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## **J.Y. Interpretation No. 631 (July 20, 2007)\***

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### **Issuance of Communications Surveillance Warrants Case**

#### **Issue**

Is Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications, promulgated and implemented on July 14, 1999, unconstitutional?

#### **Holding**

Article 12 of the Constitution provides, “The people shall have freedom of secrecy of correspondence.” The purpose of this Article is to protect the people’s rights to choose whether or not, with whom, during which period of time, and in which way to communicate, and to protect the contents of their communications from arbitrary invasion by the State or from having their above rights violated by others. In addition to statutory authorization, when the State decides to adopt measures restricting the above rights, the conditions must be specific, definite, and necessary. Also, the procedures must be reasonable and legitimate. Hence the protection of freedom of secrecy of correspondence guaranteed by the Constitution will not be compromised. Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications (hereinafter “Act”), promulgated and implemented on July 14, 1999, provides, “During criminal investigations, the communications surveillance warrant mentioned in the preceding paragraph shall be issued by prosecutors upon applications from judicial police authorities or by virtue of the prosecutors’ own authority.” It does not require that the communications surveillance warrant shall in principle be issued by an impartial judge who exercises the judicial power independently. To the contrary, it delegates,

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\* Translation and Note by Ching-Yi LIU

concurrently, the duty of applying for and the power of granting the communications surveillance warrant to prosecutors and judicial police officers, who are responsible for criminal investigations. Such a provision cannot be considered reasonable, nor can it be considered legitimate, and it thus constitutes a violation of Article 12 of the Constitution that guarantees the freedom of secrecy of correspondence. After announcement of this Interpretation, this provision shall become null and void no later than when the new Article 5 of the Act, revised on July 11, 2007, becomes effective.

### **Reasoning**

[1] Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act clearly stipulates that an individual whose constitutional rights are unlawfully violated may, after exhaustion of ordinary judicial remedies, petition this Court to review the constitutionality of the statutes or regulations applied by a final decision of a court of last resort. One of the evidentiary grounds that the final judgment rendered against the petitioner in this case was obtained through wiretapping, and whether the wiretapping was legal or not was determined according to Article 5 of the Act on Protection and Surveillance of Communications (hereinafter “Act”), promulgated and implemented on July 14, 1999, the statute applied by the court of last resort in making the final judgment. Therefore, this Court is certainly authorized to review the case pursuant to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act.

[2] Article 12 of the Constitution provides, “The people shall have freedom of secrecy of correspondence.” The purpose of this Article is to protect the people’s rights to choose whether or not, with whom, during which period of time, and in which way to communicate, and to protect the contents of their communications from arbitrary invasion by the State or from having their above rights violated by others. The freedom of secrecy of correspondence is one among concrete

categories of the right to privacy guaranteed to the people in the Constitution. It is not only an basic right necessary for the protection of human dignity, individuality and integrity of personality, but also for the protection of the private sphere of personal life from intrusion and self-determination of personal information (*see* J.Y. Interpretation No. 603). Such freedom is explicitly guaranteed by Article 12 of the Constitution. In addition to statutory authorization, when the State decides to adopt measures restricting the above rights, the conditions must be specific, definite, and necessary. Also, the procedures must be reasonable and legitimate. Hence the protection of freedom of secrecy of correspondence guaranteed by the Constitution will not be compromised.

[3] The Act is a statute enacted by the State with the purpose of balancing the interest in the “protection of the people’s freedom of secrecy of correspondence from illegal invasion” and the interest in the “guarantee of national security and maintenance of social order” (*see* Article 1 of the Act). According to the Act, a communications surveillance warrant putting an individual’s private correspondence under surveillance may be issued only when it is necessary to safeguard national security or to maintain social order, provided that both substantive and procedural legal requirements are met (*see* Articles 2, 5, and 7 of the Act). Article 5, Paragraph 1 of the Act provides, “A communications surveillance warrant may be issued when there is an adequate showing of facts to support the suspicion that a defendant or criminal suspect has committed one of the following offenses and that national security or social order has been seriously endangered, while there is probable cause to believe that the content of communications of the defendant or criminal suspect is relevant to the offense, and it would be impossible or difficult to collect or investigate the evidence by means other than communications surveillance.” This is the legislative authorization that is concrete and clear enough for the State to restrict its people’s freedom of secrecy of correspondence. When the State conducts its surveillance

