April 30, 2002). Sirimit and Boonjuti had applied in 1999 to become assistant judges but they were disqualified due to physical disability arising from childhood polio. They had petitioned the Judicial Commission for a review of their case but had been told that judges must be held in high regard by society. This means that they must inspire public awe and respect. Walking with a limp does not fit such criteria. The two subsequently convinced the Ombudsman to submit their case to the Constitutional Court arguing that Section 26(10) of the Justice Personnel Law was unconstitutional because it prohibits persons with physical disabilities from taking the examination to become a judicial official. That is, they were prohibited the opportunity to take a test that would demonstrate their intellectual capacity to serve as a judge. They held the section contravened Section 30 of the Constitution, which prohibits discrimination on the basis of

physical or health conditions.³⁰

In an 8/3 decision, the Court ruled Section 26(10) was constitutional. In the minority, Justices Issara, Sujit and Amara, argued the law was a violation of the petitioners' constitutional rights, and clearly discriminatory. In speaking with the press, however, justices in the majority held that the Judicial Commission had every right to recruit individuals "with optimum potential" into its workforce, and that the Commission had to take into account "prevalent cultural values" placing preference on able-bodied persons.³¹ The ruling created considerable public debate and the entire judicial system came under heavy criticisms in the press. In defense of the judiciary, Region 3 Appeals Court Judge Sriamporn Salikhup said: "The Courts do not dislike the disabled, but society does not fully accept their status yet." A disabled judge could be the subject of ridicule. "Imagine when a judge is hearing a trial and the disputing sides are gossiping about him and laughing. How could he proceed with the trial?"³² No mention was made of the obvious solution to the dilemma suggested by Judge Sriamporn: a strict application of the judiciary's traditional broad interpretation of contempt of court.

On issues of the constitutionality of laws and the protection of constitutional rights, the Constitutional Court has been very conservative. Through a series of precedents, the majority has limited the Court's own jurisdiction to a review of laws enacted by the legislature, which rarely, in themselves, are unconstitutional. As a result, the majority has placed off limits any judicial review of the rules and regulations designed by bureaucrats to implement legislation, and which, in the view of liberal reformers, are designed to control citizens and restrict their constitutional rights. The majority also has demonstrated that it will serve as neither a force for social change or legal reform when it comes to protecting the rights of citizens. In its attempt to protect the image of the judiciary in the Sirimit/Boonjiti case, rather than protecting the rights of the handicapped as mandated by the Constitution, the majority merely encouraged ridicule by and contempt among liberal reformers for the entire judicial system.

There remains disagreement on the Constitutional Court's jurisdiction to review decrees, rules, regulations, and orders of the executive branch. Former CDA Secretary-General Bowornsak Uwanno interprets Section 264 to exclude most executive branch acts from the Court's jurisdiction. His definition of *Alaw* as used in Section 264 and other sections of the constitution refers only to Acts of Parliament (Acts and Organic Laws), Emergency Decrees, the Palace Law on Succession, and revolutionary decrees still in force but issued prior to promulgation of the constitution by the leaders of various *coup d=etat*. Dr. Bowornsak argues the Administrative Court has jurisdiction over any other issues. Dr. Charan Phakdithanukul and others argue the Court's jurisdiction includes executive rules and regulations which are issued by virtue of the provisions of a law passed by parliament.³³

The Act on Establishment of Administrative Courts and Administrative Court Procedures, 1999 establishes the Administrative Court's jurisdiction by defining by-laws to include *Aa* Royal Decree, Ministerial Regulation, Notification of a Ministry, ordinance of local administration, rule, regulation or other provision which is of general application and not intended to be addressed to any specific case or person. (Section 3, para 8). The fundamental problem remains, however, the Administrative Court only has a mandate to rule on the legality of an action (or non-action) under these provisions; it does not have a mandate to rule on the constitutionality of a provision. Therefore, Thai citizens still have no legal redress to question the constitutionality of a rule or regulation devised by the bureaucracy or politicians.

CONCURRENCE WITH DECISIONS OF THE ELECTION COMMISSION OF THAILAND CONCERNING POLITICAL PARTY REGISTRATION

The Constitutional Court has ruled on 39 cases concerning political party issues. (See Table 2). These consist of three basic sub-categories, one of which arises from party decisions and two of which arise from ECT initiatives. These are: 1) Party Dissolution (5 cases), 2) ECT Deregistration (33 cases), and 3) ECT Refusal to Register a Party (one case). In all of these cases, regardless of the sub-category, the first question considered was whether or not the Court had jurisdiction. From the very first case, Justices Komain and Prasoert, in the minority, asserted that the Constitution does not grant the Constitutional Court the power to dissolve a party, with the exception of Section 63, under which a party seeks to overthrow the democratic form of government by any means not in accordance with the Constitution. They asserted that although the Political Parties Act, Sections 65 and 73 grant the Court the power to dissolve a party, no law, not even an organic law like the Political Parties Act, can supercede the Constitution. Thus no law can modify the powers of the Court. That can only be done through a constitutional amendment.³⁴

The majority, however, held that it was the intent of the Constitution for the Court to dissolve a political party because among the many ways in which an MP's membership in the House may be terminated, Section 118(9) states "loss of membership of the political party in the case where the political party of which he or she is a member is dissolved by an order of the Constitutional Court and he or she is unable to become a member of another political party within sixty days as from the date on which the Constitutional Court issues its order". In the view of the majority, the Political Parties Act merely clarifies the procedures under which this process would be implemented. In subsequent cases of this nature, Justice Komain continued to cast a minority vote. Justice Prasoert, on the other hand, merely reiterated his disagreement on this issue in his written opinions but cast his vote with the majority, noting that the Court had established a precedent that it did have jurisdiction over the dissolution of political parties.³⁵

Party Deregistration Decisions

Parties can vote among their membership to dissolve their party for a number of reasons. In general, however, there are two principal motivations: 1) the party has no funds or political will to carry on with its mission, or 2) the party wishes to merge with another party. There have been five cases of this type. Two parties, Khwam Sayam (24/2544, August 14, 2001) and Sarattha Prachachon (30/2544, September 13, 2001) voted to dissolve their respective parties. In the view of the Court, since the voting was conducted in accordance with each party's internal regulations, and because the majority in each party voted for dissolution, the Court ruled in favor of the dissolutions.

There have been three cases of party dissolution for the purpose of merging with another party. The Court's first case of this type, (6/2541, August 11, 1998) concerned the request of the Muan Chon Party to dissolve in order that it could merge with the New Aspiration Party. The majority ruled that since the executive committees of both parties had agreed to this arrangement, Muan Chon could be dissolved. After the 2001 General Elections, the Seritham Party requested dissolution (28/2544, September 6, 2001) in order that it could merge with the Thai Rak Thai Party. Citing the precedent established in 6/2541 and the mutual agreement of both Seritham and Thai Rak Thai, the Court confirmed the dissolution.

TABLE 2
Political Party Deregistration

Case #	Date	Thai Name of Party	Reason	
1	06/2541	11-Aug-98	Muan Chon	Merger with New Aspiration
2	02/2542	4-Mar-99	Pathirup	180 day rule
3	45/2542	10-Aug-99	Maha Rasathorn Thipat	180 day rule
4	46/2542	10-Aug-99	Chiwit Mai	180 day rule
5	47/2542	24-Aug-99	Chat Niyom	180 day rule
6	03/2543	27-Jan-00	Chat Samakhi	180 day rule
7	04/2543	27-Jan-00	Thai Kao Na	180 day rule
8	29/2543	11-Jul-00	Thammarat	180 day rule
9	30/2543	13-Jul-00	Nam Chai	ECT rejection of credentials
10	64/2543	10-Dec-00	Rak Chat	No report
11	01/2544	11-Jan-01	Pracha Sangkhom	180 day rule
12	02/2544	11-Jan-01	Thai Phattana	180 day rule
13	06/2544	15-Feb-01	Pracharat	Failure to follow plan
14	07/2544	23-Feb-01	Naeo Ruam Kaset	180 day rule
15	08/2544	23-Feb-01	Phalang Samakhi	180 day rule
16	21/2544	9-Aug-01	Thai Samakhi	180 day rule
17	22/2544	9-Aug-01	Chat Kasetakorn Thai	180 day rule
18	23/2544	9-Aug-01	Rak Samakhi	180 day rule
19	24/2544	14-Aug-01	Ram Sayam	Party decision to close
20	25/2544	16-Aug-01	Sangkhom Prachachon	180 day rule
21	26/2544	30-Aug-01	Phithak Thai	No report
22	28/2544	6-Sep-01	Seritham	Merger with Thai Rak Thai
23	29/2544	6-Sep-01	Chaoraina Thai	180 day rule
24	30/2544	13-Sep-01	Sarattha Prachachon	Party decision to close
25	31/2544	18-Sep-01	Phalang Kasettakorn	180 day rule
26	32/2544	9-Oct-01	Nitim Mahachon	No report
27	34/2544	16-Oct-01	Prachachon	No report
28	01/2545	10-Jan-02	Thin Thai	No report
29	02/2545	17-Jan-02	Ekaphap	No report
30	05/2545	31-Jan-02	Sangkhom Thai	No report
31	08/2545	28-Feb-02	Sangkhom Mai	No report
32	10/2545	12-Jun-02	Phalang Thai	180 day rule
33	11/2545	28-Jun-02	Chaona Phattana Prathet	180 day rule
34	12/2545	28-Jun-02	Wang Mai (New Aspiration)	Merger with Thai Rak Thai
35	36/2545	13-Jul-02	Phalang Mai	No meeting quorum
36	42/2545	18-Jul-02	Borannarak	180 day rule
37	43/2545	23-Jul-02	Phattana Thai	180 day rule
38	50/2545	19-Sep-02	Sangsan Thai	-- --
39	51/2545	19-Sep-02	Thai Ruamphalang	-- --

The last case of this type was the request by the New Aspiration Party (12/2545, June 28, 2002) to merge with Thai Rak Thai. This was a much more controversial merger than the two previous instances. Although New Aspiration was part of the Thai Rak Thai coalition government of Prime Minister Thaksin Shinawatra (March 2001 – present) many New Aspiration members, such as those from the former Muan Chon Party faction, did not wish to see New Aspiration dissolve. At the same time, factions within Thai Rak Thai were opposed to New

Aspiration members joining their party fearing that their influence would be diluted by New Aspiration leadership. Nevertheless, through internal elections, the majority in each party approved the merger. The Court therefore approved.

The New Aspiration – Thai Rak Thai merger was substantively different than the previous two mergers because in the 2001 General Election each party won both constituency and party list seats in the National Assembly. While it may appear obvious that any New Aspiration party member who had won a constituency seat should retain their parliamentary seat after the merger because they had won the popular vote in their constituency, the status of the party list MPs is not as clear. Party list seats are awarded on the basis of the ratio of votes received by all parties that received a minimum of 5% of the popular vote on the party list ballot. Party list MPs are then appointed in the order of their occurrence on their party list. The intent of the drafters of the 1997 Constitution, and the campaign promise of Thaksin Shinawatra, was that members of the cabinet would be selected from those on the party list. Since cabinet members lose their parliamentary status after appointment to the administration, their seats are then taken by the party list candidates next on the list. The question is, after a party merger, what happens to the party list MPs of the dissolved party?

The question is moot for New Aspiration Party leaders that had been awarded a cabinet position in the Thaksin coalition government. This is because these individuals had relinquished their party list seat when they joined the cabinet. Since the constitution allows individuals not elected to parliament to serve as a member of the cabinet (but not the Prime Minister), as long as these individuals retained their cabinet seats, they remain part of the executive. The question is for the party list members sitting in parliament. One could argue that they should retain their seat because their party had won the seats. Alternatively, one could argue that after the merger, their party no longer existed and therefore the seats should go to those next on the list of Thai Rak Thai. Neither the ECT, nor anyone else, has raised this question with the Court, and therefore the Court has not considered the issue.

ECT Deregistration Decisions

The majority of cases, 33 of 39, submitted to the Constitutional Court by the Registrar of Political Parties of the Election Commission of Thailand have involved the deregistration of a political party for failure to adhere to the provisions of the Political Parties Act (1998). It was the intention of the drafters of the 1997 Constitution that political party and electoral reforms would lead to a reduction in the number of parties contesting elections and that remaining parties would grow larger in membership, become more professional, and develop party platforms reflecting a position on policy issues of importance to voters. In this manner, the problem of the typical Thai political party, serving as the vehicle for an individual or a small faction rather than a policy position, would wither away. To support this process, the constitution even requires the ECT to provide political parties with an annual fund to help the party develop itself (Section 329(5)).

To deny a political party the opportunity to draw on public funds to develop itself is an inherently political decision. To ensure that legal, and not subjective, criteria are used by the ECT, that is, to hold the ECT accountable, it is perhaps wise for the Constitutional Court to review ECT petitions before ordering a dissolution. For example, to reduce the possibility that a group of individuals do not establish a party merely to receive a party subsidy from the ECT, Section 29 of the Political Parties Act (1998) stipulates that after registration, a party has 180 days to build its base to at least 5,000 members distributed among four regional branches. In 22

instances, new political parties failed to meet this deadline and the ECT subsequently sought Court concurrence to deregister the parties. The Political Parties Act also has strict reporting requirements, wherein the parties are required to submit two reports annually. One report is on their finances, how they spent funds received from the ECT, and the other on party activities and development. Eight parties failed to file reports within the time limits stipulated by the Political Parties Act and were deregistered by the ECT's petition to the Court. Finally, another party violated its own internal rules and made decisions at a meeting that did not have a quorum. For this violation of the Act, the ECT has petitioned the Court to dissolve the party.

ECT Refusal to Register a Party

There is also one case in which the ECT refused to register a political party. The Registrar of Parties has this authority when a party fails to submit the required information or if the members of the proposed party fail to meet the criteria established in the Constitution. Again, to ensure ECT accountability and to prevent the ECT from making politically subjective or politically expedient decisions on whether or not to register a party, it is perhaps wise to require the Constitutional Court to review and issue a final order on such ECT petitions. To date, there has only been one instance when the Registrar of Parties refused to register a party. The Nam Chai Party (30/2543, July 13, 2000) was refused registration because the President of the party failed to meet the disfranchisement test of the Constitution; specifically, as he was under detention in the Nan Provincial Jail (Section 106(3)).

There was a high degree of unanimity among the justices in all cases concerning party registration. In general, the justices followed a literal interpretation of the laws, rules and regulations that govern the registration of political parties and internal party administration. Such decisions were therefore within the conservative legal/judicial philosophy held by a number of justices. At the same time, the decisions were in line with the intent of liberal reformers. Nevertheless, there are strongly held minority positions on these types of cases on procedural and legal grounds. For example, if the ECT petitions the Court to dissolve a party for failure to achieve minimum membership and branch requirements within 180 days, if the party argues that the ECT has based its decision on inaccurate information (e.g., individuals with no citizenship, missing household registration documents, or individuals already belong to another party), Justices Amara and Issara would lift the petition and request the Registrar of Parties to submit the case to the full ECT to investigate the discrepancies, since the Court does not have the capacity to conduct this type of investigation.

Secondly, a party has to report to the Registrar any time the party changes rules and executive members, or holds general and executive committee meeting. Sometimes a party does not follow the rules properly (such as issuing invitation letters one week before a meeting). For minor infractions, Justices Amara and Issara would not support the ECT's petition for deregistration. Finally, a party's failure to submit a report within the proscribed time limit must be carefully reviewed. Several parties have misunderstood the regulations that specify the date they become a *de jure* party. The ECT holds the position that the party is *de jure* on the date the ECT accepts the party's application, while many parties have misunderstood that they are *de jure* only after they have met membership and party branch requirements. As a result, several of these parties have been under the impression that they were not required to submit an annual report because they had not been a *de jure* party for 90 days before the end of the calendar year. In such cases, Justices Amara and Issara would lift the ECT's petition if there was evidence the party had not been properly informed by the Registrar of the exact date the party became *de jure*.³⁶

GOVERNANCE OF CONSTITUTIONAL MECHANISMS AND THE POWERS OF THE ELECTION COMMISSION OF THAILAND

A key authority of the Constitutional Court is its power to rule on the authority of independent bodies created by the constitution and to resolve disputes between constitutional bodies. Among the Court's most important decisions of this nature are the 19 rulings it has made on the powers of the Election Commission of Thailand (ECT) (See Table 3). Although the majority of these cases concerned the 2000 Senate Election, the Court's first ruling of this nature, its third ruling (3/2541, July 14, 1998), went to the very heart of the ECT's powers to govern elections independent of the executive and judicial branches of government. Collectively, these decisions were critical to the success of the electoral reforms embodied in the 1997 Constitution.

As noted previously, there had been considerable debate in the Constitutional Drafting Assembly (CDA) on whether or not a Constitutional Court was necessary. In contrast, there was general consensus in the CDA that an independent election commission would be required to remove management and oversight of elections from the Ministry of Interior (MOI). For a number of years, election analysts and citizens in general had viewed MOI control as the source of electoral fraud. Mutually beneficial ties between ministry officials and local politicians, particularly incumbents from powerful provincial families, were thought to be a major source of electoral fraud. Moreover, the political party which controlled the positions of Minister and Deputy Minister of the MOI were perceived to have an advantage over other parties in preparations for, and management of, elections. The general consensus was an independent election agency would be an essential mechanism to eliminate conspiracies between MOI officials and politicians that led to electoral fraud.

TABLE 3

Election Cases before the Constitutional Court

Case #	Date	Description	Petitioner
1	03/2541	14-Jul-98 ECT vs. Civil Court	ECT & Civil Court
2	15/2541	19-Nov-98 Penalties for failure to vote	ECT
3	06/2542	27-Apr-99 Cooperation of government units with ECT	ECT
4	07/2542	27-Apr-99 Voting rights of those living outside their district	ECT
5	08/2542	27-Apr-99 Interpretation under Section 315	ECT
6	51-52/2542	23-Nov-99 Senate candidates must leave House 1 year before	Par. Pres.
8	53/2542	9-Dec-99 Current Senators can be candidates but otherwise meet criteria	Senate
9	05/2543	14-Feb-00 Definition of a "State Official"	Par. Pres.
10	06/2543	29-Feb-00 Applicability of Section 68 to Royal Family	ECT
11	13/2543	17-Mar-00 Court investigations of ECT decisions	ECT
12	20/2543	26-Apr-00 Must have all 200 Senators to begin first session	Par. Pres.
13	24/2543	20-Jun-00 Ordering new elections before announcing previous results	Ombudsman
14	26/2543	22-Jun-00 Less than 200 Senators and Cabinet orders session of House	Cabinet
15	54-55/2543	31-Oct-00 PPA Sections 85/1, 85/3, 85/9 violate constitution	Pres. of Senate
17	56/2543	31-Oct-00 PPA Section 113/1 para 3 and 4 violate constitution	Pres. of House
18	12/2544	29-Mar-01 Removal of Sanit and 9 Senators from office	Par. Pres.
19	13/2544	29-Mar-01 Removal of Sanit and 9 Senators from office	Ombudsman

There was some debate, however, on the powers of the ECT to annul an election

nationwide or in specific constituencies, or to call for a recount of ballots. Such decisions had always been the prerogative of the Courts. There were two problems with Court jurisdiction. First, plaintiffs were required to meet stringent civil/criminal code standards to prove their allegations beyond a reasonable doubt before a judge would issue an annulment or order a recount. Seasoned Thai politicians had learned long ago how to avoid creating the types of paper trails that would meet these standards. Second, the adjudication and appeals process could prevent the expeditious resolution of a complaint. In one high profile case in Buri Ram Province, for example, it took the courts almost three years to reach a final decision.³⁷ To address these problems, the CDA empowered the ECT to determine nullifications and recounts. When the commissioners themselves found *compelling evidence*, rather than the more vigorous evidence required by a Court of law, they could pronounce their decision with immediate effect.

Judicial Powers of the ECT

With this background, the Constitutional Court's first case involving the ECT was significant for a number of reasons. First, it was the Court's first ruling concerning a jurisdictional dispute between two constitutional organs, and the issue went to the heart of the entire electoral reform process; second, the case itself was politically volatile and of high public interest; third, it established a number of important precedents. In this case, (3/3541: July 14, 1998), a dispute between the Civil Court and the Election Commission of Thailand (ECT), the Court confirmed that politicians would not be able to interfere with the operations of the Election Commission by filing endless law suits against ECT decisions and actions. Second, it established a precedent that regular courts could not interfere with the jurisdiction of a constitutionally-mandated, independent agency. Third, it demonstrated that a constitutional organ had the power, under certain circumstances, to over-rule the decisions of the regular courts. The case was also important because it was the first to highlight a predilection among certain justices to premise their decisions on points of law rather than constitutional provisions or constitutional intent. This was a worry to many constitutional reformers who feared the justices who had long careers in the judiciary would erode the Court's own powers to maintain constitutional supremacy.

In November 1997, Chuan Leekpai's Democrat Party had been able to form a government (November 11, 1997 – January 5, 2001) only through the defection of twelve Prachakorn Thai Party members, the so-called "Cobra Faction" led by Vattana Asavahaem.³⁸ Prachakorn Thai had been part of the previous Chavalit coalition government (November 29, 1996 – November 6, 1997) and had officially moved to the opposition with Chavalit's NAP. To punish the dissidents, as well as to destabilize the new Democrat coalition, party leader Samak Sundaravej sought to expel the rebels from Prachakorn Thai. The dissidents would then lose their MP status leaving the Democrat coalition with a very narrow margin in the House of Representatives. Through a 13-month, convoluted series of legal maneuvers, Samak achieved his goal of expelling the dissidents, although the Court subsequently ruled they had not lost their MP status, thus thwarting his other goal of destabilizing the Democrat coalition.

Samak began the process of expulsion at a general meeting of his party on December 29, 1997. The Meeting voted to increase the number of Party Executive Committee members by 11, bringing the Committee up to its allowable level of 65. The new pro-Samak members would make it possible for Samak to tip the balance in a second crucial committee vote required to expel the dissidents from the Executive Committee, and subsequently from the party under a third vote. As required by the Political Party Act of 1981, on January 15, 1998 Samak requested the Election Commission to register the committee changes. The Cobra dissidents, let by

Vattana Asavahame, filed a petition with the ECT on February 3 to stay the registration until either the ECT or the courts had determined if the party resolution had been legal. After further investigation, however, on February 24, the ECT determined the resolution had been legal and proceeded to register the Executive Committee changes.

