

## J. Y. Interpretation No. 419 (December 31, 1996) \*

- ISSUE:** (1) May Vice President concurrently hold the office of Premier of the Executive Yuan? Is this a political question that bars the judicial branch from rendering an Interpretation?
- (2) Are the Premier and the entire Cabinet constitutionally obligated to resign on the occasion of each new president's inauguration? If so, how should such resignations be handled?
- (3) Does the Legislative Yuan have the authority to pass a resolution requesting the President to take certain actions not otherwise provided by the Constitution?

**RELEVANT LAWS:**

Articles 35-44, 49- 51, 53, 55, 57, 62, 63, 75, 103-105, 111 and 174 of the Constitution (憲法第三十五條至第四十四條、第四十九條至五十一條、第五十三條、第五十五條、第五十七條、第六十二條、第六十三條、第七十五條、第一百零三至第一百零五條、第一百十一條及第一百七十四條); Article 2, Paragraphs 1-4, 7, 8 and Article 6, Paragraphs 3, 5 of Amendments to the Constitution (憲法增修條文第二條第一項至第四項、第七項、第八項、第六條第三項、第五項); J. Y. Interpretations Nos. 1, 15, 17, 20, 30, 74, 75, 207, 261, 325, 328, 342 and 387 (司法院釋字第一號、第一五號、第

\* Translated by Professor Andy Y. Sun, Except as indicated otherwise, all notes are added by the translator.

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一七號、第二〇號、第三〇號、第七四號、第七五號、第二〇七號、第二六一號、第三二五號、第三二八號、第三四二號、第三八七號解釋)；Articles 3 and 4 of the Organic Act of the National Security Council (國家安全會議組織法第三條、第四條)。

### KEYWORDS:

cabinet (內閣), check and balance of powers (權力制衡原則), customary constitution (憲法慣例), Five Power Division (五權分立), general resignation (總辭), Legislative Yuan (立法院), political question (政治問題), Premier (行政院院長), re-nomination (再提名), Vice President (副總統).\*\*

**HOLDING:** 1. The Constitution does not expressly specify whether the Vice President may concurrently hold the office of Premier of the Executive Yuan. While the nature of the duties of the two offices is not apparently incompatible, in case the office of the President should become vacant or the President is incapable of carrying out his/her duties, the situation [of the same individual holding two offices] will affect the very design of power acting or succession under the Constitution, hence it will not be com-

**解釋文：**一、副總統得否兼任行政院院長憲法並無明文規定，副總統與行政院院長二者職務性質亦非顯不相容，惟此項兼任如遇總統缺位或不能視事時，將影響憲法所規定繼任或代行職權之設計，與憲法設置副總統及行政院院長職位分由不同之人擔任之本旨未盡相符。引發本件解釋之事實，應依上開解釋意旨為適當之處理。

pletely in conformity with the Constitution's objective of having separate individuals assume the duties of the offices of Vice President and Premier, respectively. The facts that triggered the present Interpretation should be properly disposed of in accordance with this ruling.

2. That the Premier tenders the general resignation [of the entire Cabinet] on the occasion of the new President's inauguration is a matter of courtesy in deference to the nation's leader, not an obligation under the Constitution. [Therefore,] how such a resignation not otherwise obligated under the Constitution should be handled is a matter of governance and falls within the presidential discretion, not subject to constitutionality review by this Yuan.

3. In accordance with the Constitution, the Executive Yuan is responsible to the Legislative Yuan. Except as otherwise stipulated by the Constitution, the Legislative Yuan does not have the authority to pass a resolution requesting the President to undertake or not to undertake a certain

二、行政院院長於新任總統就職時提出總辭，係基於尊重國家元首所為之禮貌性辭職，並非其憲法上之義務。對於行政院院長非憲法上義務之辭職應如何處理，乃總統之裁量權限，為學理上所稱統治行為之一種，非本院應作合憲性審查之事項。

三、依憲法之規定，向立法院負責者為行政院，立法院除憲法所規定之事項外，並無決議要求總統為一定行為或不為一定行為之權限。故立法院於中華民國八十五年六月十一日所為「咨請總統儘速重新提名行政院院長，並咨請立法院同意」之決議，逾越憲法所定立

act. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination to the Legislative Yuan's confirmation as soon as possible" exceeded the constitutional authority of the Legislative Yuan and shall be considered as advisory [opinion only] that carries no constitutional binding power over the President.

**REASONING:** This Interpretation results from four respective petitions: (1) a petition filed by Mr. Hau Lung-bin along with 81 other members of the Legislative Yuan on the constitutional question of whether the Vice President may concurrently hold the office of Premier of the Executive Yuan; (2) a petition filed by Mr. Chang Chun-hsiung along with 56 other members of the Legislative Yuan regarding the question of whether the fact that Vice President Lien Chan also serves as Premier of the Executive Yuan violates, among other things, Article 49 of the Constitution; (3) a petition filed by Mr. Fong Ting-kuo along with 61 other

法院之職權，僅屬建議性質，對總統並無憲法上之拘束力。

**解釋理由書：**本件係因：一、立法委員郝龍斌等八十二人為副總統得否兼任行政院院長，適用憲法時產生疑義，聲請解釋。二、立法委員張俊雄等五十七人為連戰副總統兼任行政院院長，有牴觸憲法第四十九條等條文之疑義，聲請解釋。三、立法委員馮定國等六十二人為新任總統可否就行政院院長率內閣總辭時，對行政院院長批示慰留或退回，而無須再提名並咨請立法院同意，又副總統得否兼任行政院院長，於適用憲法時均產生疑義，聲請解釋。四、立法委員饒穎奇等八十人為總統改選，行政院院長須否辭職並由總統重新提名行政院院長咨請立法院同意，副總統得否兼任行政院院長，及立法院八十

members of the Legislative Yuan regarding the questions of whether a newly inaugurated President may decline the Cabinet's general resignation led by the Premier and simply retain the Premier [to continue his services] without the need for renomination and confirmation by the Legislative Yuan; furthermore, whether the Vice President may simultaneously hold the office of Premier of the Executive Yuan; and (4) a petition filed by Mr. Yao Ying-chi along with 79 other members of the Legislative Yuan regarding the questions of whether the [same] Premier must resign, be renominated by the President and approved by the Legislative Yuan in light of the presidential election, whether the Vice President may also hold the office of Premier of the Executive Yuan, whether the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination for the Legislative Yuan's confirmation as soon as possible" exceeds the constitutional authority bestowed on the Legislative Yuan and whether such a resolution has

五年六月十一日審查通過「咨請總統儘速重新提名行政院院長，並咨請立法院同意」決議案，是否逾越憲法賦與立法院之職權，以及對總統有無拘束力等，產生疑義，聲請解釋。以上四案經大法官議決應予受理及將上開各案合併審理，並依司法院大法官審理案件法第十三條第一項規定通知聲請人代表及訴訟代理人暨關係機關行政院指派代表及訴訟代理人等，於八十五年十月十六日及十一月一日到場，在憲法法庭行言詞辯論，合先說明。又言詞辯論終結後，聲請人立法委員饒穎奇於十一月二十六日具狀聲請再開言詞辯論，經大法官審酌審理過程所得資料，已足供判斷，認無再開言詞辯論之必要，併此指明。

legal binding force over the President. The Grand Justices granted these four petitions and resolved to consolidate them into a single case for review. It must be first pointed out that, in accordance with Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act, notices were served to the legal representatives and counsels of the petitioners, as well as to the designated representative and counsels to the related agency, the Executive Yuan. Oral argument was conducted at the Constitutional Court on October 16 and November 1, 1996. After the conclusion of the oral argument, petitioner Mr. Yao Ying-chi moved for another oral argument on November 26. Having reviewed the information collected, the Grand Justices considered the materials sufficient to warrant an Interpretation and ruled that no further oral argument was necessary.

Arguments contained from the first to the third petitions may be summarized as follows: (1) Whether the Vice President may also serve as Premier is not a political question. While many constitutional ques-

本件前述第一案至第三案聲請人之主張略稱：一、副總統可否兼任行政院院長非屬政治問題：蓋所有憲法上之爭議，多具政治性，若因此而視之為政治問題不予解釋，則憲法上爭議將難於

tions do inherently carry a certain level of controversy that is political in nature, no constitutional disputes may be resolved judicially because they are all being treated as political questions. Given the fact that the Grand Justices have previously rendered several Interpretations on political issues (such as J. Y. Interpretations Nos. 261, 387, etc.), provided that the Judicial Yuan has also in its history issued more than a dozen statutory interpretations on the issue of holding more than one public office simultaneously, wouldn't it be self-contradictory if the issue of whether the Vice President may simultaneously hold the office of Premier of the Executive Yuan were to be considered a political question? Moreover, the doctrine of political question is a theory that has been developed incrementally through individual cases or precedents by American courts. Yet its contents are nevertheless vague and constantly subject to challenges by scholars and, thus, should not be hastily adopted. Moreover, given the fact that our nation has adopted the system of advisory interpretation for constitutional questions, the Grand Justices are obligated to render

經由司法解決，以往大法官對政治性問題已作成多則解釋（如釋字第二六一號、第三八七號等）。尤其司法院歷年以來就兼職案件所著解釋多達十餘號，若將副總統兼任行政院院長認作政治問題，豈非自相矛盾？況政治問題乃美國法院經個案逐漸發展而成之理論，其內涵既不明確，又受學者質疑，實不宜遽予引用。又我國係採憲法疑義解釋制度，只要合於聲請法定要件，大法官即有解釋義務。二、副總統與行政院院長之職務不相容，不能兼任：衡諸憲政理論，總統代表國家，統而不治，行政院院長領導政府，治而不統，我國憲法即依此項理論設計，並屬於內閣制之一種，依憲法第三十七條、第五十七條、增修條文第二條第四項等相關規定，總統與行政院院長間有制衡關係，故總統絕不能兼任行政院院長。副總統依增修條文第二條第一項之規定，競選時與總統候選人聯名登記，在選票上同列一組圈選；副總統出缺時，依同條第七項亦由總統提名並召集國民大會補選，故副總統與總統理念相同，關係密切並具有一體性，總統既不能兼任行政院院長，副總統自亦不能為之。依憲法第五十三條行政院為國家最高行政機關，行政院院長及其領導之內閣須對立法院負責，

their interpretation to a given question as long as the petitions meet certain legal standards. (2) The office of the Vice President and the Premier are incompatible in nature and cannot be concurrently held [by the same individual]. Having surveyed various constitutional theories, we find [it is clear] that the President represents the country that symbolizes the rule but does not govern; the Premier leads the government that governs but does not symbolize the rule, and this principle is a kind of cabinet rule upon which our Constitution is designed. In accordance with Articles 37 and 57 of the Constitution and Article 2, Paragraph 4, of the Articles in Addition and Amendment to the Constitution (hereinafter “Constitutional Amendments”), there is a check-and-balance relationship between the President and the Premier. Therefore, the President may not concurrently hold the office of the Premier. In accordance with Article 2, Paragraph 4, of the Constitutional Amendments, the vice presidential candidate shall register together with the presidential candidate in a given election campaign and they shall be placed to-

副總統固屬備位性質，憲法上亦無明定之職權，但副總統有輔弼總統之責，乃總統之僚屬或副手，平日承總統之命行事，副總統實具有潛在之職權，一旦由副總統兼任行政院院長，則閣揆變成總統之幕僚長，而行政權盡入總統囊中，憲法設計之制衡機制破壞殆盡，覆議核可權及副署制度均失其意義，且事實上，兼任損及公益並有害於人民之信賴，時間之分配亦不容一人兼任兩項繁重職務。另由行政法學之觀點，縱認副總統非總統之部屬，但基於憲法機關功能維護之理論，副總統既有襄助總統之職責，仍不應兼任院長職務。又憲法機關以不能互相兼任為原則，若有兼任情事，必憲法有明文可據（如美國副總統之兼任參議院議長）。我國憲法第四十九條及增修條文第二條第八項分別規定：總統缺位時，由副總統繼任，至總統任期屆滿為止，總統、副總統均缺位時，由行政院院長代行其職權；總統因故不能視事時，由副總統代行其職權，總統、副總統均不能視事時，由行政院院長代行其職權。副總統與行政院院長分別設置，乃憲法保障總統職位之繼任，所作雙重保險機制，由副總統兼任行政院院長，不僅使候補人數減少，且一旦總統缺位，勢將出現一人同時擔任



gether as a team on the voting ballot. In accordance with the same Article, Paragraph 7, in case the office of the Vice President should become vacant, the President shall nominate and call forth the National Assembly to elect [a candidate]. Therefore, the President and Vice President shall share the same philosophy, maintain a close relationship and work as an integral unit. Since the President may not concurrently be the Premier, it follows that the Vice President can not concurrently serve as Premier either. Under Article 53 of the Constitution, the Executive Yuan is the highest organ [or body] of the nation's executive branch; hence, the Premier and the Cabinet under his/her leadership is subject to oversight by the Legislative Yuan. While the Vice President by nature is to serve as a contingency to the President, the Constitution does not clearly delineate the powers and duties bestowed to him, yet being the President's counselor who carries out the orders of the President on a daily basis, the Vice President does in fact have the duty to assist and counsel the President. Hence, the Vice President does possess certain

