J.Y. Interpretation No. 721 (June 6, 2014)*

Election of Party-list Proportional Representatives Case

Issue

Are the electoral provisions setting forth the Single Electoral Constituency with Two Votes system for legislator elections and the number of seats for party-list representatives and five percent threshold for political parties therein unconstitutional?

Holding

Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution (hereinafter the "Constitutional Amendment") provides for a Parallel Voting System of the Single Electoral Constituency with Two Votes system, the number of seats for party-list proportional representatives and its threshold for political parties to win such seats. Such provisions do not breach the constitutional democratic order upon which the Constitution hinges. The provision regarding the Parallel Voting system and the threshold for political parties in Article 67, Paragraph 2 of the Civil Servants Election and Recall Act has the same content as the aforesaid Constitutional Amendment. Hence, it raises no conflict with the Constitution either.

Reasoning

[1] The Constitution is the fundamental and supreme law of this country. Any amendment to it shall be made by the governmental body governing constitutional amendment in accordance with constitutional due process. The

* Translation and Note by Eleanor Y. Y. CHIN

National Assembly is the constitution-amending body established by the Constitution; an amendment it enacts based on its powers bestowed by the Constitution is of equal status with the original constitutional provisions. If, nonetheless, an amendment were to be allowed that would alter the existing constitutional provisions that have essential significance and upon which the governing order is founded, the integral governing order of the Constitution would be effectively destroyed. For this reason, such an amendment would lack the requisite appropriateness. Among the constitutional provisions, principles such as the principle of the democratic republic under Article 1 of the Constitution, the principle of popular sovereignty under Article 2, the protection of fundamental rights of the people under Chapter II as well as the principle regarding checks and balances of governmental powers shall have essential significance, upon which the integrality of fundamental constitutional principles hinges. Such provisions form the constitutional democratic order, which is the foundation of the current Constitution and by which any governmental body established by the Constitution is obligated to abide. Unless its process of amendment contains clear and gross flaws or its content involves a breach of the constitutional democratic order, an amendment to the Constitution shall be respected (*see* J.Y. Interpretation No. 499). In other words, so long as an amendment to the Constitution does not contradict the principle of the democratic republic and the principle of popular sovereignty, nor involve alteration of the core contents of fundamental rights of the people or the principle of checks and balances of governmental powers, such an amendment does not breach the constitutional democratic order.

[2] Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution provides that: “Beginning with the Seventh Legislative Yuan, the Legislative Yuan shall have 113 members, who shall serve a term of four years, which is renewable after re-election. The election of members of the Legislative Yuan

shall be completed within three months prior to the expiration of each term, pursuant to the following provisions, the restrictions in Articles 64 and 65 of the Constitution notwithstanding: (1) Seventy-three members shall be elected from the Special Municipalities, counties, and cities in the free area. At least one member shall be elected from each county and city. (2) Three members each shall be elected from among the lowland and highland aborigines in the free area. (3) A total of thirty-four members shall be elected from the nationwide constituency and among citizens residing abroad" (hereinafter "Amendment 1"). "Members for the seats set forth in Subparagraph 1 of the preceding paragraph shall be elected in proportion to the population of each Special Municipality, county, or city, which shall be divided into electoral constituencies equal in number to the number of members to be elected. Members for the seats set forth in Subparagraph 3 shall be elected from the lists of political parties in proportion to the number of votes won by each party that obtains at least five percent of the total vote, and the number of elected female members on each party's list shall not be less than one-half of the total number" (hereinafter "Amendment 2"). These two amendments adopt the Single Electoral Constituency with Two Votes System, namely, a two-vote system combining a single electoral constituency system with a proportional representation system. Legislators elected from Special Municipalities, counties, and cities are elected based on the single constituency system in accordance with the first clause of Amendment 2, with one legislator elected from one constituency each. As to those elected from the nationwide constituency and among citizens residing abroad, pursuant to the latter part of the same Amendment they are elected based on a proportional representation system in which ballots are cast to a party list, and a five percent threshold is required for political parties to be allotted seats. Only those political parties winning five percent or more of political party ballots will be allotted seats for legislators from the nationwide constituency and citizens residing abroad.

The election results of the single electoral constituency and those of political-party ballots are calculated separately in deciding the quotas of these two categories of legislators-elect (the calculation method thereof is hereinafter referred to as the "Parallel Voting System," with reference to the minutes and stenographic records of the National Assembly published in October 2005, at page 304).

[3] Article 129 of the Constitution stipulates that: "The various kinds of elections prescribed in this Constitution, except as otherwise provided by this Constitution, shall be by universal, equal, and direct suffrage and by secret ballot." The equal suffrage referred to therein is specifically prescribed by the right to equality and suffrage under Articles 7 and 17 of the Constitution. Judging by the language therein, it follows that the constitution-amending body is given room to consider the relevant circumstances and assess advantages and disadvantages. However, since elections are an indispensable means to implement fundamental democratic principles such as considering public opinion and accountability while manifesting the principle of popular sovereignty, the voting method prescribed must not impede the realization of the principle of the democratic republic and the principle of popular sovereignty, nor shall it alter the core contents of the rights to equality and suffrage. As to legislative elections in different countries, some give more weight to the representation of electoral constituencies and adopt relative majority rule, while others give more weight to the differences in political parties and adopt a party-list proportional representation system. These are different alternatives of democratic politics and reflect the differences among political cultures in respective countries. Provisions regarding adjustment to the voting methods of electing legislators of the Legislative Yuan stated in Amendments 1 and 2 adopt the Parallel Voting System and require the number of seats for party-list proportional representatives to be thirty-four seats. This reflects the choice made by our citizens with respect to

democratic politics, with the intention of satisfying both the representativeness of electoral constituencies and diversity of political parties. These amendments, providing that the number of seats for party-list representatives shall be allotted based on earned political party ballots, aim to enhance the operation of party politics by means of party-list proportional representatives as a way to aid and complement regional representatives. Such a combination and its allotment of seats are a display of the general will of the people, and they do not contradict the principle of the democratic republic and the principle of popular sovereignty. Allegations invoking the practices of other electoral systems (such as a coexisting system) to challenge the Parallel Voting System provided in Amendments 1 and 2 as a breach of the constitutional democratic order shall not be sustained. Although the five percent threshold for political parties provided in Amendment 2 may result in a certain discrepancy between the percentages of ballots received by, and seats allotted to, political parties and create an appearance of unequal ballots, its purpose is to ensure that the efficiency of legislative operations and the smooth interaction between the executive branch and the Legislature are not impeded by a clustering of small parties and fragmentation of the political party system. In addition, it may be observed from the election results of party-list proportional representative elections in recent years that the possibility of winning elections for those political parties that are not the two main parties has not been completely ruled out. As a result, the provision concerning the threshold for political parties stated in Amendment 2 does not hinder the realization of the principle of the democratic republic and the principle of popular sovereignty, nor does it alter the core contents of the rights to equality and suffrage. As such, it is within the scope of the constitution-amending body to consider the relevant circumstances and assess advantages and disadvantages, which is not in violation of the aforementioned constitutional democratic order. As for the provision regarding the Parallel Voting System and

the threshold for political parties stated in Article 67, Paragraph 2 of the Civil Servants Election and Recall Act, since it was enacted according to Amendment 2 and its content is identical thereto, such a provision raises no conflict with the Constitution.

[4] The Petitioner, the Taiwan Constitution Association, was a candidate party in a party-list proportional representative election. Subparagraph 1 of Amendment 1 provides that at least one legislator shall be elected from each county and city. Such a provision relates to the division of electoral constituencies instead of to the party-list proportional representative elections. Furthermore, the Petitioner did not state how its constitutional right had been injured. This part of the Petition does not meet the requirements provided in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. Under Subparagraph 3 of the same provision, such a petition for constitutional interpretation shall not be granted. Moreover, the other Petitioner, the Green Party, was a participant in a final and binding judgment and not a party to the judgment at issue. As such, its constitutional right was not impaired as a result of the judgment, and it may not file a petition for constitutional interpretation on such grounds. Hence, it shall be hereby stated that the petition shall not be accepted in accordance with the aforementioned provisions.

Background Note by the Translator

The seventh legislative election took place on January 12, 2008, pursuant to Article 4, Paragraphs 1 and 2 of the Additional Articles of the Constitution and Article 67, Paragraph 2 of Civil Servants Election and Recall Act, adopting the Single Electoral Constituency with Two Votes System, with one vote cast to a regional candidate, and the other to a political party. The regional legislators thereof were elected from electoral constituencies equal in number to the number of members to be elected (single electoral constituency system), while legislators

of the nationwide constituency and citizens residing abroad were elected based on a party list, with those political parties receiving five percent or more of political party ballots being elected in proportion to their ratio of received ballots (party-list proportional representation system). The Central Election Commission publicized the list of legislators-elect on the 18th day of the same month and year.

The petitioner, the Taiwan Constitution Association, along with the Civil Party filed an election lawsuit, which was supported by the Green Party, alleging that the preceding provisions governing the said legislative election were contradictory to the principle of popular sovereignty and harmed the principle of equal election, as well as the guarantee of the right to equality and suffrage, and that these provisions, in so providing, constituted causes for invalid election and for invalidation of the non-regional legislators-elect thereof. The lawsuit was dismissed in Taiwan High Court Civil Judgment 97-Xuan-Shang-9 (2009). The Taiwan Constitution Association and the Green Party thus filed a petition for constitutional interpretation on the grounds that the preceding provisions in relation to the Parallel Voting System of Single Electoral Constituency with Two Votes System, the number of seats for party-list proportional representatives, and the threshold for political parties set forth therein as applied in the final binding judgment were contradictory to the principle of popular sovereignty under Article 2 of the Constitution and the principle of equal election manifested in Articles 7 and 129 of the Constitution.