Samak did not have the strength within his party to expel the dissidents in December because the party had no legal cause for expulsion. When voting on the formation of a government, MPs are free to cast their vote for any party, unless their party has issued a resolution requiring a vote for a specific party. In November, the Prachakorn Party had issued no such resolution. By March 2, 1998, however, Samak believed he was ready to cast the fatal blow when the opposition filed a no-confidence motion against the Democrats. If the dissidents sided with the government, he thought they could be legally expelled for violating a party resolution requiring they vote against the Chuan government.

To counter Samak's tactic, Vatana and the Cobras filed a law suit in Civil Court on March 18 against ECT Commissioner Theerasak Karnasut charging the ECT's decision to register the December Executive Committee changes had been unconstitutional. They argued only a court of law had the authority to determine if Samak's changes had been legal. On May 6, Civil Court senior judge Chavalit Yongpanich accepted the lawsuit. He indicated to the press the first trial date would be set for September 2 and the case would take about six months to complete. The Cobras were thus protected from expulsion until February 1999, giving the Democrat coalition at least another 10 months in power. With tactical legal delays, the Cobras could stretch that out even longer. Thus was established the context for the Constitutional Court to consider its first conflict of jurisdiction case. Which constitutional organ, the courts or the ECT, had the authority to rule on political party issues? In the past, this had always been the court's jurisdiction but either a literal or a broad interpretation of Section 145 of the Constitution suggested this power now resided with the ECT.

The Cobras law suit did not impede political developments. On March 20 the Prachakorn Thai Executive Committee issued a resolution requiring all of its 18 MPs to vote against the government. Vatana defiantly told the press that his group of twelve would vote for the government and that he was not worried about expulsion from the party because he had already filed a law suit to overturn the December Executive Committee changes that had given Samak the Committee majority to pass the no-confidence debate policy resolution. A verdict against Samak would have the effect of nullifying the policy resolution. Samak also had to concede that constitutionally, MPs can make their own judgments regardless of party resolutions, except on matters concerning ordinary motions and bills. The following day, the dissidents voted with the government to defeat the no-confidence motion 208 vs. 177.³⁹ This temporarily solved the political problems facing the Chuan Administration.

On June 1 the Prachakorn Thai Party Executive Committee met again, this time to remove the twelve Cobras from the Executive Committee and replace them with additional pro-Samak members. This change would make it possible for a committee vote sufficient to expel the Cobras from the party. Vatana and his group petitioned the ECT on June 10 to reject the changes. Since the Civil Court had accepted the lawsuit to question the legality of the December 29 meeting, Vatana also asked Judge Chavalit to issue an injunction against the ECT registering the June 1 changes until the Civil Court had completed adjudication of the case on the December changes. On June 26 Judge Chavalit issued the injunction.

ECT Chairman Theerasak Karnasut initially confirmed to the press the ECT's decision

on the party=s June 1 petition would have to be placed on hold due to the injunction. With the counsel of former CDA Secretary-General Bowornsak Uwanno, however, Samak argued that the Civil Court=s injunction could not prevent the ECT from registering the committee changes. The Constitution was the highest law and the constitution authorized the ECT to make decisions on party disputes. Only the Constitutional Court had the power to block an ECT decision. Bowornsak added, if a Court of law had the authority to order other constitutional bodies from carrying out their duties, the expeditious work of these organs would be constantly ground to a halt by lengthy legal proceedings. In order to establish a precedent preventing courts from interfering with the constitutionally mandated duties of other constitutional organs, Samak and Bowornsak urged the ECT to submit the case to the Constitutional Court.⁴⁰

Civil Court Judge Chavalit countered that the ECT had no judicial status. ECT decisions were not final, so they were subject to dispute in court under the Civil Law. He cited Section 233 of the constitution to point out that only courts, not the ECT, have the power to rule on such disputes. Indicating the gravity of the Civil Court=s position, Chavalit told the press he was considering taking legal action against a university law professor for giving a press interview deemed as defamatory and in contempt of court. Thammasat professor Surapol Nitikraipol had told the press the Civil Court was considering the case only from the perspective of the Civil Code and was ignoring the constitution, the Political Parties Act, and the Election Commission of Thailand Act.⁴¹

After considerable internal discussion, the ECT commissioners decided on July 2 to seek clarification from the Constitutional Court on ECT duties and authority. Within two weeks, on July 14, 1998, the Court ruled 12:1 the Civil Court=s ruling had no binding effect on the ETC. The Political Parties Act 1998, which had come into effect on June 10, 1998, and Section 145 of the Constitution, gave the ECT, as Registrar of Parties, absolute authority to investigate and issue decisions on party disputes.⁴²

Based on the decision of the Constitutional Court, Theerasak announced the ECT would re-initiate the review process of Samak=s June petition and issue a decision by August 15. Judge Chavalit immediately challenged the ECT to register the changes before he had made a decision on the case, warning the commissioners they could face charges of malfeasance if he eventually ruled in favor of the Cobras. Chavalit told the press the trial would proceed on September 2 because the Constitutional Court had not ruled the Civil Court lacked authority to accept the case. He further argued the Constitutional Court had erred in its ruling by incorrectly interpreting Section 266 to empower the Constitutional Court to overrule a lower court decision. According to his interpretation of the law, his injunction was still in force.

This Civil Court challenge to the authority of the Court had the potential of undermining the entire constitutional reform process. Judge Chavalit=s position clearly demonstrated the continued resistance within the judiciary to the concept under the 1997 Constitution that only the Constitutional Court has the authority to interpret the Constitution. Within two weeks, however, the other six senior judges of the Civil Court and the Deputy Chief Justice had convinced Chavalit to delay review of the Cobra case until after the judiciary had had an opportunity to study the details of the Constitutional Court=s landmark ruling. On September 2, Chavalit finally relented by informing the litigants he was throwing out the case because the Civil Court had no power over the ECT and thus it would be useless to continue trying the case.⁴³

For proponents of constitutional supremacy, this case had established important precedents; nevertheless, they were concerned the individual written decisions of the justices

exhibited a disturbing predilection among some members of the Court for premising their decisions on laws and regulations rather than on the constitution. The vast majority of judges, for example, concluded the Civil Court initially had the authority to accept Vatana's case against the ECT because the Political Parties Act (1998) had not come into force until June 10, 1998. Therefore, when the Civil Court accepted the case it was merely following the Political Parties Act (1981), which was still in force. They agreed, however, that the Civil Court's June 26 injunction had no binding effect on the ECT because once the Political Parties Act (1998) had come into force, the ECT had sole authority. Only Court President Chao clearly pointed out regular courts had no authority to accept the case.⁴⁴ He noted that Sections 144-145 of the Constitution clearly indicate a member of the ECT is to serve as the Registrar of Parties while the full ECT has the sole authority to investigate and decide on party disputes. Section 6 states the constitution is the highest law and any law which contradicts it is unenforceable. Therefore, the Civil Court could not apply the Political Parties Act (1981) to over-rule the authority of the ECT under Sections 144-145, even if there were no new Political Parties Act in force to replace the 1981 act.

Even more disturbing were the opinions of Justices Issara and Preecha. Issara ruled no decision was required in the case because only the Administrative Court, not the Civil Court, had the authority to adjudicate a case involving a state or constitutional agency. In the longest written decision, Justice Preecha acknowledged the case was more appropriate for the Administrative Court; however, since the Administrative Court had not been established yet, it was incumbent on the Civil Court to accept the case. He further argued the ECT was not a court of law. It could therefore not interpret Section 144 para 2 of the Constitution and Section 10(6) of the Election Commission Act, 1998 as granting it the power to make a final decision on an issue. Final decisions could only be made by the courts. This was the first of a series of strongly worded opinions to be issued by Justice Preecha in which he essentially has contended constitutional provisions cannot contradict other law, and by implication therefore, all other laws take precedence over constitutional provisions, regardless of Section 6 of the Constitution. Some of Justice Preecha's strongest opponents have suggested that this position is an intentional exercise of power contrary to the provisions of the Constitution, and thus an impeachable act under Section 303 of the 1997 Constitution.

Penalties for Failure to Vote

Although the Court had essentially ruled that the ECT had sole power to make decisions regarding elections, members of the ECT were divided on a number of issues and sought the Court's assistance to settle their internal disputes over interpretation of the Constitution. For example, on August 17, 1998, the ECT submitted a motion to the Court outlining their internal disagreement over the power of the ECT to define the penalties that could be imposed against those who failed to vote in an election.⁴⁵ Specifically, one faction within the ECT believed that to ensure citizens voted in accordance with Section 68, the ECT should impose sanctions against citizens who did not vote, such as suspending their right to receive certain government services.

The Court ruled 11/2, (15/2541: November 19, 1998) that it was unconstitutional for the ECT to impose additional penalties because Section 68, para 2 of Constitution clearly specified that citizens only lose their right to vote. The ECT only had the power to define the process under which a person would lose their right to vote as provided by law, such as procedures for notification and the length of voting right suspension.⁴⁶ Sanctions against citizens who fail to vote can only be imposed by an Act of Parliament. The suspension of voting rights actually carries with it a number of penalties, at least for the politically active citizen. This is because the

Constitution specifies in a number of sections that holding voting rights is a qualification. For example, anyone wishing to run for the House or the Senate must be enfranchised, as must anyone who signs a petition of 50,000 voters to submit a bill to the House or a motion of impeachment to the Senate.

Rules for the Senate and General Elections

As noted previously, the majority of Court decisions concerning the powers and decisions of the ECT centered on the 2000 Senate Election. Collectively, they were as contentious as the Cobra Case because they clarified the rules under which Thailand's first senate elections would be held, and by extension, to the next general elections for the House of Representatives. The primary goal and vision of the drafters of the 1997 Constitution was that the Senate would be free of both political and bureaucratic influence, and that it would represent and serve the interests of civil society. Therefore, regulations governing the qualifications of senate candidates sought to exclude the possibility that politicians or bureaucrats would gain seats in the new senate. However, the five members of the Election Commission of Thailand could not agree on how to interpret some of these rules, and their vocal disagreement naturally led to intense debate among those considering running as a candidate for either the senate or the house. A major point of disagreement within the ECT was how to interpret a transitory provision of the Constitution, Section 315, para 4. It lists a number of sections of the constitution concerning the qualifications of senators and MPs, and states that these qualifications are not applicable to the members sitting at the time of the promulgation of the Constitution. Among these rules is that a senate candidate must have resigned any membership in the House of Representatives at least one year before applying for candidacy (Section 126(2)). Other rules pertained to such things as age limits and educational qualifications.

In order to settle its internal debate, on March 23, 1999, the ECT submitted a motion to the Court outlining the opposing interpretations of Section 315, para 4. However, by a unanimous 12/0 vote, (8/2542: April 27, 1999), the Court dismissed the motion noting that the dispute was internal to the ECT and therefore not between two constitutional organs as specified in Section 266. Moreover, the Court could not decide on an issue for which there had yet to be an impact or complaint. On the same day, the Court had dismissed two other motions filed by the ECT for similarly controversial issues. In this manner, the Court was continuing to emphasize its decision in the Cobra Case, that the ECT had the authority to make decisions, if constitutional, regarding elections as outlined in the Constitution.⁴⁷ The ECT, therefore came to an internal decision and announced sitting senators, who met all other qualifications, could contest the next senate elections. An MP, on the other hand, could not contest the senate elections unless he or she had resigned from their seat one year prior to the date of candidacy application. This decision subsequently prompted three separate motions to the Court.

Members of the House of Representatives submitted two separate motions to the Court questioning their disqualification from running for the senate: one from Chart Thai Party Deputy-Leader Prayuth Siripanit and 95 other MPs submitted September 29, 1999 and the other from Den Tomina and 103 other MPs submitted on October 26, 1999. Because they were essentially the same issue, the Court considered both motions at the same time (51-52/2542: November 23, 1999). The majority ruled Section 315, para 4 did not disqualify MPs from contesting the first senate election. Justices Chumphol, Preecha, and Issara in the minority ruled the Court did not have jurisdiction in this case and dismissed the motion. Justices Prasoert, Mongkhon and Ura, also in the minority, essentially argued that the intent of the transitory provisions of Section 315, para 4 were for the purpose of making it possible for MPs and Senators elected prior to

promulgation of the constitution to continue to serve during the transition prior to new elections, even though they did not meet the higher qualifications required for MPs and Senators under the new constitution. They argued it was the intent of the constitution to exclude certain individuals from contesting seats in both the new House and Senate so that political reforms could immediately commence. Therefore, the new qualifications applied to all for the new elections.

The majority of the Court, however, voted 7/6 that the ECT's interpretation was incorrect. President Chao noted the point raised by the minority but further noted the ECT had ruled that current senators were eligible to run in the next election and therefore MPs must be treated the same. In addition, the constitution prohibits the government from dissolving the House before passing three critical organic laws within 240 days. Thus, no MP could have actually met the one-year deadline; and therefore, this particular section, for the sake of justice, should be ruled null and void. Although Justice Chai-anan ruled all other exclusions in Section 315, para 4 were null and void, others in the majority did not address this issue. As a result there was lack of clarity over the applicability of such qualifications as the minimum age requirement of 40, and having a Bachelor's degree or higher.

This lack of clarity prompted a group of 60 senators to file a motion on November 26, 1999 requesting the Court to rule on whether or not sitting senators had to meet the new constitutional requirements to contest the next senate election. The ECT had ruled (53/3542: December 9, 1999) that sitting senators, in general, were not prohibited from contesting the first senate election, even though the 1997 Constitution prohibits senators from having two consecutive terms (Section 126(3)). Nevertheless, the ECT insisted candidates still must meet all other qualifications, such as being at least 40 years old and having earned a Bachelor's degree or higher.

The Court voted 7/3 to concur with the ECT that although current senators could run in the next election, they were required to meet all other qualifications. Justice Prasert, in the minority, maintained his previous position that neither current MPs nor Senators could contest in the first Senate race under the new constitution. Justices Chao and Jul asserted sitting senators did not have to meet the new criteria, just as sitting MPs did not. This suggests that had they expanded on their decision in 51-52/2543, they would have agreed with Justice Chai-anan. However, Chai-anan did not sit on this case and it was the majority opinions of Justices Chumphol, Komain, Suchinda, Suwit, Ura and Anan that specified sitting senators had to meet all other qualifications for senate candidates in the next elections. The only exemption was that they could contest the election. As a result of these two opinions, both sitting MPs and Senators could contest the senate elections.

Another way in which the drafters of the constitution sought to ensure that no government official with administrative power could be elected to the Senate was to add the phrase "or other State official" to Section 109(11) prohibiting either a member of the House or Senate from being a civil servant or state enterprise employee. In preparation for the 2000 Senate Election, the ECT issued a ruling on January 11, 2000 to define "other state official", the effect of which was to disqualify more than 100 candidates who had submitted their candidate applications during the period specified by the ECT (December 19-25, 1999), and who had been approved previously as candidates by the ECT. At issue was the ECT's inclusion of individuals who served on various government committees and boards that hardly have any administrative powers, such as the boards of state colleges and universities, as "other State officials"⁴⁸. The most contentious parts of the definition were a broad interpretation of "administrative powers" and a broad interpretation of individuals who received "partial" remuneration from the state budget. The

ECT ruled that board members had the administrative power to appoint university administrators and they received a meeting allowance (partial remuneration) for attending board meetings. Ironically, it is the very type of individual that would serve on the board of trustees of an institution of higher education that would fulfill the role of a reformer's dream senate candidate.

A number of newly expelled candidates filed suit in the Civil Court, in accordance with the Election Act, arguing that their candidacy had previously been approved by the ECT within the 7-day deadline established by the Election Act. The first of these cases were decided on February 4, 2000 by the Civil Court and by the Chaiyaphum and Phitsanulok Provincial Courts. They all ruled the ECT had waited too long to disqualify the candidates. The courts held the Election Act very specifically outlined the process by which the qualifications of candidates are to be reviewed by the ECT and the ECT was not authorized to amend that process for its own convenience. Its decision was therefore illegal. Nevertheless, the courts did not rule on whether or not the individuals were qualified to be candidates, nor did they define the term "other State official", both such decisions being the sole jurisdiction of the ECT.

In the interim, the President of the House acted upon a petition by Dr. Amara Raksataya, Udorn Tantisunthorn and other expelled candidates submitted a petition to the Constitutional Court under Section 266 for a ruling. The Court saw three issues (05/2543: February 14, 2000). First, did the ECT have the authority to define "other state officials"? Second, was the ECT's definition, including 28 new positions, in accordance with the intent of Section 109(11) barring officials from becoming candidates? Third, was the ECT's decision to withdraw its approval of candidates after the 7-day deadline unconstitutional? Justices Chumphol, Preecha, Suwit, and Issara ruled the Court did not have jurisdiction over this case and dismissed the motion. Seven other justices ruled the ECT did have the power to define "other state official", with Justice Prasert arguing it did not. However, 8 justices ruled the ECT's definition was not in accordance with the intent of Section 109(11). They further ruled by a narrow majority of 6 that the Court did not have the jurisdiction to rule on whether or not the ECT's decision to withdraw approval was unconstitutional.⁴⁹ As a result of this ruling, the ECT reconfirmed the candidacy of a number of highly-respected individuals, many of whom subsequently won seats in the Senate.⁵⁰

The next set of cases involving the ECT arose as a result of the March 4, 2000 Senate Election, which served as a major benchmark in Thailand's political reform process with more than 70% of registered voters participating in Thailand's first direct election of senators. Previous appointed Senates had been dominated by senior military and civilian bureaucrats, as well as those well-connected to the ruling party. The new 200-member Senate had been envisioned by the drafters of the 1997 Constitution as an a-political body representing well-known and respected personalities from each province that would serve as a counter-balance against both political and bureaucratic forces. There was great concern therefore when a number of ex-politicians, as well as spouses, siblings, and aides to politicians, entered the senate race bringing along with them the bane of vote buying. Citizens recalled the powerful Ministry of Interior had never been able to stop such fraud when it had managed elections; how could five independent Election Commissioners fare any better. Citizens also recalled that whenever a few cheaters were actually caught, they usually were able to complete their term of office long before the courts could ever issue their final judgment, and that after a call for a new election the courts would drop the case. It appeared the critical senate elections would be politics as usual. However, for the politicians, there were two small glitches. First, the ECT was playing with a new set of rules that were stacked against the traditional tricks of electoral fraud. Second, a year-long, nationwide series of voter education activities had created a civil society backlash against

electoral irregularities.

Political analysts were initially surprised when Bangkok voters rejected the scores of politically affiliated candidates running in the 18-member capital constituency. Instead, reflecting constitutional intent, voters favored a set of individuals representing the diversity of Thai civil society.⁵¹ The provincial returns were less impressive because vote-buying and other irregularities were rife; and, more than half of those elected in the provinces were openly connected with politicians.⁵² What really shocked the nation, however, was the ECT=s refusal to endorse the election of most politically well-connected victors; disqualifying 76, or 42%, of the 182 provincial winners, and two Bangkok winners, on the basis of *prima facie* evidence of vote buying or other electoral irregularities. The boldness of the ECT=s action was unprecedented, as the commissioners had the mettle to disqualify the wife of the Minister of Interior,⁵³ the chief political advisor of the Minister of Interior,⁵⁴ the elder brother of the Deputy Minister of Interior,⁵⁵ the wife of the Minister of Justice,⁵⁶ the sister of the Deputy Minister of Agriculture,⁵⁷ and the wives, siblings, canvassers, and business associates of numerous members of parliament, provincial governors, and city mayors.

In its battle to rid the elections of fraud and cheating, the ECT subsequently organized five rounds of balloting over the next four months through July 2000 before it endorsed all 200 senators. In the process, however, it prompted three cases before the Constitutional Court. The first major issue was whether or not the 122 Senators-elect endorsed by the ECT could convene the first senate meeting; or, if not, could the previous Senate continue until all 200 senators had been endorsed. The Court ruled 10/3 the Senate could not convene until all 200 had been endorsed and 9/4 that the previous Senate could no longer serve as the senate (20/2543: April 26, 2000).⁵⁸

Subsequently, after the third round of voting and as June 24 began to approach, the date on which the Thai Parliament traditionally convenes each year, the Cabinet asked the Court whether or not it could issue a royal decree to convene the House of Representatives. The Court ruled 12/1 the Cabinet could issue the decree and that thereafter members of the House could immediately convene (26/2543: June 22, 2000). Justice Preecha, once again dismissed the motion as he had done with almost all cases involving the ECT.⁵⁹

Although the ECT was under considerable pressure from the government and even pro-reformers to endorse all winners in the by-election so the Senate could begin to function, after the second round of balloting on April 29, the ECT held to its principles and refused to endorse 12 winners. Moreover, in order to control fraud, the ECT issued a new ruling that any candidate previously suspended twice would be prohibited from running in subsequent by-elections. Nevertheless, fraud continued and therefore the ECT refused to endorse four winners in the third round held on June 4. Before the fourth round of voting could be held, however, one of the suspended candidates filed a complaint with the newly established Ombudsman arguing the ECT had no authority to prohibit twice-suspended candidates from running in a by-election.⁶⁰ In a highly controversial 7/6 ruling, (24/2543: June 20, 2000), the Court agreed that the ECT had overstepped its authority and power. Following Justice Prasert, the majority pointed out that the Constitution provided a long list of qualifications and disqualifications required for senate candidates. Any new qualifications or disqualifications could be added only through a constitutional amendment. Therefore, the ECT=s action was unconstitutional.⁶¹

No candidate who benefited from the Court=s ruling was elected during the fourth round. Yet, after five months and four rounds of elections, the ECT had only endorsed 199 Senators-

elect. A fifth round was called for trouble-plagued Ubon Ratchathani Province. A three-time suspended candidate was finally endorsed by the ECT on July 26, 2000 making it possible for the Senate to convene. Nevertheless, the ECT stressed that it would continue to investigate 48 cases of alleged election law violations. It warned the senators that if it determined there was sufficient evidence against any senator, the ECT would expel the individual from the Senate and call for a new election in their province under Section 96 of the Election Act (1998). Indeed, after nearly one year in office, on March 13, 2001, the ECT expelled ten senators, including Mr. Sanit Worapanya, the President of the Senate.⁶²

Implementation of the Senate Elections demonstrated flaws, lacuna, and contradictions in the new electoral rules and regulations. Thus, from the inception of candidate registration, there was intense debate among reformers on methods of improving both the ECT and the election laws. At the same time, forces in favor of the *status quo* sought ways to weaken the power of the ETC. The only issue on which there was general agreement was that the ECT Act needed to be amended before the November General Elections to ensure that four months of balloting would not be required before a government could be formed.⁶³ The Chuan government therefore appointed a panel of distinguished experts to draft a series of amendments to address these problems and to further strengthen the ETC.