三項職務之「三位一體」局面，自與憲法本旨相違。若非總統缺位，而係不能視事，則「三位一體」固依舊不能避免，並且產生究竟以副總統抑行政院院長身分代行，以及有無憲法第五十一條三個月期限適用之難題，而無從解決。復依照憲法增修條文，副總統之彈劾適用第六條第五項之規定，行政院院長則與一般公務人員之彈劾相同，依同條第三項處理，二者程序及效果完全不同，副總統兼任行政院院長而有違法失職情事時，監察院如何彈劾將無所適從。設若行政院院長總揆庶政，或因施政疏失而遭監察院糾彈，甚至去職，則是否仍適合擔任副總統，亦生質疑。又副總統須對國民大會負責，一旦兼任須向立法院負責之行政院院長，倘立法院與國民大會意見不同時，易形成衝突局面。再者，在三權分立或五權分立之外，尚有元首權，係立於行政、立法及司法權等之上，以超然中立之態度，由總統、副總統協調於五院之間，憲法第四十四條之規定即寓有此一意旨，副總統兼任行政院院長，則本身既為爭執之一造，自無從作超然中立之協調。最後，依司法院歷來解釋，關於兼職之禁止與否，皆視職務性質是否相容或有無利益衝突為斷，由以上所述足認副總統兼任行政院

latent powers and duties to discharge. If the Vice President were to become concurrently the Premier, the chief of the Cabinet would become the chief of staff to the President, who then would possess the entire administrative authority, thereby entirely destroying the check-and-balance mechanism designed under the Constitution, rendering [the Premier's] concurring and countersignature power meaningless.<sup>1</sup> In fact, holding two offices not only impinges upon the public interest but also jeopardizes the public trust. The required time commitment further precludes one individual from undertaking two positions since each carries a heavy workload. Furthermore, from the view

院長皆與容許兼職原則有違，乃憲法所不許。三、副總統兼任行政院院長不構成憲政慣例：按憲法慣例或憲政上之習慣法，其成立應有反覆發生之先例，並對一般人產生法之確信，始足當之。副總統兼任行政院院長以往雖有兩例，但均發生於動員戡亂及戒嚴時期，並非常態，且有違憲之疑義，自不能視為憲政慣例或習慣法。四、新任總統對行政院院長率閣員總辭時，不應批示慰留或退回，必須重新提名咨請立法院同意：在五權憲法架構下，總統與行政院院長間並無從屬關係，故行政院院長之辭職並無長官可以批示。總統對行政院院長之免職令僅形式上而非實質上權力，行政院院長於新總統選出後辭職，總統即應提名新院長人選咨請立法院同意。原立

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<sup>1</sup> Article 37 of the Constitution stipulates: "The President shall, in accordance with the law, promulgate laws and issue orders [or ordinances] in accordance with the countersignature of the President of the Executive Yuan (hereinafter referred as "Premier") or with the countersignatures of both the Premier and the Ministers or Chairmen of Commissions concerned." This concurring or countersignature power was later curtailed by Article 2, Paragraph 2 of the Constitution Amendments: "Presidential orders to appoint or remove from office the Premier of the Executive Yuan or officials appointed with the confirmation of the Legislative in accordance with the Constitution, and to dissolve the Legislative Yuan, are not required to counter-sign by the Premier. The provision of Article 37 of the Constitution is not applicable in this regard." The purpose of this amendment was to avoid a potential constitution crisis in which a stalemate occur between the President and Premier if and when the President wants to remove or dismiss a Premier or minister but the latter parties refuse to oblige. See also Article 58, Paragraph 2 of the Constitution stipulating the powers reserve to the Executive Yuan.

point of administrative law, even though the Vice President may not be considered as a subordinate to the President, based on the theory of upholding the integrity of each constitutional body, the Vice President should not concurrently be the Premier since he/she already has the duty to counsel the President. In addition, it should be a matter of principle that no two constitutionally created offices may be occupied by the same individual and any exception must be expressly stipulated by the Constitution (as under the U.S. Constitution where the Vice President also serves as President of the Senate). Article 49 of the Constitution and Article 2, Paragraph 8, of the Constitutional Amendments respectively provide: “The Vice President shall succeed in case the office of the President is vacant until the expiration of the original presidential term, in case both the offices of the President and Vice President become vacant, the Premier shall serve as the Acting President [until a new president is elected]; in case the President is incapable of carrying out his/her duties, the Vice President shall act on behalf of the President, in case both

法院同意之院長，已具副總統身分，客體不同，不能以已經立法院同意而延續任職至新總統就任後。綜上所述，副總統兼任行政院院長係屬違憲行為，應由司法院解釋為不得兼任，其已兼任者，應自司法院解釋公布之次日起，於本職與兼職中擇一辭職，未選擇者，視為辭卸本職等語。

the President and Vice President are incapable of discharging their duties, the Premier shall be the Acting President.” That the Constitution respectively institutes the offices of the Vice President and the Premier is a double insurance mechanism designed to safeguard [a smooth] succession of the presidency. If the Vice President were also the Premier, it would not only reduce the number of [possible] successors, but also create a “trinity” situation where a single individual would simultaneously occupy three offices should the office of President become vacant. This naturally would contradict the fundamental principles of the Constitution. If the office of the President is not vacant but the President is incapable of discharging his/her duties, while this “trinity” situation is nevertheless inevitable, it further creates a difficult and [perhaps] irresolvable issue of whether this successor should assume acting status either as Vice President or Premier, and whether the three-month interim term under Article 51 of the Constitution is applicable.<sup>2</sup> [By

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<sup>2</sup> Article 51 of the Constitution provides that the term by which the Premier serves as Acting President shall not exceed three months.

the same token,] in accordance with the Constitutional Amendments, Article 6, Paragraph 5, stipulates the impeachment of the Vice President, whereas the impeachment of the Premier applies the [general] rules governing the impeachment of government employees and the disposition thereof in accordance with the same Article, Paragraph 3, with two distinctively different proceedings and results.<sup>3</sup> Thus, there would be no applicable rules on how the Control Yuan may impeach the Vice President if he/she should also be the Premier while committing impeachable offenses. Conversely, as the

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<sup>3</sup> Note that this Article has since been amended and revised, but the rule and spirit of differentiating presidential and vice presidential impeachment from other types of impeachments (including that of the Premier) remains the same. Before July 21, 1997, the impeachment power of all public officials resides exclusively in the Control Yuan albeit presidential and vice presidential impeachments are subject to different proceedings. As of that date (when the forth Constitution Amendments went into effect), however, the power to impeach the President and Vice President was transferred to and now lies in the hands of the Legislative Yuan. See Article 4, Paragraph 7 of the Constitution Amendments (as of April 25, 2000): "Notwithstanding Articles 90, 100 of the Constitution and Article 7, Paragraph 1 of the Constitution Amendments, the Legislative Yuan's impeachment of the President or the Vice President shall be moved forth by more than one-half, and passed by more than two-thirds of the total members of the Legislative Yuan, before the [Bill of] Impeachment may be submitted to the National Assembly." The Control Yuan, on the other hand, retains power over all other impeachment matters. See Article 7, Paragraph 3 of the Constitution Amendments: "Notwithstanding the restrictions imposed by Article 98 of the Constitution, the Control Yuan's impeachment proceeding against a public official at the central or local government as well as personnel at the Judicial or Examination Yuan shall not be initiated except by the submission of no less than two Ombudsmen, and be reviewed and resolved by no less than nine Ombudsmen."

chief executive of the entire government, if and when the Premier is sanctioned by the Control Yuan due to negligence in discharging his/her duties, or even resigns or is removed from his/her post, it is also questionable whether he/she is still fit for the position of Vice President. Moreover, as the Vice President reports to the National Assembly, once he/she takes the Premier position, he/she is now also required to report to the Legislative Yuan, and thus a conflicting situation would be created if and when the Legislative Yuan and the National Assembly disagree. Furthermore, in addition to the checks and balances among the three or five branches, there is also the presidential power that is over the executive, legislative and judicial power and so forth so that the President and Vice President may be in agreement and coordinate among the five branches with objectivity and neutrality. This [spirit and design] is incorporated into Article 44 of the Constitution.<sup>4</sup> That

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<sup>4</sup> Article 44 of the Constitution states: "In case of disputes between or among different Yuans, except otherwise provided by this Constitution, the President may call forth a conference within which presidents of each respective Yuan shall meet to resolve their disputes." Technically the Constitution authorizes the President to step in and provide Good Offices in resolving a dispute. Whether or not this is a presidential "power" that sits above the checks and balances of different branches, as petitioners argued, is questionable. Also, only the President is given this authority, not the Vice President.

the Vice President concurrently serves as the Premier results in him/her being a [potential] party involved in the dispute, thereby not being able to coordinate that very dispute objectively and neutrally. Finally, based on a series of this Yuan's previous Interpretations, whether occupying two offices should be permitted or prohibited hinges upon whether the nature and scope of their respective duties are compatible or involve any conflicts of interest. The aforementioned [arguments] are sufficient to determine that allowing the Vice President to serve concurrently as Premier violates the conflict of interest rules and is prohibited by the Constitution. (3) There is no customary rule of the Constitution for the Vice President to concurrently be the Premier: Before a [given practice or case] is to acquire the effect of being a constitutional precedent or customary rule of the Constitution, it must be a precedent that is subject to the same recurrence and must create a firm belief among the general populace. Although there were two instances where the Vice President concurrently served as the Premier, both occurred during the

Period of National Mobilization for the Suppression of the Communist Rebellion and the Period of Martial Law and are considered extraordinary with questionable constitutionality. Therefore, they cannot [in any way] be considered constitutional precedents or customary rule. (4)

The new President should not just retain or return the general resignation by the Premier along with the entire Cabinet, but must renominate [them] and seek confirmation by the Legislative Yuan. Under the constitutional framework of the Five Powers Division, there is no subordinate relationship between the President and the Premier. It follows that there is no superior officer available to approve the resignation of the Premier. The Presidential Order for the Premier's Discharge of Duties is only a pro forma matter that carries no substantive powers. When the Premier tenders his or her resignation after the election of a new President, the President must then immediately nominate a new candidate for the Premier position and submit that nomination to the Legislative Yuan for confirmation. While the previous Premier was indeed approved by the



Legislative Yuan, he/she is now in a different capacity as the Vice President and should not use [that previous confirmation] as a justification to continue serving until after the inauguration of the new President. In sum, it is an act that violates the Constitution for the Vice President to serve concurrently as the Premier. Wherefore, [the petitioners plead that] the Judicial Yuan should insert in its Interpretation the language that [the Constitution] does not allow simultaneous and concurrent occupation of both positions and for those who have already done so, they must resign from either one of the positions as of the next day after the issuance of the Interpretation. If and when no choice is made, [under the Constitution] the resignation of the Premiership should be considered effective.

Arguments contained in the aforementioned fourth petition may be summarized as follows: (1) The Legislative Yuan's resolution of June 11, 1996, requesting the President to re-nominate the candidate for the Premier of the Executive Yuan and to submit said re-nomination for

前述第四案聲請人及關係機關行政院主張略稱：一、立法院於八十五年六月十一日通過咨請總統儘速重新提名行政院院長，並咨請立法院同意決議案，逾越權限對總統不具拘束力：憲法對行政院院長並無任期之設，只規定由總統提名，立法院同意任命，依司法院

for the Legislative Yuan's confirmation as soon as possible exceeded its [constitutional] authority and had no binding force over the President. The Constitution sets no provision on the term of the Premier of the Executive Yuan but only provides that he/she is to be nominated by the President and approved by the Legislative Yuan. In accordance with Judicial Yuan Interpretation No.387, the Premier should resign before the first session of the newly elected members of the Legislative Yuan. The incumbent Premier, Mr. Lien Chan, had already tendered the general resignation on January 25, 1996, was [then] nominated by the President and approved by the Legislative Yuan to begin his second tenure as the Premier. This is in conformity with the Constitution. Hence, before the Legislative Yuan is re-elected, the President does not have any obligation to renominate nor is there any need for the Legislative Yuan to reapprove the appointment. Furthermore, in accordance with Article 57 of the Constitution, it is the Premier who is responsible to the Legislative Yuan, not the President; the Legislative Yuan cannot supervise the Presi-

釋字第三八七號解釋，立法委員任期屆滿改選後第一次集會前，行政院院長應行辭職，現任行政院連院長已於八十五年一月二十五日提出總辭，並經總統提名，獲立法院同意，重新出任行政院院長，符合憲政體制。在立法院未改選前，總統自無再提名之義務，更不生又咨請同意之問題。況依憲法第五十七條之規定，對立法院負責者為行政院而非總統，立法院不能越權監督總統。又依憲法相關規定，立法院尚無以決議方式，要求總統為一定行為之權限。憲法第六十三條雖規定立法院有議決法律案、預算案、戒嚴案、大赦案、宣戰案、媾和案、條約案及國家其他重要事項之權，惟立法院前述決議既非此所謂國家重要事項，又非以三讀程序通過之法律案，不具拘束力，應無疑義。二、副總統兼任行政院院長乃高度政治性之問題：政治問題或統治行為應由憲法所設計之政治部門即政府與國會自行解決，司法機關不宜介入，乃各國之通例，司法院釋字第三二八號解釋亦將政治問題排除於司法審查之外。惟司法院大法官之解釋具有定分止爭之功能，無論作成解釋或認為屬於政治問題不加解釋，仍屬司法裁量事項，本件關係機關皆予以尊重。三、副總統兼任行政院院

dent without exceeding its power. Also, under various provisions of the Constitution, there is no power granted to the Legislative Yuan to require the President to conduct a certain act by the passage of a resolution. While Article 63 of the Constitution authorizes the Legislative Yuan with the power to decide by resolution upon statutory and budgetary bills, bills on martial law, amnesty, declaration of war, conclusion of peace or treaties and other important affairs of the State, it is unquestionable that the aforementioned resolution does not have any binding effect since it constitutes neither other important affairs of the State nor bills of act that require the process of Three Readings. (2) That the Vice President concurrently serves as the Premier is a highly political question. It is a common practice among all nations that political questions or acts of governing should be resolved between the political departments themselves, i.e., the executive and parliament, under the architecture of the Constitution, and it is inappropriate for the judicial branch to intervene. The Judicial Yuan Interpretation No.328 also excludes po-