This Interpretation began by referring to the theory of limitations on constitutional amendments first introduced in J.Y. Interpretation No. 499 to discuss the constitutionality of the subject matters involved in this Interpretation. If there are no clear and gross flaws manifested by the constitution-amending body during the constitutional amendment process, and if the content of the amendment does not contradict with the principle of the democratic republic, the

principle of popular sovereignty, the protection of the fundamental rights of the people and the principle of checks and balances of governmental powers, then such amendment shall be deemed to be constitutional. To explain in further detail, for the allotment of seats for legislators-at-large, there exist in various democratic countries the Parallel Voting System and the Compensatory System. The determination as to which system to adopt is a value judgment of legislators. The legislators have chosen the Parallel Voting System, and such system does not contradict the principles of the democratic republic and popular sovereignty, and therefore raises no doubt of conflict with the Constitution. Furthermore, the purpose of the five percent threshold for political parties is to ensure that the efficiency of legislative operations and the smooth interaction between the executive and legislative branches are not impeded by a clustering of small parties and fragmentation of the political party system. Moreover, the legislative election results in recent years have shown that such amendment has not deprived the possibility of political parties other than the two major parties being elected. As such, the core contents of the rights to equality and suffrage have not been altered, and the electoral amendments outline in this case are constitutional.

J.Y. Interpretation No. 325 (July 23, 1993)*

The Parliamentary Power of Inquiry Case

Issue

Does the Control Yuan retain its status as one of the parliamentary chambers following the Constitutional amendments of 1992? Does the Control Yuan still have the power to make inquiries? On what terms could the Legislative Yuan make its own inquiries?

Holding

J.Y. Interpretation No. 76 holds that the Control Yuan and the other national representative entities are jointly equivalent to the parliament as commonly understood in the world of democracies. However, since Additional Article 15 of the Constitution [later revised and renumbered as Additional Article 7 of the Constitution] was put into practice, the status and powers of the Control Yuan have undergone significant changes to the effect that it can no longer be considered a national representative entity. As such, the aforementioned J.Y. Interpretation is no longer applicable to the Control Yuan. The five-Yuan governmental system of the Constitution remains unchanged, though, and the Additional Articles of the Constitution alter neither the original powers of the Control Yuan to impeach, censure, and rectify, nor its ancillary power to make inquiries as vested by Articles 95 and 96 of the Constitution. In this regard, such powers of inquiry remain the sole prerogatives of the Control Yuan. In order to exercise its constitutional powers and responsibilities, the Legislative Yuan may apply Article 57, Subparagraph 1 and Article 67, Paragraph 2 of the Constitution.

* Translation and Note by Yen-Tu SU

In addition, with resolution of the plenary session or of the respective committee, the Legislative Yuan may request that the relevant authorities provide information concerning the bill under review. If necessary, the Legislative Yuan may request review of the original documents via a plenary Yuan resolution. The respondent authority is obliged to provide the requested information or documents unless the refusal is warranted by law or can otherwise be justified. But there are instances in which the governmental authorities are authorized by the Constitution to act independently. Such examples include legal reasoning of judicial adjudication, the examination authority's grading of examinees, decisions of the members of the Control Yuan on whether to impeach or rectify, and acts, files and evidences concerning the investigation and adjudication of a criminal case that has yet to be closed. The Control Yuan has long refrained from inquiring into decision-making in such institutions. For the same reason, the Legislative Yuan should be refrained from making requests to obtain and review documents from such institutions.

Reasoning

[1] Our Constitution does not use the term "Parliament." Previously, a question was raised as to which entity was to represent our Parliament when such a designation was necessary for the sake of international networking. Upon petition, this Court issued J.Y. Interpretation No. 76, which succinctly holds that "the National Assembly, the Legislative Yuan, and the Control Yuan are jointly equivalent to a parliament as commonly understood in the world of democracies." This Interpretation was essentially grounded on the consideration that these entities were all composed of representatives or members who were directly or indirectly elected by the people, and, in terms of their constitutional status and powers, they were all to be deemed as comparable to parliaments in democratic countries. However, Additional Article 15 of the Constitution [later revised and

renumbered as Additional Article 7 of the Constitution] has rendered inoperable such original constitutional arrangements of the Control Yuan as the indirect election of its members, its power to confirm nominations to certain offices in the Judicial Yuan and the Examination Yuan, and the legislative immunities granted to its members by virtue of their serving as national representatives of the people. Under the aforementioned Additional Article of the Constitution, the Second-Term Members of the Control Yuan are to be nominated and appointed by the President with the consent of the National Assembly. The Control Yuan is thereby no longer a national representative entity, but an institution with a different status and powers. Accordingly, the aforementioned J.Y. Interpretation is no longer applicable to the Control Yuan.

[2] Aside from establishing the National Assembly, the Constitution vests the executive, legislative, judicial, examination, and control powers in the five respective Yuans. With their powers vis-à-vis one another delineated by the Constitution, all of these institutions are the highest organs of the state, and the entire separation of powers is distinct from the separation of the three branches of government that is commonly adopted by other countries. There is no necessary connection, for instance, between the separation of powers of the five Yuans and the designation as to which entity is equivalent to the parliament as commonly understood in the world of democracies. The Additional Articles of the Constitution do not alter the five-Yuan governmental system, nor do they increase the powers of the Legislative Yuan. Since no change is made to the powers of the Control Yuan, such as the powers to censure or impeach public officials in central or local governments for dereliction of duty or violation of law, the power to rectify measures of the Executive Yuan and its affiliate ministries, and the ancillary power to make inquiries as vested by Articles 95 and 96 of the Constitution, these powers remain the sole prerogatives of the Control Yuan.

[3] To enable the Legislative Yuan to function properly, Article 57,

Subparagraph 1 of the Constitution provides that "[t]he Executive Yuan has the responsibility to present to the Legislative Yuan a policy statement and a report on its administration. When the Legislative Yuan is in session, its members have the right to question the Premier and the Ministers of the Executive Yuan." In the same vein, Article 67, Paragraph 2 of the Constitution provides that "[t]he committees [of the Legislative Yuan] may invite government officials and concerned citizens to attend the committee meetings and answer questions." In other words, members of the Legislative Yuan may ask or raise questions during sessions and thereby gain information concerning facts or opinions from answers provided by the questioned officials or by the invited attendees. If more information is needed, the Legislative Yuan may request that the relevant authorities provide information concerning the bill under review via a resolution of the Yuan or the respective committee. If necessary, the Legislative Yuan may request review of the original documents via a plenary Yuan resolution. Such arrangements are derived from and pursuant to the Constitutional provisions regarding the assembly and exercise of powers by members of the Legislative Yuan, and the responding authority is obliged to accommodate unless the refusal is warranted by law or can otherwise be justified. But there are instances in which the governmental authorities are authorized by the Constitution to act independently. Judges, for instance, are fundamentally protected by Article 80 of the Constitution to adjudicate cases in accordance with law independently and without any interference. Members of the Examination Yuan and Control Yuan are also protected by Article 88 of the Constitution and Additional Article 15, Paragraph 6 of the Constitution [later revised and renumbered as Additional Article 7, Paragraph 5 of the Constitution] respectively to act independently. Investigations conducted by prosecutors are closely related to criminal trials, and both are critical procedures for the proper exercise of the penal power of the state. Except for being constrained by prosecutorial integration, the ability of

prosecutors to perform their duties independently and without outside interference shall also be protected. A relevant precedent is J.Y. Interpretation No. 13, in which this Court held that, except for their transfer, tenured prosecutors enjoy the same protections as tenured judges. Since the aforementioned personnel are supposed to carry out their responsibilities independently, they should be able to make decisions of their own without outside interference. Therefore, the Control Yuan has long been restrained from inquiring into measures such as the legal reasoning of judicial adjudication, and examination authority's grading of examinees, decisions of the members of the Control Yuan on whether to impeach or rectify, and acts, files and evidence concerning the investigation and adjudication of a criminal case that has yet to be closed. For the same reason, the Legislative Yuan should be restrained from making requests for obtaining and reviewing documents from such institutions.

Background Note by the Translator

With all of its representatives newly elected by the people of Taiwan, the Second National Assembly passed the Second Additional Articles of the Constitution in May 1992. One of the major changes made by this round of constitutional reform was the transformation of the Control Yuan from a parliamentary chamber into an ombudsman institution. In the wake of this constitutional amendment, two petitions were brought to the Taiwan Constitutional Court with the hope to clarify ambiguities such as whether, under the amended Constitution, the Legislative Yuan has the parliamentary power of inquiry that is distinct from the investigative powers of the Control Yuan. The first petition was brought by the Legislative Yuan upon the passing of an extemporaneous motion proposed by some of its members, and it argued that the transformed Control Yuan should no longer retain and exercise any parliamentary powers concerning impeachment, inquiry and oversight, and that

all such powers should be transferred to the Legislative Yuan. Led by Shui-Bian CHEN, then a legislator in the opposition, a group of seventy-three members of the Legislative Yuan from across the aisle later brought the second petition to the Court pursuant to the then newly-enacted Constitutional Court Procedure Act. The second petition urged the Court to hold that, notwithstanding the peculiar separation of the five branches of government and the continued existence of the Control Yuan as an oversight institution under the existing constitutional order, the Legislative Yuan has inherent ancillary powers to make inquiries. Based on these two petitions, the Constitutional Court issued J.Y. Interpretation No. 325 in July 1993.