It was no surprise when the panel's package of 22 reforms reached the House of Representatives that conservatives sought to redraft the amendments to seriously weaken the ECT's independence and to restrict its authority to act against candidates for electoral irregularities. The new Senate, however, overturned most of these revisions in order to restore the ECT's independence and power. The amendments then went to a joint House-Senate committee to forge compromise among opposing views. Once approved, both the Senate and the House submitted motions to the Constitutional Court to question the constitutionality of certain amendments.

The President of the Senate submitted a motion seeking a ruling on the constitutionality of four amendments to the Election Act Amendments (2000): Sections 85/1, 85/3, 85/8, and 85/9. Section 85/1 empowers the ECT to call a new election in a constituency where it determines there has been cheating and to suspend the voting rights for one year of any candidate it found to have cheated. This so-called "red card" would effectively prohibit cheaters from contesting in the new election or subsequent by-elections as Sections 109 and 126 of the Constitution requires candidates for the House and the Senate respectively to be enfranchised. Reformers believed it had been the ECT's inability to red card Senate candidates that had led to five rounds of voting.

A candidate disqualified under Section 85/1 had the right under Section 85/3 to petition a special panel of legal experts to examine whether or not the ECT's decision had been just and legal. If the panel determined the decision was not appropriate; however, the ECT was not required to reverse its decision if it printed the details of its decision in the Government Gazette. In addition, the ECT had requested authorization to call a new election on the grounds of cheating even after it had endorsed a candidate. That is, if within two years it found evidence of cheating, by simply calling a new election the MP or Senator would immediately lose their seat. The House wanted to limit this to 180 days after the election. The compromise reached in Section 85/9 was one year. Finally, in any constituency where the ECT found a party had engaged in electoral fraud, Section 85/8 authorized the ECT to invalidate all of that party's party list ballots. The Court ruled (54-55/2543, October 31, 2000) that the subject amendments were all constitutional.⁶⁴

The President of the House of Representatives submitted a motion to the Court on behalf of Marut Bunnak and 42 other MPs to ascertain the constitutionality of Section 113/1 para 3 and para 4 of the Election Act amendments. This amendment was designed to further promote the reform whereby members of the cabinet would be selected from among party list MPs rather than traditional constituency MPs. Specifically, the amendment requires a party that appoints a constituency MP to the cabinet to pay for the cost of organizing a by-election to select a new constituency MP. MPs argued it was neither a crime nor unconstitutional for a constituency MP to become a member of the cabinet, and therefore they should not be penalized. The Court ruled (56/2543, October 31, 2000) that Section 113/1 was constitutional.⁶⁵

Collectively, the decisions of the Constitutional Court on issues raised by the ECT helped to stabilize the electoral process and as a result the Court did not have to consider any other cases of this nature through the entire process of the general elections held on January 6, 2002. The next such case arose when the ECT implemented Section 85/9 to dismiss the President of the Senate and 9 other Senators on March 13, 2001. These cases (12-13/2544, March 29, 2001) will be examined in the following section on the dismissal of officials from office.

CONCURRENCE WITH DECISIONS TO VACATE OFFICIALS FROM OFFICE

Since its inception, the Constitutional Court has ruled on 26 cases concerning the vacation of officials from office. Eight of the cases focused on whether or not an official was qualified under the terms of the constitution to hold their position, and 18 cases focused on whether or not an official violated Section 295 of the Constitution by failing to submit an asset and liability statement as required by Sections 291 and 292 of the Constitution, or for filing a false or incomplete statement (See Table 4).⁶⁶

Many of the vacation from office cases were of intense public interest due to their charged political nature, while others were only marginally noticed because the individuals in question were not of national stature or, in the case of Section 295 indictments, Court precedents enabled interested parties to predict the outcome of the case. In these types of cases, the Court has been generally supportive of constitutional intent, although in every case there was disagreement on the validity of the charges and the intent of the constitution. In only two of these cases, one against then Deputy Minister of Agriculture Newin Chidchop and the other against Prime Minister Thaksin Shinawatra, were there allegations of political interference with the outcome of the Court's ruling. This was due primarily to the controversial method in which votes were counted to determine the majority opinion.

Failure to Meet Constitutional Qualifications for Office

The Constitutional Court has ruled on eight cases in which one or more officials has been charged with failure to meet the qualifications of their office (See Table 4). Each of these cases was highly political, which is precisely the reason the drafters of the 1997 Constitution placed consideration of such instances in the hands of the Constitutional Court. Previously, such decisions had been made by either an *ad-hoc* committee dominated by the ruling party or through the regular court system. Decisions on cases of the first type were generally lacking in transparency or accountability, and decisions were perceived by the public to be based on how the government of the day wished a decision to be made. Court decisions were generally more transparent and accountable; however, because Thai civil and criminal courts did not follow continuous trial procedures prior to March 2002, and because of the lengthy appeals process, a

case could take five years or more to reach a final decision; in some cases, long after the official in question had actually left the office under question.

The Constitutional Court follows the continuous trial method so cases are often completed in a matter of months, rather than years. Secondly, these highly political issues are placed in the hands of an independent agency whose members are less prone to political pressure due to their relatively secure tenure in office. Nevertheless, they remain accountable to the public because they must file asset and liability statements with the National Counter Corruption Commission to ensure they do not become corrupt and they can be impeached like any other judge by the Senate for behavior unbecoming an officer of the court.

TABLE 4

Vacation from Office for Failure to Meet Constitutional Qualifications

Case #	Date	Official	Cause	Expelled
1 01/2542	23-May-98	Prachakorn Thai Cobra Faction Dep. Ag. Minister Newin	Party Expulsion	No
2 36/2542	15-Jun-99	Chidchop	Section 216(4)	No
3 49/2542	4-Oct-99	MP Charnchai Issarasenarak Dep. Ag. Minister Newin	Education	Yes
4 57/2543	28-Nov-00	Chidchop	Party Expulsion	No
5 04/2544	6-Feb-01	10 Members of Chuan Cabinet	Section 292	No
6 12-3/2544	29-Mar-01	10 Senators	Section 85/9	Yes
7 18/2544	26-Jun-01	2 NCCC Commissioners	Section 258(3)	No
8 38/2544	4-Jul-02	ECT Chairman Sirin Thooplaklam	Section 138(1)	Yes

Twelve Members of the House of Representatives, the Cobra Faction of the Prachakorn Thai Party 1/2542: May 23, 1998⁶⁷

The first case of this nature that the Court considered focused on Section 47, paragraph 3 and 118(8) of the Constitution concerning the termination of membership in the House of Representatives. The key issue in this case is the power of a political party, specifically the Executive Committee of a party, to expel a member and thereby remove the member from his or her seat in the House of Representatives. This is an important issue, particularly as political parties become fewer and larger under the reforms of the 1997 Constitution. The question is how much power does a party have to force its members to follow the decisions of the executive committee? Can a party expel a member from the party if a member votes against a bill or against his or her own party in a no confidence debate? This is a critical issue because the 1997 Constitution does not allow for independent candidates to sit in the House of Representatives. Every MP must belong to a political party. Therefore expulsion from one's party may, under some circumstances, cause the member to lose his or her parliamentary seat.

The special circumstance under which an MP is able to retain his or her seat after expulsion from their party is found in Section 47 para 3 of the Constitution that states an MP may contest the decision of his or her political party and seek an opinion from the Constitutional Court if the MP is “. . . of the opinion that their political party's resolution or regulation on any matter is contrary to the status and performance of duties of a member of the House of Representative under this Constitution . . .” Under Paragraph 4, if the Court determines the

party's decision is contrary to or inconsistent with the fundamental principles of the democratic regime of government, the decision shall lapse. Where the party's decision concerns the expulsion of a member, under Section 118(8), if the Court determines the party's decision was contrary to the status and performance of the duties of an MP, the individual has 30 days to join another political party and thereby retain their seat in the House.

The background of this case was previously discussed as the first case testing the powers of the Election Commission of Thailand (03/2541: July 14, 1998). As that case unfolded, ultimately the Prachakorn Party expelled the 12 members of the Cobra faction for voting against the party and for the government in a no-confidence motion. The minority position in this case was eloquently expressed by Justice Chai-anan. In his view, and that of Justices Suwit and Mongkhol, the roles of an MP and a party are distinct. The minority agreed that MPs have a variety of duties to the public, which are legislative in nature; however, it is not one of their duties to form a government, whose duties are administrative in nature. The formation of a government is the duty of parties under the direction of their executive committees. Whether or not an MP's party is part of a government or not has no impact on whether or not he or she can fulfill their legislative duties as an MP. Thus, in the case of the formation of a government or a no confidence motion, if an MP votes contrary to the party's decision, the party has every right to expel the MP from the party, and the member should lose their seat in parliament.⁶⁸

Justice Komain, along with five other justices in the majority⁶⁹ argued to the contrary that MPs are representatives of the people and they must carry out their duties honestly for the good of all citizens. The party's decision to expel the MPs from their party and thereby from their seat in the House made it impossible for them to pursue their duties. Therefore they had the right to seek membership in another party and maintain their parliamentary seats. Justices Chao, Prasert and Chumphol, also in the majority, disregarded the "duty" argument and pointed out Section 222 para 1(4) of the Political Parties Act (1998) and the Prachakorn Thai Party's own internal regulation 47 requires that any vote to expel a member from the party must be by secret ballot and the resolution must be passed by no less than 75% of the votes -- in this particular case, by 56 votes. However, in this case, there was no secret ballot and only 54 members voted for the expulsion. Therefore, the expulsion was null and void.

This ruling is problematic for MPs because the majority decision was based on two different lines of reasoning. Therefore, there was only a 6/3 vote to establish a precedent on whether or not an MP's primary "duty" is to his or her constituents or their party. Three justices did not address this issue at all but rather focused on the legality of procedures. As a result, were there no procedural issues, it is difficult to state whether the 3 justices would have voted for or against the "duty" argument. That is, instead of the majority ruling being 9/3, it could have been a split 6/6 decision. There has, however, been a second case of this nature.

Deputy Minister of Agriculture Newin Chidchop, (57/2543: November 28, 2000)

Deputy Minister of Agriculture Newin Chidchop (Buriram, Solidarity Party) filed a similar complaint with the Court after Solidarity Party voted to expel him through a resolution of October 10, 2000. The party charged that Newin was too involved in the affairs of another party, Chart Thai, and that at a Chart Thai campaign rally Newin had verbally attacked a member of his own party contesting against the Chart Thai candidate. Moreover, the party alleged it was common knowledge that Newin planned to switch to Chart Thai for the next general election.⁷⁰ The Court proceeded to pursue additional evidence and statements from the opposing parties. Party Chief Chaiyos Sasomsap pointed out to the Court that the party's October 10 resolution

was only the first step in a process of expelling Newin. Technically, therefore, Newin was still a member of the party. In addition, while the Court was considering this case, Chavalit Yongchaiyuth dissolved the House of Representatives on November 7, 2000, so Newin was no longer an MP under Section 118(1) of the Constitution. Based on these two issues, the Court dismissed the case in its November 28, 2000 ruling without considering whether or not the Solidarity Party resolution was in accordance with Section 47 para 3 of the Constitution.⁷¹

Thus, there is still no clear precedent to guide MPs on whether their first duty is to his or her constituents, even if that means voting against one's own party, or is their first duty to their party, even if that means voting against their conscious and their perception of their constituent's interests. Taken to its logical conclusion, the "duty" argument voiced by the Court in the Cobra case would mean that there is no circumstance under which an MP expelled from his party could not immediately join another party to retain his or her seat. As a result of this dilemma, the next MP who votes against his or her party, and is then expelled, will find it difficult to imagine how the Court might rule on their case. This lack of clarity provides considerable leverage for parties over their members in the House.

Deputy Minister of Agriculture Newin Chidchop, (36/2542: June 15, 1999)

Prior to his party expulsion case, Deputy Minister Newin had had an earlier experience with the Constitutional Court. This case was the Court's most controversial ruling to that date, primarily because of the predilection of some justices to premise their decisions on points of law rather than constitutional provisions and constitutional intent. The minister, unpopular among reformists,⁷² had been sued for defamation by former Democrat MP Karun Sai-ngam. The Buri Ram Provincial Court had found Newin guilty on June 19, 1998, sentenced him to a six month jail term, suspended for three years, and fined him Baht 50,000. Section 216(4) of the constitution states that a minister must vacate his cabinet position upon being sentenced by a judgment to imprisonment. The Constitution for the People Society therefore submitted a letter on April 21, 1999 to Prime Minister Chuan requesting Newin be dismissed from the cabinet.⁷³

Chuan preferred the Constitutional Court determine if Newin should lose his position as this would establish a precedent for future cases, not to mention relieve him of responsibility for a volatile political decision that could destabilize his fragile and fractious coalition government. Senate Speaker Meechai Ruchuphan also supported this process because only ten percent of MPs need sign a petition requesting a Court ruling under Section 96 of the Constitution.⁷⁴ On May 6, with Newin's own Solidarity Party taking the lead, a group of MPs submitted their petition to Speaker Meechai. Their carefully worded petition, playing to the Court's demonstrated predilection for premising their decisions on points of law, requested the Court to consider two principle issues. First, did a suspended sentence fall within the definition of Section 216(4)? Second, since a sentence could be appealed to a higher court, could Section 216(4) be invoked prior to a final verdict by a court (in essence the court of last appeal, the Supreme Court)?

To many former members of the Constitution Drafting Assembly the answers were quite clear because these very issues had been debated by the CDA on May 8, 1997. The CDA had concluded ministers were to be held to a higher level of accountability and moral standards than those required of members of parliament. A suspended sentence was still a sentence, and Section 216(4) was in effect without regard to the appeals process which normally lasts years. Indeed, the CDA had considered a written proposal to include the term "final judgment" in Section 216(4) but had rejected this concept.⁷⁵ Had "final judgment" been included, the lengthy appeals process would have made the intent of Section 216(4), the swift removal of a minister

sentenced for criminal activity, null and void. Therefore, the drafters of the constitution made explicit distinctions between cause for removal of a minister and cause for the removal of an MP or a Senator. Section 216(4) states a cause for the removal of a minister from the cabinet is simply: Abeing sentenced by a judgment to imprisonment@. In sharp contrast, for the removal of an MP or a Senator, Section 118(12) and Section 133(10) respectively state a cause as Ahaving been imprisoned by a final judgment to a term of imprisonment, except for an offence committed through negligence or a petty offence@.

Countering this interpretation, many jurists and legal experts pointed out the Supreme Court had issued a ruling clarifying, as a point of law, that a suspended jail term was not considered imprisonment. Indeed, even before the Court received the Newin petition, Justice Preecha told reporters the matter would be a tough decision because if the Court over-ruled the Supreme Court=s definition of imprisonment there would be far-reaching ramifications.⁷⁶ In Justice Preecha=s rule-by-law view, Court decisions on issues of law must be premised on legal terminology. The Constitution is the supreme law, and no law should be drafted which contradicts the constitution. However, the constitution itself cannot contradict other law or there would be legal chaos. Therefore, where the constitution does not explicitly define a term, the interpretation defined by law must be used to avoid a conflict between the constitution and lesser law. Justice Preecha reasoned in the Newin case that if the Constitutional Court ruled a suspended sentence meant imprisonment, no regular court in the future could use suspended sentences.⁷⁷

Due to the stark contrast between these two points of view, and because of the important precedent the Court would establish on the removal of ministers from the cabinet, the public anxiously awaited the ruling. On June 15, 1999, in a 7:6 decision, the Court ruled that Newin was eligible to retain his cabinet position.⁷⁸ The Court lost significant credibility when it issued the Newin ruling for two reasons. First, at least one justice had a clear conflict of interest when he insisted on issuing an opinion on the case.⁷⁹ Second, the Court=s written decision and the final 7:6 vote contradicted the justices= individual written decisions. This was the result of a procedural problem in the manner in which votes were counted, and it would be this same procedural flaw that would be used subsequently to acquit Prime Minister Thaksin Shinawatra of violating Section 295 of the Constitution.

The press initially reported that the Court=s decision had been premised on two issues: Newin=s sentence was not the result of a final judgment and it was by definition not a sentence to imprisonment. In actual fact, however, the Court had rejected Newin=s argument that his judgment was not final. In his written opinion, Justice Suwit eloquently discussed the clear distinction made in the constitution between Section 216(4) and Sections 118(12) and 133(10) to demonstrate constitutional intent for a minister to lose his position once a Court decision was made without reference to the lengthy appeals process. Indeed, Justice Suwit=s personal written argument appeared verbatim in the Court=s central written decision. Of the thirteen justices, only Justices Komain, Issara, and Chumphol had argued that a sentence must be final.

Justice Suwit failed, however, to pursue his line of constitutional intent reasoning on Newin=s second argument that a suspended jail sentence was not by definition an imprisonment. Rather, Suwit immediately turned to the Penal Code to support Newin=s argument. Only three other justices, Preecha, Jul, and Ura, agreed with Suwit=s interpretation of the Penal Code. The question asked by constitutional reformers was quite simple, how did two minority opinions constitute a majority opinion? More specifically, if the Court specifically had rejected the appeals issue in their central decision, how were the votes of Komain, Issara and Chumphol

added to the other minority opinion on definition to form a 7:6 decision in favor of Newin? In the view of reformers, the vote should have been 6:4 against Newin.

Condemnation of the Newin decision was immediate and intense. Senior statesmen and former chairman of the CDA Anand Panyarachun called the ruling flawed. Former Minister of Education Chumphol Silapha-acha, (and the brother of the Chat Thai Party Leader), went on national television to explain why the ruling was invalid. Former CDA Secretary General Bowornsak Uwanno decried the failure of the justices to respect constitutional intent. Senate Speaker Meechai Ruchuphan declared: *It is risky using subordinate laws to interpret a principal law. We have to adhere first to the constitution=s intention.* Speaker Meechai urged justices to forget their former career because they had to accept that the Constitutional Court is higher than the Supreme Court. If they were to think as ordinary judges, they would compromise their duty. Former CDA member Dr. Amara Raksataya called for a campaign to submit a petition by 50,000 eligible voters to initiate impeachment proceedings against select justices.⁸⁰

The minority justices who favored a Penal Code definition of imprisonment were taken aback by public and media reactions to their decision. Justice Preecha wrote a lengthy, two-part defense of his decision in reaction to Senate Speaker Meechai=s rebuke. Justice Jul went so far as to demand a ban against public comment on Constitutional Court decisions. Bowornsak retorted demands that critics of the Court be liable to punishment was a blunt rejection of accountability. The Court was not a court of justice, therefore it was not immune to criticism. Since the Court considered disputes with a wide range of political implications, the public has the right to make comment.⁸¹ Although not noted in public, many analysts conclude Justice Jul=s demand was itself unconstitutional because Section 269 of the Constitution specifically requires the Court to implement procedures which offer the public an opportunity to challenge a justice and the reasoning of a decision or an order of the Constitutional Court.⁸²

Proponents of the rule by law position argue that no agency or individual is above the law. The intent of their battle-cry rings false, however, because what they should be saying is no agency or individual is above the constitution. Clearly no one is above the law, if someone steals or robs they must be held accountable in a court of law. On constitutional issues, however, the courts and the law are not the proscribed recourse for achieving accountability. There is a widespread belief among Thai politicians and bureaucrats that every agency, governmental or non-governmental, and every individual must be controlled by and held accountable to someone in the political or bureaucratic chain of command. They fail to comprehend that under Thailand=s new constitution, independent agencies, and indeed the government itself, are ultimately accountable to the citizens not to a bureaucratic mechanism or the law. The 1997 Constitution provides special mechanisms and procedures to ensure accountability to the public. The most potent weapon is a variety of impeachment proceedings which can be initiated by citizens through the Senate to hold not only justices of the Constitutional Court accountable, but the officials of all other independent mechanisms created by the Constitution of the Kingdom of Thailand (1997).

Member of the House of Representatives, Charnchai Issarasenarak, (49/2542: October 4, 1999)

The Court established an important precedent in the parliamentary expulsion case of Charnchai Issarasenarak (Democrat, Nakorn Nayok), as well as demonstrated the sharp philosophical divide within the Court over the rights of politicians (49/2542: October 4, 1999).⁸³ Sithichai Kittiyaneet (Chart Thai, Nakorn Nayok) and 55 other MPs filed a petition requesting the Court to expel Charnchai from the House of Representatives because Charnchai had presented

false documents when applying for candidacy in the 1995 and 1996 general elections.⁸⁴ Charnchai berated the Court for accepting the petition, arguing that it had no authority to rule on the issue.⁸⁵ When it became apparent the Court would pursue the case, Charnchai stormed out of his initial hearing threatening to sue President Chao for abuse of authority and constitutional violations. In an attempt to thwart the Court from continuing its probe, he filed a law suit against Chao, which would have prevented Chao from participating in any decision under conflict of interest rules. Secondly, he resigned from his seat in the House, stating he wanted to pursue his civil court case against President Chao.⁸⁶

The civil court wisely rejected Charnchai's suit, noting President Chao had acted within the scope of his duties in accepting the petition from Sithichai and party. The Court remained divided, however, on whether to proceed with the case since Charnchai had resigned his seat. Justices Komain, Issara, Chumphol, Preecha, Jul, and Ura favored dismissal. Justice Suwit, who had supported the other six in the Newin case, however, swung his vote in favor of pursuing the case. In their individual written opinions, the minority subsequently argued that the Court could not rule on the case because the remedy, dismissal from office, could not be applied since Charnchai had already resigned his seat. Indeed, in the closing paragraph of his ruling, Justice Preecha argued the majority justices could be subject to civil and criminal charges because their intentional action of proceeding with the case had destroyed the future and the political rights of Charnchai.⁸⁷

In sharp contrast to Preecha, the majority believed the Court had an obligation to rule on a malpractice specifically because it might have an impact on a MP's status. They saw Charnchai's resignation as a ruse to avoid the additional penalties that would be imposed on him if he were found to have been an unqualified candidate when he won his House seat in 1995 and 1996. While the minority had argued expulsion from the House had been the only viable remedy if Charnchai was found guilty, the majority looked beyond the simple expulsion. Specifically, if the Court found him guilty, he would be required to return all of his salary and other remuneration he had received while in office. More critically, however, if his parliamentary membership was ordered null and void, he would be barred from seeking a future seat in either the house or the senate. The majority's decision that his previous elections had been null and void, thus ended Charnchai's political career.⁸⁸

Had the minority prevailed, Charnchai probably would have regained his seat in the 2001 General Election, and he probably would have never been punished for his fraud in 1995 and 1996. The majority, nevertheless, established a precedent that it would not allow defendants to escape justice through manipulation of the law; specifically, a defendant would not be allowed to escape prosecution or final Court judgment by resigning the position which is being challenged. That is, a case may proceed whether or not the defendant is currently holding the position that is the point of issue. The case also clearly set a precedent that if one remedy cannot be applied but others can, then the law may be applied even if the Court cannot impose the complete set of remedies. The subsequent disregard by several justices for these two important precedents in the Thaksin case goes to the core of public debate on the Thaksin case, as well as the impeachment petition against the four justices who ruled Section 295 of the Constitution was not applicable in Thaksin's case because he had already left office.