長現行憲法並未禁止，二者職務並具有相容性：自民國二十五年國民政府公布之「五五憲草」，經政治協商會議以迄制憲國民大會，所討論者為總統與行政院院長兩職位之互動，均未涉及副總統，蓋副總統僅係備位性質，兼任行政院院長，從制憲過程而言，並無禁止之意。查大法官歷來對憲法或法律上職務得否兼任之解釋，主要基於職務性質及功能是否相容或有無利益衝突，就此項標準而言，副總統純係備位，平日並無具體之法定職權，故不發生與行政院院長職務性質功能不相容或利益衝突之情形。按我國憲政體制非純粹內閣制，行政院院長之副署權與內閣制國家閣揆副署虛位元首公布法令者不同，我國憲法上真正之制衡機制，乃在於行政院對立法院之關係，而由副總統兼任行政院院長亦不致破壞憲法制衡機制之設計。又依憲法增修條文第二條第一項及總統副總統選舉罷免法之規定，總統副總統同為人民選舉產生，既非由總統任命，亦不得由總統免職。總統與副總統之一體性僅係競選夥伴之「一體性」，並無職權分享之「一體性」，總統與副總統兩者之間並不具有上命下從或指揮監督之長官與部屬關係，憲法有關總統刑事豁免權之規定於副總統並不適用；憲法及

litical questions from the jurisdiction of judicial review. Yet [recognizing that] it is the very function of the Interpretations by the Grand Justices of the Judicial Yuan to settle a given controversy or dispute, it is nevertheless a matter of judicial discretion, and the related [executive] agencies must give their due respect [to the exercise of such discretion], whether an Interpretation shall be rendered or not due to its [nature] being a political question. (3) The current Constitution does not prohibit the Vice President from serving concurrently as Premier of the Executive Yuan, and the duties of the two offices are compatible: From the “May 5th Constitution Draft” issued by the Nationalist Government in 1936 through the Political Consultative Conference and the Constitution Conference of the National Assembly, the discussions [always revolved around] the interactions between the President and the Premier, and never touched upon the position of the Vice President, since it is only a standby position and as far as the legislative history of the Constitution is concerned, there was never a prohibition against [the Vice President] serving con-

法律（中華民國總統府組織法）均未提及副總統行使職權之事項，亦無如一般行政機關副首長輔助首長處理事務之規定，是以副總統兼任行政院院長即非兼具「聽命者」與「制衡者」之角色，故不可能造成憲政上角色衝突問題。至反對兼任者所持兼任在總統缺位或不能視事時，將造成職位重疊問題，已有解決方法，因為副總統兼任行政院院長如遇總統缺位時，依憲法第四十九條規定由副總統繼任總統，所兼任之行政院院長，則可由其以總統身分向立法院提名新院長人選，副總統則依增修條文第二條第七項辦理補選。在未提名或補選之前，固有可能出現所謂「三位一體」之現象，惟此一情形與總統副總統均缺位時，由行政院院長代行其職務三個月，並無二致，後者既為憲法所許，則依同一法理，前者亦應無不許之理。而關於總統不能視事時之代行職務，根據上述處理程序亦非不能解決。又主張副總統不得兼任行政院院長者，認為兼任一旦有違法失職情形，造成監察院行使彈劾權之窒礙，或者出現院與院間爭執須引用憲法第四十四條由總統協調處理時，將引起角色混淆。實則若行政院院長由副總統兼任，遇有彈劾案發生，如係對職務行為違法失職之彈劾，自可視案件

currently as the Premier. In all of the Grand Justices' Interpretations concerning whether [an individual] may hold more than one office either under the Constitution or under law, the standard has been whether the nature and function of the duties discharged are compatible with each other or whether there is any conflict of interest. Based upon such standard, the position of the Vice President is purely on a standby basis which does not carry any substantive, legally discharged duties; thus, under no circumstances is it not compatible or in conflict with the nature and duties of the Premier of the Executive Yuan. Because the constitutional design of this nation is not that of a pure cabinet system, the countersignature power bestowed on the Premier is different from that of those countries adopting the cabinet system in which the Prime Minister countersigns with the figurehead of the state in order to promulgate a given law.<sup>5</sup> The real check-and-balance mechanism

性質究與行政院院長或副總統有關，而決定應採何一程序，如係對非職務行為（如私德不檢）之彈劾，則可由監察院決定採何種程序，在運作上不致有窒礙之處。關於憲法第四十四條協調權之規定，依憲法規定意旨係由總統居於超然地位行使，在總統未缺位時，副總統並無憲法上之職權主動介入協調院際紛爭，不致產生「協調者」與「被協調者」之矛盾。總統對有關行政院與其他院之紛爭，本可自行處理，亦可授權副總統或其他適當人員為之，在副總統兼任行政院院長之情形，總統自不宜授權副總統為之，亦可避免角色衝突。四、副總統兼任行政院院長我國已有先例存在，衡諸外國立法例此項兼任亦不違反相容性：行憲以來，迄今有兩位副總統兼任行政院院長，即陳誠自四十七年七月至五十二年十二月；嚴家淦自五十五年五月至六十一年五月，前後達十一年，並無窒礙難行之處，此二先例雖在動員戡亂時期，但當時憲法與目前憲法有關總統與副總統之關係及副總統備位性質之規定，並無變更，自可作為先例

<sup>5</sup> See supra note 1. The term "cabinet system" used in this context should in fact be in reference to the parliamentary system, with the United Kingdom's constitutional practices being the leading example.

under this nation's Constitution lies within the relationship between the Executive and the Legislative Yuan. Having the Vice President also serve as the Premier would not in anyway mar the design of this check-and-balance mechanism. Furthermore, in accordance with Article 2, Paragraph 1, of the Constitution Amendments and the Presidential and Vice Presidential Election and Recall Act, the Vice President is elected by the people as the President; he/she is neither appointed nor can he/she be discharged by the President. The President and Vice President are on the same ticket as election partners, but [otherwise] they do not share the same duties. There is no superior or subordinate relationship between the President and the Vice President. The provision concerning presidential immunity from criminal prosecution does not apply to the Vice President.<sup>6</sup> Neither the Constitution nor the law (the Organic Act of the Presidential Office of the Republic of China) mention the duties discharged to

而援引。再者，我國憲法既非純內閣制亦非純總統制，在比較憲法中可資援用之例尚不多見，唯一可供參考者，即美國副總統之兼任參議院議長，蓋美國憲法嚴格區分行政權與立法權，仍容許跨行政部門兼任立法部門之職位，可見備位性質之副總統兼任其他有實權職務，仍具相當彈性。五、新任總統就職時，行政院院長提出總辭，總統自得予以慰留：自司法院釋字第三八七號解釋作成後，行政院院長應於立法委員任期屆滿改選後第一次集會前提出總辭，乃新的憲政制度，連院長八十五年一月二十五日即係基於憲法義務之辭職。而目前憲法規定，總統任期與立法委員互有參差，李總統當選就任後，連院長所提出辭職，則屬基於政治倫理所為之禮貌性辭職，接受與否、「重提原任」或「另提新人」乃總統依其職權而為之政治權衡。至於所謂立法院八十五年二月時所同意者為「未兼任副總統的行政院院長」，或「總統宣稱不續任的過渡行政院院長」，如今立法院所同意之對象已有不同，應依憲法規定重新行使同意權一節，惟查立法院對總統所提行政院院

<sup>6</sup> Article 52 of the Constitution states, "With the exception of act of rebellion or treason and without being recalled or discharged, the President shall be immune from criminal prosecution and liability."

the Vice President, nor are there any regulations similar to those of an executive department [or agency] on how a deputy assists the affairs of the chief. As a result, being the Premier [concurrently] does not put the Vice President in the double role of obeying the President and trying to check and balance the powers [of the President] at the same time, and, therefore, cannot possibly create an issue of constitutional conflict of roles. With regard to the opposition's argument that allowing concurrent and simultaneous occupation will cause an overlay of duties in case the office of the President becomes vacant, there is already a solution. In that situation, the Vice President shall succeed to the presidency in accordance with Article 49 of the Constitution. As far as the premiership is concerned, as the new President, he/she can nominate a new candidate for the Premier position and submit said nomination to the Legislative Yuan for confirmation. The vacancy of the Vice Presidential office [created by the succession] will be filled by the make-up election in accordance with Article 2, Paragraph 7, of the Constitutional

長人選行使同意權，即係針對人選之適任性作出決定，當然並未附任何條件限制，故無所謂對象或內涵改變問題，行使同意權之立法委員仍屬同屆，其席次結構未變，行使同意權之對象又為同一，即無重複行使之必要等語。

Amendments. While there is a possibility that a so called “trinity” situation may occur, it would be no different from the situation where the Premier serves as Acting President for no more than three months in case both the President and the Vice President should be unable to attend to office.<sup>7</sup> Given that the latter [scenario] is sanctioned by the Constitution, by the same rule, there is no reason why the former is not permitted. There is no reason why the above procedure cannot be used as well to resolve the situation where the President is unable to attend to office due to any cause. Moreover, those who oppose the Vice President serving [concurrently] as the Premier argue that it will cause great difficulties and obstacles for the Control Yuan in carrying out its duties in the event an impeachable offense may have been committed, or cause role confusion in the event the President should need to coordinate and settle a dispute between different Yuans in accordance with Article 44 of the Constitution. Yet in

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<sup>7</sup> See Article 2, Paragraphs 7 and 8 of the Constitution Amendments. Under the current system, these provisions suspend Article 49 of the Constitution concerning presidential and vice presidential succession.



a given impeachment for neglect of duties or violation of law, which procedure should be applied depends upon the nature of the case, i.e., whether it relates to carrying out duties as the Vice President or the Premier; for impeachment not related to carrying out duties (such as moral turpitude), the Control Yuan shall decide which procedure is to apply. Thus, there should not be any difficulties or obstacles [in this regard]. With regard to the coordination power under Article 44 of the Constitution, the purpose of the Constitution is to place the President in a neutral position to carry out that duty. Thus, when the office of the President is not vacant, the Vice President does not have any constitutional authority to engage actively in settling the disputes among Yuans at his/her own initiative, and thus does not create a contradiction of being the coordinator and the coordinated. While the President may delegate the Vice President or other proper personnel to coordinate and settle a dispute between the Executive Yuan and other Yuans, this apparently is not appropriate and the President should not delegate the Vice President such authority in

the event the Vice President also serves as the Premier so that conflict of roles can be avoided. (4) There are precedents where the Vice President serves as the Premier; there is no violation of compatibility standard by reference to examples of other nations: To date, two Vice Presidents have also served as the Premier since the promulgation of the Constitution: [Mr.] Chen Cheng from July 1958 to December 1963 and [Mr.] Yen Chia-kang from May 1966 to May 1972 (for a total of eleven years) which caused no difficulties or obstacles [in executing the Constitution]. Although these two examples took place during the Period of National Mobilization for the Suppression of the Communist Rebellion, they can nevertheless be considered precedents since there has been no change in the Constitution concerning the relationship between the President and the Vice President as well as the standby nature of the Vice President. Moreover, since our Constitution adopts neither a pure cabinet nor a pure presidential system, from a comparative constitutional point of view, there are not many cases that can be made reference to

in this situation. The only reference that can be found is the United States, where the Vice President also serves as the President of the Senate. While the U.S. Constitution strictly distinguishes the executive power from the legislative power, it nevertheless permits a crossover position from the executive branch to the legislature. It illustrates that there remains certain flexibility for a standby Vice President to also occupy a position that carries substantive power. (5) The President can naturally retain the Cabinet in response to the Premier's general resignation of his/her entire Cabinet at the time the new President is inaugurated. Ever since the Judicial Yuan's Interpretation No.387, the new constitution system has required that the Premier submit a general resignation [on behalf of the entire Cabinet] before the newly elected members of the Legislative Yuan convene their first session. The resignation tendered by Premier Lien on January 25, 1996, was to fulfill this constitutional obligation. However, since the terms of the President and members of the Legislative Yuan are staggered under the current Constitution,

Premier Lien's [second] resignation after President Lee was re-elected was a political courtesy. Whether the President accepts the resignation, renominates the incumbent, or nominates a new candidate is a matter of political consideration within the President's discretion and power. [The opposition] claims that because the candidate approved [for the Premier position] by the Legislative Yuan in February 1996 was "a Premier who has not taken up the position of Vice President," or "an interim Premier whom the President declared would not be reappointed," now that circumstances have changed, [the current nomination, in fact] involves a change of target and the reappointment should be subject to the Legislative Yuan's reconfirmation under the Constitution. However, the confirmation process conducted by the Legislative Yuan is to review and decide on a given nominee's qualification without any strings or conditions attached; therefore, there is no such issue of the so-called change of target or contents. Given the fact that the same composition of the Legislative Yuan still exists from the same election cycle with the same nomi-

nee, there is indeed no need to repeat the same confirmation process.