While its central holding is to affirm that the Legislative Yuan is vested with a certain power of inquiry by virtue of being a parliamentary chamber, the reasoning of J.Y. Interpretation No. 325 has also had profound influence on how the parliamentary power of inquiry is conceived and institutionalized in contemporary Taiwan. It was not until 1999 that the procedures for initiating and exercising the parliamentary power of inquiry were codified into law, and the statute (the Law Governing the Legislative Yuan's Power) is essentially a codification of what the Court laid out in J.Y. Interpretation No. 325 concerning the request and review of government documents. In J.Y. Interpretation No. 585 (2004), the Court, while reaffirming the central holding of J.Y. Interpretation No. 325, took a more expansive view on what the Legislative Yuan could do with its power of inquiry. In addition to accessing information or original documents held by the relevant governmental authorities, the Court held in J.Y. Interpretation No. 585 that "if necessary and with a plenary Yuan resolution, the Legislative Yuan may take testimonies or statements from civilians or government officials that are deemed relevant to the subject matter of investigation, and may impose reasonable punishment for contempt in the form of fines." J.Y. Interpretation No. 585 also recognized executive privilege as a justifiable claim for government

authorities to withhold information and exhorted the Legislative Yuan to further institutionalize its powers of inquiry with better legislation. But the general statutory rules regarding the Legislative Yuan's power of inquiry as provided by the Law Governing the Legislative Yuan's Power have so far remained unchanged.

In September 2013, President Ying-Jeou MA sought to oust Legislative Speaker Jyn-Ping WANG by accusing him of meddling in a court case against the Democratic Progressive Party Caucus Whip Chien-Ming KER. President MA based his accusation on wiretaps that were obtained by prosecutors in the Special Investigation Division (SID) of the Supreme Prosecutors Office in conducting investigation for a different case, and the legality of such extra-judicial use of judicial wiretapping was soon in serious dispute. In November 2013, the Judiciary and Organic Laws and Statutes Committee (JOLSC) of the Legislative Yuan requested review of copies of all the documents, wiretap transcripts, and wiretap recordings that led to the September controversy and on file with the SID prosecutors under the case number 100 Te-Ta-Zi No. 61. The Supreme Prosecutors Office declined to provide the requested copies to the JOLSC, and the JOLSC subsequently held Prosecutor General Shih-Ming HUANG in contempt of parliament for evading oversight and referred him to the Control Yuan for impeachment.

Against this backdrop and with the backing of the Ministry of Justice and the Executive Yuan, the Supreme Prosecutors Office petitioned the Constitutional Court to adjudicate this inter-branch dispute as a matter of constitutional adjudication as well as unified legal interpretation. Citing J.Y. Interpretations Nos. 325 and 585, Petitioner argued that the JOLSC's review request was an unconstitutional infringement upon prosecutorial independence. Petitioner also argued that the parliamentary oversight of prosecutors should be limited to such general matters as institutional design, budgets, and laws

regarding prosecution, and that only the Control Yuan could hold a prosecutor accountable for his or her performance in an individual case after the investigation of the case is closed.

The Constitutional Court issued its decision in the case, J.Y. Interpretation No. 729, in May 2015. In an attempt to balance the interests of prosecutorial independence and parliamentary oversight, the Court in that case held that only after the prosecutorial investigation of a case is closed for good could the Legislative Yuan request to review the documents and evidence contained in the prosecutor's case file, and even then, the requested review must be for the consideration of a bill that is specific in terms of purpose and scope, germane to the exercise of the constitutional authorities of the Legislative Yuan, and not prohibited by law. In J.Y. Interpretation No. 729, the Court also noted that, if there is concern that the legislative review may compromise investigations in other cases, the prosecution may withhold the provision of the requested files until the investigations for the other cases are closed. J.Y. Interpretation No. 729 further modified J.Y. Interpretation No. 325 by making it clear that the Legislative Yuan must pass a plenary Yuan resolution not only to request review of the original documents and evidence in the prosecutor's case file, but to request review of the identical copies of such documents and evidence as well.

J.Y. Interpretation No. 585 (December 15, 2004)*

Scope of Legislative Authority Case

Issue

Has the Legislative Yuan, by enacting the Act of the Special Commission on the Investigation of Truth in Respect of the 319 Shooting, gone beyond the scope of its legislative power? Are any of the relevant provisions contained therein unconstitutional?

Holding

[1] For the purpose of effectively exercising its constitutional powers, the Legislative Yuan may exercise a certain power of investigation, which is inherent in its legislative powers, to take the initiative in obtaining all relevant information necessary to exercise its powers so that it can fulfill its duties as an elected body of representatives and bring its functions of separation of powers and checks and balances into full play by making informed and prudent decisions after adequate and sufficient deliberations. The Legislative Yuan's investigative power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authority. Under the principles of separation of powers and checks and balances, the scope of the targets or matters subject to the Legislative Yuan's investigative power does not grow unchecked. The matters to be investigated by the Legislative Yuan must be substantially related to the exercise of its powers under the Constitution. And, in addition, whenever a matter is related to the independent exercise of powers by an organ of the State that is guaranteed by the Constitution, the Legislative Yuan may not extend its investigative power to such

* Translation and Note by Chung-Hsi Vincent KUAN

a matter. Furthermore, an executive chief, by the authority inherent in his or her executive powers, is entitled to decide not to make public any information that may affect or interfere with the effective operation of the executive branch. This is an executive privilege intrinsic to the executive power. The Legislative Yuan, in exercising its investigative power, should give due respect to such privilege if the matter subject to investigation involves such information. In a specific case, should there exist any dispute as to whether a particular matter to be investigated either relates to the independent exercise of powers by an organ of the State or falls within the scope of executive privileges, or whether any information subject to the executive privilege should be under investigation or made public, the Legislative Yuan and the other organs of the State should seek reasonable channels to negotiate and settle their differences, or establish applicable requirements and procedures by law, pursuant to which the judicial organ will hear and settle the dispute.

[2] The manner in which the Legislative Yuan may exercise its investigative power is not limited to the power to request the production of files, under which it may request the agencies concerned to provide reference materials in regard to the matters involving the exercise of the Legislative Yuan's powers or request such agencies to produce the original documents in respect thereof. If and when necessary, the Legislative Yuan may also, by resolution of its plenary session, request the presence of a civilian or government official related to the matter under investigation to give testimony or express opinions, and may impose reasonably compulsory measures upon those who refuse to fulfill their obligations to assist in the investigation within the scope of pecuniary fines. (The aforesaid should serve as a supplement to J.Y. Interpretation No. 325.) Nevertheless, the relevant procedures, e.g., the initiation of the investigative power, the organization responsible for the exercise of such power, the scope of the matters subject to investigation in a particular case, the procedures to be

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

[3] Thus, this Court hereby renders its opinions as to whether the various provisions of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting as promulgated and implemented on September 24, 2004, (hereinafter the "SCITA") regarding the organization, authority, methods of investigation, procedures and compulsory measures for the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCIT") are in line with the constitutional intent set forth above.

1. The first sentence of Article 2, Paragraph 1 of the SCITA provides, "This Commission shall consist of seventeen members who shall be fair and impartial with professional knowledge and outstanding reputation, and shall be

recommended by the various political parties (groups) of the fifth Legislative Yuan for appointment by the President within five days of the promulgation hereof." The second sentence of Article 2, Paragraph 2 thereof provides, "The various political parties (groups) shall submit their respective lists of recommended persons within five days of the promulgation hereof; failure to submit such list within the specified time limit shall be deemed as renouncement of such recommendation and any and all resulting vacancies shall be filled within five days by selection of the convening member of the Commission who is elected by the existing members for appointment by the President." Article 15, Paragraph 2 thereof provides, "The vacant seat of any member of this Commission who is expelled or any seat that falls vacant for any reason shall be filled by another person recommended by the political party (group) making the original recommendation within five days; failure to so recommend any person within the specified time limit shall entitle the convening member of the Commission to select a person *sua sponte* for appointment by the President within five days." And, finally, Article 16 thereof provides, "Where appointments shall be made by the President under Articles 2 and 15 hereof, the President shall make such appointments within the specified time limit. The President's failure to make such appointments within the specified time limit shall render such appointments effective automatically." The foregoing provisions regarding the appointment of members of the SCIT are not allowed under the Constitution unless the appointments were approved by a resolution of the Legislative Yuan and made by the President of the Legislative Yuan.

2. The SCITA fails to specify the term for members of the SCIT. However, to the extent that the principle of non-continuance upon expiration of term for the Legislative Yuan is followed, there is no violation of the Constitution. Furthermore, Article 11, Paragraph 2 thereof provides, "The funds required by this Commission shall be appropriated from the second reserves of the Executive

Yuan, and the Executive Yuan shall not reject such appropriation." As long as all applicable laws and regulations concerning budgets are complied with, there is no violation of the Constitution.

3. Article 4 of the SCITA provides, "This Commission and its members shall be above partisanship and shall, in accordance with laws, exercise its and their respective authorities and answer to the entire nation without being subject to any instruction or supervision by any other agency or any interference." The phrase "without being subject to any instruction or supervision by any other agency" is intended to mean "without being subject to any instruction or supervision by any agency other than the Legislative Yuan." Article 15, Paragraph 1 thereof provides, "Any member of this Commission who is incapacitated, in violation of laws and/or regulations, or who has made inappropriate statements or committed inappropriate acts may be expelled from his or her office by the consent of two thirds of the total number of members of this Commission." In regard to the provisions governing the expulsion of members of the SCIT, the Legislative Yuan's power to remove such members is not precluded thereby. There is no violation of the Constitution in this regard.