Ten Members of the Chuan Leekpai Cabinet, (4/2544: February 6, 2001)

The fifth case questioning the qualifications of an official was the outgrowth of a constitutional reform that requires the National Counter Corruption Commission to make public

the asset and liability statements that are filed by the prime minister and his or her ministers under Section 292 of the Constitution (Section 292 para 2).⁸⁹ The ultimate objective of this reform is to hold the NCCC itself accountable. That is, if the NCCC fails to adequately verify the asset and liabilities of the executive branch, the public is able to conduct its own inquiry. To this end, Amorn Amornrattananont, Secretary-General of the October Network,⁹⁰ began to cross-reference the accounts of the Chuan Leekpai cabinet (September 11, 1997 – March 2001) with company records in the Commercial Registration Department. In the process, in late October 2000, he found that 10 members of the Chuan administration held an executive position or shares in profit-oriented companies in violation of Sections 208 and 209 of the Constitution.⁹¹

The ten members all claimed they had duly resigned from their positions and no longer held shares. That is, the information in the Commercial Registration Department (CRD) that Amorn had relied on was out of date. Nevertheless, on October 30, 2000, in accordance with Section 96 of the Constitution, a group of 32 senators filed a petition with Senate Speaker Sanit Worapanya to initiate impeachment proceedings against the 10 cabinet members.⁹² The Court acquitted all 10 ministers (4/2544, February 6, 2001), after due consideration of evidence presented by the accused that CRD records were indeed incorrect.

Senate Speaker Sanit Worapanya and 9 Other Senators, (12/2544: March 29, 2001 and 13/2544: March 29, 2001)

As noted in the previous section on the Election Commission of Thailand, the 2000 Senate Elections were marred by fraud making it necessary for five rounds of voting to be organized before the full 200 members of the Senate could be endorsed by the ECT. As one measure to control fraud, the ECT had sought to exclude candidates who had been disqualified from two rounds of voting from contesting in subsequent contests. The Court had ruled (24/2543) it was unconstitutional for the ECT to establish new candidate qualifications, as the qualifications were clearly listed in the constitution. To overcome this problem, after the Senate elections, a series of electoral reforms were introduced so that similar problems would not arise in the upcoming general elections for the House of Representatives. Among these amendments to the Election Act was authorization for the ECT to continue investigations of endorsed senators and MPs for up to one year after an election. If the ECT found evidence of election fraud, it had the power to call new elections and suspend the voting rights of those for whom it found solid evidence, the so-called “red card”. Having the right to vote is a qualification for any candidate, thus this rule effectively barred them from contesting any office for one year. Where evidence was only *prima facie*, the individual would be allowed to contest in the by-election, the so-called “yellow card”.

On March 13, 2001, the Election Commission shocked the Senate and the nation when it announced that it was expelling 10 senators for cheating in the 2000 Senate Election, including Senate Speaker, Sanit Worapanya.⁹³ As noted in the previous section on the Election Commission, the Court ruled in two separate decisions that the ECT’s actions were constitutional.

Two National Counter Corruption Commissioner, (18/2544: June 26, 2001)

The seventh vacation case (18/2544, June 26, 1991) was similar in nature to the case against the 10 ministers in the Chuan cabinet. However, it was closely tied to the NCCC indictments against Prime Minister Thaksin Shinawatra (20/2544) and Senator Prayuth Mahakitsiri (19/2544). As with the case raised against the 10 ministers, these charges were

raised by October Network Secretary-General Amorn Amornrattananon. He charged that NCCC Commissioners Khunying Preeya Kasemsant na Ayutthaya and Sawat Orrungroi should be removed from office because they had violated Section 258 (3) that prohibits commissioners from holding any position in a partnership, a company or any other type of profit-oriented organization. Specifically, Commercial Registration Department documents showed Khunying Preeya was an executive of Kasem Vanarom Co. and Wong Amorn Co., while Sawat was an executive of Best General Communications Co.⁹⁴ The intent of Section 258 (3) and other related sections is to ensure that the members of all independent mechanism created by the Constitution devote full-time to their duties; and more significantly, to reduce the potential for any conflict of interest in the pursuit of their mandate.

Of particular interest to lawyers for Thaksin and Prayuth was that Khunying Preeya had participated in the NCCC sub-committees that had investigate their alleged violations of Section 295, and both had voted to indict the two for violation of Section 295. In the view of defense lawyers, if Khunying Preeya and Sawat were unqualified to be commissioners, then all of the NCCC's decisions, and in particular the indictments against their clients, were null and void. Other lawyers, of course, pointed to the precedent established in administrative law that such actions would not be null and void.

The Court concluded that it had three issues to consider. First, did it have the jurisdiction to consider the motion? Second, were Khunying Preeya and Sawat executives as charged in the complaint filed by Senate Speaker Sanit Worapanya? Third, if they were executives, and therefore unqualified to sit on the commission, were the decisions of the NCCC in which they had participated null and void? On the first issue, the justices voted 9/5 that the Court had jurisdiction over the case. They subsequently ruled 11/3 that neither defendant was an executive as alleged, and therefore there was no need to consider the third issue.⁹⁵

Chairman of the Election Commission of Thailand, General Sirin Thoopklam, (38/2545: July 4, 2002)

The final impeachment ruling to date by the Constitutional Court was against the Chairman of the Election Commission, General Sirin Thoopklam (38/2445, July 4, 2002). The election of Gen. Sirin by the Senate to be a member of the Election Commission of Thailand had been highly controversial because the first Election Commission, under the Chairmanship of Theerasak Karnasut, had disqualified Sirin for electoral fraud in the March 2000 Senate election. He had been allowed to contest the by-election in April 2001 but he had failed to win back his Lopburi provincial seat. Second, allegations were made that the nominee selection process was flawed and therefore the names of the nominees submitted to the Senate by the selection panel were invalid. Section 138 (1) of the Constitution requires the Selective Committee make nominations "by votes of not less than three-fourths of the number of all existing members of the Selective Committee."⁹⁶ However, in this case, after the third round of voting, no remaining nominee could secure three-fourths of the votes. Therefore the Selective Committee changed the procedures in the 6th and 7th round of voting, which resulted in the nomination of Gen. Sirin.

The Court ruled 9/6 that the nomination process during rounds 6 and 7 were unconstitutional because the Constitution provides an exit to this type of situation. That is, if any nominee fails to receive the required $\frac{3}{4}$ votes, the candidate is to be dropped and the Supreme Court would make the final selections. Therefore, the election of individuals nominate in round 7 were invalid. A new nomination process would have to be implemented and Gen. Sirin replaced (although he could participate in the new round of nominations). Four justices, Phan,

Preecha, Jul, and Kramol ruled the process was in accordance with Section 138(1) and therefore constitutional. Justices Sak and Chumphol ruled the issue did not fall under Section 266 and therefore the case should be dismissed.⁹⁷

Indictments under Section 295 of the Constitution of the Kingdom of Thailand (1997)

Background to Promulgation of Section 295

The framers of the Constitution of the Kingdom of Thailand (1997) envisaged the National Counter Corruption Commission (NCCC) as a primary tool to ensure accountability and transparency in Thai governance by requiring the NCCC to inspect the asset and liability statements of thousands of officials as stipulated in Section 291 of the Constitution. The NCCC is further charged with prosecuting those officials whose asset and liability statements indicate an “unusual” increase in wealth through the Supreme Court of Justice’s Criminal Division for Persons Holding Political Positions, which has the power to impose fines and prison sentences, as well as to seize any unusual increase in assets for the state (Section 294). Since timely, correct submission of the asset and liability statements is central to this accountability process, the Constitution authorizes the NCCC to enforce the submission of statements. For those officials who fail to submit asset and liability statements as required by the Constitution, or who submit false or incomplete statements (Section 291 and 292), the NCCC is to forward their case to the Constitutional Court, which has the power to expel the official from office and prohibit the official from taking any political position for a period of five years (Section 295).

The evolution of this reform package began during a brief interim of civilian democratic rule in the mid-1970s when Parliament passed the Anti-Corruption Act (1975), establishing Thailand’s first Counter Corruption Commission in the Office of the Prime Minister – an executive department. Unfortunately, the CCC was designed with limited powers of investigation and no prosecutorial authority. As a result, even when leadership had been strong, and the Commission had had the full support of the government, the Commission was essentially the proverbial *paper tiger*. The primary problem was that the CCC was designed to be reactive rather than pro-active in suppressing corruption. Its powers were limited to investigation of complaints it received against civil servants, local administrators, and state enterprise employees (CCA: Article 3). Its mandate did not generally extend to politicians or political appointees. It was not structured and it was not authorized to independently initiate investigations.

In conducting its investigations, the Commission was authorized to send an official letter to the suspect’s immediate superiors to request facts on a case, to which the office was required to respond in writing within 30 days, unless an extension was requested (for up to a total of 90 days). Secondly, the CCC was authorized to send a letter requesting any individual involved in a case to appear before it to make a statement or to deliver a copy of an account or any other article or object (CCA: Article 14). The CCC, however, had no power to enforce such requests because CCC officials were not authorized to issue a summons or a search warrant. In view of these limitations, as well as the stringent evidence requirements under the criminal procedure code, (the requirement for a paper trail documenting the act of corruption), it was difficult for the CCC to substantiate charges. As a result, since it first began investigations in 1977, the CCC found sufficient evidence to recommend disciplinary or criminal action in only 6 percent of the 26,537 cases it closed.⁹⁸ During its last year of operation in 1998, the CCC had 3,393 complaints under consideration. The Commission closed 1,466 of these cases but found grounds for criminal prosecution in only 20 cases and grounds for disciplinary action in only 12 cases.

The CCC was also weak because it lacked prosecutorial authority. After the CCC completed an investigation, the duties of the Commission ended when it submitted its report to the superior of the accused official. The superior would then create a disciplinary investigation committee to re-examine the CCC=s report and legal conclusions. This internal committee retained complete discretion to accept or reject the CCC=s recommendations and to determine the fate of the accused. The CCC annual reports to the government indicated the conclusions reached by the Commission; however, neither these reports, nor any other public documents, provided any detail on the decisions ultimately made by the internal agency=s committees. Sealing the CCC=s image as a paper tiger, all too often, what the public remembered were sporadic newspaper reports noting an internal committee=s decision to discipline an official with retirement at full pension, transfer to an inactive post with full pay, or exile to a remote outpost.

Finally, as noted previously, the CCC was not normally authorized to pursue complaints against politicians or other political officials. Nevertheless, by the late 1980=s, as businessmen assumed greater control over the National Assembly and the Cabinet, there were a growing number of incidents where politicians were alleged to have been corrupt. Indeed, such corruption had become so prevalent that on February 23, 1991 a group of soldiers calling themselves the National Peace Keeping Council overthrew the civilian administration of Chatichai Choonhavan (August 4, 1988 – February 23, 1991), in part due to allegations of corruption against Chatichai=s “Buffet Cabinet”. Three days later, on February 25, 1991, the NPCK established the Asset Investigation Committee (AIC) headed by General Sitthi Chiraroj to: 1) examine the assets of senior politicians, 2) determine if any were “unusually rich”, and 3) to confiscate unusual wealth on behalf of the state.

The concept of confiscating an official=s unusual wealth emerged under Thailand=s military dictatorship. Specifically, after the death of Prime Minister Field Marshall Sarit Thanarat (09/02/1959-08/12/1963), who was viewed by all as notoriously corrupt, the new premier, Field Marshall Thanom Kittichachorn (09/12/1963-15/10/1973), established an investigative committee and on June 16, 1964 ordered, under the powers of Article 17 of the 1959 Constitution, the confiscation of 604.5 million Baht in unusual wealth. Sarit=s heirs contested the seizure but the Supreme Court ruled that the courts had no authority to overrule a decision made under Article 17 of the Constitution.⁹⁹ Subsequently, after student protests led to fall of Thanom, the interim-civilian government of Sanya Thammasak, relied on Article 17 of the 1972 Constitution to seize the wealth of Thanom and six associates on August 1, 1974.

“Unusual wealth” was not used against cabinet members again until 17 years later in the highly politicized 1991 AIC investigation. General Sitthi=s committee was criticized because it selectively focused on certain individuals while ignoring others who were alleged to have been corrupt but who were supporting the new military regime. It also took the position of laying the burden of proof that funds were acquired legally on the defendant, rather than requiring the Committee itself to prove funds were derived from corruption. Eventually, the Committee found 10 individuals associated with the Chatichai administration to be unusually wealthy and ordered confiscation of that portion of their assets determined by the Committee to be “unusual”.¹⁰⁰ Sanoh Thienthong, representing the group, filed suit to have the courts overrule the convictions and the seizure of assets. Since Article 17 had long since been removed from Thai constitutions, on March 26, 1993, the Supreme Court ruled that the AIC was an unconstitutional mechanism with no judicial authority. Therefore, its decisions were null and void.

The failures of the CCC and the experience of the AIC led to a series of reforms under the

1997 Constitution designed to reign in corrupt officials, both civil servants and politicians. The primary agency to implement these reforms is the National Counter Corruption Commission, whose role, duties, and power are significantly different from those of the CCC. The first major difference with the CCC is the NCCC is required to be pro-active. Rather than waiting for a complaint to be filed, it is required to follow a process to uncover instances of corruption. Second, it has the power to enforce its requests for documentation from officials. Third it has the power to prosecute corrupt officials itself in instances where the Attorney General declines to prosecute an official indicted by the NCCC. Fourth, it dispenses with the need for a paper trail to prove corruption, replacing criminal procedure evidence requirements with the concept of “unusual wealth”. The state is not required to prove unusual wealth is the result of corruption but rather the burden of proof lies with the defendant that the wealth was acquired through legal means. Finally, the NCCC is not under the executive branch of government where it can be easily manipulated, rather it is an independent organization.

The primary method through which the NCCC is to pro-actively initiate investigations is the requirement in the Constitution of the Kingdom of Thailand (1997) that the NCCC inspect the accuracy, the actual existence, and any changes in the assets and liabilities (Section 301(4)) of tens of thousands of individuals including members of the Cabinet, House of Representatives, Senate, and local assemblies, as well as of political officials and high level bureaucrats, their spouses and dependent children (Section 291 and 296). Under Section 292, officials are required to submit these asset and liability statements within 30 days after taking office (Section 292(1)), within 30 days of vacating office (Section 292(2)), and within 30 days from the date of the expiration of one year after vacating office (Section 292(3), para 2).¹⁰¹ Through an inspection of the accuracy, the actual existence, and any significant changes in the assets and liabilities of those required to file (Section 301(5)), the NCCC is in a position to determine whether or not an official has become unusually wealthy, an indicator the official may have committed an offence of corruption or malfeasance in office (Section 301(3)).¹⁰² In instances where the NCCC is able to identify unusual wealth, under Section 294, the NCCC may indict the official and send the case to the Supreme Court’s Criminal Division for Persons Holding Political Office for prosecution.

Obviously, it would be difficult for the NCCC to pursue this mandate if officials refused to submit accurate and complete statements. Therefore, the NCCC has the power to enforce Section 291 and 292 through Section 295 of the Constitution that enables the NCCC to indict an official and request the Constitutional Court to order the official to vacate his or her office and ban them from any political position for a period of five years if they either fail to file a statement, or if the statements is incomplete or contains false information.

The Constitutional Court Record on Indictments under Section 295

As outlined in Table 5, since its inception on April 11, 1998 through October 10, 2002, the Constitutional Court has ruled on 18 cases in which the National Counter Corruption Commission has indicted an official under Section 295 of the 1997 Constitution for violating Section 291 by providing false or incomplete information in their statement (6 cases), or for violating Section 292 by failing to submit an Asset and Liability Statement (12 cases). The Court has concurred with the NCCC in 17 cases, the one exception being the indictment against Prime Minister Thaksin Shinawatra in his previous capacity as Deputy Prime Minister in the government of Chavalit Yongchaiyuth (29 November, 1996 – November 7, 1997). Furthermore,

with the exceptions of the Thaksin case and subsequent Section 295 indictments, the justices have been relatively united in their majority decisions confirming the indictments filed by the NCCC and removing officials from office and barring them from office for a period of five years.

Table 5

**Political Officials Charged By the NCCC Under Section 295 of the Constitution
March 2000 through October 10, 2002**

Case Number	Date Issued	Name	Position When Offense Occurred	Charge	Vote G/I
1	10/2543	Anan Satsatananon	Political Advisor	failure to submit	13/0
2	11/2543	Chatchai Sumetchotimetha	Political Advisor	failure to submit	13/0
3	12/2543	Sukhum Choedchoem	Senator	failure to submit	12/1
4	23/2543	Chirayu Charasathian	Political Advisor	false statement	13/0
5	27/2543	Kosol Srisang	Political Advisor	failure to submit	10/1
6	28/2543	Mahusen Masuyi	Official PM's Office	failure to submit	09/2
7	31/2543	Sanan Khajornprasas	Minister of Interior	false statement	11/0
8	05/2544	Sumet Upholthian	Municipal Councilor	failure to submit	14/0
9	19/2544	Prayuth Mahakijisiri	Senator	false statement	12/1
10	20/2544	Thaksin Shinawatra	Dep.Prime Minister	false statement	07/8
11	14/2545	Sombun Niamhom	District Councilor	failure to submit	14/1
12	17/2545	Sawaet Thongrom	Political Advisor	failure to submit	13/0
13	18/2545	Withaya Siriphong	Political Advisor	failure to submit	13/0
14	35/2545	Sanit Surangsi	Ast.Sec.PM's Office Secretary to	failure to submit	10/0
15	37/2545	Somphong Kestraphiban Phenpha	Minister	false statement	14/1
16	39/2545	Phusansaphanimit	Political Advisor	failure to submit	09/5
17	41/2545	Subin Phiphornpong	Political Advisor	false statement	11/4
18	53/2545	Saman Nguansa-ang	Political Advisor	failure to submit	14/0

The first indication that the NCCC's new process might have significant impact in the political reform process was the Court's controversial ruling against Deputy Prime Minister, Minister of Interior, and Secretary-General of the Democrat Party, Major General Sanan Kachornprasart (31/2543: August 10, 2000). In March 2000, less than three weeks after the Election Commission had disqualified his wife as an elected Senator, the National Counter Corruption Commission had indicted Sanan, one of Thailand's most powerful politicians, for filing a false statement of his assets and liabilities. The Court's concurrence with the NCCC resulted in the immediate dismissal of Sanan from all of his political positions and bared him from participation in politics for a period of five years. Similar to the Newin case, Sanan's defense was premised on legal definitions and arguments over interpretation of law. In contrast, the NCCC's position was simple: Sanan had filed a false statement. In accordance with the Section 295 of the Constitution and new NCCC Act (1999), this was a ground for removal from office.

As noted previously, Section 293 para 2 requires the NCCC to make the statements and supporting documents of the prime minister and his ministers public within 30 days of receipt. This is one manner in which the NCCC can itself be held accountable to the public. As a result,

a little-known NGO advocacy organization, the People=s Liberty Protection Group, was able to notice some questionable items in Sanan=s statement and conducted an investigation of its own. It then leaked this information to the opposition prior to the annual no-confidence debate in Parliament at the end of 1999. Although Sanan had thought he had successfully explained the discrepancies that were raised during the debate in the House, after the debate, both the opposition and the NGO filed complaints with the NCCC requesting an investigation.

The core issue was Sanan=s claim to have received a 45 million Baht loan from a car rental firm to purchase a real-estate investment. Sanan had filed documents with the NCCC claiming he had received the loan in three installments during 1997. The charge laid against Sanan by reformers was the loan did not exist and was merely reported to divert attention away from his actual wealth.¹⁰³ The NCCC could find no independent documentation confirming the loan was real, and concluded the documents Sanan had filed constituted a false statement. It is important to stress the NCCC made no definitive judgment on the actual existence of the loan, it only concluded Sanan=s documents were a false representation of the loan, if it did exist.

Sanan=s defense team focused its arguments before the Constitutional Court on two issues. First, the loan was real and they could provide documentation to prove this. Second, the loan was made following accepted business practices recognized by the Supreme Court. The essence of their argument was Sanan had not breached any law, and Supreme Court precedents would convince the Constitutional Court to rule in Sanan=s favor. Nevertheless, the evidence and witnesses produced by the defense merely confirmed the loan documents Sanan had filed with the NCCC were false.

The Constitutional Court had previously confirmed five Section 295 indictments handed down by the NCCC; however, none of these cases had been as politically controversial, nor had the defendants the benefit of Sanan=s impressive legal team. As the Court began its deliberations there were allegations that Sanan, or others acting on his behalf, were attempting to influence the Court. Although never confirmed, the reputation of the Court was so damaged that one highly respected, liberal reform-oriented justice, Dr. Chai-anan Samudavanij, resigned. There were fears that the balance of the Court would side with the defense team=s argument for a rule by law interpretation. Nevertheless, on August 10, 2000 the Court issued its unanimous ruling against Sanan, concluding he had filed false documents, thus restricting Sanan=s pursuit of his long political career.¹⁰⁴

Again, it is important to note the Court did not determine whether or not the loan was real, the same position as the NCCC, it had merely considered whether the documents Sanan had filed were an accurate representation of the loan. The Court had applied a literal interpretation to Section 295 of the Constitution to conclude that Sanan had filed a false statement. The Court disregarded legal arguments on the existence of the loan and on the Supreme Court=s previous decisions on the legality of the process Sanan alleged he had followed in order to secure and to document the loan.