Having considered the overall arguments, this Interpretation is rendered with the following rationale:

#### I.

The pre-determinative factor in resolving the issue of whether the Vice President may [concurrently] hold the office of Premier of the Executive Yuan is whether it is a political question. A political question is a doctrine developed from and enlarged by the practices of [many] constitutional democracies, with volumes of references available. Issues involving a political question or its similar concept (such as an act of governing or governmental action) should be left for political consideration by the constitutionally created political branches (including the executive and legislative branches), not for judicial review. Interpretation No.328 of this Yuan set a precedent that the definition of existing national territorial boundaries under Article 4 of the Constitution is a matter of major political question, which shall not be interpreted by the Constitu-

本件斟酌全辯論意旨，作成本解釋，其理由如左：

#### 一

副總統得否兼任行政院院長之疑義是否屬於政治問題，乃本件解釋關於兼職合憲性之先決事項。按政治問題或類似之概念（如統治行為或政府行為）所指涉之問題，應由憲法上之政治部門（包括行政及立法部門）作政治之判斷，而非屬可供司法裁決之事項，此在立憲民主國家之憲政實踐中，所累積發展而成之理論，不乏可供參考者，本院釋字第三二八號解釋亦有關於憲法第四條所稱固有疆域範圍之界定，係屬重大關予以解釋之案例。惟就副總統兼任行政治問題，不應由行使司法權之釋憲機政院院長之違憲疑義而言，係屬二項憲法職位互相兼任時，是否牴觸憲法之法律問題，並非涉及政治上之人事安排，揆諸本院歷來對憲法上職位兼任所作之諸多解釋（例如釋字第一號、第十五號、第十七號、第二十號、第三十號、第七十四號、第七十五號及第二〇七號等），本件關於副總統兼任行政院院長

tional Interpretation agency [or institution] in the course of executing its judicial authority. Yet the constitutionality of whether the Vice President may [concurrently] serve as Premier is a question of law concerning the validity of holding more than one public office under the Constitution, which does not involve political appointment. Historically, this Yuan has rendered many Interpretations regarding the issue of [having an individual] hold more than one office under the Constitution (See Interpretations Nos. 1, 15, 17, 20, 30, 74, 75 and 207 for other instances). The constitutional question concerning the Vice President's concurrently serving as the Premier in this petition, therefore, cannot avoid substantive judicial review [merely] by a claim for it under the category of political question or a similar concept. [This Yuan] takes the petition's position that it is not a political question.

The constitutional convention always plays a critical role in countries that do not have a written constitution and its effect is beyond question. While the concept

之憲法疑義部分，尚不能以政治問題或類似概念為由，不為實體之解釋。聲請意旨主張前述兼職非屬政治問題，自屬可採。

憲政慣例在不成文憲法國家，恆居重要地位，其規範效力亦不容置疑。至於在成文憲法之下，雖亦有憲政慣例之概念，但僅具補充成文憲法之作用，

of a constitutional convention also exists in countries that do have a written constitution, it is only complementary to the written constitution, and its importance is not comparable to the former. A customary rule is a recurring practice that is followed or abided by over a long period of time, thereby acquiring binding effect. Even though there may be precedents to a given act or practice, an act or a practice does not acquire the status of a customary rule as long as there are contradictory precedents or suspicions that it may have violated the written laws so that its binding effect is in question. In the present case, although there were two instances in which the Vice President also served as Premier, there was also a precedent whereby [an individual] immediately resigned from the Premier position after being elected as the Vice President. While there is a controversy on the constitutionality of this circumstance, based upon the above illustration, [those precedents] certainly cannot be deemed as taking a binding effect as a customary rule under our Constitution.

尚不能與前者相提並論。所謂慣例係指反覆發生之慣行，其經歷長久時間仍受遵循，而被確信具有拘束行為之效力時，始屬不成文規範之一種。若雖有行為之先例，但因亦曾出現相反之先例或因有牴觸成文規範之嫌，拘束力備受質疑者，即不能認其為具備規範效力之慣例。本件副總統兼任行政院院長，以往雖有二例，然亦有因當選副總統而立即辭卸行政院院長之一例，況此種兼任是否牴觸憲法，既有爭論，依上開說明，自不能認已成為我國之憲政慣例而發生規範效力。

On the issue of whether occupying two [public] positions [concurrently] is permitted under the Constitution, if and when the Constitution expressly prohibits [such an act], that prohibition obviously must be obeyed; for example, Articles 75 and 103 of the Constitution restricting members of the Legislative and Control Yuans from holding other [public] positions. In addition, [even if the Constitution is silent,] this prohibition also applies when the two positions are not compatible with each other. This Yuan has on several occasions interpreted this rule (See Interpretations Nos. 20, 30 and 207 cited above). While the Constitution is silent on whether the Vice President may [concurrently] serve as the Premier and there is no expressed prohibition, the critical issue is the compatibility of the two positions. Incompatibility means occupying both positions would violate the fundamental principles of a constitutional democracy or create the concern of conflict of interest. Since the United States ordained its constitution in 1878, a fundamental principle has been a strict check-and- balance system among the three [political] powers.

關於憲法上職位兼任是否容許，憲法有明文禁止兼任者當然應予遵守，如憲法第七十五條及第一百零三條之立法委員及監察委員兼職限制之情形是；此外，若兩種職務確屬不相容者亦不得兼任，迭經本院前引釋字第二十號、第三十號、第二〇七號等著有解釋。副總統得否兼任行政院院長憲法未作任何規定，自無明文禁止可言，故本件所涉者要在兩種職務兼任之相容性問題。按所謂不具相容性，係指憲法上職位兼任違反憲政之基本原理或兼任有形成利益衝突之虞而言。自從一七八七年美國聯邦憲法採嚴格之三權分立為其制憲之基本原則，以及法國一七八九年人權宣言第十六條揭櫫：「任何社會中，未貫徹權利保障，亦無明確之權力分立者，即無憲法。」以還，立憲民主國家，莫不奉任是否相容，首應以有無違反權力分立權力分立為主臬，故就憲法上職位之兼之原則為斷。一旦違反權力分立原則，除非憲法設有例外之規定（例如美國副總統之兼為參議院議長、內閣制國家之議員得兼任閣員），否則即屬違憲行為。依權力分立原則所區分之各個權力範圍（如立法部門、行政部門及司法部門），若因部門內之權限，依憲法之設計，必須由兩個機關不同之構成員分別



In France, Article 16 of the 1789 Declaration of the Rights of Man and of the Citizens proclaimed, “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”<sup>8</sup> Ever since then, there has not been any country with a constitutional democracy that does not regard the check and balance of powers as the paradigm. Therefore, whether the two constitutional positions are compatible first hinges upon whether the principle of the check and balance of powers is violated. Once it is, unless the Constitution provides exceptions (such as the Vice President also serves as President of the Senate under the U.S. Constitution<sup>9</sup> or a member of the Parliament may serve as a member of the Cabinet in a cabinet system), such act is deemed unconstitutional. By the very design of the Constitution, if and when the discharge of a certain duty within each power branch (such as the executive, legislative and judicial branches) under the principle of the check

行使者，亦在不得兼任之列，例如採兩院制之國會，其法案通過須分別經兩院議決，如由一人同時擔任兩院之議員，則與憲法將立法權分由兩院行使之本旨不符，其兼任自亦非憲法之所許，本院釋字第三十號解釋以「若立法委員得兼國民大會代表，是以一人而兼具提案與複決兩種性質不相容之職務」為由，認立法委員不得兼任國民大會代表，即係本於同一意旨。又如在行政權範疇之內，國家元首與閣揆或閣員間職務相容性問題，則端視各國政制而定：在採內閣制之國家或雙首長制之國家，基於元首與閣揆間制衡之機制，一人當然不得同時兼任；在總統制國家（如美國及中南美諸國），通常國家元首即為最高行政首長，並無閣揆之設置，總統兼閣員（部長）固鮮有其例，但副總統則常兼任部長（如哥斯大黎加、巴拿馬等）；再如一般稱為委員制之瑞士，其行政部門聯邦委員會(Conseil Federal, Bundesrat)，有部長七名，總統及副總統均由部長輪替兼任，蓋均祇涉及行政權之內部分工，而於權力分立之基本原則無違，自亦不生牴觸憲法問題。若就中央

<sup>8</sup> Text of English translation is based on MILTON VIORST, THE GREAT DOCUMENTS OF WESTERN CIVILIZATION, at 192 (1965).

<sup>9</sup> See Article 1, Section 3, Clause 4 of the U.S. Constitution.

and balance of powers must be carried out by different members of two agencies, no individual can then hold both offices. For example, for a congress that adopts two houses, each bill must pass both to be enacted into law. [As a result,] no individual may serve as a member of both houses [under the U. S. Constitution] because that does not comply with the fundamental principle of dividing the power of the legislature into two departments.<sup>10</sup> Based upon the same reason, in our Interpretation No. 30, [we held that] members of the Legislative Yuan may not also serve as members of the National Assembly for the reason that “if a member of the Legislative Yuan may also serve as a member of the National Assembly, it is [as if] accu-

與地方之分權而論，更非所謂一遇職位互兼即為法所不許，以法國為例，內閣總理或部長兼任市長或其他地方民選職位，亦非罕見。我國中央政制與前述各種制度均不盡相同，但於權力分立原則之堅持則不遜於其他各國，司法、考試及監察三權各自獨立行使職權，固無疑義。行政權與立法權亦截然劃分，並使其成員不得互兼，此為憲法第七十五條立法委員不得兼任官吏之所由設。而憲法對總統及副總統均缺位，或任期屆滿尚未選出，或選出後總統、副總統均未就職之情形，明定由行政院院長代行總統職權，其期限為三個月（憲法增修條文第二條第八項、憲法第五十條、第五十一條），未如其他國家之憲法對總統或副總統均缺位時由國會議長繼任（如美國、法國第五共和及義大利等），或

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<sup>10</sup> Article 1, Section 6, Clause 2 of the U.S. Constitution provides, “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, ... and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” Prohibition of this clause against any senator or congressman being appointed to any civil office during the senator’s or representative tenure and against any person holding any office under the United States being a member of either House was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public officers for the benefit of its own members, not so much on the principle of check and balance of powers. *Atkins v. United States*, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). Note that technically, neither the U.S. Constitution itself nor congressional acts provide any express restrictions against a member of the Senate from being a member of the House of Representatives, and vice versa.

ing the power of [constitution and bill] proposition and referendum, two incompatible duties, in one person.” Also, in the scope of executive power, each nation enacts its own laws in dealing with the compatibility issue between the head of state and the prime minister or members of the cabinet based upon its individual political system. In countries that adopt the cabinet or dual-leadership system, the same individual obviously cannot be in both positions because of the need of the check and balance of powers between the head of state and the prime minister. In countries that adopt the presidential system (such as the United States and many countries in Latin America), there is no installation of a prime minister [or Principal Officer of the Cabinet]; the head of state is normally also the highest executive officer. Rarely have there been cases in which the President also serves as a member of the cabinet (or minister), yet the Vice President often serves as a minister [of some sort] (such as in Costa Rica and Panama). In Switzerland, which adopts what is generally known as the council system, its Federal Council (Con-

甚至規定最高司法機關首長亦得代理總統（如一九八八年十月五日之巴西憲法），蓋嚴守權力分立原則，屬於行政權體系內之權限行使，應由行政體系內輪替，不採制憲過程中由五院院長依次代理總統之建議。我國憲法規定行政院院長由總統提名經立法院同意任命之（第五十五條第一項），行政院對立法院決議之事項移請覆議時，須經總統之核可（第五十七條第二款及第三款），總統公布法律、發布命令須經行政院院長之副署，其屬緊急命令者尚須經行政院會議之通過（憲法第三十七條、增修條文第二條第四項），而行政院無論學理上及實際上皆係由院長主導之獨任制官署，論者以總統與行政院院長兩種職位互有制衡之作用，非無理由。是總統與行政院院長不得由一人兼任，其理甚明。副總統為總統之備位，若由副總統兼任司法、考試或監察三院之院長，其違反五權分立原則而為憲法所不許，實毋庸辭費。至於副總統兼任行政院院長則既不生顯然牴觸權力分立原則之問題，自難從權力分立之觀點遽認其為違憲。

seil Federal or Bundesrat) consists of seven ministers and the Offices of the President and Vice President of the Confederation are rotated among those ministers. Since this [rotation] only concerns the internal division of executive duties, it does not violate the basic principle of the check and balance of powers and naturally does not give rise to the issue of constitutionality.<sup>11</sup> As far as the separation of powers between the central and local government is concerned, there is no such thing as illegality per se in any case of holding two offices. For example, it is not unusual to have the Prime Minister of the Cabinet or a minister also serve as mayor or in other elected offices in France. Our central government system is not exactly the same as any one of the abovementioned systems, yet the insistence upon the principle of the check and balance of powers is [certainly] no less than in other countries. There is no question that the