4. Article 15, Paragraph 1 of the SCITA provides, "Any member of this Commission who is incapacitated, in violation of laws and/or regulations, or who has made inappropriate statements or committed inappropriate acts may be expelled from his or her office by the consent of two thirds of the total number of members of this Commission." The said provision, in making "violation of laws and/or regulations or who has made inappropriate statements or committed inappropriate acts" a cause for expulsion, may not be in line with the principle of clarity and definiteness of law and thus should be reconsidered and revised accordingly.

5. The first sentence of Article 8, Paragraph 1 of the SCITA provides, "This

Commission shall have exclusive jurisdiction over the investigation of any and all cases involving criminal liability in relation to the 319 Shooting." Furthermore, Article 8, Paragraph 2 thereof provides, "This Commission, in exercising the aforesaid authorities, shall have any and all powers and authorities exercisable by a prosecutor or military prosecutor pursuant to law." In addition, Article 13, Paragraph 1 thereof provides, "In the event that the outcome of the investigation conducted by this Commission reveals any case involving criminal liabilities, the prosecutor or military prosecutor transferred *pro tempore* to this Commission shall *sua sponte* prosecute for such a case." The foregoing provisions have gone beyond the scope of the investigative power exercisable by the Legislative Yuan and thus are contrary to the principles of separation of powers and checks and balances.

6. Article 13, Paragraph 3 of the SCITA provides, "In the event that the outcome of the investigation conducted by this Commission differs from the facts as determined by a court in its final and conclusive judgment, it shall be a ground for retrial." The said provision is in violation of the fundamental principle of rule of law whereby a law shall be equally applied to all and is also beyond the scope of the investigative power exercisable by the Legislative Yuan.

7. Article 12, Paragraph 1 of the SCITA provides, "In respect of the events under investigation by this Commission, a written investigative report shall be submitted to the Legislative Yuan within three months and the same shall be published. If the truth remains unascertained, the investigation shall continue and a report shall be submitted to the Legislative Yuan and Control Yuan every three months and the same shall be published." As far as the report to the Control Yuan is concerned, the said provision should be reconsidered and revised, since it is not in line with the constitutional intent that each organ shall attend to its own business.

8. Article 8, Paragraph 3 of the SCITA provides, “On the date of promulgation hereof, various agencies shall make available any and all files and exhibits in their possession in respect of the cases over which this Commission shall have exclusive jurisdiction and transfer the same to this Commission.” Article 8, Paragraph 4 thereof provides, “In exercising its authorities, this Commission shall not be subject to any restrictions imposed by the National Secrets Protection Act, Trade Secrets Act, Code of Criminal Procedure and any other laws. Any agency requested to provide information to this Commission shall not avoid, delay or reject any relevant request on the grounds of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground.” Article 8, Paragraph 6 thereof provides, “This Commission and its members, in exercising its or their respective authorities, may designate any matter and request any and all agencies, groups or individuals concerned to make explanations or provide assistance in respect of such matter. Those so requested shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground.” With respect to the parts of the provisions concerning exclusive jurisdiction, transfer of files and exhibits, as well as the provisions concerning the independent exercise of powers by an organ of the State that is guaranteed by the Constitution, they are contrary to the principles of separation of powers and checks and balances and have gone beyond the scope of the investigative power exercisable by the Legislative Yuan.

9. Article 8, Paragraph 6 of the SCITA provides, “This Commission and its members, in exercising its or their respective authorities, may designate any matter and request any and all agencies, groups or individuals concerned to make explanations or provide assistance in respect of such matter. Those so requested shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other

ground." With respect to the provisions to the effect that no rejection may be made whatsoever as to matters involving national secrets or investigation secrets, appropriate amendments should be made.

10. The first sentence of Article 8, Paragraph 4 of the SCITA provides, "In exercising its authorities, this Commission shall not be subject to any restrictions imposed by the National Secrets Protection Act, Trade Secrets Act, Code of Criminal Procedure and any other laws." Furthermore, Article 8, Paragraph 6 thereof provides, "This Commission and its members, in exercising its or their respective authorities, may designate any matter and request any and all agencies, groups or individuals concerned to make explanations or provide assistance in respect of such matter. Those so requested shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground." With respect to the provisions concerning the fundamental rights of the people, the principle of due process of law and the principle of clarity and definiteness of law have been violated.

11. Article 8, Paragraph 7 of the SCITA provides, "In case of violation of the provisions of Paragraphs 1, 2, 3, 4, or 6 hereof, the head of the agency and individual in violation shall be subject to a fine of not less than TWD100,000 but not more than TWD1,000,000; in case of any continuous violation subsequent to any fine already imposed hereby, successive fines may be imposed." In addition, the first sentence of Article 8, Paragraph 8 thereof provides, "Any head of agency, responsible person of any group or any individual concerned who rejects the investigation conducted by this Commission or any of its members and, in so rejecting, causes material impact, or who makes false statements, shall be subject to punishment pursuant to Paragraph 7 hereof." The foregoing provisions are contrary to the principle of due process of law and the principle of clarity and definiteness of law.

12. The second sentence of Article 8, Paragraph 8 of the SCITA provides, "Any head of agency, responsible person of any group or any individual concerned who rejects the investigation conducted by this Commission or any of its members and, in so rejecting, causes material impact, or who makes false statements,…shall also be subject to prosecution and punishment pursuant to Articles 165 and 214 of the Criminal Code." The foregoing provision should mean that the prosecutorial agencies shall carry out investigations and prosecutions and the courts shall hold trials according to law, respectively, if any of the aforesaid persons is suspected of any crime after the investigation is conducted. The said provision should be reconsidered and revised accordingly.

13. Article 8, Paragraph 9 of the SCITA provides, "This Commission and its members, in exercising its or their respective authorities, may prohibit any person under investigation or any other person related to such person from exiting the country." The said provision is found to go beyond the scope of the investigative power of the Legislative Yuan and is in violation of the principle of proportionality.

[4] The provisions of the SCITA as covered by Items 5, 6, 8, 10, 11 and 13 above, which are found to be contrary to constitutional intent, shall become null and void as of the date of the promulgation hereof.

[5] The Constitutional Court is empowered by the Constitution to exercise its authority independently to interpret the Constitution and hold constitutional trials. The preventative system used to ensure the effectiveness of the interpretations given or judgments rendered by the judiciary is one of the core functions of the judicial power, irrespective of whether it involves constitutional interpretation or trials, or civil, criminal or administrative litigation. Although the petition for preliminary injunction at issue is not in conflict with the Constitution, it nevertheless is no longer necessary to examine the issue now that an

interpretation has been given for the case at issue.

Reasoning

[1] This matter has been brought to the attention of this Court because ninety-three members of the Legislative Yuan, including Jian-Ming KE, were of the opinion that the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting as promulgated and implemented on September 24, 2004 (hereinafter the "SCITA") had transgressed the authority granted to the Legislative Yuan by the Constitution. They have, therefore, by more than one third of the incumbent members of the Legislative Yuan, duly initiated a petition for constitutional interpretation in regard to the questions about the meanings of the constitutional provisions governing their functions and duties, as well as of the question as to the constitutionality of the SCITA. Simultaneously, they have petitioned this Court for a preliminary injunction (referred to by the Petitioners and hereinafter as "expeditious disposition") before an interpretation is delivered for this matter, declaring in effect that the application of the SCITA be suspended for the time being. In regard to the petition for the preliminary injunction, this Court, pursuant to Article 13, Paragraph 1 of the Constitutional Court Procedure Act, ordered that the representatives of the Petitioners, their agents *ad litem*, as well as the representatives appointed by the agency concerned, namely, the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCIT"), appear before the Constitutional Court for oral arguments on October 14, 2004. In addition, legal scholars were also invited to appear before this Court to present their opinions as *amicus curiae*. Whereas, in regard to the petition for the constitutional interpretation, this Court ordered that the representatives of the Petitioners, their agents *ad litem*, as well as the representatives and agents *ad litem* appointed by the agency concerned, namely, the Legislative Yuan, appear before the Constitutional Court for oral arguments

on October 27 and 29, 2004. In addition, representatives of the other agencies concerned, namely, the Control Yuan, Ministry of Justice and Ministry of the Interior, as well as legal scholars, were also invited to appear before this Court to present their opinions.