It should be noted that the Court=s ruling merely restricted, it did not end Sanan=s political career, nor does any Court decision necessarily “end” anyone=s political career. Immediately after Sanan formally left office, Prime Minister Chuan Leekpai appointed Sanan as an un-paid advisor to the Democrat Party. Sanan also opened a popular “politics school” for MPs and Senators. He has thus been able to keep his fingers in the day-to-day affairs of national and party politics. In another instance, former Senator Prayuth Mahakitsiri, who was forced from office the same day that Thaksin was acquitted, was elected as a Deputy Secretary General

of Thaksin's Thai Rak Thai Party. Rule of law reformers believe the intent of the Constitution was to prohibit indicted officials from all political activity. Rule by law proponents, and current practice, however, follow the letter of the Act on Persons Holding Political Positions, which limits "political positions" to those specifically listed in the Act.

While the Sanan case had been dramatic, and served to bolster the Court's image after the controversial Newin decision, the most significant Section 295 case to date was the NCCC's indictment of Thaksin Shinawatra for filing an incomplete statement. After Thaksin and his Thai Rak Thai Party had won a landslide victory in the 2001 General Elections, and with Thaksin holding the premiership for only a few months, the Constitutional Court acquitted Thaksin. The acquittal was not a statement of Thaksin's guilt or innocence, however. As a result, the ruling has been highly controversial.

In the Thaksin case, four justices ruled: 1) Thaksin was not required under Section 292 to submit any asset and liability statements because he had formally assumed and left office before the 1997 Constitution came into effect on October 11, 1997; and, 2) since Thaksin was no longer holding the office of Deputy Prime Minister, Section 295 was not applicable. Four other justices, following the majority opinion (11/4) that Thaksin was required to submit statements as required by Section 292, and that Section 295 was applicable, ruled in the minority (7/4) that there was insufficient evidence to determine whether or not Thaksin had "intentionally" provided false or incomplete information in his statements. Through a procedural quirk in the manner in which votes were counted by the Court, reminiscent of the Newin case, the votes of the two minority positions were added together to form a majority decision to acquit Thaksin (4 votes that Section 295 was not applicable + 4 votes that there was insufficient evidence = 8 for acquittal).

The first time that the applicability of Section 295 had ever been questioned by any of the justices of the Constitutional Court was in the Thaksin case. However, the applicability of Section 292 has been an issue since the Court's first ruling on this type of case. An analysis of how the legal critique of Section 292 evolved may shed some light on the more critical issues that were raised concerning Section 295 in Thaksin's case. This is a key issue in the constitutional reform process because the ability of the NCCC to indict an official under Section 295 lies at the very heart of the NCCC's power to enforce Sections 291 and 292 of the Constitution, and thereby the commission's pursuit of indictments against officials for unusual wealth under Section 294.

In the NCCC's first indictment of an official under Section 295, (10/2543: March 9, 2000), Anan Satsatananon was found guilty 13/0. Nevertheless, Justice Komain added a unique twist to his decision, ruling that Section 292(1) was not applicable to Anan. Komain argued Anan was not required to submit an account within 30 days of taking office because he had been appointed to his position in the PM's Office in February 1997, while the constitution had not come into effect until October 11, 1997. More specifically, Sections 315-317 essentially state that the administration and legislature in existence at the time of promulgation of the constitution remained the administration and legislature until the formal end of their term of office as provided for in the 1997 Constitution. Therefore, Anan was merely continuing in his old position; he had not taken a new position, and was therefore not liable for submitting a statement under Section 292 (1) within 30 days of gaining a new office. Justice Komain, nevertheless, found Anan guilty under Sections 292(2) and (3) because he had failed to submit the two subsequent statements required after his November 7, 1997 departure from government.

Although the other justices had established a strong precedent by 12/1 that Section 292(1) was applicable to all individuals serving through the transition to the new Constitution, and were therefore required to submit a statement no later than November 9, 1997, and although thousands of officials holding the same positions they had held before promulgation of the constitution had demonstrated their understanding of the intent of the constitution by filing statements no later than November 9, 1997, Justice Komain continued to dissent on this issue. Indeed, in the case of Sukhum Choedchoem (12/2543: March 7, 2000), who was still in office and therefore was charged only with failure to submit the statement required under Section 292(1), Komain voted to acquit on the grounds that the law was not applicable.¹⁰⁵

Justice Komain further expanded his legal argument in the case against Kosol Srisang (27/2543: July 3, 2000), stating that a political advisor who had been appointed during the Chavalit Administration and who had left office was not liable for submitting any statements under Sections 292(1), (2) or (3). Acknowledging that ministers were to retain their seats under Section 317 of the Constitution, and therefore were subject to 292(2) and (3), (but not Section 292(1) as he had argued in the Anan case), Komain pointed out that the Act on the Regulations for Political Officials, Section 10(4) states that a political advisor's term ends with the termination of the tenure of the minister who had appointed him or her. Section 317 of the Constitution was applicable only to ministers, not to their advisors. Therefore, no political advisor under the Chavalit Administration was subject to any part of Section 292 since their term ended just a nano-second before the new constitution came into force. This was thus a reversal of his previous rulings against political advisors Anan Satsatananon and Chatchai Sumetchottimetha. It also raised a fundamental contradiction in his initial rulings. That is, if one argued that a minister did not assume a new office on October 11, 1997 due to transitional clause Section 317, then the minister's tenure cannot be said to have finished. Therefore, regardless of who may or may not be specifically mentioned in the transitional clauses, Section 10(4) of the Act on Regulations of Political Officials did not become effective on October 11, 1997, but rather on November 7, 1997 when the Prime Minister tendered his resignation and all ministers left office.

Although there were three subsequent Section 295 indictments decided by the Court prior to Justice Komain's forced resignation after being convicted and sentenced to a suspended prison term over the unfair treatment of a subordinate, he had taken a leave of absence during this period and therefore he had not participated in any of these proceedings (including the Sanan decision).¹⁰⁶ As a result, there was no further elaboration of his line of thinking until the case against Thaksin, in which four justices overcame the fundamental contradiction in Komain's decision to acquit Kosol.¹⁰⁷ Drawing on Komain's early Section 295 rulings, Justices Kramol, Chumphol, Phan and Sak developed three basic lines of reasoning to conclude that Thaksin was not required to file any asset and liability statements arising from his service as Deputy Prime Minister from August 15, 1997 through November 7, 1997. In a fourth line of reasoning, they argued that because Thaksin did not hold any political office at the time of his indictment, the NCCC could not indict him under Section 295.

Following Komain's original line of argument, the four minority justices noted Thaksin was not liable under Section 292(1) for submitting a statement before November 9, 1997 because he had not taken a new position on October 11, 1997. Second, they noted that Section 321, para 2, of the Constitution instructed the CCC, acting as the NCCC until NCCC commissioners could be elected, "for the purposes of implementing this Constitution, [to] prescribe necessary regulations for the performance of its duties under this Constitution." The "Regulations on the Performance of the Duties of the National Counter Corruption Commission (1998)" were duly

prepared and came into effect on July 10, 1998. However, since the regulations were not retroactive, Thaksin was not required to submit either the first statement that he filed on November 7, 1997, (the day he and other members of the Cabinet had resigned) or the second statement (Section 292(2)) that he submitted on December 4, 1997 (30 days from his resignation from the Cabinet).

Third, turning to the third statement (Section 292(3)) submitted on December 4, 1998, the four justices argued that precisely because Thaksin had left the office of Deputy Prime Minister on November 7, 1997, he was not required to submit either a statement one year after he had left office, or the prior two submissions. They noted that Section 291, when taken into consideration with Section 13 of the NCCC Regulations, clearly define those who are required under the Regulations to submit a statement to be only those individuals who held one of the offices defined in the Regulations on the day the Regulations went into effect, i.e., July 10, 1998. Thaksin had not held any office since November 7, 1997; therefore, he was not an individual specified in the Regulations and subsequently he was not required to submit any asset and liability statement as defined in Section 292. This argument conveniently forgets that the NCCC had informed all MPs, Senators, and Ministers in October 1997 that they were required to file statements in accordance with Section 292. Almost all of them, including Thaksin, had followed these instructions, thus acknowledging their obligation.

This left one final problem. Was it not the intent of the Constitution that all officials were subject to Sections 291 and 292, regardless of the unique circumstances arising from the promulgation of the Constitution on October 11, 1997 and the coming into force of regulations to implement Constitutional provisions on July 10, 1998? The four minority justices argued this clearly was not the intent of the Constitution. Adopting a literal interpretation of Section 295, they argued that the intent of the Constitution was very specific on the charges that could be brought against Thaksin or any other former political official in his circumstances. They emphasized Section 295 of the Constitution, which stipulates the punishment for an individual who violates Section 292, specifically states: “Any person holding a political position who intentionally fails to submit the account . . . or intentionally submits the same with false statements or conceals facts . . . shall vacate office . . . and such person shall be prohibited from holding any political position for five years as from the date of the vacation from office” They reasoned that if an individual was no longer in office, obviously it was impossible for the Court to order the individual to vacate his or her office as required in Section 295. Second, if the Court could not order an official to vacate from office, it was not possible to prohibit the individual from holding a political office for five years from the date of vacating office. This argument, of course, ran counter to the precedents established in the Charnchai Issarasarak case (49/2542, October 4, 1999), where the Court had ruled that an official could not escape indictment by simply resigning from office, and that expulsion from office was only one of several remedy that could be applied to those whom the Court had found to be guilty as charged by the NCCC.

In addition, again drawing on a literal interpretation, the four justices further noted that Section 294 of the Constitution is the provision for officials who have either vacated office or died.¹⁰⁸ Under this section, the NCCC is to examine the statements only to determine if they demonstrate an unusual increase in assets, an indicator of corruption. Where the NCCC suspects unusual wealth, it is to send the case to the Supreme Court of Justice’s Criminal Division for Persons Holding Political Positions, (not the Constitutional Court), for a ruling on whether or not there is sufficient evidence of “unusual wealth” to confiscate the excess assets and impose other criminal penalties. The justices further noted that the NCCC had not charged Thaksin with unusual wealth or corruption, nor was the NCCC in a position to charge him with corruption.

This is because Section 75 para 2 of the National Counter Corruption Act, 1999 states that an official may be charged with unusual wealth only when the official is holding office or within two years of vacating office. The justices pointed out that the NCCC had only become aware of media charges that Thaksin had hidden assets in September 2000, a full 2 years and 10 months after he vacated office.

Taken to its logical conclusion, if the minority ruling by Justices Kramol, Chumphol, Phan and Sak were ever to become a majority, the precedent would have the following impact:

1. Those individuals holding political office on or before July 10, 1998 need not file an asset and liability statement under Section 292(1), i.e., within 30 days of assuming office. Nevertheless, they are required to file under Sections 292(2) and (3), if they continued in office beyond July 10, 1998.
2. Only those officials who assumed office after July 10, 1998 have a duty to submit all three statements required by Section 292.
3. The NCCC may indict individuals under Section 295 only if the individual is holding the office on the day he or she is indicted.
4. The Constitutional Court may issue a ruling only if the individual continues to hold the office until the day the Court issues its opinion.

In other words, only 6 of the 19 officials indicted to date by the NCCC under Section 295 would be liable under their interpretation of the law.¹⁰⁹ The first issue is now moot because there are now no political officials who continue to hold the office they held prior to July 10, 1998. Issues 3 and 4, however, are troublesome because they reflect a fundamental contradiction with constitutional intent and a challenge to precedents established by the Court. Specifically, the intent of the Constitution of 1997 is for the NCCC to uncover instances of corruption, and prosecute such corruption through Section 294 of the Constitution. However, the fundamental constitutional process through which the NCCC is to uncover corruption and unusual wealth is through an analysis of the asset and liability statements political officials submit under Sections 291 and 292. Under the old CCC, officials could simply ignore CCC requests for information, or they could easily provide false and incomplete information. In order to prevent this from happening, the 1997 Constitution provides sanctions through Section 295 against officials who fail to submit accurate and complete information. Without the sanctions of Section 295, the capacity of the NCCC to implement Section 294 will disintegrate as officials increasingly refuse to submit their asset and liability statements and then simply resign from office in order to avoid prosecution.

The Aftermath of the Thaksin Ruling

The official written verdict in the case of Thaksin (20/2544: August 3, 2001) was immediately controversial for two major reasons. First, the media and opponents of the decision argued that in contrast to previous Court decisions, the central written decision was not released the day that the verdict was announced, and it was several weeks later before the individual written opinions of each justice were released. This complaint demonstrates how little the general public and the media actually understood about how Court decisions are issued as it is often 2-4 weeks after the Court announces its position before the central decision is completed and it usually takes several months before the individual decisions are all completed.¹¹⁰ The second, and more significant controversy, was that neither the individual oral or written opinions of the eight justices in the majority match the central decision in terms of applicability of the law or in terms of a consideration of guilt or innocence: two points the seven minority justices

pointed out in their individual written decisions.

On the first legal issue pertaining to the case, whether Thaksin was required to file statements under Sections 291 and 292, and whether these submissions complied with Section 295, by a vote of 11/4 the central written decision of the Court cited precedents established in 10/2543 (Anan Satsatananon) and 27/2543 (Kosol Srisang) to rule that Thaksin was duty-bound to file three sets of asset and liability statements. Secondly, the Court ruled 11/4 that the term “office holder” in Section 295 has the same meaning when mentioned in Sections 291 and 292, regardless of the individual’s subsequent status after leaving office or in the case of death. Therefore, by the same 11/4 ruling, the NCCC’s indictment under Section 295 was legal and constitutional.

The second legal issue pertaining to Thaksin’s case was whether or not he had violated Section 295. Here the Court cited the precedents it had established in 31/2542 (Sanan Khajornprasas) and 19/2544 (Prayuth Mahakijisiri) on the definition of “intention” to submit a false or incomplete statement. The Court had ruled that the term “intent” referred to a normal recognition of intent, such as whether the accused had knowledge of properties; it did not cover special intent to commit wrong-doing, such as using elaborate methods to cover up ill-gotten wealth. This means that there must be sufficient evidence to demonstrate that the accused with full awareness and with incriminating evidence committed wrong. Critics of the decision complain that the written opinions of the four justices who ruled there was insufficient evidence to prove Thaksin had “intentionally” violated Section 295, appear to some to have adopted a higher standard of evidence than in earlier cases. That, however, remains a subjective question.

Of much greater significance is the fact that disingenuously, and ignoring the written opinions of the justices that had found Thaksin guilty of violating Section 295 by a vote of 7/4, and of the 11/4 decision to reject the argument that Section 295 was not applicable, the central opinion states that Thaksin was not guilty of violating Section 295 by a vote of 8/7. The problem is the four justices who had been overruled by their peers on the applicability of Section 295 had never proceeded in their deliberations to consider whether or not Thaksin had violated Section 295. Therefore, in neither their oral nor their written decisions did they make a ruling on his guilt or innocence.

Condemnation of the acquittal grew as the media and academics began to make comparisons between the Thaksin verdict and the verdict reached by the Court in the morning of the same day ruling Prayuth Mahakitsiri was guilty 12/1 (19/2544: August 3, 2001); and after it became apparent that the written decisions of Kramol, Chumphol, Phan and Sak addressed only the issue of Section 295 rather than whether or not Thaksin had intended to conceal assets. In Prayuth’s case, the applicability of Section 295 was not raised as an issue. Although he was holding a political office as a senator at the time of his indictment by the NCCC and on the day of the Court’s ruling against him, he had been a senator since July 8, 1997, prior to promulgation of the constitution in October, 1997. Therefore, the justices were unable to apply the argument used in Thaksin’s case that he was not holding an office and therefore not liable to Section 295. Nevertheless, the four justices had built the foundation of their argument in the Thaksin case on former Justice Komain’s line of reasoning that an official holding office prior to promulgation of the constitution never assumed a new position on October 11, 1997 and was therefore not required to file the first asset and liability statement required by Section 292(1).

Although Justices Chumphol and Sak did not participate in the Prayuth decision, neither Justice Kramol nor Justice Pan raised former Justice Komain’s argument in defense of Prayuth,

as they had in Thaksin's case. They could have argued that Prayuth had no duty to file the single statement he had filed on November 7, 1997 because he had been a Senator before promulgation of the Constitution, and under the provisional clause Section 315 he retained his seat in the Senate until new elections were to be held (March 2000). Therefore, his single statement the NCCC used as the basis of his indictment was null and void.

Only Justice Preecha, had ruled Prayuth not guilty on the grounds there was insufficient evidence that he had intentionally filed a false or incomplete statement, just as he had done in the Thaksin case. However, there were obvious contradictions in the decisions of the other three justices who had ruled there was insufficient evidence in Thaksin's case but sufficient evidence against Prayuth. Justices Anan, Jul and Suchinda had required proof beyond reasonable doubt in Thaksin's case but only *prima facie* evidence against Prayuth. In Thaksin's case they had ruled there is no reason to assume that a husband and wife living under the same roof should know about each other's financial affairs. They told Prayuth a husband and wife must take care of each other and they must be aware of each others financial status and assets. And, where they had accepted Thaksin's claim that he and his wife had too much wealth to remember, they rejected Prayuth's similar claim.¹¹¹

The decisions of the Constitutional Court are final (Section 268) and therefore there is no appeal. Nevertheless, as a result of the contradictions in the rulings, Sanan Kanjanachorn, who had been found guilty previously under Section 295, (31/2543) decided to file impeachment charges against four justices on the grounds of judicial misconduct for applying double standards. Since it is rather difficult to demonstrate double standards on the basis of the subjective judgment of an individual that there was or was not sufficient evidence, Sanan did not file against Justice Preecha, Anan, Jul and Suchinda. Rather he filed against Kramol, Chumphol, Pan and Sak for stating Section 295 was not applicable, even though the Court had clearly established a precedent in previous cases that Section 295 was applicable, and indeed, in the central written decision in the Thaksin case, the Court had specifically reiterated the precedent.¹¹²

Sanan announced in November 2001 that he would submitted a petition to the President of the Senate to seek impeachment proceedings against the four justices under Section 304, which grants the right of 50,000 voters to initiate proceedings through the President. After checking through Sanan's list of 60,000 signatures to ensure that it included at least 50,000 eligible voters, the President, in accordance with Section 305, referred the petition on March 22, 2002 to the NCCC for investigation. If the NCCC subsequently submits a report to the President that there is a *prima-facie* case, the vote of not less than three-fifths of the total number of existing senators (120 of 200) is required for immediate dismissal of the accused from office (Section 307).

Justices Kramol, Pan, and Sak filed a writ with the Administrative Court on February 12, 2000, seeking an injunction to prevent the NCCC from conducting an investigation against them. However, on April 30, the Administrative Court dismissed the suit refusing to issue an injunction. Meanwhile, House Speaker Uthai Pimchaichon joined with 50 Thai Rak Thai Party MPs in a petition to the Constitutional Court seeking to block the NCCC's investigation. On April 25, 2002, the Constitutional Court, in a 7/4 decision, refused to accept the petition.¹¹³

As the first step in the impeachment process, the NCCC referred the petition to an internal committee charged with considering accusations against individuals from independent agencies to determine whether or not the NCCC should proceed with an investigation.

Ironically, Commissioner Prasit Damrongchai, the only member of the NCCC to vote in Thaksin's favor, is the chair of this committee. On April 14, 2002 the committee determined that the petition had merit and that the NCCC should initiate a formal investigation. The case is currently under investigation.

CONCLUSION

The debate on the formation, the composition, and the powers of the Constitutional Court of Thailand was contentious during the constitutional drafting process. The debate pitted the Courts, MPs, the Senate, and democracy advocates against each other, sometimes in unusual alliances. Over five years of Court decisions have demonstrated that the compromises made by the CDA are still the subject of public debate. Nevertheless, whether or not one agrees or disagrees with specific decisions of the Court, there is no doubt that it has served its function as an independent arbitrator of difficult political and legal disputes. By taking these decisions out of the hands of politicians and bureaucrats, Thai citizens have been fairly confident that the reforms in the 1997 Constitution will eventually come to fruition, albeit in a two steps forward, one step back process.

Although the Court has issued several highly controversial rulings that have severely split the justices into opposing camps, the vast majority of its rulings have been premised on a high degree of agreement. From the perspective of liberal reformers, who are intent on using the 1997 Constitution as a tool to end the reign of the bureaucratic polity that has ruled Thailand for much of the past 60 years, the Constitutional Court has been conservative and disinclined to promote the protection of the rights of citizens over the power of the state. From the perspective of conservative reformers, and conservatives in general, the Court has held the line against changing a system with which they are comfortable and which they are confident will be able to maintain Thailand's competitiveness in the global economy without unduly restraining democratic ideals.

The general public and the media have perceived the Court to have made its decisions without undue political interference or pressure, with three major exceptions. These were the Newin, Sanoh, and Taksin cases, which were highly political in nature. With the Senate election of four new justices on February 28, 2003; there are growing concerns about whether or not the Court will be able to maintain its early tradition of non-partisanship because three of the new justices are perceived to have strong ties to the Prime Minister.¹¹⁴ Criticism has arisen because there have been no opposition party representatives on the three selection panels since the promulgation of the current constitution five years ago. Since nominees must receive the votes of 3/4th of the 13-member committee, the four government representatives on the committee have an effective veto over all applicants, which enables them to reduce the pool of candidates proposed to the Senate to those individuals whom the government approves.

Time will tell whether or not these four new justices demonstrate their independence. Of more significance, however, is that as the new members of the Court begin to exert their influence, analysts will again attempt to determine if the reform forces of rule of law will be able to overcome the status quo forces of rule by law. Based on the background of three of the new justices, and the voting history of Justices Jumphol, Kramol, Pan, Preecha and Sak, it is probable the Court will remain fairly conservative over the next five years with many 8/7 decisions on critical rule of law versus rule by law issues.

The conservative nature of the Court is demonstrated by the influence of rule of law

proponents in determining the structure of the Court. Due to the importance of the new elected Senate as a theoretical balance against political and bureaucratic forces, Section 322 of the constitution provides that members of all of the independent mechanisms elected by resolution of the old, unelected-Senate would serve only a half term. In an interesting twist, Constitutional Court justices nominated by the Supreme Court began to claim in late 2001 that they could sit a full term since they had not been “elected by resolution” of the Senate. While proponents of constitutional reform have argued that the intent of the Constitution is clear, that the first slate of members of independent mechanisms should serve only a half term, the Senate resolved in September 2002 that those justices who had not been “elected” by the Senate could serve their full nine-year term.