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<sup>11</sup> The executive power rests in most part in the Federal Chancellery (Bundeskanzlei or Chancellerie fédérale), with the Federal Chancellor being its chief executive officer. With regard to the Federal Council, its councilors are elected every four years by the Federal Assembly (the two Houses united in a plenary session). The main task of the President of the Confederation is to preside over the Council's meeting and to represent the Confederation as its head of state. For details, see Parliament of Switzerland, at <http://www.parlament.ch/poly/Framesets/E/Frame-E.htm>.

legislative, examination and control powers are independently executed. Even the executive and legislative powers are distinctly separate with members of one [branch] not permitted to serve in the other one, and this is the purpose of Article 75 of the Constitution, which prohibits any member of the Legislative Yuan from concurrently serving in the Executive Yuan. Unlike the constitutions of other countries that require the Speaker of the Parliament to succeed [the president] in case the offices of both the President and Vice President become vacant (such as the United States, the French Fifth Republic, and Italy), or the highest official of the judicial branch to serve as Acting President (such as in Brazil's Constitution of October 5, 1988), [our] Constitution provides that the Premier shall act as the President for a term of [no more than] three months in case the offices of both the President and the Vice President become vacant, or the President and Vice President have not yet been elected when the term [of the previous incumbent] expires, or have been elected but not yet inaugurated (Article 2, Paragraph 8, of the

Constitutional Amendments; Articles 50 and 51 of the Constitution). By strictly adhering to the principle of the check and balance of powers, the discharging of powers within the executive branch ought to be rotated within that branch, and the proposal during the enactment of the Constitution that the position of Acting President be rotated among the chiefs of the Yuans was not adopted. Our Constitution provides that the Premier shall be nominated by the President and approved [or confirmed] by the Legislative Yuan (Article 55, Paragraph 1),<sup>12</sup> that presidential approval is required before the Premier should resubmit a given resolution [already enacted] by the Legislative Yuan for reconsideration (Article 57, Subparagraphs 2 and 3),<sup>13</sup> that the Premier's coun-

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<sup>12</sup> As of July 21, 1997, as a result of the fourth constitution amendment, however, the Premier is directly appointed by the President and no longer subject to the confirmation of the Legislative Yuan. See Article 3, Paragraph 1 of the Constitution Amendments.

<sup>13</sup> This in effect amounts to an executive veto power. Under the same provision, the Legislative Yuan may convene itself and override a given veto with more than 1/2 of the total member votes within 15 days since the day the session begins (in the euphemism "reconsideration") or the veto stands. When the veto is in fact overridden, the Premier must either abide by it or resign from office. See Article 3, Paragraph 2, Subparagraph 2 of the Constitution Amendments. If the Premier chooses to do neither, the Legislative Yuan may, within the strict time frame imposed in the Constitution and with more than half of the entire votes, enact a bill of no confidence. When that happens, either the Premier must leave office within ten days or the President may disband the Legislative Yuan. See *id.*, Subparagraph 3 and Article 2, Paragraph 5.

tersignature is necessary before the President may promulgate a law or issue an [executive] order; that, if in the form of an emergency order, even the approval of the Cabinet Meeting is required (Article 37 of the Constitution; Article 2, Paragraph 4, of the Constitution Amendments), and that either in theory or in practice, the Executive Yuan is an office under the sole leadership of the Premier.<sup>14</sup> Therefore, it is not without reason that there is a certain check-and-balance function between the President and the Premier, and clearly the Offices of the President and the Premier cannot be occupied by the same person. The Vice President is in a standby position for the President; thus, suffice it to say that it would be a violation of the Principle of the Five Powers Division and unconstitutional if and when the Vice President should also serve as the chief of the Judicial, Examination or Control Yuan. However, given that there may not necessarily be an obvious contradiction to

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<sup>14</sup> Ever since the implementation of the Constitution, this power has been more or less a “window dresser.” Now that the Premier is directly appointed by the President, it is likely that the power of countersign is all but a mere formality given the Premier now serves strictly at the pleasure of the President.

the Principle of the Five Powers Division if the Vice President were to serve as the Premier, it is indeed difficult to abruptly consider that unconstitutional from the point of check and balance.

The next issue that must be examined is whether there is any division of duties between the Vice President and the Premier and whether there exists a function of check and balance or conflict of interest between the two. From the drafters of the Draft Constitution issued on May 5, 1936, (commonly known as the May 5th [or Double Fifth] Constitution Draft) to the National Assembly that ordained the current Constitution, the purpose and function of the installation of the Vice President was always to succeed the President in case that office became vacant, or to serve as Acting President in order to carry out its duties only. There were no other powers and duties [bestowed] on the Vice President under ordinary circumstances. The legislative history is not only evidenced by the related documents concerning the history of the Constitution but also confirmed in the

其次應審究者，乃副總統與行政院院長有無職權分工，二者之間是否亦存在制衡作用或利益衝突之情事。查自民國二十五年五月五日公布之中華民國憲法草案（俗稱五五憲草）之起草者，以迄制定現行憲法之國民大會，其設置副總統之目的及功能，皆係本於總統缺位時繼任總統，或總統因故不能視事時代行總統職權而已。除此之外，平時別無其他職權，經過情形不僅有相關制憲資料可供參證，亦為聲請人立法委員張俊雄等於八十五年六月十五日提出之釋憲理由書所是認。制憲者之原意乃表現為憲法第四十九條之規定：總統缺位時，由副總統繼任至總統任期屆滿為止；總統因故不能視事時，由副總統代行其職權。除本條之外，未見關於副總統職掌及地位之規定，現行法律除國家安全會議組織法第三條及第四條規定副總統與五院院長等同為國家安全會議之組成人員，以及總統不能出席時由副總統代理外，亦未賦予副總統任何權限。



Petition for Constitutional Interpretation of June 15, 1996, submitted by Chang Chun-hsiung, a member of the Legislative Yuan.<sup>15</sup> The original intent of the Constitution's drafters is illustrated in Article 49 of the Constitution: "In case the office of the President should become vacant, the Vice President shall succeed until the expiration of the original presidential term. In case the President should be unable to attend to office in due cause, the Vice President shall be the Acting President."<sup>16</sup> There are no rules [under the Constitution] on the powers, duties, and status of the Vice President other than this provision, and except for Articles 3 and 4 of the Organic Act of the National Security Council which provides that the Vice President and the heads of all Five Yuans shall be members of the National Security Council and the Vice President shall be

故在法定職權上，副總統與行政院院長並無分工之關係，亦無任何制衡作用或利益衝突之可言，與前述國民大會代表與立法委員、總統與行政院院長法定職權即已存有不能相容或角色混淆之情形，其間尚有其差異。副總統既為備位而設，於上開繼位或代行外，未有具體職權，則所謂兼任行政院院長將發生處理公務時間分配問題或有損公益及人民信賴，尚非確論。

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<sup>15</sup> Mr. Chang is affiliated with the Democratic Progressive Party, then the opposition party to the rule of the Nationalist Party (Kuomintang or KMT). He and several other members of his party filed the petition primarily as a challenge to the KMT authority. Ironically, after DPP came into power, Mr. Chang was appointed by President Chen Shui-bian first as Chen's Chief of Staff, then Vice Premier and eventually the Premier, to begin on October 11, 2000. See OFFICIAL GAZETTE OF THE OFFICE OF THE PRESIDENT, Issue No. 6361, October 11, 2001.

<sup>16</sup> See *supra* note 7.

the Acting Chairperson in case the President cannot preside over the Council meetings, there is no power authorized to the Vice President under existing statutes. Therefore, from the viewpoint of legal authority, there are no relations between the two on the division of duties, nor can it be said that there is any check-and-balance function or conflict of interest. This is different from the aforementioned situation where respective legal authority, either between members of the National Assembly and the Legislative Yuan or between the President and the Premier, is incompatible or causes role confusion. Concerning the backup position which possesses no substantive power except in the case of succession or acting, it is unfounded to claim that concurrent service as the Premier would cause a problem of distribution of work time and damage to the public interests and trust.

As indicated above, although he/she has no substantive and concrete authority under the Constitution, the Vice President [nevertheless] enjoys a prestigious status and naturally possesses a certain political

副總統地位崇隆，在政治上自有其影響力，但憲法上並無具體職權，已如前述。在未依憲法繼任總統或代行總統職權時，若行使任何屬於總統之憲法上權力，即屬於法無據。與一般行政機

influence. If [the Vice President were to] carry out any constitutional power reserved for the President before succession or acting status were to take place in accordance with the Constitution, such an act would be deemed legally groundless. This is not to be compared with the fact that a deputy chief in an administrative agency should, in accordance with the written or unwritten rules and as a matter of course, assist the chief in that agency's affairs. In fact, there have never been instances where the Vice President has been authorized to carry out powers reserved expressly for the President under Articles 35 to 44 of the Constitution even when the Office of the President was not vacant or the President could not attend to that office. Based upon a relationship of trust, the Vice President may inevitably play several ad hoc or ceremonial roles in carrying out certain missions; however, these are not to be considered as the legal duties of the Vice President in assisting the President. Thus, this most certainly is not to be treated as the equivalent of the legal relationship between the chief and deputy chief in an administrative agency. It fol-

關之副首長依成文或不成文規範，當然有輔助該機關首長處理事務者不能同日而語。實際上，我國亦從無副總統在總統未缺位或不能視事時，經授權行使憲法第三十五條至第四十四條或其他憲法上明定屬於總統之權限。副總統在備位之餘雖不免基於總統之信任關係，擔任若干臨時性或禮儀性之任務，但皆非可視為副總統有襄助總統之法定職權，與法律關係，尚不能等同視之。職是之一般機關首長與副首長在行政組織上之故，平時總統在位亦無不能視事之情形時，由副總統兼任行政院院長並不發生二者職務上之利益衝突。又副總統容有輔弼總統之事實，亦未如聲請意旨所稱副總統為總統之僚屬或副手，平日承總統之命行事，一旦兼任則有角色衝突之情事。至所謂兼任有礙憲法機關功能維護一節，實則副總統之備位即屬此一職位維繫國家元首不能一日或缺之憲法功能所在，副總統亦未因兼任行政院院長而喪失其備位作用。

lows that there can be no conflict of interest concerning their duties if the Vice President should also serve as Premier of the Executive Yuan while the President is in office and there is no situation under which he/she cannot attend to that office. Even if there is merit to the idea that the Vice President assists and supports the President, it does not amount to the petitioner's claim that as a deputy or subordinate to the President, the Vice President carries daily operations by the direction and instruction from the President, and a conflict of roles would occur if the Vice President were to serve in both capacities. With regard to the claim that concurrent services would create obstacles to the maintaining of the functions of constitutional bureaucracies, it is the very function of the Vice President to be in a standby position to ensure that there will not be a day where there is not a head of state in place to carry out the intent of the Constitution, and such standby function is not diminished because the Vice President serves concurrently as the Premier.

graph 1, of the Constitutional Amendments, “The presidential and vice presidential candidates shall register jointly and be listed on the same ballot.” Therefore, under normal circumstances, the President-Elect and Vice President-Elect should belong to the same political party or have the same political affiliation and share a common political philosophy. However, in order to win the election, it is [not unusual] for candidates with different political convictions to be brought together on the same ballot as a result of political party realignments. Especially, if and when the Office of the Vice President becomes vacant, in accordance with the same Article, Paragraph 7 of the Constitutional Amendments, the President [must within three months] nominate a [vice presidential] candidate to be elected by the National Assembly.<sup>17</sup> This means the President would have to find a candidate acceptable to the majority of the National Assembly, which does not necessarily make political beliefs or convictions a

定：「總統、副總統候選人應聯名登記，在選票上同列一組圈選」，故當選總統、副總統者，屬於同一政黨或同一政治派系，其政治理念共通，當為常態。但為爭取選舉勝利，難保不發生政黨合縱連橫之事而將理念不同之人選，同列一組圈選；尤其遇有副總統出缺，依增修條文同條第七項規定，由總統提名候選人，召集國民大會補選，則總統之人選為提名對象，而非以理念為優先勢須以國民大會中多數黨黨團所能接受之考慮，其情形與總統提名行政院院長人選咨請立法院同意，並無不同。是以總統與副總統非必然理念相同，關係密切。縱使二人理念一致，關係匪淺，惟副總統既不能與總統共同行使元首之職權，又不能分享憲法上元首之特權，更無日常互為代理之可言，豈可視二人在法律上為一體？關係機關辯論意旨主張：所謂一體者，除競選時共為夥伴外，別無其他意義，尚非無見。此一情形，亦可用於說明總統與行政院院長之關係，若總統不能影響立法院多數黨黨團之投票，其提名行政院院長固然以多數黨黨團之意見為依歸；反之，總統若

<sup>17</sup> As of July 21, 1997, such election is now conducted by the Legislative Yuan, not the National Assembly any longer. See *supra* note 12.

priority consideration. This is not different from the process in which the President nominates a candidate to be confirmed by the Legislative Yuan as the Premier. Therefore, the President and the Vice President do not necessarily share the same philosophy and maintain a close relationship. Even if that were in fact the case, how could the two be viewed as a single legal entity since the Vice President cannot jointly carry out the powers and duties of the President, nor can he/she share the constitutional privileges reserved for the head of state, let alone act on his/her behalf on a daily basis? It is not without merit in the related agencies' argument that the term "single entity" really carries no meaning other than that of a partnership in an election. This can also be used to describe the relationship between the President and the Premier. Without being able to influence the majority party to cast [favorable] votes, the President's Premier nomination would have to hinge upon the opinion of the majority political party. Conversely, if the President should also be the head of the majority party of the Legislative Yuan, or