[2] The Petitioners have argued summarily that: (1) The SCIT, by its nature, is an unconstitutional organ: the SCIT not only replaces the prosecutorial agencies in regard to the conducting of investigations (*see* Article 8, Paragraphs 1, 2 and 3), transferring prosecutors *pro tempore* (*see* Article 9, Paragraph 1), instructing prosecutors as to the prosecution (*see* Article 13, Paragraph 1), but also interferes with the courts in holding trials (*see* Article 13, Paragraph 3), as well as with the investigative power of the Control Yuan (*see* Article 8, Paragraph 3). And, additionally, the SCIT may possess the power to organize itself, prepare offices, administer affairs and hire staff on its own initiative (*see* Article 11, Paragraph 1), and the funds required by the SCIT shall be appropriated from the second reserves of the Executive Yuan, which shall not reject such appropriation (*see* Article 11, Paragraph 2). As such, the SCIT is a centralized special organ whose powers are simply unchecked by any other agency, which does not fit within with the constitutional order of freedom and democracy. The SCIT, which does not belong to any constitutional organ as provided under the Constitution, and is not restricted by the Five-Yuan system, may nonetheless exercise the judicial power, control powers and the power of the Legislative Yuan to request production of files, as well as the executive power. It, therefore, is an unconstitutional hybrid organ. (2) The enactment of the SCITA has transgressed the legislative power: The Legislative Yuan, by creating an unconstitutional hybrid organ through the enactment of the SCITA, has transgressed the boundaries of the legislative power, thus contradicting the demands of equitable democracy. (3) The enactment of the SCITA is contrary to the principle of separation of powers: The SCITA, as legislation aiming at a specific case, namely, the 319 Shooting, should be deemed

as null and void because it results in the combination of legislation and execution, which is contrary to the separation of powers. (4) The authorities exercisable by the SCIT have infringed upon the powers of other constitutional organs, which is contrary to the principle of separation of powers: (i) Invasion of the President's powers of immunity, as well as appointment and removal of personnel: Under Article 8 of the SCITA, the targets subject to the investigation conducted by the SCIT shall include the President, who may not reject the investigation conducted by the SCIT or its members on the ground of national secrets, which provision is clearly void for violation of Article 52 of the Constitution. In addition, the appointment of members of the SCIT completely deprives the President of his power to appoint and remove personnel, which is also void for violation of Article 41 of the Constitution. (ii) Invasion of the core areas of the investigative power of prosecutors: (a) Under Article 8, Paragraphs 1, 2 and 3 and Article 9 of the SCITA, the prosecutorial agencies have been replaced by the SCIT; and (b) Under Article 13, Paragraphs 1 and 3, the SCIT not only has jurisdiction over a specific criminal case, but also may instruct a prosecutor in carrying out prosecution, thus combining the legislative power with the executive power and weakening the principle of separation of powers as to criminal procedure and *Rechtsstaat* (a state governed by rule of law). (iii) Invasion of the core areas of the judicial power: Article 13, Paragraph 3 of the SCITA provides that, if the outcome of the investigation conducted by the SCITA differs from the facts as determined by a court in its final and conclusive judgment, the determination of the SCITA shall control. Thus, it has infringed upon the core of an independent trial, which is in violation of Article 80 of the Constitution. (iv) Invasion of the core areas of the investigative power of the Control Yuan: (a) Article 8, Paragraphs 3, 4, 5 and 6 of the SCITA have granted the SCIT the congressional power of investigation, which should not have belonged to the Legislative Yuan. Thus, it has gone beyond the boundaries set by J.Y. Interpretation No. 325 as to

the investigative power of the Control Yuan. (5) The provisions regarding the appropriation of funds for the SCIT are in violation of the Constitution: The Legislative Yuan may not request the Executive Yuan to make budgetary spending as to any specific items, or it will be in violation of the Constitution. The provisions of Article 11, Paragraph 2 of the SCITA have obscured the boundaries between the legislative and executive powers and rendered the system of accountability of politics chaotic, which is contrary to Article 70 of the Constitution, as well as J.Y. Interpretations No. 264 and 391. (6) The organization of the SCIT is in violation of the Constitution: (i) The SCIT has replaced the people with political parties: Article 2, Paragraph 2 of the SCITA provides that various political parties (groups) shall recommend candidates for membership of the SCITA. However, since political parties cannot represent the people, the recommendation of the members of the SCIT has destroyed the legitimacy of the members and the organization by enabling the Chinese Nationalist Party and the People First Party to recommend a total of nine members, giving the said parties outright control over the operation of the SCIT. (ii) Members of the SCIT do not have any term of office: According to Article 15, Paragraph 1 of the SCITA, any member "recommended" by the minority party is likely to be expelled from his or her office at any time by the members of the majority party for "inappropriate statements or acts," whereas a member "recommended" by the majority party may not be removed from office once he or she assumes the office unconstitutionally, which is in violation of the principle of democracy of limited mandate of powers. (7) The SCITA is in violation of the fundamental rights of the people and is inconsistent with the principles of proportionality and due process of law: (i) Inconsistency with the principle of proportionality: Article 8, Paragraph 7 of the SCITA provides that, in case of violation of the provisions of Paragraphs 1, 2, 3, 4 or 6 hereof, the head of the agency and individual in violation shall be subject to a fine of not less than TWD100,000 but not more

than TWD1,000,000 and successive fines may be imposed. Since the purpose of the said provision is unconstitutional, it shall not pass review for the constitutionality of its purpose. Furthermore, Article 1, Paragraph 1 of the SCITA provides that the legislative objectives of the SCITA shall be to settle the disputes arising from the election and to stabilize the political situation. When it comes to the means employed, however, the SCITA not only has failed to use the least intrusive means, but also has used disproportional means in comparison with the desired objectives in terms of the blanket, generalized authorization granted to members of the SCIT to exercise compulsory measures, thus infringing upon such fundamental rights of the people as freedom, privacy, etc. (ii) Inconsistency with due process of law: The provisions of Article 8, Paragraphs 4 and 8 have precluded the various restrictions imposed by the Code of Criminal Procedure, etc., by granting blanket and generalized authorization to the SCIT and its members to exercise compulsory measures at will. Any head of agency or other person who rejects the investigation or makes false statements shall, in addition to the punishment set forth in Article 8, Paragraph 7 thereof, also be subject to prosecution and punishment pursuant to Articles 165 and 214 of the Criminal Code, which is obviously in violation of due process of law.

[3] The agency concerned, namely, the Legislative Yuan, has argued summarily that: (1) The petition at issue fails to meet the requirements for filing such a petition and thus should be dismissed because it does not involve questions about the meanings of constitutional provisions governing the functions and duties of the legislators, nor does it concern any question as to the constitutionality of the application of any law. (2) Under the principle of constitutional interpretation of law, the SCITA, whether in whole or in part, does not violate the Constitution: (i) The nature of the SCIT: Under the principle of separation of powers, most suitable agency and distribution of agency functions, the pertinent powers shall be allocated to the most suitable, efficient agency available. The ROC

Constitution does not provide in any article for executive reservation, nor does it clearly prohibit the creation of any similar agency such as the SCIT. Thus, the Legislative Yuan shall have the power to enact such legislation. Since a public legal entity may exist between the State and a private person apart from the five Yuans provided for under the Constitution, and the State may entrust public authority to a private person, the SCIT, which is created *ad hoc* for a specific mission, should in principle be allowed. (ii) The enactment of the SCITA falls within the legislative powers: The Legislative Yuan, under Article 63 of the Constitution, shall have the power to legislate as to any important affairs of the State. Since the creation of the SCIT is intended to settle the political disputes arising from the undiscovered truth of the 319 Shooting, which is an important affair of the State, it falls within the legislative power as long as no fundamental rights of the people are infringed. (3) The authorities exercisable by the SCIT have not infringed upon the powers of other constitutional organs, nor is the manner in which the SCIT exercises its authority contrary to the principles of separation of powers and checks and balances: There are two mechanisms covered by the SCITA. One is the SCIT, which is created under the SCITA and in charge of the "investigation of the truth"; the other is the prosecutor(s) borrowed *pro tempore* by the SCIT pursuant to the SCITA, who shall be solely in charge of the exercise of the "investigative power regarding criminal cases". Articles 1 through 7 of the SCITA govern the "authorities and methods of investigation" for the SCIT; Article 8 et seq. govern the "criminal investigations" conducted by the prosecutors borrowed *pro tempore* by the SCIT; and Articles 9 and 18 thereof serve as the linking clauses for the SCIT and the prosecutors borrowed *pro tempore*, requiring mutual cooperation between the SCIT and the prosecutors borrowed *pro tempore*. The two agencies exercise the investigative power and prosecutorial power, respectively, and cooperate with each other. As a result, the SCIT does not infringe upon any executive power or prosecutorial

power and thus does not violate the principle of separation of powers. In addition, since the SCITA does not endow the SCIT with any judicial power, there is no infringement of any judicial power (court jurisdiction). (4) The provisions regarding the appropriation of funds for the SCIT are in line with the Constitution: Article 11, Paragraph 2 of the SCITA provides that the funds required by the SCIT may be appropriated from the second reserves, which is legally supported by Article 70, Subparagraph 3 of the Budget Act and Article 11, Paragraph 2 of the SCITA. In addition, Article 70 of the Constitution is not violated since such spending does not increase expenditures. In addition, since the appropriation of the second reserves is not an exclusive power of the Executive Yuan, the Legislative Yuan is not precluded from making use of such funds. Therefore, no inherent executive power is infringed. (5) The appointment of members of the SCIT and the organization of the SCIT are both in line with the Constitution: Article 2 of the SCITA provides that the members of the SCIT shall be recommended by means of proportionality of various political parties. Similar methods are seen in other organizations, e.g., the recommendation of members of the Central Election Commission. And no party manipulation is seen in such organizations, which is therefore in line with fairness and professionalism. Article 16 of the SCITA does not infringe upon the presidential power to appoint and remove personnel. (6) The SCITA is not in violation of the fundamental rights of the people or due process of law: Article 8, Paragraphs 4, 6 and 9 and Article 10 of the SCITA must be read together with Articles 8 and 9 thereof. As a result, the "prosecutors borrowed *pro tempore*," who are already entrusted with such power, shall still exercise the power of compulsory measures, and thus the SCIT is not authorized by the law in an extraordinary manner to impose any restrictions on personal freedom. In addition, the SCITA has granted the SCIT necessary investigative power. Under Article 1, Paragraph 2 and Article 8, Paragraph 2, the SCIT must exercise its powers pursuant to law. Moreover, a

generalized provision of law is not necessarily unconstitutional. Articles 152 et seq. of the Administrative Procedure Act, which prescribe the procedure for formulating regulations, may be applied *mutatis mutandis* by making and publishing administrative regulations. The working rules for the SCITA are in line with the said legal principle. As for the infringement of the people's fundamental rights, depending upon the circumstances, administrative appeals, administrative litigation or state compensation claims may be initiated or brought by the aggrieved person. The protections and remedies for rights are already in place. Therefore, there is no infringement of the demand for the protection of the people's fundamental rights.