on the communications of a defendant or suspect for the purpose of carrying out a criminal investigation, it means that the State is taking a measure of collecting relevant communications records of the person under surveillance by monitoring and screening the details of his or her communications and may seize such records. It is one of the types of coercive measures in criminal procedure through which the records seized may be admitted as evidence for the determination as to whether the person is guilty. However, it is worthwhile to note that in the case of adopting the measure of communications surveillance, the freedom of secrecy of correspondence is restrained in such a way that the person under surveillance is not notified, nor has he or she ever given his or her consent to such surveillance or been offered any opportunity to defend himself or herself. Furthermore, as the surveillance usually continues without any interruption for a specific period of time and is conducted without tangible space barriers, the person's basic rights are violated for a relatively longer time. Since those who are put under surveillance usually do not know that their basic rights are being violated, they have no way to exercise their rights to defend themselves (such as the right to remain silent, the right to counsel, and the right against self-incrimination) that are protected under the Code of Criminal Procedure. In addition, because the enforcement of communications surveillance may simultaneously result in the violation of rights to secrecy of communications of innocent third parties other than those named in a communications surveillance warrant, it could do much worse damage to the people's basic rights than search and seizure in criminal procedure.

[4] Communications surveillance is essentially a measure that violates the people's basic rights with extreme force and in a broad way. In order to achieve the purpose of the coercive measure, when conducting communications surveillance, the State usually deprives those who are put under surveillance of their rights to avoid such coercive measure before the measure is adopted. In order

to prevent unnecessary violations of privacy rights that occur due to the coercive measure adopted by investigation authorities and at the same time not compromise the purpose of the coercive measure, it is essential to place an independent and impartial judicial institution in charge of reviewing government applications for communications surveillance warrants so that the people's freedom of secrecy of correspondence can be protected. Therefore, when prosecutors or judicial police authorities believe it is necessary for the purpose of criminal investigation to put certain private communications under surveillance, they shall in principle apply to a court for a communications surveillance warrant so as to ensure the due process guarantee provided by the Constitution. The disputed Article 5, Paragraph 2 of the Act lacks such requirement, and this in turn leads to the result that the prosecutorial and judicial police authorities, who are responsible for criminal investigations, are in fact charged with, concurrently, the duty of applying for and the power of granting the communications surveillance warrant, without any proper inter-authority check and balance mechanism on governmental powers to prevent undue violations of the people's freedom of secrecy of correspondence that is guaranteed by the Constitution. Consequently, such a provision cannot be considered reasonable, nor can it be considered legitimate, and it thus constitutes a violation of Article 12 of the Constitution that guarantees the freedom of secrecy of correspondence. After announcement of this Interpretation, this provision shall become null and void no later than when the new Article 5 of the Act, revised on July 11, 2007, becomes effective. Moreover, since communications surveillance is a severe intrusion into the people's freedom of secrecy of correspondence, those who have the power to grant communications surveillance warrants should make their every effort to review applications for warrants strictly to ensure that the requirements set forth in Article 5 of the Act are satisfied. Even when it is indeed necessary for them to grant a communications surveillance warrant, they should adhere to the principle of minimum violation, and specify, without any vagueness, the period for such

surveillance, the person under such surveillance, and the method of surveillance. Furthermore, it would be superfluous to dwell on the principle any more than to note that they should supervise the implementation of the surveillance at all times.

### **Background Note** by the Translator

The petitioner is a police officer working for the information technology office in a police station. The petitioner received a cell phone call from an unidentified female Ms. X via the petitioner's own cell phone. Ms. X asked for the police officer's assistance in retrieving personal information about another female, Ms. KAO. The petitioner thus used a computer, accessing the database of the National Police Agency, and acquired the information about Ms. KAO, which the petitioner then disclosed to Ms. X.

Before the petitioner revealed the private information, a prosecutor had approved a request to monitor the petitioner's cell phone communications. The prosecutor became aware of the petitioner's leak of the information through the surveillance and then retrieved the logs of the petitioner's review records from the National Police Agency. In the Taiwan High Court Criminal Judgement 92-Shang-Su-882 (2003), the judge used the transcribed text from the surveillance as evidence and decided that the petitioner's act had constituted the offense of disclosing secrets of Article 132, Paragraph 1 of the Criminal Code.