The Constitutional Court never formally discussed the issue of term limits. It only listened to a verbatim report by the Secretary General of the Court that he had sent an official letter to the Senate President that 4 justices who were selected from among legal specialists and political scientists were about ready to complete their 4 ½ year term, and therefore the Senate should initiate the selection process to find their replacements. The Secretary General’s letter did not mention the 5 justices from the Supreme Court at all.¹¹⁵ That the majority were able to exclude this issue from the Court’s discussion agenda demonstrates the extent to which the majority in the current Constitutional Court prefers to follow a strict, legalist interpretation of the Constitution in the tradition of a system under rule by law. What amazes many critics about this decision is that a constitutional interpretation of the term limits in Section 322 falls under the authority of the Constitutional Court, not its Secretary General, the Senate, or any other formal or informal body.

Yet it is difficult to state definitively that the Court has followed the letter of the law in the conservative legal and judicial sense. It is particularly difficult to state that it has usually fallen back on precedent established by lesser laws, rules and regulations. A perfect example of this phenomenon is the vexing problem confronting members of the Court concerning when a five year ban on politicians convicted under Section 295 should begin. In the Prayuth case (August 3, 2001), the 10/2 majority argued the ban should commence on the date Prayuth left office (March 22, 2000). The minority argued the ban should commence on the date the NCCC discovered (announced) the wrong-doing (November 23, 2000). A criminal convicted in Thailand’s regular courts would prefer either of these two options to the reality of a sentence commencing when the Criminal Court issues its verdict.

APPENDIX 1

THE CONSTITUTIONAL COURT OF THAILAND: JUDICIAL REVIEW JURISDICTION AND LIMITATIONS¹¹⁶

PART 1: Jurisdiction:

The source of the Constitutional Court's judicial review jurisdiction is Chapter VII, Part 2, Sections 262-269 of the Constitution of the Kingdom of Thailand, 1997. The Court's jurisdiction is limited to provisions of parliamentary acts of law specified in the constitution, and a constitutionally specified set of decrees, rules, and regulations. It is not empowered to rule, in general, on the constitutionality of regulations, orders, rules, or announcements issued by the executive branch. Such issues must be referred to the Administrative Court.¹¹⁷ Section 270 establishes the Court as an independent agency with a secretariat responsible directly to the President of the Court, with full autonomy in personnel administration, budget and other activities provided by law.

PART 2: Standing Limitations:

The Court may accept for consideration only those issues brought before it through an application from a limited number of officials and institutions specified in the Constitution. The authority of each applicant is limited to issues arising from specific sections of the constitution. Average citizens may not directly submit an application to the Court; although they may do so indirectly, under circumstances specified in the constitution, such as the regular courts, the President of Parliament, the Ombudsman, the Attorney-General, the National Counter Corruption Commission and other constitutional bodies. The constitution vests the following individuals or agencies with the authority to submit motions to the Court, under the noted sections of the constitution.

1. President of the National Assembly (*ex-officio* the President of the House of Representatives): Sections 142, 262, 263, and 266
2. President of the House of Representatives: Sections 96, 177, 216, 219, 262, and 263
3. President of the Senate: Sections 96, 177, 216, 219, 262, and 263
4. Members of the House of Representatives: Sections 47 para 3, 118(1), 180,
5. Members of the Senate: Section 180
6. Prime Minister: Section 262
7. Attorney-General: Section 63
8. Judge: Section 264
9. Ombudsman: Section 198
10. National Counter Corruption Commission: Sections 295, and 321 para 2
11. Election Commission of Thailand: Sections 315 para 5(2), 319 para 3, and 324 para 1(2)
12. Members of Political Parties: Section 47 para 3
13. Political Party Executive Committee Members: Section 47 para 3
14. Any Institution or Agency Under the Constitution: Section 266

PART 3: Timing Limitations:

In accordance with Section 264 para 1 and para 3, the Court may not accept for review a specific provision of law for which it has previously issued a decision. While its decisions are applicable to the case in question and all future cases of a similar nature, its decisions are not retroactive to previous cases where a final judgment of the Supreme Court has been issued. Therefore, during the course of litigation, a court or litigant must apply to the Constitutional Court before the a court rules on the final appeal.

PART 4: Subject Matter Limitations:

A motion may be considered by the Court only if it relevant to an issue specified in the constitution. There are six clusters of issues: 1) the constitutionality of parliamentary acts, 2) the constitutionality of laws, 3) the governance of constitutional bodies, 4) the removal of officials, 5) political party issues, and 6) the constitutionality of regulations and laws exempted in the transitional provisions of the Constitution, now no longer in force.

Constitutionality of Parliamentary Acts

Section 262, Constitutionality of a Bill: After the National Assembly passes a bill, but before it is presented to the Monarch for signature, a group of MPs and/or Senators may submit an opinion through the President of the National Assembly, the President of the Senate, or the President of the House of Representatives that a bill, or part thereof, is unconstitutional. Ten percent of the total members of the National Assembly must sign the opinion, (normally seventy MPs and Senators; or 70 MPs, or 70 Senators). If the bill is an organic law bill, however, only 20 members need sign the opinion. The Prime Minister is also authorized to submit an application to the Court on his or her own initiative.

Section 177, Constitutionality of an Alternative Bill: If a bill has been stalled or temporarily vetoes by parliamentary procedure (Section 175), an MP or the Cabinet might introduce an alternate bill with the same or similar principles. If the new draft is questionable, the President of either house can submit such an opinion to the Court to determine if the draft should lapse.

Section 219, Constitutionality of an Emergency Decree: Before passing an emergency decree one-fifth of the members of either house, (normally 100 MPs or 40 Senators), may submit an opinion through their respective President requesting the Court to determine whether the decree is for the purpose of maintaining national or public safety, national economic security, or averting public calamity (Section 218 para 1).

Section 180, Constitutionality of Appropriations: Ten percent of the members of either the House or Senate may directly file a complaint with the Court that a budget appropriation is in violation of Section 180 para 6, wherein an MP, Senator, or a committee member has directly or indirectly drawn on the appropriation for their own benefit. The Court must declare such actions void.

Section 263, Constitutionality of Draft Parliamentary Rules and Procedures: Twenty MPs and/or Senators may question the constitutionality of National Assembly, House, or Senate rules of procedure which have been passed but not yet published in the Government Gazette. The application to the Court may only be submitted by the President of the National

Assembly, the President of the Senate, or the President of the House of Representatives.

Constitutionality of Laws

Section 264, Constitutionality of a Legal Provision: During the course of a judicial proceeding, if a party to the case raises an objection that a provision of law (narrowly defined as an Act of Parliament listed in the previous section) arising in the case violates Section 6 of the Constitution, or if the court itself is of this opinion, the court must seek a decision from the Court. Section 6 states that the Constitution is the supreme law of the State and that any law, rule, or regulation which is contrary to, or inconsistent with, the Constitution is unenforceable. It is used in conjunction with Section 28 para 2 which grants individuals the right to invoke the provisions of the constitution to either bring a lawsuit or to defend themselves in court. Prior to the 1997 Constitution, citizens had no right to invoke a section of the Constitution as a point of law. The Court will accept a court=s application only if it has not previously ruled on the specific provision raised in the complaint, and the law in question is not under the jurisdiction of the Administrative Court. The Court=s decision is applicable to the case in question and all future cases but cannot be used retroactively to overturn a final regular court judgment.

Section 198, Constitutionality of a Law, Rule, Regulation, or Act: Individuals may file a complaint with the Ombudsman against officials for failure to perform their duties in compliance with the law or for performance or omission to perform duties which unjustly cause injuries to the complainant. If, in the course of fact-finding on the complaint, the Ombudsman believes that any law begs the question of constitutionality, the Ombudsman may submit the case and its opinion to the Constitutional Court or the Administrative Court for a decision. If, in the course of fact-finding on the complaint, the Ombudsman believes that any decree, rule, regulation, or action begs the question of constitutionality, the Ombudsman may submit the case and opinion to the Administrative Court for a decision.

Section 315 para 5(2), Constitutionality of the Election Law: During the provisional period, the ECT is authorized to nullify a provision of the election law by issuing a regulation in substitution of the provision in order to ensure an honest and fair election or if it believes the provision to be contrary to, or inconsistent with, the constitution. Before publication in the Government Gazette, the new regulation must be submitted for review by the Court.

Constitutional Bodies:

Section 266, Disputes between Constitutional Organs: If a dispute arises within or between institutions or agencies established by the Constitution, the President of the National Assembly or one of the bodies in conflict may submit an opinion to the Court seeking resolution of the dispute. Specifically, the Court admits two types of petitions: from a single agency that doubts its own authority and from two or more agencies in dispute over their authority.

Section 63, Overthrow of the Government or Constitution: Any person may request the Attorney-General to investigate the facts that an individual or a political party is attempting to overthrow the government or the constitution. After the A-G conducts an investigation he or she will submit a motion to the Court requesting an order for the act to cease. In cases involving a political party, the Court may dissolve it. In both types of cases, the A-G may proceed with criminal prosecution. This Section is designed to thwart Thailand=s history of

coup d=etat wherein the victors normally award themselves amnesty.

Removal of Officials¹¹⁸

Section 96, Terminating the Membership of an MP or Senator: Ten percent of the members of either house, (normally 50 MPs or 20 Senators) can file a complaint against a member of their particular chamber requesting the Court terminate the membership of the accused. Likely causes for such a complaint would be allegations the member did not meet candidacy requirements, being detained by a court warrant or sentenced to imprisonment, being bankrupt or unusually wealthy, or conflicts of interest such as receiving concessions from the State through a partnership or interfering in the career path of a permanent official. Only the President of the Senate or the President of the House can refer the complaint to the Court.

Section 216, in conjunction with Sections 96-97, 109-110, 206, and 208-209, Removal of a Minister from the Council of Ministers: Ten percent of the members of either house, (normally 50 MPs or 20 Senators) can file a complaint against a Minister requesting the Court to terminate their membership in the Council of Ministers [Cabinet]. Likely causes for such a complaint would be allegations the minister did not meet candidacy requirements, being sentenced to imprisonment, being bankrupt or unusually wealthy, or conflicts of interest such as receiving concessions from the State through a partnership, operating a business, interfering in the career path of a permanent official, or failure to accurately report assets and liabilities. Only the President of the Senate or the President of the House can refer the complaint to the Court. On the other hand, if one sought to dismiss a minister or high ranking official, they may go through the impeachment process via Sections 303-307.

Section 142, Disqualification of an Election Commissioner: The President of the National Assembly must refer to the Court a complaint from members of parliament charging an Election Commissioner is disqualified under Section 137 or has contravened Section 139. The complaint must be signed by ten percent of the total members of the National Assembly, (normally 70 MPs and Senators, 70 MPs, or 70 Senators). Likely causes for such a complaint would include allegations of a Commissioner=s unsound state of mind, being detained by a court warrant or sentenced to imprisonment, being bankrupt or unusually wealthy, engaging in an independent profession (moonlighting), or being a member of a political party.

Section 295, Removal from Office for Failure to Submit An Accurate Statement of Assets and Liabilities: If the NCCC determines that a politician, political appointee, senior civil servant, judge, or the commissioner of a constitutionally-mandated organ has intentionally filed an inaccurate statement of assets and liabilities, or has failed to file a statement, the NCCC will refer the case to the Court to determine if the individual should be removed from office and barred from holding any other public office for a period of five years.

Political Party Issues

Section 47 para 3, Constitutionality of a Political Party Resolution or Regulation: Twenty-five percent of the members of a political party who are members of the House, or members of the Party=s Executive Committee may file an opinion on the constitutionality of a resolution, regulation, or action of their party.

Section 118(8), Constitutionality of Party Membership Termination: An MP terminated from party membership by his or her party, and thereby losing his or her seat in the House, may

file a petition with the Court that the termination was in violation of Section 47 para 3, and therefore the applicant should be allowed to join another party in order to maintain his or her seat in the House. Section 47 para 3 requires party resolutions and regulations to be in compliance with the status and performance of duties required for a member of the House under the constitution, and be consistent with the fundamental principles of a democratic, constitutional monarchy.

Constitutionality of Interim Regulations and Laws During the Transition Period (Now Lapsed)

Section 319 para 3, Constitutionality of Interim Election Commission Regulations: An interim provision of the constitution required the ECT to institute regulations for the performance of its duties prior to the passage of the organic law governing the Election Commission. The Court was required to rule on the constitutionality of the interim regulations.

Section 324 para1(2), Constitutionality of the Interim Election Law: An interim provision of the constitution required the ECT to institute election regulations prior to the passage of the organic law governing elections. The Court was required to rule on the constitutionality of the interim regulations.

Section 321 para 2, Constitutionality of Interim NCCC Regulations: An interim provision of the constitution required the CCC to function as the NCCC until such time as the NCCC was formally established. The Court was required to rule on the constitutionality of the interim regulations the CCC would follow in its capacity as acting-NCCC.

Appendix 2

Justices of the Constitutional Court of Thailand

Name	Sector	Replaces	Entry Date	Exit Date	Exit Reason	Retirement Age 70
Chao Saichua	Political Science	-- --	11-Mar-98	23-Dec-99	retired	23-Dec-99
Komain Phatraphirom	Law	-- --	11-Mar-98	1-Mar-01	resigned	-- --
Jumphol na Songkhla	Supreme Court	-- --	11-Mar-98	7-Apr-07	retired	7-Apr-07
Jul Atirek	Law	-- --	11-Mar-98	11-Oct-02	1/2 term	23-May-04
Chai-anan Samutwanich	Political Science	-- --	11-Mar-98	1-Jul-00	resigned	-- --
Prasoert Nasakul	Law	-- --	11-Mar-98	7-Sep-01	retired	1-Sep-01
Pricha Chaloeawanich	Supreme Court	-- --	11-Mar-98	11-Apr-07	full term	18-Nov-08
Mongkol Saraphan	Supreme Court	-- --	11-Mar-98	11-Apr-07	full term	23-Apr-09
Sujinda Yongsunthorn	Law	-- --	11-Mar-98	11-Oct-02	1/2 term	25-May-06
Suwit Thiraphong	Supreme Court	-- --	11-Mar-98	11-Apr-07	full term	23-Feb-08
Anan Ketwong	Political Science	-- --	11-Mar-98	11-Oct-02	1/2 term	6-Aug-05
Issara Nitithanprakas	Law	-- --	11-Mar-98	3-Oct-02	retired	3-Oct-02
Ura Wangomklang	Supreme Court	-- --	11-Mar-98	11-Apr-07	full term	9-Sep-09
Sujit Bunbongkar Kramol	Political Science	Chao	12-Feb-00	12-Aug-06	1/2 term	9-Oct-12
Thongthammachat	Admin. Court	-- --	29-Sep-00	7-May-05	retired	7-May-05
Phan Chantharapan	Admin. Court	-- --	29-Sep-00	6-Aug-08	retired	6-Aug-08
Amara Raksasataya	Political Science	Chaianan	27-Oct-00	10-Dec-03	retired	10-Dec-03
Sak Taechachan	Law	Komain	3-Apr-01	3-Apr-10	full term	1-Jan-11
Jira Boonpojanasunthorn	Law	Prasoert	12-Feb-02	12-Feb-11	-- --	-- --
Saowanee Asawaroj	Law	Issara	28-Feb-03	28-Feb-12	full term	-- --
Suthee Sitthisomboon	Law	Jul	28-Feb-03	28-Feb-12	-- --	-- --
Manit Wityatem	Law	Sujinda	28-Feb-03	28-Feb-12	-- --	-- --
Suwan Suwandecho	Political Science	Anan	28-Feb-03	28-Feb-12	-- --	-- --

ENDNOTES:

¹ For more details on Thailand's constitutional history see: James Klein, "The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy," Working Paper Series #8, [The Asia Foundation: San Francisco, March 1998], pp. 5-19; and Bowornsak Uwanno and Wayne D. Burns, "The Thai Constitution of 1997: Sources and Process," University of British Columbia Law Review, Vol. 32, No. 2, 1998, pp. 227-233.

² 1997 Constitution, Section 264, paragraph 3.

³ Rang Rattathamanun Haeng Racha-anacak Thai, Phutthasakarut ... [Draft Constitution of the Kingdom of Thailand, Buddhist Era], Volume 1, Bangkok: CDA, July 1997, p. 91.

⁴ Discussion by the author with Thai human rights lawyers, January, 2003.

⁵ Rang Rattathamanun Chabab Prachachon [Draft Constitution: People's Edition], Bangkok: CDA, August, 1997, Section 260, p. 76; Draft Constitution, July edition, Volume 2, p. 331. Section 304 empowers one-fourth of the members of the House, or 50,000 eligible voters to file a petition with the President of the Senate requesting the Senate to impeach an official. The vote of three-fifths of the total number of Senators is required to remove an official (Section 307). 1997 Constitution, Sections 304 and 307.

⁶ Public Relations Committee, Constitution Drafting Committee. Rang Rattathamanun Chabab Prachachon Phua Kantham Prachaphichan [Draft Constitution: People's Edition for Public Hearings], Bangkok: CDA, May 8, 1997. Sections 254 and 256. Under the original draft of the 1997 Constitution, the Constitutional Court Nominee Selection Committee would include 1) the President of the Supreme Court, 2) four deans of law selected by the deans of the Faculty of Law of all state institutions, 3) four deans of political science selected by the deans of the Faculty of Political Science of all state institutions, 4) four political party representatives selected by a panel representing one representative from each political party with representation in the House of Representative, and 5) four Senators selected by the Senate.

⁷ Seri Suwanaphanont proposed that the President of the Supreme Court serve as *ex-officio* President of the Constitutional Court, and that the number of legal experts be reduced from six to three, with the addition of three judges selected from among Supreme Court justices. Suni Chairas and Kosol Srisangk proposed inclusion of both the President of the Supreme Court and the President of the Administrative Court. They proposed reducing the number of law experts from six to two, and the number of political scientists from three to two. A new category of "other experts" could then be filled by judges. Draft Constitution, July Edition, Volume 2, pp. 319-321.

⁸ 1997 Constitution, Sections 255 and 257(1). The selection process for law and political science deans and representatives of political parties remained unchanged from the original draft.

⁹ "Tribunal Overrules the Senate," Bangkok Post, January 8, 1998, p. 1.

¹⁰ It is important to note the Speaker was a member of the opposition New Aspiration Party. He had been Speaker under the Chavalit administration. When the Democrats were in the opposition they had found him to be fair and therefore they did not invoke their right to replace him with someone from the Democrat Party or other parties in the new government coalition.

¹¹ The six who voted in support of the Supreme Court were Speaker Wan Muhammed Nor Matha, Supreme Court President Sakda Mokkhamakkul, CCC Chairman Opas Arunin, former Attorney-General Prathuang Kiratibutr, former Supreme Court President Sophon Rattanakorn, and former Judge Advocate-General Kovit Mathayomchan. Voting against were Senate Speaker Meechai Ruchaphan, former Council of State Secretary-General Boonchana Attakorn, and Attorney-General Suchart Traiprasit.

¹² There were initial concerns about Jumphol's law degree as he did not specify in his vitae the name of the institution that granted his degree. There was debate in the Senate on whether or not a panel should be established to examine Jumphol's background in more detail. The compromise between those who insisted on review and those who insisted on following the Constitutional Tribunal's ruling was to provide Senators with one week to form their own opinion on Jumphol. "Senate Delays Vote on Constitution Court Bid," The Nation,

January 17, 1998, p. 3. Jumphol's nomination was acknowledged without objection. "New Choice of Supreme Court Gets Senate Nod," Bangkok Post, January 24, 1998, p. 4.

¹³ Air Vice Marshal Prasong Soonsiri was elected on January 24, 1997 to fill Ukrit's seat on the CDA.

¹⁴ The majority opinion was filed by Boonchana Atthakorn, Opas Arunin, Prathuang Kiratibutr, and Police Lt. Gen. Kovit Mathayonchan. Meechai Ruchaphan, Sophon Rattanakorn and Suchart Triprasit dissented. Wan Muhammed Nor Matha and Sakda Mookhamakkul abstained.

¹⁵ The selection panel nominated former Attorneys General Komain Patarapirom and Kanit na Nakorn. Post, March 12, 1998, p. 4. Komain was also opposed by democracy advocates. The relatives of victims of the May 1992 military suppression said Komain was even more unacceptable than Ukrit because Komain had been involved in the issue of an executive decree to pardon all parties involved in the bloody crackdown on pro-democracy demonstrators. Bangkok Post, April 3, 1998, p. 3.

¹⁶ Correspondence from Justice Amara Raksasat, November 18, 2002.

¹⁷ A number of Senators called for a panel to be set up to vet Administrative Court nominees Kramol Thongthammachart and Phan Chantharaparn; however, the majority, including former charter drafters, cited the precedent established by the Constitutional Tribunal. They noted the only thing the Senate could do was to set up a panel to work out guidelines to be considered by the King before his appointment of nominees from the courts, thus placing the entire burden for the decision on His Majesty. "Senators Endorse Two New Judges," Bangkok Post, August 12, 2000, p. 3.

¹⁸ Section 126(3) of the 1997 Constitution prohibits a senator from sitting for two consecutive terms of office, although a former senator may run for a seat after he or she has sat out for one term.

¹⁹ The five judges nominated by the 86 judges of the Supreme Court are: Supreme Court Vice-Presidents Suwit Thirapong and Amphorn Thongprayoon, (subsequently replaced by Justice Jumpol na Songkhla); and Justices Preecha Chalermvanich, Mongkol Sratana, and Ura Wang-omklang. The five legal experts elected by the Senate to sit on the Court are Lt. Gen. Jul Adirek, former Judge Adjutant General; Prasert Nasakul, former Secretary General of the Council of State; Suchinda Yongsunthorn, former Deputy Permanent Secretary of the Ministry of Foreign Affairs; Issara Nitithanprapat, former Deputy Director of the Budget Office; and Ukrit Mongkolnavin, former President of Parliament, (subsequently replaced by former Attorney General Professor Komain Patarapirom). The three political science specialists elected by the Senate are Thammasat professor Anan Ketuwong, Senator and former Chulalongkorn professor Chai-anan Samutwanit, and retired Deputy Permanent Secretary of Foreign Affairs, Chao Saichua.