[4] Having taken into consideration all aspects of the arguments, this Court has delivered this interpretation. The reasons are as follows:

The Petitioners, in exercising the legislative power provided under Article 62 of the Constitution, question the constitutionality of the SCITA, i.e., whether the SCITA is consistent with the constitutional principle of separation of powers. Furthermore, under the SCITA, the members of the SCIT shall be recommended by the various political parties (groups) (*see* Article 2, Paragraph 1 and 2 thereof); the SCIT shall be created by the Legislative Yuan (*see* Article 17 thereof); and the SCIT shall submit investigative reports to the Legislative Yuan periodically (*see* Article 12). All of the foregoing matters concern the legislators' exercise of their authorities, and the exercise of such authorities in respect of the SCITA has generated doubt as to the constitutionality of the SCITA. Besides, more than one third of the incumbent members of the Legislative Yuan have initiated a petition for constitutional interpretation in respect of the said doubt. We, therefore, are of the opinion that this matter should be heard since it is in line with the provisions of Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act.

[5] The Legislative Yuan, consisting of members elected by the people, is the highest legislative organ of the State and shall exercise the legislative power on behalf of the people. For the purpose of effectively exercising its constitutional powers, the Legislative Yuan may exercise a certain power of investigation, which is inherent in its legislative powers, to take the initiative in obtaining all relevant information necessary to exercise its powers so that it can fulfill its duties as an elected body of representatives and bring its functions of separation of powers and checks and balances into full play by making informed and prudent decisions after adequate and sufficient deliberations.

[6] The Legislative Yuan's investigative power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authorities. Under the principles of separation of powers and checks and balances, the scope of the targets or matters subject to the Legislative Yuan's investigative power does not grow unchecked. The matters to be investigated by the Legislative Yuan must be substantially related to the exercise of its powers under the Constitution. And, in addition, whenever a matter is related to the independent exercise of powers by an organ of the State that is guaranteed by the Constitution, the Legislative Yuan may not extend its investigative power to such a matter (*see* J.Y. Interpretations Nos. 325 and 461). Furthermore, an executive chief, by the authority inherent in his or her executive powers, is entitled to decide not to make public any information that may affect or interfere with the effective operation of the executive branch, e.g., matters relating to such national secrets as national security, defense or diplomacy; internal discussions in the process of policy-making and information regarding existing criminal investigations. This is an executive privilege intrinsic to the executive powers. The Legislative Yuan, in exercising its investigative power, should give due respect to such privilege and not compel publication of such information or provision of relevant documents by the executive branch if the matter subject to investigation involves such

information. In a specific case, should there exist any dispute as to whether a particular matter to be investigated either relates to the independent exercise of powers by an organ of the State or falls within the scope of executive privilege, or whether any information subject to the executive privilege should be under investigation or made public, the Legislative Yuan and the other organs of the State should seek reasonable channels to negotiate and settle their differences, or establish applicable requirements and procedures by law, pursuant to which the judicial organ will hear and settle the dispute.

[7] The manner in which the Legislative Yuan may exercise its investigative power is not limited to the power to request the production of files, under which it may request that the agencies concerned provide reference materials in respect of the matters involving the exercise of the Legislative Yuan's powers or request such agencies to produce the original documents in respect thereof. If and when necessary, the Legislative Yuan may also, by resolution of its plenary session, request the presence of a civilian or government official related to the matter under investigation to give testimony or express opinions, and may impose reasonably compulsory measures upon those who refuse to fulfill their obligations to assist in the investigation within the scope of pecuniary fines. (The aforesaid should serve as a supplement to J.Y. Interpretation No. 325.) Nevertheless, the relevant procedures, e.g., the initiation of the investigative power, the organization responsible for the exercise of such power, the scope of the matters subject to investigation in a particular case, the procedures to be followed under various methods of investigation, as well as the judicial relief procedures, should all be adequately prescribed by law. In extraordinary cases, should there exist any necessity of mandating those other than members of the Legislative Yuan to assist in the investigation as to any particular matters, special laws must be enacted, setting forth in detail the purposes of the mandate, the scope of the investigation, the matters relating to personnel and organization,

including, without limitation, the qualifications, appointment, term of the mandated persons and the authorities, methods and procedures for the special investigation, which would also serve as the basis of supervision. The organizations and meeting procedures prescribed under the respective laws must conform to the principle of democracy. The scope of the investigation in a specific case shall not be in violation of the principles of separation of powers and checks and balances, nor can it infringe upon the core authority of another constitutional organ or cause material harm to the exercise of powers by another constitutional organ. In respect of the procedures prescribed for the investigation methods, the constitutional principles of proportionality, clarity and definiteness of law, as well as due process of law, must all be complied with where such procedures may involve any restrictions imposed on the people.

1. The Nature of the SCIT

[8] The SCITA is an extraordinary piece of legislation passed by the Legislative Yuan for the purpose of creating the SCIT in an attempt to ascertain the truth of the 319 Shooting. Judging from the provisions of Article 2, Paragraphs 1 and 2 and Articles 16 and 17 of the SCITA, the formation of the SCIT is prepared by the Legislative Yuan. Based on the constitutional principle of accountability of politics, under which an organization and its authorities should not be separated, the SCIT should be categorized as a special commission designed to assist the Legislative Yuan in exercising the investigative power. This theory is also supported by Article 12, Paragraph 1 thereof, which provides for the SCIT's obligation to submit reports to the Legislative Yuan. Therefore, the SCIT is not an organization that does not belong to any constitutional organ, nor is it a hybrid organ that exercises the legislative, executive, judicial and control powers simultaneously.

[9] The creation of the SCIT under the SCITA is intended to discover the truth

of the 319 Shooting of the President and Vice President (*see* Article 1, Paragraph 1 thereof). This is an important affair of the State as to which the Legislative Yuan may conduct an investigation so that it may supervise the executive branch and satisfy the people's right to know, which is consistent with the requirement that the Legislative Yuan may exercise the investigative power, if necessary, to exercise its constitutional authorities effectively.

[10] Even though the Legislative Yuan has the power to enact the SCITA, the constitutionality of the SCITA should nevertheless be determined after taking into consideration whether the organization, authorities, meeting procedures and the investigative methods and proceedings of the SCIT fit in with the constitutionally required principles of democracy, separation of powers and checks and balances, proportionality and clarity and definiteness of law, as well as due process of law. Hence, this Court hereby renders its opinions as to whether the relevant provisions of the SCITA are in line with the constitutional intent set forth above.

2. The Organization of the SCIT

[11] The Legislative Yuan's investigative power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authority. The exercise of such power should be carried out by the Legislative Yuan by establishing an investigation commission pursuant to law. Only in extraordinary cases should the Legislative Yuan mandate non-members of the Legislative Yuan to assist in the investigation as to any particular matters by enacting special laws through resolutions in its plenary session. For instance, an investigation commission consisting of members of the Legislative Yuan cannot conduct effective investigations due to the highly specialized nature of the matters subject to investigation. Although the qualifications, appointment, and procedures for the selection of the members of such a commission fall within the confines of

parliamentary autonomy, such matters should nonetheless be prescribed by law and the appointments made by the President of the Legislative Yuan upon resolution by the plenary session of the said Yuan. Article 41 of the Constitution is not relevant in such a situation.

[12] The first sentence of Article 2, Paragraph 1 of the SCITA provides, "This Commission shall consist of seventeen members who shall be fair and impartial with professional knowledge and outstanding reputations, and shall be recommended by the various political parties (groups) of the fifth Legislative Yuan for appointment by the President within five days of the promulgation hereof." The second sentence of Article 2, Paragraph 2 thereof provides, "The various political parties (groups) shall submit their respective lists of recommended persons within five days of the promulgation hereof; failure to submit such list within the specified time limit shall be deemed as renouncement of such recommendation and any and all resulting vacancies shall be filled within five days by selection of the convening member of the Commission who is elected by the existing members for appointment by the President." The foregoing provisions are meant to be part of a special law enacted by the Legislative Yuan, which, having taken into account that the matters subject to investigation are of a special nature, requiring highly specialized expertise, fairness and impartiality, has mandated those professionals other than members of the Legislative Yuan to form an investigation commission for the purpose of assisting the said Yuan in exercising the investigative power. Under the principle of parliamentary autonomy, the Legislative Yuan should decide on the qualifications, appointment, and procedures for the selection of the members of such a commission. If the Legislative Yuan has decided to accept the candidates recommended by the various political parties (groups), and the appointments of such candidates have been made by the President of the Legislative Yuan upon resolution by the plenary session of the said Yuan, there is no violation of the

Constitution. Although the Legislative Yuan may, as a token of respect for the head of state, submit a list of the nominated candidates to the President for the latter to appoint under Article 41 of the Constitution, this, however, does not mean that the President has any substantive authority to select such members. Nor is the countersignature of the Premier as provided under Article 37 of the Constitution required. The President should also respect the candidates selected by the Legislative Yuan in order to show respect for the authorities of the said Yuan. Therefore, the foregoing provisions of Article 2, Paragraphs 1 and 2 of the SCITA, as well as Article 15, Paragraph 2 thereof, which provide, "The vacant seat for any member of this Commission who is expelled or whose seat falls vacant for any reason shall be filled by another person recommended by the political party (group) making the original recommendation within five days; failure to so recommend any person within the specified time limit shall entitle the convening member of the Commission to select a person *sua sponte* for appointment by the President within five days," should mean that, upon recommendation of such members by the various political parties (groups) or selection of a candidate by the convening member of the SCIT, the appointment shall pass the Legislative Yuan by resolution of the plenary session before the President of the Legislative Yuan submits it to the President for appointment. By the same token, Article 16 of the SCIT, which provides, "where appointments shall be made by the President under Articles 2 and 15 hereof, the President shall make such appointments within the specified time limit; failure to make such appointments within the specified time limit shall render such appointments effective automatically," is also found not to contravene Articles 41 and 37 of the Constitution.