為立法院多數黨之黨魁或能影響過半數委員之投票取向時，總統必然提名政見與之一致且為其本身屬意之人選，日後施政行政院院長果追隨總統亦步亦趨，也不生違憲問題，復不能因此而謂總統與行政院院長已具有一體性。聲請意旨中，有從一體性論點而導出「總統不能為者，副總統亦不能為」之結論，自不足採。副總統與總統之關係既如上述，則由副總統兼任行政院院長，憲法第三十七條之副署、第五十七條第二款、第三款之覆議核可及增修條文第二條第四項發布緊急命令之程序等相關規定所涉及之機制，尚難認為即受影響。蓋總統與行政院院長職務之制衡，在於制度上由不同之人分別擔任，而非以任職者之黨派關係或政治主張為斷。尤其不能謂擔任總統與行政院院長者，必須政治主張相反或施政方針對立，始符制衡設計而合憲。又副總統之罷免及補選雖涉及國民大會之職權，然依憲法增修條文副總統並無向國民大會報告國情或聽取建言之職責，自不生聲請意旨所稱兼任行政院院長應分別向國民大會及立法院負責，易造成二民意代表機關衝突之問題。

if he/she could sway more than half of the votes, the President would certainly nominate his/her preferential choice who shares his/her political convictions. Then no constitutionality issue would be created since the Premier in the coming days would closely follow every step the President takes. However, this does not come close to the claim that the President and the Premier have forged a single entity. Inferring from the point of single entity, the petition's conclusion that "the Vice President cannot act on those that cannot be acted upon by the President" is not sufficient to be adopted. Given the above-described relationship between the Vice President and the President, if and when the Vice President should concurrently be the Premier, it can hardly be said that the mechanism involving the power of countersignature under Article 37; reconsideration under Article 57, Subparagraphs 2 and 3 of the Constitution; and promulgating emergency orders under Article 2, Paragraph 4, of the Constitutional Amendments and other related provisions will be compromised. The check and balance between the powers and duties of the

President and the Premier lies upon the system under which two different individuals occupy each position respectively, rather than being determined by the incumbent's political connections or propositions. It is definitely not the case that the occupants of the Offices of the President and Premier must uphold contrasting political views or policies in order to comply with the design of and to uphold the Constitution. Furthermore, while the recall and refill [processes] do concern the power of the National Assembly, the Vice President does not have the duty [or obligation] to report the state of the country to or take advice from the National Assembly. Naturally, this will not result in a conflict between the National Assembly and the Legislative Yuan, as per the claim by the petitioner that concurrent service of the Premier requires that [the incumbent] be responsible to both bodies.

Article 49 of the Constitution provides that, in case the office of the President should become vacant, the Vice President shall succeed until the expiration of the original presidential term; in

憲法第四十九條規定：總統缺位時，由副總統繼任至總統任期屆滿為止。總統因故不能視事時，由副總統代行其職權。總統、副總統均不能視事時，由行政院院長代行其職權。總統、



case the President should be unable to attend to office in due cause, the Vice President shall be the Acting President. In case the offices of both the President and Vice President should become vacant, in accordance with Article 2, Paragraph 8, of the Constitutional Amendments, the Premier shall act for the President and, in accordance with Paragraph 1 of the same Article, call for the election of a new President and Vice President to serve out the term of the preceding President. While it is indeed likely that the positions of the President, Vice President and Premier will devolve on the same individual if the Vice President concurrently serves as the Premier and once the office of the President becomes vacant or the President cannot attend to his/her duties, as illustrated above, this obviously is not permitted by the Constitution under normal circumstances. Yet this so-called “trinity” phenomenon is likely to be found not only when the Vice President serves concurrently as the Premier, but also under Article 49 of the Constitution; Article 2, Paragraph 8, of the Constitutional Amendments; and Article 50 of the Constitution,

副總統均缺位時，依憲法增修條文第二條第八項規定，由行政院院長代行其職權，並依同條第一項規定補選總統、副總統，繼任至原任期屆滿為止。副總統兼任行政院院長一旦發生上述總統缺位或因故不能視事之情形，確將出現總統、副總統及行政院院長三個職位皆集於原本為副總統者一身，依前開說明顯非正常情況下憲法之所許。惟此種所謂「三位一體」之現象，並非僅於副總統兼任行政院院長時，始有發生之可能，憲法第四十九條、增修條文第二條第八項及憲法第五十條均係為三個職位集中於一人之機率而設。憲法第五十一條對行政院院長代行總統職權時，並明定其期限不得逾三個月。副總統兼任行政院院長一旦出現總統缺位之情形，以副總統身分繼任總統後應立即提名新院長人選，咨請立法院同意；其在立法院休會期間者，則適用憲法第五十五條第二項由副院長代理其職務，並於四十日內咨請立法院召集會議，行使同意權。若發生者非總統缺位而係因故不能視事，不能視事之事故如超過三個月，兼行政院院長之副總統或可類推亦受憲法第五十一條所定期間之限制，並有憲法第五十五條第二項之適用。由上所述，因副總統兼任行政院院長雖有發生繼任總統所

which are all designed to deal with the possibility of three positions being consolidated in one person. Article 51 expressly limits the Premier's term as Acting President to no more than three months. Once the Vice President who concurrently serves as Premier succeeds the President in case of vacancy, he/she must immediately nominate a new candidate for Premier and submit [the nomination] to the Legislative Yuan for confirmation. Should this occur during a recess of the Legislative Yuan, Article 55, Paragraph 2, of the Constitution applies, which states "the Vice Premier shall be the Acting Premier and shall submit a request within 40 days to the Legislative Yuan to convene and to exercise their consent power [in a make-up session]. If the succession is not due to vacancy but [the President's inability] to attend to office, if and when such cause lasts for more than three months, Article 51 of the Constitution should apply, *mutatis mutandis*, to the Vice President who concurrently serves as the Premier." Article 55, Paragraph 2, is also applicable. From the abovementioned analyses, while there may be questions about the acting

或代行職權之疑義問題，然非全無解決途徑，則聲請意旨主張兼任所造成之窒礙情形已達明顯違憲程度云云，尚有商榷之餘地。至憲法增修條文對一般公務人員及總統副總統之彈劾，設有不同程序，分別規定於第六條第三項及第五項。如副總統兼任行政院院長因失職行為而受監察院彈劾時，其適用之程序，本得以其失職行為係緣於副總統抑或行政院院長身分而發生為判斷標準，其後續之懲戒或罷免程序亦同。若與職務行為無關，則可由監察院決定採何種程序提案彈劾，雖不能謂完全不發生適用法律之疑義，然尚難以此遽認副總統兼任行政院院長已達顯不相容之情事。至聲請意旨有謂行政院院長或因施政疏失而遭監察院糾彈甚至去職，則其繼續擔任副總統之適當性將受質疑等語，乃係政治上之疑慮，非關法律問題。

eduties of a Vice President who concurrently serves as Premier and succeeds thPresident, they are apparently not without solution. Consequently, there is indeed room for discussion concerning the petition's claim that the obstacles created by the concurrent holding of two positions have apparently reached the level of unconstitutionality. Article 6, Paragraphs 3 and 5, of the Constitutional Amendments provide different procedures for dealing with the impeachment of government employees as opposed to those dealing with the President and Vice President.<sup>18</sup> In case the Vice President who concurrently holds the office of the Premier commits an impeachable offense, the applicable procedure shall be based upon the capacity in which the offense occurred, and the penalty and recall procedure thereafter shall be so based. If it is not related to [constitutional] duties, then the Control Yuan shall in its discretion decide which im-

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<sup>18</sup> As of July 21, 1997, the fourth Constitution Amendments transferred the power of presidential and vice presidential impeachment to the Legislative Yuan and National Assembly (Article 2, Paragraph 10 of the Constitution Amendments) whereas the power of impeachment of other public officials remains in the Control Yuan (Article 7, Paragraph 3 of the Constitution Amendments).

peachment procedure is to follow. While this is not completely explicated in the application of laws, it is hardly the case to conclude abruptly that the [duties of the] Vice President have apparently become incompatible with being concurrently the Premier. As to the petitioner's claim that if and when the Premier is impeached by the Control Yuan or even resigns due to [gross] negligence in carrying out his/her duties, the appropriateness of [the same person] still serving as the Vice President is questionable, it is a matter of political concern, not a legal issue.

Article 44 of the Constitution proclaims, "In case of disputes between two or among more Yuans, except as otherwise provided by this Constitution, the President may convene meetings of the Presidents of the Yuans concerned for consultation with a view to reaching a solution." There are those who compare this to that of the power of neutrality for the head of state. The petition also argues that the President is exercising the power of the head of state that should be beyond and above the five powers, and that the

查憲法第四十四條稱：「總統對於院與院間之爭執，除本憲法有規定者外，得召集有關各院院長會商解決之。」此一規定論者有將之比擬為元首之中立權者，本件聲請意旨亦主張總統所行使者為元首權，應超然於五權之上，由副總統兼任行政院院長即形成「協調者」與「被協調者」之矛盾，喪失元首權超然中立之作用等語。惟不論憲法本條之規定是否等同於元首權或中立權，學理上尚無定論，且所謂元首權 (*pouvoirroyal*) 又稱中立權或調和權 (*pouvoir neutre, intermédiaire et régu-*

neutrality of the head of state is lost due to the contradiction created between the “coordinator” and the “coordinated” when the Vice President concurrently serves as the Premier. Note that there is no scholarly conclusion on whether this provision of the Constitution is equivalent to the power of head of state or neutrality. As a means to maintain a monarchic constitutional system, the power of the head of state (*pouvoir royal*), also known as the power of neutrality or intermediation (*pouvoir neutre or intermédiaire et régulateur*), is a theory advocated by a few French scholars (such as B. Constant Clermont-Tonnerre) in the early nineteenth century, which reserves limited power to the monarchy as the head of state (See Carl Schmitt, *DER HUETER DER VERFASSUNG*, 3 Aufl., 1985, S. 133ff.). Such meaning does not fit the later developed political system of representative democracy, and has been criticized as a mere fiction (See Klaus von Beyme, *DIE PARLAMENTARISCHEN REGIERUNGSSYSTEME IN EUROPA*, 2. Aufl., 1973, S. 89). There are also constitutional scholars who believe that it is

lateur), 乃十九世紀初年一、二法國學者(Clermont-Tonnerre, B. Constant)為維持在君主立憲體制之下，君主作為國家元首所保留之少許權力所提倡之學說（參看 Carl Schmitt, *Der Hueter der Verfassung*, 3. Aufl., 1985, S.133ff.），此種意義之中立權或調和權與日後代議民主政治發展之實情不符，而受批評為人為設想之名詞（參看 Klaus von Beyme, *Die parlamentarischen Regierungssysteme in Europa*, 2. Aufl., 1973, S.89.）；且憲法學者亦有認為無論國王或總統作為國家元首，政治上調和鼎鼐本無待憲法規定，可謂事物之本質者（參看 Carl Schmitt, *Verfassungslehre*, 8. Aufl., 1993, S.287.）。中立權是否已成為現代國家憲法上之建制，猶有爭論，並未形成普遍接受之權力分立理論，自不影響本件之解釋。況縱使總統行使憲法第四十四條之權限，視為元首之中立權，亦不生協調者與被協調者之矛盾。

the very nature of the matter and it goes without [expressed] constitutional regulation that the head of state must seek to reconcile and coordinate political differences, be that a king or a president (See Carl Schmitt, *VERFASSUNGSLEHRE*, 8 Aufl., 1993, S. 287). Hence, whether the power of neutrality has become the building block of modern constitutions remains controversial and has not become a widely accepted principle for the separation of powers. It naturally does not affect the interpretation of the present case. Even if the President's exercising of the power under Article 44 of the Constitution may be viewed as the power of neutrality for the head of state, there is no contradiction created between the coordinator and the coordinated.