The petitioner had two claims. First, communications surveillance warrants should be approved and issued by a court. For this reason, Article 5, Paragraph 2 of the Act on Protection and Surveillance of Communications, which provides that communications surveillance warrants are to be issued by a prosecutor during criminal investigations, is unconstitutional. Second, the communications surveillance warrant in this case was issued for the reason of monitoring suspected crimes relating to guns and ammunition. However, the transcribed text

obtained from monitoring the suspected crimes beyond the scope set forth in Article 5, Paragraph 1 of the Act was used by the judge of the case as evidence. The petitioner claimed the decision in the case contradicted the Constitution and thus petitioned for constitutional interpretation.

Both J.Y. Interpretations Nos. 654 and 631 pertained to the freedom of “secrecy of correspondence.” While the subject being wiretapped in J.Y. Interpretation No. 631 was a suspect under criminal investigation, the subject who was under surveillance in J.Y. Interpretation No. 654 was a detainee in custody for his alleged criminal offenses. In J.Y. Interpretation No. 654, the Constitutional Court indicated that a detainee, even though his personal liberty and security and several other constitutional rights may be limited because of the detention, shall, outside of the scope of such limitations, still enjoy all other constitutional rights as an ordinary person under the presumption of innocence doctrine. It can be implied from the Constitutional Court’s words that the Constitutional Court affirmed that detainees still enjoy the freedom of “secrecy of correspondence” so that the detainee is ensured to have the right to a fair trial.

The facts of J.Y. Interpretation No. 654 are summarized as follows. The petitioner was not allowed to see anyone or communicate with anyone by letter after he was taken into custody for criminal offenses he allegedly committed. In addition, the prosecutor issued an order to audio-record all the conversations between the petitioner and his lawyer during his counsel’s visitation. As a result, all the conversations between the petitioner and his counsel were placed under the surveillance of and audio-recorded by the officers of the detention center.

Article 23, Paragraph 3 of the Detention Act provided that when counsel visits an accused in custody, the visitation shall be placed under surveillance according to Paragraph 2 of the same Article. Furthermore, Article 28 of the Detention Act provided that the information obtained through the surveillance and audio-recording during the visitation in accordance with Article 23,

Paragraph 3 may be admitted into evidence both in the investigative process and the criminal trial against the accused. The petitioner asserted that the above surveillance and audio-recording impinged upon his right to litigate protected by Article 16 of the Constitution. He submitted an objection to the Taiwan Panchiao District Public Prosecutors Office that was overruled by the Taiwan Panchiao District Court. As a consequence, the petitioner decided to challenge, by proceeding to lodge a petition for interpretation to the Constitutional Court, the constitutionality of Article 23, Paragraph 3 and Article 28 of the Detention Act, and Article 1, Paragraph 2 of the Organization Act of Detention Centers providing that matters regarding the detention of the accused shall be supervised by the district court and the prosecutors office in the same jurisdiction of the detention center. The Constitutional Court issued J.Y. Interpretation No. 654 in which it decided that Article 23, Paragraph 3 and Article 28 of the Detention Act were unconstitutional and became ineffective as of May 1, 2009. Below is the summary of J.Y. Interpretation No. 654:

While the physical freedom or other certain constitutional rights of a detainee are limited by law because of the detention, under the doctrine of presumption of innocence, the detainee nevertheless enjoys, in principle, all other constitutional rights outside of the scope [of such limitations] as an ordinary person.

Article 23, Paragraph 3 of the Detention Act provides, “under surveillance” referred in Paragraph 2 shall apply when counsel visits a detainee. Taking into consideration the meaning and purpose of the Detention Act and its Enforcement Rules as well as the totality of the legal system, the term “surveillance” entails not only on-site monitoring by the detention center personnel, but also eavesdropping, recording, and audio-recording, among other acts. Under current

practices, counsel visitation is routinely monitored and recorded pursuant to the aforementioned statutory provisions. These provisions, which allow a detention center to conduct surveillance and audio-recording without considering whether they achieve the purpose of detention or are necessary in maintaining the order of the detention center, have hindered the exercise of the right to defense and exceeded the scope of necessity, thus violating the principle of proportionality under Article 23 of the Constitution, and they thus are inconsistent with the meaning and purpose of the Constitution to protect the right to judicial remedy.