[13] Since the investigative power of the Legislative Yuan is exercised by an investigation commission created by the plenary session of the said Yuan and composed of members thereof, the term of office for the members of the

investigation commission shall end no later than the day when the specific term of the Legislative Yuan expires so that the principle of representative politics is followed. The principle of non-continuance upon expiration of term shall also apply to the situation where an investigation commission is composed of non-members of the Legislative Yuan who are mandated by the said Yuan by resolution of its plenary session. It should be noted that Article 12, Paragraph 1 of the SCITA provides, "In respect of the events under investigation by this Commission, a written investigative report shall be submitted to the Legislative Yuan within three months and the same shall be published. If the truth remains unascertained, the investigation shall continue…" Although the failure of the said provision to specify the term of office for the members of the SCIT is not unconstitutional in itself, the term of office for such members should, as a matter of course, end no later than the day when the term of the fifth Legislative Yuan expires, as the SCIT is created by the authorization of the fifth Legislative Yuan. Furthermore, since the SCIT is a special commission subordinate to the Legislative Yuan, the funds required for its operations shall be allocated by the said Yuan. However, if dictated by the factual situations and consistent with applicable laws and regulations relating to budgets, the second reserves may also be appropriated without infringing upon the executive power. Article 11, Paragraph 2 of the SCITA provides, "The funds required by this Commission shall be appropriated from the second reserves of the Executive Yuan, and the Executive Yuan shall not reject such appropriation." This provision, along with Article 12, Paragraph 1 thereof mentioned above, is not unconstitutional as long as the constitutional intent mentioned above is complied with.

[14] Under the principles of representative politics and the accountability of politics, the Legislative Yuan shall, in exercising its investigative power, assume political responsibility and be subject to popular supervision as to whether it has abused its power and authority. Even under extraordinary circumstances when

the Legislative Yuan deems it necessary to mandate those other than members of the Legislative Yuan to assist or substitute for the legislators in investigation as to any particular matters, the Legislative Yuan shall still be obligated to supervise the performance of those mandated personnel in carrying out their duties under the principles of representative politics and the accountability of politics. By no means should such mandated personnel be exempt from any supervision by the Legislative Yuan and allowed to exercise the investigative power on their own initiative. Therefore, the SCIT is obligated to report to the Legislative Yuan under Article 12, Paragraph 1 of the SCITA, which provides, "In respect of the events under investigation by this Commission, a written investigative report shall be submitted to the Legislative Yuan within three months and the same shall be published. If the truth remains unascertained, the investigation shall continue and a report shall be submitted to the Legislative Yuan…every three months and the same shall be published." Moreover, Article 4 thereof provides, "This Commission and its members shall be above partisanship and shall, in accordance with laws, exercise its and their respective authorities and answer to the entire nation without being subject to any instruction or supervision by any other agency or any interference." The phrase "without being subject to any instruction or supervision by any other agency" should not have precluded the Legislative Yuan from exercising its supervision over the SCIT, but, instead, is intended to mean "without being subject to any instruction or supervision by any agency other than the Legislative Yuan." Additionally, in view of its duty to instruct and supervise the SCIT, the Legislative Yuan shall have the power to remove any member of the SCIT who is deemed incompetent by resolution of its plenary session. The power to remove personnel, when compared with the power to appoint personnel, is more permanent and exercisable at any time. Thus, it is not only a power necessary to control and supervise effectively those personnel who are conducting the investigation, but also is a key to the

fulfillment of the Legislative Yuan's constitutional obligation under the principle of representative politics. Therefore, Article 15, Paragraph 1 thereof provides, "Any member of this Commission who is incapacitated, in violation of laws and/or regulations, or who has made inappropriate statements or committed inappropriate acts may be expelled from his or her office by the consent of two thirds of the total number of members of this Commission." The provision is intended to grant the SCIT the power to expel its members, but it should still be subject to the resolution of the plenary session of the Legislative Yuan, whose power to remove members of the SCIT remains intact. The foregoing provisions are not unconstitutional as long as the constitutional intent mentioned above is followed. However, part of the foregoing provisions, in making "violation of laws and/or regulations or has made inappropriate statements or committed inappropriate acts" a cause for expulsion, may not be in line with the constitutional principle of clarity and definiteness of law and thus should be reconsidered and revised accordingly. As an additional note, the SCIT's exercise of its authorities shall comply with the principle of democracy. Hence, the quorum for members of the SCIT to commence the exercise of the investigative power should also be clearly provided by law.

3. The Powers of the SCIT

[15] The Legislative Yuan's investigative power is a mere subsidiary power of the said Yuan to facilitate the exercise of its constitutionally mandated legislative powers and authorities. Naturally, such power is different from either the investigative power in respect of prosecution for criminal offenses or the jurisdiction of courts. Under the principles of separation of powers and checks and balances, the Legislative Yuan may not, by legislation, grant itself or any committee subordinate to it the power to exercise the said investigative power or court jurisdiction. Since the SCIT is a special commission subordinate to the Legislative Yuan that is designed to exercise the investigative power of the said

Yuan, the authorities possessed by the SCIT should be no more than those exercisable by the Legislative Yuan under its investigative power. Furthermore, the authorities of the SCIT should be limited to the investigation of the 319 Shooting, but should not go so far as to exercise the investigative power as to crimes, which is only exercisable by a prosecutor or military prosecutor pursuant to law, nor the court jurisdiction. Therefore, the authorities of the SCIT should be limited to the scope specified in Article 7 of the SCITA, which provides, "This Commission shall conduct investigations into the events having occurred before and after the 319 Shooting, or into any and all relevant matters derived from such events so as to discover the truth relating to the planning and the motives, objectives of any and all persons concerned, as well as the facts and effects of such events and matters." Nevertheless, such investigations should not exclude or interfere with the Control Yuan or any other agency concerned in conducting investigations into the same events or matters by their own authorities. Therefore, the first sentence of Article 8, Paragraph 1 thereof provides, "This Commission shall have exclusive jurisdiction over the investigation of any and all cases involving criminal liabilities in relation to the 319 Shooting." Furthermore, Article 8, Paragraph 2 provides, "This Commission, in exercising the aforesaid authorities, shall have any and all powers and authorities exercisable by a prosecutor or military prosecutor pursuant to law." In addition, Article 8, Paragraph 3 thereof provides, "On the date of promulgation hereof, various agencies shall make available any and all files and exhibits in their possession in respect of the cases over which this Commission shall have exclusive jurisdiction and transfer the same to this Commission." The foregoing provisions have delegated to the SCIT more authority than the investigative power exercisable by the Legislative Yuan itself and therefore are not consistent with the Constitution. In addition, Article 13, Paragraph 1 thereof provides, "In the event that the outcome of the investigation conducted by this Commission reveals any case

involving criminal liabilities, the prosecutor or military prosecutor transferred *pro tempore* to this Commission shall *sua sponte* prosecute for such a case." The foregoing provisions have also gone beyond the scope of the investigative power exercisable by the SCIT by delegating more authority to such prosecutor or military prosecutor than the SCIT may possess and thus are contrary to the Constitution. As a result, the provisions of Article 13, Paragraph 2 thereof regarding jurisdiction, which are ancillary to the foregoing provisions, should also be so treated. All the above provisions are contrary to the fundamental constitutional principles of separation of powers and checks and balances. As for Article 9, Paragraph 1 thereof, which provides, "While exercising its authorities, this Commission may borrow and transfer a prosecutor or military prosecutor *pro tempore* to assist in the relevant investigations," such borrowing and transfer should be subject to the consent of the borrowed person and of the agency to which he or she belongs out of respect for such borrowed person and agency. The prosecutor or military prosecutor *pro tempore* transferred to the SCIT, though still preserving his or her status as a prosecutor or military prosecutor during the period of such transfer, may not, as a matter of course, exercise the prosecutorial power exercisable by him or her pursuant to law under his or her original status due to the nature of the Legislative Yuan's investigative power.

[16] No doubt, the lawmakers are free to some extent to formulate the reasons for retrial, which forms one of the links in legal proceedings. However, any enacted law should have general application to a majority of future events whose occurrence is uncertain and which meets the requisite elements of such law. Article 13, Paragraph 3 of the SCITA provides, "In the event that the outcome of the investigation conducted by this Commission differs from the facts as determined by a court in its final and conclusive judgment, it shall be a ground for retrial." The said provision is not constitutionally valid, since the reason for retrial is intended for a specific case only, which is in violation of the fundamental

principle of rule of law whereby a law shall be equally applied to all, and is also beyond the scope of the investigative power exercisable by the Legislative Yuan.