[Judging] whether an act is unconstitutional is similar in nature to [judging] whether an act is illegal under other public laws. Before an act is held illegal per se under a given public law, which results in [that act] being ab initio and ipso facto ineffective, it must be clearly and grossly flawed (academically known as *Gravitaets*

憲法上行爲是否違憲與其他公法上行爲是否違法，性質相類。公法上行爲之當然違法致自始不生效力者，須其瑕疵已達重大而明顯之程度（學理上稱為 *Gravitaets-* bzw. *Evidenztheorie*）始屬相當，若未達到此一程度者，則視瑕疵之具體態樣，分別定其法律上效果。是故設置憲法法院掌理違憲審查之國家

bzw. Evidenztheorie). If and when such level is not reached, then the legal effect of each act is determined by the nature and substance of the flaw, respectively (Theretarischen Regierungssysteme in Europa, 2, fore.). For countries that have the setting of a constitutional court to review the constitutionality (such as Germany and Austria), their judgments are not rendered in the simple, dichotomized form of constitutional-unconstitutional or valid-invalid. There may be a wide variety of cases where a law [or policy] is not in conformity with the constitution yet not declared invalid, [being declared] unconstitutional but becomes invalid only within a certain period of time, or while constitutional yet with an admonition to the related agency to take certain precautionary actions due to the likelihood that it may become unconstitutional. Throughout its history of interpreting the Constitution, this Yuan has not adopted the dichotomy of either completely constitutional or unconstitutional. Rather, it is a diverse model similar to the German and Austrian [system] established with many precedents. When there are no expressed constitutional

(如德國、奧地利等)，其憲法法院從事規範審查之際，並非以合憲、違憲或有效、無效簡明二分法為裁判方式，另有與憲法不符但未宣告無效、違憲但在一定期間之後失效、尚屬合憲但告誡有關機關有轉變為違憲之虞，並要求其有所作為予以防範等不一而足。本院歷來解釋憲法亦非採完全合憲或違憲之二分法，而係建立類似德奧之多樣化模式，案例甚多，可資覆按。判斷憲法上行為之瑕疵是否已達違憲程度，在欠缺憲法明文規定可為依據之情形時，亦有上述瑕疵標準之適用（參照本院釋字第三四二號解釋）。所謂重大係指違背憲法之基本原則，諸如國民主權、權力分立、地方自治團體之制度保障，或對人民自由權利之限制已涉及本質內容而逾越必要程度等而言；所謂明顯係指從任何角度觀察皆無疑義或並無有意義之爭論存在。本件副總統兼任行政院院長，憲法並無禁止之明文規定，又未違反權力分立原則，從兩種職務性質而論，復無顯然不能相容或有利益衝突之處，而此一兼任問題，各方仍有仁智之見，則其兼任尚難認為瑕疵重大而明顯，已達顯然違憲程度。況依憲法增修條文第二條第三項之規定，行政院院長之免職命令，須新提名之行政院院長經立法院同意後

provisions to be based upon, the above criterion is also applicable in deciding whether the flaw of an act under the Constitution has reached the level of being unconstitutional (See Interpretation No. 342). “Grossly” means the flaw violates the basic principles of the Constitution, such as national sovereignty, separation of powers, guarantee for the organizations in the local self-rule system, or the restriction on the liberties and rights of the people has encroached upon their fundamental nature and exceeded the necessary degree. “Clearly” means free from the existence of any doubts or controversial merits from any perspective. In the present case, the Constitution does not expressly prohibit the Vice President from concurrently serving as the Premier, nor does the case violate the principle of separation of powers, nor is there any incompatibility or conflict of interest between the natures of the two positions. While each side still maintains different points of view on the issue of concurrent service, it can hardly be said that it is grossly and clearly flawed, hence, to have clearly reached the level of being unconstitutional. In accor-

生效，若原任行政院院長參與副總統競選，並獲當選，總統依法提名新行政院院長，在未經立法院同意前，副總統依上述規定尚須兼任行政院院長，其為憲法之所許，既無疑義，自不能將在特定條件下憲法所許可之行為，遽予解釋為違憲。朝野人士之所以對此一兼任問題之合憲性，各持己見者，主要肇因於現行憲法以五權分立之架構，分別採取內閣制與總統制下之若干建制融合而成，論者基於理念或對政制之偏好，其結論南轅而北轍，毋乃當然。憲法結構之調整應由有權修憲之機關衡情度勢，斟酌損益，非關釋憲機關之權限。惟憲法分設總統、副總統及行政院院長三種職位，其本意實應由不同之人分別擔任。又憲法原文對副總統缺位時，並無補選之規定，增修條文第二條第七項明定：「副總統缺位時，由總統於三個月內提名候選人，召集國民大會補選，繼任至原任期屆滿為止。」亦足證明修憲者對副總統職位之重視，不容其長期懸缺，俾維持總統缺位時得立即有法定繼任者，以確保元首職位之機能不致中斷。若遇有總統缺位時，兼任行政院院長之副總統繼任後或可援引憲法第五十一條及第五十五條第二項之規定，作為人事安排之依據，但難謂並無聲請意旨一再



dance with Article 2, Paragraph 3, of the Constitutional Amendments, the discharge order for the [original] Premier does not take effect until the Legislative Yuan confirms the new Premier. If the original Premier should participate in the vice presidential campaign and be elected, while there is no doubt that the Constitution does permit the Vice President to the Legislative Yuan is to confirm a new Premier nominated by the President in accordance with the law, naturally such constitutionally permissible act under that particular circumstance cannot be abruptly interpreted as being unconstitutional. That each side insists upon its point of view on the constitutionality of concurrent service is due primarily to the current Constitution's framework of the Five Powers Division, which adopts a number of [different] structures under the cabinet and presidential system, respectively. It is obvious that distinctively diverse conclusions can be drawn from the perspectives of different political ideologies or systems. Any adjustment of the constitutional structure should be carefully considered by the authorized body with the power to

指稱減損繼任「雙重保險機制」之疑慮。若副總統兼任行政院院長所遭遇之情形為總統不能視事，則尚不能直接從憲法條文中獲致解答。蓋在副總統與行政院院長分別由二人擔任之常態情形，副總統自可代行總統之職權，直至總統不能視事之原因消滅為止。如副總統與行政院院長同屬一人，其代行總統職權即有產生不能相容之情事，因代行職權者，既非以單純行政院院長身為之，則與憲法第五十一條專指由行政院院長代行總統職權之規定有間。可見上開情形已不在憲法設計總統職權替代機制之範圍，或須以轉換適用之方式始能勉為因應；究與憲法上述三個職位應分別由不同之人擔任之常態設計不符，並對憲法所規定繼任或代行職權之機制有所影響。聲請意旨迭次執以指摘，自有相當理由。

amend the Constitution, which is not within the jurisdiction of the constitutional interpretation body. However, by separately installing three types of positions-- the President, the Vice President and the Premier, the original intent of the Constitution was to have different individuals serve [in each position], respectively. Furthermore, although the original text of the Constitution provides no provision for the [make-up] election of the Vice President should that office become vacant, Article 2, Paragraph 7, of the Constitutional Amendments expressly states, “[i]n case the office of the Vice President should become vacant, the President shall nominate a candidate or candidates within three months so that the Legislative Yuan may elect a new Vice President to serve the remainder of the original term.” This is sufficient to demonstrate that the Constitution drafters did pay attention to the office of the Vice President, to ensure that it is not subject to prolonged vacancy so that there will be an immediate successor in case the office of the President should become vacant, and the functions of the head of state are not interrupted. While

the Vice President who concurrently serves as the Premier may make personnel arrangements in accordance with Article 51 and Article 55, Paragraph 2, of the Constitution if the office of the President becomes vacant, such can hardly dispel the concerns, as repetitively argued in the petitioner's arguments, that the "double insurance mechanism" for [power] succession is weakened. In the event the Vice President who concurrently serves as the Premier should encounter the situation that the President cannot attend to his/her office, the constitutional provisions do not offer a direct solution. This is because under normal circumstances where two different individuals respectively serve as the Vice President and the Premier, the Vice President can naturally be the Acting President until the cause of such inability diminishes. However, if the same person is to be both the Vice President and the Premier, the issue of incompatibility of duties will occur with the acting of the presidential power because as long as the acting capacity is not done purely by the status of the Premier, there is [then] a discrepancy with Article 51 of the Constitu-

tion, which exclusively stipulates the situation where the Premier serves as the Acting President. It is clear that the above situation is not within the scope of the powers and duties of the substitution mechanism under the Constitution and may barely be resolved by cross applications [of different provisions]. After all, this is not in line with the design that under normal circumstances different persons should serve in the three constitutionally mandated positions, respectively, and would affect the constitutional mechanism of power succession or acting. There are merits in the petitioner's repetitive criticisms in this regard.

In sum, the nature of the duties of the Vice President and the Premier are not obviously incompatible, yet for the same person to serve in both positions will affect the constitutional mechanism of power succession or acting in case the office of the President becomes vacant or the President is incapable of carrying out his/her duties. Therefore, having the Vice President concurrently serve as the Premier is not completely in conformity with

綜上所述，副總統與行政院院長二者職務性質尚非顯不相容，惟副總統及行政院院長二職位由一人兼任，如遇總統缺位或不能視事時，將影響憲法所規定繼任或代行職權之設計，故由副總統兼任行政院院長，與憲法設置此二職位分由不同之人擔任之本旨，未盡相符。引發本件解釋之事實，應依上開解釋意旨為適當之處理。

the Constitution's objective of having separate individuals assume the duties of the Vice President and Premier, respectively. The facts that triggered the present Interpretation should be properly disposed of in accordance with this ruling.

## II.

The Constitution does not stipulate the term of the Premier. Thus, there are no clear guidelines on when the Premier should be retained or relieved of duties. Although Article 57 expressly provides that the Executive Yuan shall be responsible to the Legislative Yuan, given that the entire Legislative Yuan could not be re-elected in the past, the retaining or resignation of the Premier and his/her subordinates (the Vice Premier and all the ministers without portfolio) cannot be determined by public opinion, which is reflected in the result of such re-elections. To avoid [the situation] where the Premier is subject to no term limitations, a custom has been in place for over the past forty years that the Premier would submit a general resignation along with his/her subordinates to the new President after

## 二

憲法對行政院院長之任期並未規定，因而關於行政院院長何時卸職或留任亦無明顯之規範可循。憲法第五十七條雖明定行政院對立法院負責，但以往因為立法院未能全面定期改選，故無從按立法院改選結果所反映之民意，定行政院院長及其僚屬（副院長及全體政務委員）之去留。為避免行政院院長毫無任期之限制，遂於每屆總統改選後，由院長率同僚屬向新任總統提出總辭，四十餘年來寔假成為例規。惟行政院須於新任總統就職時提出總辭，在現行憲法上尚無明確之依據。自八十一年起立法院已全面定期改選，第二屆立法院於翌年二月選出後，當時之行政院院長即提出辭職，八十四年十月十三日本院作成釋字第三八七號解釋，明白釋示基於民意政治與責任政治之原理，立法委員任期屆滿改選後第一次集會前，行政院院長應向總統提出辭職，此種辭職乃行政

each presidential election. Yet there is no clear basis under the current Constitution for the situation where the Premier should tender a general resignation at the inauguration of the new President. In 1992, the Legislative Yuan was undergoing regular re-election, so the Premier immediately tendered his resignation after the second Legislative Yuan was elected. This Yuan issued its Interpretation No. 387 on October 13, 1995, which declares that as a constitutional obligation, the Premier shall tender his/her resignation to the President after the re-election but before the first session of the Legislative Yuan. In addition, if and when the Legislative Yuan disagrees with the Executive Yuan over an important policy, under Article 57, Subparagraphs 2 and 3, of the Constitution, the Legislative Yuan may, in the form of a resolution, request the Executive Yuan to alter that policy; the Executive Yuan, however, may, upon the presidential approval, transmit the resolution back [to the Legislative Yuan] for reconsideration; if the Executive Yuan should deem the Legislative Yuan's resolution on a given statute, budget, or treaty too diffi-

院院長憲法上之義務。除此之外，依憲法第五十七條第二款及第三款規定，立法院對於行政院之重要政策不贊同時，得以決議移請行政院變更之，行政院經總統之核可，移請覆議；或行政院對立法院決議之法律案、預算案、條約案，認為有窒礙難行時，經總統之核可，移請覆議，覆議時分別經出席立法委員三分之二維持原決議，若行政院院長不欲接受而向總統提出辭職時，亦屬憲法上義務性之辭職。對於行政院院長履行其憲法上義務之辭職，總統自無不予批准之理。至於行政院院長之其他辭職原因，本有多端，諸如因身體健康、政治情勢、領導風格等，其辭職均非憲法上義務；新任總統就任行政院院長所提出之辭職亦同。查國家元首更迭，無論君主立憲或共和國體，抑無論典型之內閣制或法國第五共和之雙首長制，自十九世紀以來，歐洲國家之內閣不乏向新就任元首提出辭職之例，故有禮貌性辭職之稱。禮貌性辭職元首是否批准因而更換內閣，各國並不一致，同一國家亦因各時期所遭遇情況而有不同（參看 Klaus von Beyme, a.a.O., S.720-727）。對於行政院院長非憲法上義務之辭職，總統自可盱衡國家政治情勢及其他情況，為適當之處理，包括核准辭職、退

cult to carry out, it may [also], upon the presidential approval, transmit the resolution back [to the Legislative Yuan] for reconsideration. If two-thirds of the members of the Legislative Yuan should decide to maintain the original resolution, the Premier shall tender his resignation to the President if he/she should decide not to accept it, and this is also a resignation as a matter of constitutional obligation. There is no reason why the President should not approve a Premier's resignation for carrying out his/her constitutional obligations. There may be a wide variety of other reasons to resign, such as physical health, political conditions, leadership style, and so forth. Yet those resignations are not constitutionally obligated, as is the Premier's resignation at the inauguration of the new President. Since the nineteenth century, regardless of whether it is a constitutional monarchy or republic, a typical cabinet or dual leadership system under the French Fifth Republic, there have been plenty of examples in European states where the cabinet submits its resignation to the newly- inaugurated head of state, hence the so-called courtesy resig-

回辭呈或批示留任等皆屬總統本於國家元首之憲法職責，作合理裁量之權限範圍，屬於統治行為之一種，尚非本院應作合憲性審查之事項。此部分聲請意旨有謂：在五權憲法架構下，總統與行政院院長間並無從屬關係，故行政院院長之辭職並無長官可以批示云云，核與憲法規定不符，蓋依憲法增修條文第二條第二項及第三項規定意旨，不僅行政院院長須經總統之任免，縱依憲法經國民大會或立法院同意任命人員（如大法官、考試委員、監察委員或審計長等），亦應由總統發布任免之命令，足證是否與總統有從屬關係無關。至於總統就任時，提出辭職之行政院院長亦同時就任副總統者，其涉及之憲法問題，已在同案另作解釋，此不贅述。

nation. There is no uniform rule among different nations on whether the head of state should approve such a courtesy resignation, thereby resulting in the change of the cabinet. Even within the same country there may be differences that depend upon the circumstances encountered in different periods (See Klaus von Beyme, a.a.O., S. 720-727). With regard to the Premier's resigning when it is not as a matter of constitutional obligation, the President should weigh the political situation of the nation and other circumstances in order to take proper disposition, including granting the resignation, returning the letter of resignation, or retaining the incumbent. These are all constitutional duties of the President [to carry out] as the head of state and within the reasonable discretionary scope of that power. As an act of governance, it is not a matter subject to constitutionality review by this Yuan. The petition claimed in this part that the President and the Premier do not have a superior-subordinate relationship under the framework of the Five Powers Division and there is no superior to approve the Premier's resign-



nation. That is not in accordance with the constitutional stipulation. Based upon the meaning and purpose of Article 2, Paragraph 2 and 3, of the Constitution Amendments, the Premier's appointment and relief of duties and those personnel who are confirmed by the National Assembly or the Legislative Yuan (such as the Justices of the Constitutional Court, members of the Examination and Control Yuan or the Comptroller [or Auditor-General]) must all be approved by the President. Suffice it to say that whether there is a subordinate relationship to the President is not relevant. With regard to the constitutional issues on a Premier, who has resigned, being inaugurated as the Vice President along with the President, interpretations have already been provided elsewhere in this case and will not be repeated here.