²⁰ Initially, the website was located at <<http://www.parliament.go.th/org-law/> concour>.

²¹ Wirat Wiratniphawan and Group, Kanwikraw Khamwinijchai khong San Rattathamanun, [Research on Analysis of the Decisions of the Court and Justices of the Constitutional Court], Forepace Publishing, Bangkok: 2002.

²² A complete list of all cases can be found on the Constitutional Court's website. The breakdown of cases by category is preliminary and subject to change after further review.

²³ This table is adapted from a chart provided as part of a Thai-language questionnaire "Evaluation of the Decisions of the Court and Justices of the Constitutional Court", prepared by Dr. Wirat Wiratniphawan and Research Team. It was distributed to participants at the National Conference of Political Scientists held in Chiang Mai, Thailand, December 6-7, 2001 as part of a research project, supported by The Asia Foundation, to analyze the first 101 decisions of Thailand's new Constitutional Court and an attempt to categorize the legal philosophies underlying the decisions of the 15 justices.

²⁴ "Khamwinijchai thi 1/2541" [Opinion No. 1/1998], Ruam Khamwinijchai San Rattathamanun, 2541, [Collected Decisions of the Constitutional Court, 1998], Office of the Constitutional Court: Bangkok, January 1999, pp. 1-47. See also Court President Chao's views on this case in "Patoktaphiset Ruang San Rattatamanun Kap Kanpathirupkanmuang" [Special Lecture on the Constitutional Court and Politics], Warasan San Rattatamanun [Journal of the Constitutional Court], Vol. 1, No. 2, May-August, 1999, pp. 25-28.

²⁵ The majority opinion was submitted by Justices Chao, Suchinda, Ura, Prasert, Chul, and Anan. Justices Chai-anan and Mongkol issued a dissenting opinion. Justices Preecha, Jumpol, Suwit, Issara, and Komain abstained citing the case should have been decided by the National Counter Corruption Commission.

²⁶ ADecision 13-14/2541," CDCC, 1998, pp. 482-488. Justice Ura issued a dissenting opinion arguing the two bills were legal as they had passed all six readings. However, the article in questions had been added unconstitutionally and therefore it alone was null and void. CDCC, 1998, pp.568-572. Democrat House Whip Preecha Suwannathat said he could not send the bills back to the Senate because they had already passed the Senate, and the article had to be included or the bills would have been unconstitutional. Bangkok Post, November 3, 1998, p.1-2.

²⁷ Former Yasothorn Province MP and northeastern radio operator Mrs. Ubol Bunyachalothorn was charged with killing Mass Communication Organization of Thailand (MCOT) Director Saengchai Sunthornwat in 1996. "Decision 5/2541, August 4, 1998," Collected Decisions, 1998, pp. 200-202.

²⁸ Wirat, pp. 342-361.

²⁹ Wirat, pp. 905-915.

³⁰ "Decision 16/2545, April 30, 2002," Constitutional Court Journal, Vol. 4, No. 10, January-April, 2002, pp. 146-150.

³¹ "Court Upholds Ban on Disabled," Bangkok Post, May 1, 2002, p. 1.

³² "Judges Back Ruling on Disabled," The Nation, May 13, 2002. This is the same judge who had file the motion to remove Ukrit from the first selection of Constitutional Court justices.

³³ Bowornsak Uwanno, *AKhambanyai Ruang Khetamnat SanRatthathanun*@ [Lecture on the Jurisdiction of the Constitutional Court], *ibid*, Constitutional Court Journal, Vol. 1, No. 1, January-April, 1999, pp. 43-45.

³⁴ "Komain, Decision 6/2541, August 11, 1998," Collected Decisions, 1998, pp. 244-248; and "Prasoert, Decision 6/2541, August 11, 1998," Collected Decisions, 1998, pp. 254-256.

³⁵ See for example, Preecha's individual decisions in Decision 02/2542 and Decisions 45-47/2542.

³⁶ Correspondence to the author from Justice Amara Raksasat, November 18, 2002.

³⁷ In June 1995, police seized 11 million Baht attached to campaign literature for Chat Thai candidates in the general election in Buri Ram (Newin Chidchob, Prasit Tangsrikiatkul and Songsak Thongsri) in the home of Naruepol and Prapaporn Siripanit. Prapaporn was the sister of Chat Thai candidate Prasit Tangsrikiatkul. On January 19, 1998, the Supreme Court found Naruepol and Prapaporn guilty of trying to buy votes. They were given a one-year jail sentence and the court confiscated the 11 million Baht. No politicians were ever prosecuted in this case. "Supreme Court Makes Landmark Ruling in Vote-Buying Case," The Nation, January 20, 1998, p. 1. See note 72 for additional details on this case.

³⁸ The Cobra group was named after an Aesop fable where a farmer took care of a sick cobra, who after its recovery bit and killed the farmer.

³⁹ Had the Cobra 12 not sided with the government, the vote would have been very close, 196 to 195. Four NAP members were absent; the Speaker and Deputy Speaker, both from opposition parties, abstained. Thira Salakpetch (Democrat, Trat) was brought in to vote from the hospital where he was recovering from a car accident. Had he not been there, the worst case scenario would have been a tie vote of 195. AChuan, No Cabinet Reshuffle,@ Bangkok Post, March 21, 1998, p.1; ANAP MP Accused of Vote Cheating,@ Bangkok Post, March 22, 1998, p. 1.

⁴⁰ ARuling on >Cobras= Gives Chuan Huge Relief,@ The Nation, June 27, 1998, p. 6; ACourt Ban on Purge Questioned,@ The Nation, June 29, 1998.

⁴¹ ACourt Firm on >Cobra= Decision,@ The Nation, June 30, 1998.

⁴² Justices Preecha, Prasert, and Issara issued minority opinions. Justice Preecha argued that the Civil Court had the power to accept the case and issue a temporary stay. Justice Prasert argued that the Civil Court had the power to accept the case prior to June 10, 1998 when the Political Parties Act came into force but did not have the power subsequently to issue a stay. All three justices failed to see that there was a conflict between the Civil Court and the Election Commission of Thailand. A Decision 3/2541, July 11, 1998," CDCC, 1998, pp. 83-154. For Preecha's decision see pp. 112-126; for Prasert, see pp. 108-111; for Issara, see pp. 147-152.

⁴³ A Constitution Court Ruling Upholds Election Commission's Authority, @ The Nation, July 15, 1998; A Battle of Courts Looms Over Injunction, @ The Nation, July 21, 1998; A Cobra's Intensity Battle, @ The Nation, July 24, 1998; A Civil Court Throws Out Cobra Faction's Case, @ The Nation, September 3, 1998. The Court's decision was not the end of the controversy over the Cobra Group. Eventually, in October 1998 the Prachakorn Thai Party Executive Committee voted to expel the dissidents from the party, and thereby deny them their seats in parliament. On October 12, 1998 Vatana and his group filed a petition with the Court to determine if their expulsion was in accordance with Section 49 para 3 and para 4 of the Constitution. If the Court ruled in their favor, they would have 30 days to join another party and thereby retain their seats in the House of Representatives. If the Court had voted against their petition, they would have lost their seats and the government coalition would have been weakened by the loss of 12 MPs leaving only a 10 member majority. On February 11, 1999, the Court ruled that the expulsion had been in violation of Section 49 and therefore the defendants had the right to join another political party.

⁴⁴ While Justice Anan gave notice to the ECT's constitutional mandate, ultimately he premised his decision on enforcement of the Political Parties Act (1998).

⁴⁵ "Decision 15/2451, November 19, 1998," CDCC, 1998, pp. 573-576. Section 68, para 2 states "The person who fails to attend an election for voting without notifying the appropriate cause of such failure shall lose his or her right to vote as provided by law.

⁴⁶ Justice Ura, in the minority, ruled the ECT could define additional penalties, while Justice Issara, as he did in almost all cases concerning the ECT, dismissed the motion. The Court subsequently ruled 10/3 in a separate motion that Section 68 did not apply to members of the Royal Family under Section 22 and 23 of the Constitution because Section 8 states the King is inviolable. Nevertheless, the Court noted the Royal Family had every right to vote if they so wished. Justices Chumphol, Preecha and Issara ruled the Court had no jurisdiction and dismissed the motion. "Decision 6/2543, February 29, 2000," Wirat, pp. 809-820. According to press reports, His Majesty the King had raised his concern with senior judges. As a Thai citizen he was duty-bound to exercise his voting rights. On the other hand, there were those who argued the King must maintain his complete neutrality and therefore he should not vote. This decision was limited to Their Majesties the King and Queen, and those of the rank of Royal Highnesses or higher: the Crown Prince, the Crown Princess, Princess Chulabhorn, Princess Soamsawali and Princes Bhajara Kittyabha. "Royal Family Can Elect to Vote, or Not," Bangkok Post, March 2, 2000, p. 1.

⁴⁷ The Court ruled 13/0 to dismiss the ECT motion concerning the Commission's powers to define how to handle absentee voting and it voted 12/1 to dismiss the Commission's request for clarification on the ECT's powers to second officials from other agencies. "Decision 6/2542, April 27, 1999" and "Decision 7/2542, April 27, 1999," CDCC, 1999, Vol., pp. 375-467.

⁴⁸ Others who would fall under this definition were: members of Provincial Primary Education Committees, Provincial Police Sub-committees, the Central Islamic Committee and Provincial Islamic Committees, and the Anti-Money Laundering Commission.

⁴⁹ The ECT subsequently filed its own motion on February 9, 2000 requesting the Court to rule on whether lower Court investigations of cases under Section 34 of the Elections Act was an infringement on the ECT's powers, and whether or not the ECT had the power to define "other State officials. In a very narrow, 7/6 vote, the Court ruled there was no infringement. The Court did not address the second issue as it had previously ruled on it in Decision 5/2543, February 29, 2000. "Decision 13/2543, March 17, 2000," Wirat, pp. 888-904.

⁵⁰ Among those previously removed from the candidate list who subsequently won a seat in the Senate were: Thongbai Thongpao, Sophon Suphaphong, Sirin Thooplak, Sak Korsangueng, and Meechai Vechawiphan.

⁵¹ Elected in Bangkok were such well-known civic leaders as street children's advocate Wallop

Tangkhanaurak, Aslum angel@ Pratheep Ungsongtham, non-profit spokespersons Sophon Supapong and Meechai Viravaidhaya, AIDs activist Jon Ungphakorn, constitutional reform advocate Kaewsan Athibhoti, and Law Society public legal aid defenders Sak Korsaeunguang and Seri Suwanpanont. Pramote Maiklad, the retired Director General of the Irrigation Department, associated in the minds of most citizens with His Majesty the King=s royal projects and drought relief activities, received the highest number of votes. He was followed by Damrong Phutthan, a media personality and founder of the Anti-Drunk-Driving Club, and by Dr. Chirmsak Pinthong, a former university lecturer turned political talk-show moderator. Former Minister of Education, Chumphol Silapa-archa, was perhaps elected precisely because of his well-known disgust with the politics of his elder brother, former Prime Minister and Chat Thai Party leader Banharn Silapa-archa.

Bangkok was not squeaky clean. In view of irregularities, the ECT refused to endorse the election of Vichien Tejapaibul, Chairman of the Board of Trade and the Thai Chamber of Commerce. An appointed senator and the leader of a wealthy Sino-Thai business family, Vichien has been criticized the past year for using his senate immunity status to avoid indictment for banking fraud associated with the Asian Economic Crisis. Also disqualified was the alleged Agodfather@ of the Taopoon district. Chatchawan Khongudom has invested in a number of legitimate businesses over the past five years but he has been unable to shake his shady image. His patronage network among those who allegedly protect his illegal gambling dens in the slums was strong enough to provide a voter base of just over 50,000. Ironically, Bangkok voters also elected retired Police General Pratin Santiprapob. He had built his Amafia-busting@ reputation based on his dogged pursuit of Chatchawan. In the first by-election, Chatchawan was able to win his seat again and was endorsed by the ETC. Vichien was not as lucky. In the second round he was beaten by Khunying Chodchoy Sophonpanich, daughter of Bangkok Bank founder Chote Sophonphanich. Khunying Chodchoy gained national recognition as a leading environmental advocate, particularly for her NGO, Magic Eyes, which focuses on keeping the streets of Bangkok clean and instilling environmental concerns among school children.

⁵² The provinces, nevertheless, also elected some stellar members of civil society including well-known children=s rights champion Montri Sinthavichai; hill-tribe advocate Mrs. Tuenjai Deetes, local governance promoter Udon Tanthisunthorn, human rights and gender equality activist Mrs. Maleerat Kaewkam, media freedom defender Somkiat Omvimol, and prominent human rights lawyer Thongbai Thongbao. Khon Kaen Province elected long-retired, multi-imprisoned, former Socialist Party of Thailand gad-fly, Klaeo Norapati.

⁵³ Mrs. Chaweewan Kachornprasart was soundly defeated in the second round of voting nearly 2 to 1 by Khunying Jintana Siritwansan, wife of former Minister of Defense General Vichit Siritwansan.

⁵⁴ Maj. General Mannonkrit Roobkachorn was subsequently endorsed after winning in the second round of elections.

⁵⁵ Prasit Potasunton, owner of the Golden Triangle Casino and Paradise Resort in Burma, was defeated in the second round of voting by Ms. Busarin Tiyapairat, elder sister of Democrat MP Yongyudh Tiyapairat.

⁵⁶ Mrs. Maliwan Ngermmuen was subsequently endorsed after she won a seat in the third round of voting. She had been defeated in the 2nd round.

⁵⁷ Ms. Usani Chidchob was subsequently endorsed after she won a seat in the second round of voting.

⁵⁸ "Decision 20/2543, April 26, 2000," Virat, pp. 930-946. Justices Mongkol and Ura, in the minority, pointed to Section 155 of the Constitution that states one-half of the senators constitutes a quorum. Therefore, the new senate should be able to meet. Justice Preecha dismissed the motion on the grounds it was not a constitutional issue.

⁵⁹ "Decision 26/2543, June 22, 2000," Virat, pp. 1032-1053.

⁶⁰ Mrs. Phornthip Thanasrivanitchai had been suspended from the first and second round. She had been barred from the third round. Perhaps reflecting local discontent with her complaint to the Ombudsman, in the fourth round she was defeated by a new face, Panya Yuprasert. Nor were the other three candidates who benefited from the Court=s ruling elected. They were Prawat Thongsomboon, who was defeated in Mahasarakham by another new face, Witthaya Masena; Udon Thani candidate Chairat Soda, who was defeated by new face Panya Yuprasert; and Mrs. Sirirat Chuklin of Nong Khai, who was defeated by previously suspended candidate Mrs. Aranya Sujanin.

⁶¹ “Decision 24/2543, June 20, 2000,” Virat, 1001-1019. Justice Issara dismissed the motion, while Justices Chumphol, Jul, Mongkhol, Anan and Ura argued the ECT could establish additional criteria. The ECT subsequently reinstated this rule by ruling that any candidate twice suspended lost their right to vote. The Constitution grants the ECT full powers to determine who can, and who cannot vote, and one qualification for a senate or house candidate is that their right to vote is not suspended.

⁶² For details see the section on Court Rulings on Qualifications of Officials, Decision 12/2544, March 29, 2001.

63. A hard core group of constitutional drafters, however, insisted no amendments were required. They argued that if the ECT properly implemented the constitution and the law, there would be no need for any legislative changes.

⁶⁴ “Decision 54-55/2543, October 31, 2000,” http://www.conCourt.or.th/decis/y2000d/d054_5543_1.html, p. 12.

⁶⁵ “Decision 56/2543, October 31, 2000,” <http://www.conCourt.or.th/decis/y2000d/d05643.html>, p. 4.

⁶⁶ An order by the Constitutional Court for an official to vacate their office should not be confused with the impeachment process. Impeachment of officials is the sole prerogative of the Senate (Section 307) and is based on the findings of the National Counter Corruption Commission rather than the Constitutional Court (Section 305).

⁶⁷ This case could technically be placed under the category of ECT Political Party Decisions. However, because it ultimately concerns the vacation of an individual from a seat in the House of Representative for failure to meet the qualifications of an MP, (i.e., being a member of a political party), it has been placed in this category.

⁶⁸ “Decision of Justice Chai-anan Samutwanich, 1/2541, May 23, 1998,” CDCC, 1998, pp. 18-23.

⁶⁹ The five other justices voting for the “duty of an MP is to the public” argument were Ura, Issara, Anan, Suchinda and Jul. Wirat, Research, pp. 305-319.

⁷⁰ “Solidarity Votes to Dismiss Newin as Member,” The Nation, October 11, 2000; “Newin Fights His Expulsion,” The Nation, October 12, 2000.

⁷¹ “Decision 57/2543, November 28, 2000,” <http://www.conCourt.or.th/decis/y2000d/d05743.html>, pp. 2-3.

⁷² Newin Chidchop, one of the founding members of the Group of 16, has been associated with a number of scandals and allegations but has never been found guilty. The most significant taint on his political career were allegations of vote buying. On June 29, 1995, just prior to the 1995 General Elections, Naruepol and Prapaporn Siripanit were arrested at their home in Buri Ram Province by Central Investigation Bureau Chief Pol. Maj. Gen. Seri Temiyavej, and charged with vote buying. The two Newin canvassers had been found in possession of Bt 11.4 million in currency divided into Bt 100 and Bt 20 bills attached to the campaign fliers of three Chart Thai Candidates: Newin, Prasit Tangsrikiartkul, and Songsak Thongsri. Seri was removed from the case and the new police team is alleged to have conducted a less than fair and vigorous investigation. Indeed, they argued that it was not possible to seek prosecution because the pair had not been caught red-handed buying votes. The Attorney General’s office believed, nevertheless, there was sufficient grounds for prosecution. The Criminal Court ordered the cash seized as it was obviously intended for vote buying. However, the Court freed the pair ruling that there was no solid law to convict and punish them since they had not been caught red-handed. The Appeals Court reversed the lower Court and imposed a one year jail sentence but suspended the term for two years. Finally, on January 19, 1998 the Supreme Court ruled that the evidence clearly demonstrated the pair were attempting to buy votes, reversed their suspended term and sent them to jail for one year. This was a landmark decision because it was the first instance in which a demonstration of the intent to buy votes was ruled to be the same as being apprehended for red-handed vote buying. Unfortunately, police had been unable to secure evidence against the masterminds of the vote fraud. General public opinion is that Naruepol and Prapaporn were not working on their own and that Newin and his influential family were behind the cash. Bangkok Post, January 20, 1999, p.1; and The Nation, January 21, 1999, p. 4. Newin and the Group of 16 were also associated with a land scam and share manipulation scheme which is thought to have contributed to the downfall of the Bangkok Bank of Commerce, a trip-wire for the 1997 Asian Economic Crisis.

⁷³ Constitution for the People Society, *Jet Tulakan Phithak rue Thamlai Rattathammanun cak Kanwinijchai*

Sathanphap Khong Kanbenratamontri [Seven Justices: Protecting or Destroying the Constitution on Their Decision Concerning the Qualifications of Ministers], Bangkok, 1999, draft table of contents. The core of the CPS is a group of former CDA members led by Dr. Amara Raksataya who seek to promote adherence to the 1997 Constitution.

⁷⁴ AConstitutional Court Best Place to Decide B Chuan,@ Bangkok Post, April 25, 1999, pp. 1, 3.

⁷⁵ Draft Constitution, Revised, Volume 2, p. 294. The proposal was submitted by Thammanun Sadphli.

⁷⁶ Post, *ibid*.

⁷⁷ Justice Preecha Chalermvancih, *AAn Nuangmachak Botkhwam Khong Than Meechai Ruchaphan*@ [Response to the Article of Respected Meechai Ruchaphan], Thai Post [Thai Post], June 29, 1999. In response to Senate Speaker Meechai=s criticism of Justice Preecha=s decision in the Newin case, Justice Preecha wrote a lengthy, two-part commentary defending his views which was published in the Thai-language Post on June 28 and June 29, 1999.

⁷⁸ The majority opinion was issued by Justices Chumphol, Issara, Jul, Komain, Ura, Preecha, and Suwit. The minority opinion was issued by Justices Anan, Chai-anan, Chao, Mongkol, Prasert, and Suchinda. Bangkok Post, June 18, 1999, p. 1. *Khamwinijchai Thi 36/2542* [Decision No. 36/1999], June 16, 1999, reprinted in Chamnan Phichetphan, *Wikraw Khamwinitchai Sanratthathanun Korani* Newin Chidchob [Analysis of the Constitutional Court Decision on the Newin Chidchob Case], Bangkok, Fai Aphai, 1999, pp. 41-52. Chamnan also summarizes the justices' individual decisions, pp. 53-99.

⁷⁹ Even before the Court had made its ruling, Dr. Amara Raksat, President of the Constitution for the People Society, had filed a letter of complaint with President Chao charging Justice Komain had a conflict of interest and should not rule on the Newin case. Specifically, Justice Komain was the defendant in two separate criminal law suits. Should he be found guilty in either case and given a suspended sentence he would be subject to potential expulsion from the Court under Section 260(7) of the constitution which used the exact wording for the expulsion of a minister: Abeing sentenced by a judgment to imprisonment@. Section 7(1) of the Court=s Rules of Case Consideration Procedure clearly states that a conflict of interest arises if any justice might be personally affected by a decision to be made by the Court. Although President Chao distributed Amara=s letter to all of the justices, Komain refused to remove himself from the case. When Justice Komain was subsequently found guilty by the Supreme Court and given a suspended sentence, he was forced by his peers to resign from the Constitutional Court.

⁸⁰ The Newin verdict received front-page coverage in the local press for several days. See for example the Bangkok Post, June 18, 19, 21,23,25, and 26, 1999. The quote for Speaker Meechai is from Bangkok Post, June 23, 1999, p. 1.

⁸¹ Bangkok Post, June 26, 1999, p. 3.

⁸² 1997 Constitution, Section 269, paragraph 2.

⁸³ ADecision 49/2542, October 5, 1999," CDCC, 1999, Vol. 3, pp. 1392-1408.