### III.

Article 62 of the Constitution expressly stipulates that the Legislative Yuan is the highest legislative body of the country. Article 63 of the Constitution provides a general regulation on the pow-

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立法院為國家最高立法機關，憲法第六十二條定有明文。立法院之職權，憲法第六十三條有概括之規定：「立法院有議決法律案、預算案、戒嚴案、大赦案、宣戰案、媾和案、條約案

ers of the Legislative Yuan: “The Legislative Yuan shall have the power to decide by resolution upon statutory or budgetary bills or bills concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, and other important affairs of the State.” In addition, the President’s nominations of the Premier in accordance with Article 55 of the Constitution and the Comptroller of the Control Yuan in accordance with Article 104 of the Constitution are both subject to the Legislative Yuan’s confirmation. [Moreover,] both the Constitution and rules that have the effect of the Constitution expressly prescribe a broad scope of powers to the Legislative Yuan. [For example,] among other things, the resolution to request the President to terminate martial law under Article 39 of the Constitution; the right to listen to the Executive Yuan’s in-session report on the administration’s policies and to interpellate the Premier and Principal Officers [ministers] of the Cabinet under Article 57, Subparagraph 1, of the Constitution; the right to resolve to alter a critical policy of the Executive Yuan or to decide whether to override the

及國家其他重要事項之權。」之外，諸如總統依憲法第五十五條提名行政院院長、依第一百零四條提名監察院審計長，均應經立法院之同意；依憲法第三十九條決議移請總統解嚴；依憲法第五十七條第一款立法委員在開會時有聽取行政院施政報告並向行政院院長及行政院各部會首長質詢之權；依同條第二款案之權；依憲法第一百零五條規定審議及第三款有決議變更行政院重要政策及對行政院移請覆議事項決議是否維持原審計長所提出之決算審核報告之權；依憲法第一百一十一條中央與地方遇有權限爭議時，亦規定由立法院解決；依憲法第一百七十四條第二款立法院亦得對憲法擬定修正案提請國民大會複決；又依憲法增修條文第二條第四項總統發布之緊急命令，須於十日內提交立法院追認；再者依本院釋字第三二五號解釋立法院院會就議案涉及事項，得決議向有關機關調閱文件原本，以上所舉皆屬憲法或有憲法效力之規範所明定屬於立法院之職權，內容甚為廣泛。上述憲法所定屬於立法院職權之事項，立法院依法定之議事程序所作各種決議，按其性質有拘束全國人民或有關機關之效力。惟任何國家機關之職權均應遵守憲法之界限，凡憲法依權力分立原則將特定職權

Executive Yuan's request for reconsideration under the same Article, Subparagraphs 2 and 3; the right to review the Comptroller's audit report on the final accounts of revenues and expenditures under Article 105 of the Constitution; to resolve disputes derived from the delineation of powers between the central and local authorities in accordance with Article 111 of the Constitution; to draft constitutional amendments and submit them for the National Assembly's referendum in accordance with Article 174, Subparagraph 2, of the Constitution;<sup>19</sup> also in accordance with Article 2, Paragraph 4, of the Constitutional Amendments, any emergency decree promulgated by the President must be submitted to the Legislative Yuan within ten days for ratification;<sup>20</sup> furthermore, in accordance with this Yuan's Interpretation No. 325, the General Conference of the Legislative Yuan may resolve to retrieve the original documents from the related [executive] agencies on matters related to a [given] agenda. These constitutionally

自立法、行政或司法等部門權限中劃歸其他國家機關行使；或依制憲者之設計根本不採為憲法上建制者，各個部門即有嚴格遵守之憲法義務。前者如一般國家屬於立法機關之調查權，在我國憲法上歸屬於監察權之範疇；後者如國會對內閣之不信任投票制度及內閣用以對抗之解散國會機制，亦為我國憲法所不採。至於行政院院長之任命，立法院雖有同意權，然必須基於總統提名並咨請立法院行使職權為前提，始得為之，憲法第五十五條之規定甚為明顯。又依憲法第五十七條第二款及第三款之規定，立法院對行政院之重要政策不贊同時，得決議移請行政院變更之；立法院決議之法律案、預算案、條約案，行政院如認為有窒礙難行時，行政院均得經總統之核可移請立法院覆議，覆議時，如經出席立法委員三分之二維持原決議時，行政院院長應即接受該決議或辭職。上述規定即屬制憲者為取代內閣制國家不信任投票及解散國會制度所為之設計，憲法歷次增修對此復未有所更改。倘認為立法院得以讀會及過半數之決議咨請總統提名新行政院院長人選，俾其行使

<sup>19</sup> See also Article 1, Paragraph 2, Subparagraphs 1-3 of the Constitution Amendments.

<sup>20</sup> It is now codified as Article 2, Paragraph 3 of the Constitution Amendment.

mandated powers that belong to the Legislative Yuan and the various resolutions made by that Yuan through the legally mandated parliamentary process in their very nature have binding effect on the entire population of the nation or related agencies. Yet any state agency must abide by the limits of the Constitution. For any particular power being taken out of the legislative, executive or judicial authority and transferred to another state agency to carry out in accordance with the separation-of-power principle, or mechanisms that the designers of the Constitution fundamentally do not adopt, each department has a constitutional obligation to strictly obey [those rules]. In the former situation, for instance, the investigative power that generally belongs to the legislature in other countries is under the authority of the Control Yuan under our Constitution;<sup>21</sup> in the latter, for instance, our Constitution does not adopt the system where the parliament may cast a no confidence vote to the cabinet and the cabinet's countermeasure to dissolve the

同意權，總統亦依其決議辦理，則無異創設為制憲者所不採之不信任投票制度。再依憲法之規定，向立法院負責者為行政院，立法院除上開憲法規定之事項外，並無決議要求總統為一定行為或不為一定行為之權限。是故立法院八十五年六月十一日所為「咨請總統儘速重新提名行政院院長，並咨請立法院同意」之決議，逾越憲法所定立法院之職權，僅屬建議性質，對總統並無憲法上之拘束力。

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<sup>21</sup> See Article 95 of the Constitution.

parliament.<sup>22</sup> As to the appointment of the Premier, although the Legislative Yuan has the confirmation power, Article 55 of the Constitution clearly stipulates that such power must be exercised on the premises of the President's nomination and request the Legislative Yuan to carry out that power. Also in accordance with Article 57, Subparagraphs 2 and 3, of the Constitution, if the Legislative Yuan does not concur with an important policy of the Executive Yuan, it may, by resolution, request the Executive Yuan to alter that policy; if the Executive Yuan deems a resolution on a statutory, budgetary or treaty bill passed by the Legislative Yuan difficult to implement, it may, upon presidential approval, request the Legislative Yuan to reconsider; if two-thirds of the members of the Legislative Yuan present vote to sustain their original bill, the Premier must immediately accept that resolution or resign from office. This is the rule designed by the Constitution drafters to substitute for the no confidence vote and

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<sup>22</sup> As of July 21, 1997, the system of no-confidence vote and dissolution of the Legislative Yuan was adopted. See Article 2, Paragraph 5 of the Constitution Amendments.

dissolution of parliament mechanism found in a country with a cabinet system, and the various constitutional amendments never sought to change it. If the Legislative Yuan were able to pass a resolution, with readings and [at least] over half of the vote cast in favor, to request the President to nominate a new Premier candidate so that it could exercise the power of confirmation, and the President did it accordingly, then it would be like creating the no confidence voting system that the Constitution drafters did not adopt. Furthermore, in accordance with the Constitution, the Executive Yuan is responsible to the Legislative Yuan. Except as otherwise stipulated by the Constitution, the Legislative Yuan does not have the authority to pass a resolution requesting the President to undertake or not to undertake a certain act. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting the President to renominate the candidate for the Premier of the Executive Yuan and to submit such renomination for the Legislative Yuan's confirmation as soon as possible" exceeded the constitutional authority of the

Legislative Yuan and shall be considered as advisory [opinion only] that carries no constitutional binding power over the President.

Justice Hsiang-Fei Tung filed dissenting opinion and dissenting opinion in part.  
Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋董大法官翔飛提出不同及部分不同意見書；劉大法官鐵錚提出不同意見書。

### 【EDITOR'S NOTE】

In March 1996, the Republic of China held its first popular and direct election for its tenth President (which used to be elected by the National Assembly). Prior to that election, in an apparent attempt to sway the election outcome and to show its displeasure over the incumbent President Lee Tang-hui's visit to the United States in 1995, the People's Republic of China launched a series of military maneuvers across the Taiwan Strait, including two missiles testing within the close range of Taiwan's territorial water. These actions created enormous tensions and uncertainties in Taiwan and strong reactions from the United States. However, the election went forward and Lee Tang-

hui, Mainland China's least favored candidate, was reelected (by 54% of the vote in a four-way race). Soon after his inauguration, Lee created a constitutional crisis by insisting on nominating his vice president, Mr. Lien Chien, to continue to serve as the Premier of the Executive Yuan.

Although Lien's appointment was eventually confirmed by the Legislative Yuan (80 for, 65 opposed, and 3 abstention) in June, the issue of whether an incumbent Vice President may concurrently serve as the Premier under the Constitution, among other things, remained unresolved. This development quickly turned into a major political firestorm and resulted in a situation where the Legislative Yuan withdrew its invitation to have the Premier present his annual state of the country report before the Legislative Yuan. In fact, Mr. Lien became a persona non grata to the Legislative Yuan. The entire interpellation and budgetary process (Article 57 of the Constitution) was also seriously disrupted. This prompted more than 80 members of the Legislative Yuan to file separate petitions for a constitu-



tional clarification before the Council of Grand Justices. The Council finally issued this Interpretation on December 31, 1996, holding that although there is no direct prohibition in the Constitution against such appointment, it is nevertheless not in full conformity with the structure, design and purpose of the Constitution.

Before this Interpretation was issued, however, apparently in an attempt to resolve the situation while taking advantage of his election mandate, President Lee, who was also chairman of the KMT, called for a National Development Conference (not constitutionally sanctioned) in December 1996 to engage in political consultative process primarily with KMT's main opposition, the Democratic Progressive Party (DPP)(several other smaller opposition parties and individuals, especially the New Party, boycotted the event). They reached a "consensus" entailing five points for future reform: (1) the President shall appoint the Premier without the Legislative Yuan's approval; (2) the President shall have the power to dissolve the entire Legislative Yuan; (3)

elections at the provincial level shall be “frozen;” (4) township or village chief executives shall be appointed; and (5) the Legislative Yuan shall have the power to dissolve the entire Executive Yuan (or the Cabinet). As a result, the incumbent and a very popular governor of the Taiwan Province, James C. Sung, announced his intention to resign in protest, setting off yet another political firestorm. Sung eventually broke rank with the KMT.<sup>23</sup> In the mean time, Lien continued to serve as the Premier until August 31, 1997, when President Lee finally reshuffled the Cabinet at the conclusion of the KMT’s 15th National Congress as a way to boost that party’s image amid a number of high profile corruption charges involving senior officials and Mr. Lien’s continuous image problem.<sup>24</sup> Lien and Sung eventually ran against each other in the 2000 presidential election and both lost to the DPP candidate, Mr. Chen Shuibian.

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<sup>23</sup> For details, see Government Information Office, *THE REPUBLIC OF CHINA YEAR-BOOK 1996*, Taipei, Taiwan: Shen’s Art Printing Co., 1997, Appendix 1: Major Events.

<sup>24</sup> See New premier Named to Boost Regime’s Image, *CHICAGO TRIBUNE*, August 29, 1997, p. 6. See also *supra* note 15.