⁸⁴ Sithichai alleged Charnchai had not completed high school and had used forged documents to enter a bachelor=s degree program at Sripatum University. Since Charnchai had submitted forged documents to the registrar of elections, his election as an MP was void. Moreover, because his entrance to Sripatum had been premised on false documents, his bachelor=s degree should also be nullified. The case was followed extensively by the press. See for example: AMP Walks Out of Hearing on His Status,@ Bangkok Post, September 25, 1999, p. 2; AMP=s Lawsuit Against Court Chief to Be Scrutinized,@ Bangkok Post, October 3, 1999, p.4; AEmbattled MP Resigns to Fight,@ The Nation, October 5, 1999, p.3; ACharnchai=s Case to Stay with Court,@ The Nation, October 6, 1999, p. 6; ALegal Twists in Charnchai Case,@ The Nation, October 7, 1999, p.6; and AMP=s Suit Against Top Judge Rejected,@ Bangkok Post, October 8, 1999, p. 2; and, AMP Stripped of House Status,@ Bangkok Post, October 13, 1999, p. 1.

⁸⁵ Among his arguments, Charnchai noted Section 115 of the constitution states MPs holding office on the date

of promulgation shall retain their status until the next general elections. In the Court's view, however, Section 115 merely provides for continuation of the House of Representatives until new elections are called. It does not prevent the removal of MPs under other sections of the constitution B although it does prevent a by-election to replace an MP who loses his or her status. Charnchai tried to argue that his MP status gave him immunity from prosecution and therefore the Court had no right to investigate him. While an MP is protected from criminal and civil law suits unless approved by Parliament, an MP is not protected against indictment under Section 96 for the removal of MPs from office. Finally, he argued Section 107 which bars candidates who do not have a valid bachelor's degree is not applicable to individuals who were elected MPs prior to promulgation of the constitution. Charnchai also pointed out that the Nakorn Naiyok Provincial Court was considering a criminal suit against him on the same issue, and therefore the Court should await the verdict of the provincial Court. However, the issue was not whether he did or did not have a bachelor's degree but rather whether or not he had used forged secondary school certificates when he applied for candidacy in the 1995 general election. "MP Walks Out of Hearing on His Status," Bangkok Post, September 25, 1999, p. 2.

⁸⁶ It is more likely, however, that he had hoped the Court would drop the case once he had resigned. Thavorn Sennium (Democrat), advisor to Minister of Interior Sanan told the press the Court could not proceed with its case against Charnchai because he had resigned. If the Court did proceed, Thavorn suggested a critical precedent would be established. Thavorn further noted the Court was not authorized to rule on Charnchai's candidate qualifications because this was the sole prerogative of the ECT. "Legal Twists in Charnchai Case," The Nation, October 7, 1999, p. 6.

⁸⁷ See for example the decision of Justice Preecha, ADecision of Justice Preecha Chaloeawanit, 49/2542, @ CDCC, 1999, Vol. 3, pp. 1476-1490. The other dissenting justices were Komain, Issara, Chumphol, Jul, and Ura.

⁸⁸ The Court found that Charnchai's had never attended secondary school or vocational school. The vocational school certificate Charnchai produced for the Court was verified by the printer of the diplomas to be a forgery. Since he used false documents to enter Sripatum University, his bachelor's degree was void. The significant issue for the Court, however, was that under the previous election law, candidates whose father were aliens were required to certify they had finished secondary school. Charnchai's father was an alien. The Ministry of Education had no records to prove Charnchai attended or completed secondary school or the non-formal education program which would have been equivalent to a secondary education. In a 7:6 decision, the Court ruled Charnchai's election was null and void. The Justices in the majority were Chao, Suwit, Mongkol, Prasert, Anan, Chai-anan and Suchinda.

⁸⁹ Section 292 para 2 requires the NCCC to disclose the statements of the prime minister and his ministers to the public without delay but not later than 30 days as from the date of submission. The NCCC posts the asset and declaration forms ("the account") on its website for public inspection. However, the Commission makes it difficult for the average citizen to review the "supporting documents". The later are essential because they have the details that need to be checked. The only thing a review of "the account" will demonstrate is gross changes in asset and liabilities from previous submissions.

⁹⁰ The October Network is an informal association of former student activists who had fought against the military regimes of the 1970's.

⁹¹ Under the Thaksin administration, it appears this service has been suspended. Those identified by Amorn over a period of several weeks beginning on October 17, 2000 were: (October 17, 4 ministers) PM's Office Minister Supatra Masdit, board member of Prisma Infor Co.; Deputy Transport Minister Pradit Pataraprasith, board member of Impolx Co. and Royal Holding Co.; Foreign Affairs Minister Dr. Surin Pitsuwan, board member of Srinakhon Tourism Co.; Deputy Foreign Affairs Minister M.R. Sukhumbhand Paribatra, board member of Pantip Park Co. and Nguamduphli Co., and shareholder in Suan Payom Co.; (October 19, 4 ministers); Industry Minister Suwat Liptapallop, director and shareholder of Kensang Construction Co. and P.S.D.N. Co.; Science Minister Arthit Ourairut, director of Rangsit Fruit Juice Co. and AO Enterprise Co.; Deputy Transport Minister Chaiya Sasomsap, manager and shareholder of 79 Group Co. and director of Prasertchai Service Co.; Deputy Finance Minister Pichet Phanvichartkul, board member and shareholder of Chetthaphan Law Co. and managing director and shareholder of Kruaphanom Co.; (October 25, 1 minister) Deputy Commerce Minister Rak Tantisunthorn, board of Puen Chamnan, Ltd.; and, (date, 1 minister) Deputy Minister of Interior Wattana Asavahame, board and shareholder of Phalang Ngan Thai Co.

⁹² Section 96 authorizes 1/10 of either the House or Senate to lodge a complaint with the President of the House asserting that the membership of one of its members has terminated under one of a variety of sections in the Constitution; in this case, Sections 208 and 209 that prohibit a minister from holding a position with a profit-making firm or holding shares in such firms.

⁹³ The expelled Senators, all of whom were charged with buying votes, were Speaker Sanit Worapanya, Lopburi, and for making unlawful promises; General Sirin Toopklam, Lopburi; Samruay Khaewattana, Ayutthaya; Puanlek Boonchiang, Phayao; Thammanoon Mongkhol, Rayong; Kavi Supateera, Khon Kaen; Chatchawan Mahasuveera-chai, Si Saket, and for making unlawful promises and distributing goods; Chit Charoenprasert, Si Saket, and for unlawful promises and holding banquets; Nirun Pitukwatchra, Ubon, and for campaign poster violations; and Weerasak Jinarat, Ubon. “Disqualified Senators Plan Appeal,” *The Nation*, March 14, 2001, p.1. Only two of the expelled senators were able to regain their seats in the by-election: Chit and Nirun.

⁹⁴ Amorn submitted the issue to the Speaker of the Senate, Sanit Worapanya. Although this case falls under the qualifications of a NCCC commissioner (Section 297 and Section 258), Sanit subsequently sent the complaint to the Court under Section 266 of the Constitution, for cases concerning the powers and duties of organs under the Constitution.

⁹⁵ Justice Sak, just arriving in his new position, did not participate in the decision. Justices Chumphol, Preecha, and Issara ruled the Court did not have jurisdiction to hear the case; thus, their minority vote did not mean they found the defendants were executives as charged. “Decision 18/2544, June 26, 2544,” <http://www.conCourt.or.th/decis/y2001d/d01844.html>, pp. 1-10.

⁹⁶ The 10-member Selective Committee includes the President of the Constitutional Court as Chair, the President of the Supreme Administrative Court, four Rectors of universities selected by the Rectors of all juristic universities in the nation, and four political party representatives elected by a committee consisting of one MP of every party with at least one sitting MP.

⁹⁷ “Decision 38/2545, July 4, 2002,” <http://www.conCourt.or.th/decis/y2002d/d3845.html>, pp. 9-10.

⁹⁸ See the CCC Annual Report for 1988, extrapolated from tables on pages 54-55.

⁹⁹ Article 17 of the 1959 Constitution granted the Prime Minister absolute power in making administrative and judicial decisions to protect national interests. Under Article 17, decisions of the Prime Minister had the same force of law as an Act of Parliament.

¹⁰⁰ The officials found guilty, and the amount of unusual wealth the AIC confiscated were: former Prime Minister Chatichai Choonhavan, 287.27 million Baht; former Personal Advisor to the PM Phithak Intharawithayanon, 335.88 million Baht; Chart Thai Party Political Advisor Pramuan Saphawasu, 70.7 million Baht; former Minister in the PM’s Office Chaloeerm Yubamrung, 31.72 million Baht; former Minister of Industry Praman Adirerikson, 139.7 million Baht; former Deputy Minister of Interior Sanoh Thianthong, 62.68 million Baht; former Deputy Minister of Commerce Phinya Chuayplod, 61.79 million Baht; Social Action Party Advisor Subin Pinkhayan, 608 million Baht; former Minister of Communications Montri Phongphanich, 336.5 million; former Deputy Minister of Interior Wattana Asavahaem, 4.0 million Baht. Phasuk Phongphaichit and Sangsit Phiyarangsarn, *Corruption kap Prachathipathai Thai [Corruption and Democracy in Thailand]*, Political Economy Center, Chulalongkorn University: Bangkok, 1994, pp. 448-455. Note that the English-language version of this study published by Silkworm Books does not include a number of the appendix, such as this one.

¹⁰¹ Since 1981, the CCC had been responsible for securing statements of assets and liabilities from all civil servants. However, these sealed submissions were never opened unless an individual was under investigation, or when the official left office. It is important to note that members of independent agencies (e.g. the Constitutional Court, the NCCC, etc), as well as judges in the Courts of Justice, are also required to submit statements within 30 days of every three years in office. Thus, for example a justice of the Constitutional Court who serves a full nine-year term must actually submit five statements: the 1st and noted above, a 2nd 30 days after they have held office three years, a 3rd 30 days after they have held office six years, and a 4th and 5th corresponding to the 2nd and 3rd noted in the text.

¹⁰² In addition to pro-active investigation of the assets and liabilities of politicians and bureaucrats, the NCCC must also respond to requests from the Senate and from the Supreme Court=s Criminal Division for Persons

Holding Political Positions (Articles 301(1) and 301(2)). Specifically, one-fourth of the members of the House of Representatives or a coalition of fifty thousand voters may lodge a complaint with the President of the Senate to request an individual be removed from office and barred from holding any position for five years (Article 304). The President of the Senate must submit the request to the NCCC for investigation, which must prepare a report for the Senate stating whether, and to what extent, the accusation is true. After review of the NCCC's report, three-fifths of the Senators may pass a resolution to remove the individual from office (Article 307). If the NCCC concludes the accusations are true, it must also submit a report to the Prosecutor General for criminal prosecution (Article 305). At this point the investigation may be extended beyond the accused to include others related to the incident as a principal, an instigator, or a supporter (Article 308). In the event the Prosecutor does not wish to proceed, the NCCC may prosecute the case itself (Article 305). Finally, the NCCC is to be responsible for carrying out other acts as provided by law (Article 301(6)). For example, Article 209 of the Constitution requires cabinet ministers to either liquidate ownership and control of stock (both private and publicly listed) or to transfer ownership and control of their stocks to a trustee while they are serving in office. If a member of the cabinet chooses to transfer ownership to a trustee, he must inform the President of the NCCC within 30 days of his appointment to office. The bill the Ministry of Finance drafted to implement this article of the constitution requires the NCCC be responsible for certifying trustee firms and monitoring trusteeships to ensure that neither the cabinet minister nor the trustee derive any interest from the shares or that the minister attempts in any way to influence the administration or management of the shares.

¹⁰³ Sanan had produced three loan contracts dated January 11, March 20 and May 15, 1997 for 20, 15, and 10 million baht respectively from AAS Auto Service Co. The NCCC questioned AAS executives and others who acknowledged all three documents had actually been signed on a single day in January 1997. The Commission also found no mention of the loan in AAS account books, and questioned whether AAS was in a position to make such a loan because its accounts indicated a balance of only 120,000 baht. Moreover, the NCCC could not find any evidence that the funds had flowed into or out of any of Sanan's bank accounts. A Loan Case Backfires on Sanan, @ Bangkok Post, March 29, 2000, p. 1.

A Willful @ is the key term in the constitution and the legislation governing the Asset and Liability Statement process. In this regard, the NCCC Commissioners unanimously agreed Sanan had willfully submitted false documentation on his alleged Baht 45.0 million debt. Although Sanan and his supporters immediately sprang to the defense that the debt was real, the NCCC clarified it had not even considered the issue of whether or not Sanan had actually received a Baht 45.0 million loan from a car service company. For the NCCC, the issue was Sanan had willfully submitted false documentation of the loan. Specifically, there was general agreement the alleged loan had actually been made in 1996. In the opinion of the NCCC, had Sanan signed a single loan agreement in January 1997 to account for the 1996 loans, the commissioners could have assumed Sanan was merely attempting to back-document the loans -- an acceptable procedure under the law. However, the use of three different loan documents was a clear indication of his willful attempt to deceive the NCCC.

¹⁰⁴ Sanan first rose to public prominence as a member of the failed March 1977 coup against the ultra-conservative Thanin Kraivixien government. Coup leader General Chalart Hiransiri was executed and Sanan was given a life sentence. However, after his Chulachomkloa Royal Military Academy Class 7 classmate, General Kriangsak Chomanan, successfully pulled off a coup against the reactionary book-burner Thanin, Sanan was released. He then formally entered politics. Although he failed an initial election in Bangkok, since 1983, Sanan has been successful in every election in his home constituency of Phichit Province. He quickly rose through the Democratic Party ranks as a financier and party power broker. Sanan was one of 22 politicians charged with corruption by the National Peace Keeping Council after its 1991 coup against the elected Chatichai Choonhavan government. However, he was not among the 10 politicians found guilty. Nevertheless, due to his conspicuous wealth, he has been constantly hounded by corruption charges. In the December 1999 no-confidence debate, NAP MP Adisorn Piangkiet (himself then under corruption investigation by the NCCC) charged Sanan with attempting to cover his ill-gotten wealth by falsifying his Asset and Liabilities Statement with a non-existing liability in the form of a Baht 45.0 million loan and the failure to list several properties and other assets.

¹⁰⁵ The other cases in which the official had held office prior to promulgation of the 1997 Constitution were: 12/2543, NCCC vs. Sukum Choedchoem and 27/2543, NCCC vs. Kosol Srisang. In the next case where the defendant had left office and had failed to file under Section 292(2) and (3), 11/2543, NCCC vs. Chatchai Sumetchotimetha, Justice Komain continued to rule the defendant guilty until the Kosol case. Although still sitting on the bench until March 1, 2001, Justice Komain did not rule in the other cases of this nature including: 31/2543, NCCC vs. Sanan Khajornprasas; and 5/2544, NCCC vs. Sumet Upholthian.

¹⁰⁶ At a meeting of the Constitutional Court on February 12, 2001, several justices had urged Komain to resign from the bench in view of the verdict against him. Section 260(7) of the 1997 Constitution requires a justice of the Constitutional Court to vacate his or her seat if they are “sentenced by a judgment to imprisonment”. Pointing to the Newin decision, Komain counter-argued that the Court had earlier ruled that a suspended sentence did not constitute a violation of Section 260. “Convicted Judge Komane Bows to Pressure to Resign,” Bangkok Post, March 2, 2001, p. 3. To the contrary, however, Justice Prasert pointed out that Komain himself had been part of the 7/4 majority that had made the landmark decision that a sentence of imprisonment should, under Section 260, be considered a sentence whether it was suspended or not. “Komain Urged To Consider Position,” The Nation, February 13, 2001, p. 2. Moreover, although Komain had ruled Newin innocent, he had done so on the grounds that Newin’s conviction was not final; that it was still going through the appeals process. The Supreme Court had just convicted Komain, thus ending his own appeal process. Even under the skewed voting process in the Newin case through which two minority opinions were added together to make a majority for acquittal, Komain could claim only one issue: a suspended sentence. Therefore, if his case were considered by the then current justices, he would have had only 4 votes in his favor, (i.e., the 4 justices who had argued a sentence under Section 260 could not be a suspended sentence).

¹⁰⁷ There were allegations in the press that some of the Constitutional Court Justices may have relied on ghost-writers to prepare their written opinions in the Thaksin case (an unconstitutional act). Allegation were made more specifically that a retired Appeals Court judge was a ghost-writer. “Ghost-written Verdicts Claim,” Bangkok Post, August 21, 2001, p. 2. However, there were never any allegations that former Justice Komain had any role in ghost-writing any of the Thaksin opinions.

¹⁰⁸ Section 294 specifically states: “In the case where the submission of the account is made by reason of the vacation of office or death of any person holding a political position . . .”

¹⁰⁹ Only 6 of the 18 individuals charged under Section 292 were still in office when their case was heard: these were Sukhum, Chirayu, Sanan, Prayuth, Sombun, and Phenpha.

¹¹⁰ The argument that in other cases the individual written opinions of the justices were always released the same day as the central written opinion is actually false. Indeed, a major problem facing the Court is the backlog of written decisions several of the justices have built. As a result, the individual decisions for these cases are withheld from the public, sometimes for more than a year, because all of the individual opinions for a particular case must be printed together in the same volume and number of the Government Gazette.

¹¹¹ This is the assessment of writers from The Nation. “Court Details Case Against Former Senator,” The Nation, August 23, 2001, p. 2. See in particular the boxed section “Differences of Opinion”. Prayuth’s wealth is formidable. In 1996, the year before the onset of the Asian Economic Crisis, Prayuth was listed as the 108 wealthiest person in Thailand in terms of stock held on the Securities Exchange of Thailand (By comparison, Thaksin was listed as number 1; his wife Potjaman as number 3; their maids Dungta and Boonchoo as 12th and 23rd respectively, and their chauffeur Chairat as 49th). The source of Prayuth’s wealth is instant coffee (Nescafe, which dominates the Thai market) and plastic films, both of which weathered the economic crisis very well. Who’s Who in Business and Finance, Vol. 3, No. 25, November, 1996, pp. 16-17, 27 and 29.

¹¹² Throughout consideration of all previous Section 295 indictments prior to the Taksin’s case, Justice Chumphol had voted with the majority that the law was applicable. Subsequent to Taksin’s case, Chumphol has continued to vote in the minority that the law is not applicable. Since the Taksin case, three other justices, Kramol, Phan and Sak, have joined Chumphol in his opinion. The Taksin case was Justice Sak’s first ruling. He had replaced Justice Komain on the bench and voted just as Komain probably would have voted. However, Justices Kramol and Phan, who had joined the Court on September 29, 2000, had both ruled with the majority in the case against Khon Kaen Municipal Councilor Sumet Upholthian (5/2544), who had been in office from December 17, 1995 through December 18, 1999. In addition, the same day they issued their verdict on Thaksin, Kramol and Phan had accepted the applicability of Section 295 in the Prayuth case. It was not until the Taksin case, later that day, that they reversed their previous position and voted that the law was not applicable under certain circumstances.

¹¹³ Justices Kramol*, Pan*, Jumphol* and Sak* withdrew from consideration of the case in accordance with the Court’s conflict of interest rules. Those who voted against accepting Uthai’s petition were Justices Issara, Mongkol, Sujit, Amorn, Suvit, Jira and Jul*. Voting to accept the petition were Justices Suchinda*, Anan*,

Preecha* and Ura. Note: * voted to acquit Thaksin. "NCCC vs. Top Court: Charter Crisis Looms," The Nation, April 19, 2002.

¹¹⁴ Pol. Maj.-General Suwan Suwanwecho led a signature campaign to solicit police and public support for PM Thaksin during the Court's inquiry into the PM's alleged concealment of assets; retired Dep. Secretary-General of the Prime Ministers Office, Suthee Sitthisomboon, as head of the Mass Communications Organization of Thailand, had approved a concession, deemed shady, to a firm owned by the Shinawatra family; and former Director General of the Customs Department, Manit Wityatem, had been criticized for assisting another Shinawatra family firm to avoid paying taxes on imported communications equipment. The fourth new justice is Dr. Saowanee Asawaroj, who is not generally seen as connected to the PM. A law lecturer at Thammasat University, she is the first woman to sit on the Court.

¹¹⁵ Correspondence from Justice Amara Raksataya, November 18, 2002.

¹¹⁶ The information for this appendix is derived from the Constitution of the Kingdom of Thailand, 1997; Ruang Naaru Kieokap San Rattathamanun [Interesting Facts on the Constitutional Court], Warasan Rattathamanun [Constitutional Court Journal] Vol. 1, No. 1, January-April, 1999, pp. 105-110; and Tarang Sadaeng Phumisit lae Hetthi Khaw Chai Sittaw San Rattathamanun [Table Illustrating Those with the Right and the Eligible Issues for Application to the Constitutional Court], ibid, pp. 113-121.

¹¹⁷ As noted previously in the text, there is disagreement on the Constitutional Court's jurisdiction to review decrees, rules, regulations, and orders of the executive branch. Former CDA Secretary-General Bowornsak Uwanno interprets Section 264 to exclude most executive branch acts from the CC's jurisdiction. His definition of law as used in Section 264 and other sections of the constitution refers only to Acts of Parliament (Acts and Organic Laws), Emergency Decrees, the Palace Law on Succession, and revolutionary decrees still in force but issued prior to promulgation of the constitution by the leaders of various *coup d'état*. Dr. Bowornsak argues the Administrative Court has jurisdiction over any other issues. Dr. Charan Phakdithanukul and others argue the CC's jurisdiction includes executive rules and regulations which are issued by virtue of the provisions of a law passed by parliament. Bowornsak Uwanno, Khambanyai Ruang Khetamnat SanRattathamanun [Lecture on the Jurisdiction of the Constitutional Court], ibid, Constitutional Court Journal, Vol. 1, No. 1, January-April, 1999, pp. 43-45. It seems likely that the CC will follow a strict definition of its jurisdiction, leaving executive rules and regulations to the Administrative Court. Once the Administrative Court is established, case precedents should resolve this issue. The Act on Establishment of Administrative Courts and Administrative Court Procedures, 1999 establishes the Administrative Court's jurisdiction by defining by-laws to include Aa Royal Decree, Ministerial Regulation, Notification of a Ministry, ordinance of local administration, rule, regulation or other provision which is of general application and not intended to be addressed to any specific case or person. (Section 3, para 8).

¹¹⁸ The Senate has the additional authority under Section 303 to remove politicians and officials from office without reference to the Constitutional Court. Fifty-thousand voters or one-fourth of the Members of the House may initiate this type of impeachment proceeding.