[17] The Control Yuan is the highest control organ of the State and shall exercise the constitutionally mandated powers of impeachment, censure, redress and auditing provided under Articles 95 and 96 on an exclusive basis. The Control and Legislative Yuans have their respective constitutional mandates, and the investigative powers exercisable by the said Yuans are not identical in terms of their respective natures, functions and purposes, nor do they overlap or conflict with each other. Since the SCIT is a special commission subordinate to the Legislative Yuan that is designed to exercise the investigative power of the said Yuan, it should not be obligated to answer to the Control Yuan, nor subject to the supervision of the Control Yuan. In addition, the investigative power exercisable by the SCIT differs from that of the Control Yuan. Besides, the exercise of such power by the SCIT, as well as the outcome of its investigation, should not affect the exercise of the investigative power by the Control Yuan. Article 12, Paragraph 1 of the SCITA provides, "In respect of the events under investigation by this Commission, a written investigative report shall be submitted to the Legislative Yuan within three months and the same shall be published. If the truth remains unascertained, the investigation shall continue and a report shall be submitted to the Legislative Yuan and Control Yuan every three months and the same shall be published." As far as the report to the Control Yuan is concerned, the said provision should be reconsidered and revised so as to clarify the authorities and duties of the SCIT and to avoid undue influence on the Control Yuan's exercise of its investigative power, since such provision is contrary to the principle described above.

4. The Scope of Investigative Power Exercisable by the SCIT

[18] As mentioned above, under the principles of separation of powers and

checks and balances, the Legislative Yuan, in exercising its investigative power, shall also be subject to certain restrictions as to the targets or matters under investigation. Article 8, Paragraph 3 of the SCITA provides, "On the date of promulgation hereof, various agencies shall make available any and all files and exhibits in their possession in respect of the cases over which this Commission shall have exclusive jurisdiction and transfer the same to this Commission." Article 8, Paragraph 4 thereof provides, "In exercising its authorities, this Commission shall not be subject to any restrictions imposed by the National Secrets Protection Act, Trade Secrets Act, Code of Criminal Procedure and any other laws. Any agency requested by this Commission shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground." Article 8, Paragraph 6 thereof provides, "This Commission and its members, in exercising its or their respective authorities, may designate any matter and request any and all agencies, groups or individuals concerned to make explanations or provide assistance in respect of such matter. Those so requested shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground." With respect to the parts of the provisions concerning exclusive jurisdiction, transfer of files and exhibits, as well as the provisions concerning the independent exercise of powers by an organ of the State that is guaranteed by the Constitution, they have failed to exclude the same from the scope of the investigative power and thus have gone beyond the scope of the investigative power exercisable by the Legislative Yuan, which is not in line with the Constitution. Additionally, as mentioned above, an executive chief, by virtue of the executive privilege inherent in his or her executive power, is entitled to decide whether or not to make public any information that involves national secrets or investigation secrets. The Legislative Yuan, in exercising its investigative power, should give due respect

to such privilege and not compel publication of such information or provision of relevant documents by the executive branch if the matter subject to investigation involves such information. In a specific case, should there exist any dispute as to whether a particular matter to be investigated either relates to the independent exercise of powers by an organ of the State or falls within the scope of executive privilege, or whether any information subject to the executive privilege should be under investigation or made public, the Legislative Yuan and the other organs of the State should seek reasonable channels to negotiate and settle their differences, or establish applicable requirements and procedures by law, pursuant to which the judicial organ will hear and settle the dispute. Therefore, with respect to the provisions to the effect that no rejection may be made whatsoever as to matters involving national secrets or investigation secrets, appropriate amendments should be made so as to comply with the aforesaid intent.

5. The Methods, Procedures and Compulsory Measures of the SCIT in Exercising the Investigative Power

[19] Every organ of the State, in exercising its power, should be subject to the law, which is the fundamental demand under the principle of rule of law. The same principle shall apply to the Legislative Yuan without exception in exercising its constitutionally-mandated powers. The exercise of the investigative power by the Legislative Yuan, depending upon the matters subject to investigation and the compulsory means used while conducting an investigation, may involve the imposition of restrictions on a variety of constitutionally-guaranteed fundamental rights of the people, including, without limitation, the personal freedom as safeguarded under Article 8 of the Constitution or the negative freedom of speech under Article 11 thereof (*see* J.Y. Interpretation No. 577), the freedom of privacy of correspondence under Article 12 thereof, trade secrets under Article 15 thereof, the right of privacy, etc. The right of privacy, though not clearly enumerated under the Constitution, is an

indispensable fundamental right protected under Article 22 of the Constitution because it is necessary to preserve human dignity, individuality, and the wholeness of development of personality, as well as to safeguard the freedom of private living space from interference and the freedom of self-control of personal information (*see* J.Y. Interpretations Nos. 509 and 535). Where the investigative power exercised by the Legislative Yuan may involve any restrictions imposed on the fundamental rights of the people, not only should there be a basis of law whose contents should be clear and definite, but it should also follow the principles of proportionality and due process of law. The first sentence of Article 8, Paragraph 4 of the SCITA provides, "In exercising its authorities, this Commission shall not be subject to any restrictions imposed by the National Secrets Protection Act, Trade Secrets Act, Code of Criminal Procedure and any other laws." Furthermore, Article 8, Paragraph 6 thereof provides, "This Commission and its members, in exercising its or their respective authorities, may designate any matter and request any and all agencies, groups or individuals concerned to make explanations or provide assistance in respect of such matter. Those so requested shall not avoid, delay or reject any relevant request on the ground of national secrets, trade secrets, investigation secrets, individual privacy or on any other ground." The foregoing provisions have granted the SCIT the authority to enforce its investigations. However, the said provisions, after eliminating the procedural safeguards granted to persons subject to investigation under existing laws, have failed to formulate applicable procedural rules, e.g., prior and sufficient notification to person(s) subject to investigation regarding the matters under investigation; statutory objectives of the investigation and the connection between such objectives and the matters under investigation; granting adequate preparation time to the person(s) under investigation; permitting the person(s) under investigation to accept legal assistance; permitting reasonable grounds for rejection of investigation, testimony and provision of confidential

documentation; appropriate mechanisms of examination and cross-examination, if necessary; option of open or *in camera* proceedings as per nature of the matters subject to investigation, etc. Despite the fact that Article 1, Paragraph 2 of the SCITA provides, "For matters not provided for by this Act, the provisions of any other applicable laws shall apply," the phrase "the provisions of any other applicable laws shall apply" contained therein still does not alter the fact that the SCITA fails to provide adequately for the methods and procedures to be adopted by the SCIT in exercising its authorities. Thus, the requirement of due process of law is not satisfied. As to the issue of whether the imposition of restrictions upon the fundamental rights of the people is necessary to achieve the objective of ascertaining the truth, it would be difficult to decide if the principle of proportionality is complied with since the regulatory contents remain ambiguous at this point. Accordingly, both Article 8, Paragraph 4 and Article 8, Paragraph 6 of the SCITA have failed to satisfy the requirements of due process of law and the principle of clarity and definiteness of law.

[20] In order to exercise its investigative power effectively, the Legislative Yuan may, by resolution of its plenary session, impose reasonable pecuniary fines upon those who refuse to fulfill their obligations to assist in the investigation, which is a power ancillary to the Legislative Yuan's investigative power. Nevertheless, in respect of the imposition of pecuniary fines upon those who refuse to fulfill their obligations to assist in the investigation, the means of imposing fines must be necessary to achieve the objectives of the investigation on the one hand, and the requirements and criteria for such fines must be specific and unambiguous on the other hand, so that any person subject to the fines may foresee the culpability of his or her act. In addition, the provisions in respect thereof shall also be subject to judicial review so as to determine whether they satisfy the demands of the principle of proportionality under Article 23 of the Constitution, as well as the principle of clarity and definiteness of law. Article 8,

Paragraph 7 of the SCITA provides, "In case of violation of the provisions of Paragraphs 1, 2, 3, 4 or 6 hereof, the head of the agency and individual in violation shall be subject to a fine of not less than TWD100,000 but not more than TWD1,000,000; in case of any continuous violation subsequent to any fine already imposed hereby, successive fines may be imposed." In addition, the first sentence of Article 8, Paragraph 8 thereof provides, "Any head of agency, responsible person of any group or any individual concerned who rejects the investigation conducted by this Commission or any of its members and, in so rejecting, causes material impact, or who makes false statements, shall be subject to punishment pursuant to Paragraph 7 hereof." The foregoing provisions have failed to specify the procedure under which the Legislative Yuan may exercise its power to impose such pecuniary fines. In addition, before the provisions of Article 8, Paragraphs 4 and 6 are amended according to the aforesaid intent, the requirements for the imposition of such fines upon those who refuse to fulfill their obligations to assist in the investigation are also ambiguous, which is contrary to the demands of due process of law and the principle of clarity and definiteness of law. Moreover, if any head of agency, responsible person of any group or any individual concerned rejects the investigation conducted by the SCIT or any of its members and, in so rejecting, causes material impact, or makes false statements, he or she shall also be "subject to prosecution and punishment pursuant to Articles 165 and 214 of the Criminal Code" according to the second sentence of Article 8, Paragraph 8 of the SCITA. The foregoing provision should mean that the prosecutorial agencies shall carry out investigations and prosecutions and the courts shall hold trials according to law, respectively, if any of the aforesaid persons is suspected of any crime after the investigation is conducted, but does not mean that the mere rejection of investigation or making of false statements by the said persons will suffice to meet the criminal elements of Articles 165 and 214 of the Criminal Code or any other offense. The said

provision should be reconsidered and revised accordingly. The compulsory measures ancillary to the investigative power exercisable by the Legislative Yuan should be limited to the imposition of pecuniary fines. Nevertheless, Article 8, Paragraph 9 of the SCITA provides, "This Commission and its members, in exercising its or their respective authorities, may prohibit any person under investigation or any other person related to such person from exiting the country." The said provision, by granting the SCIT or its members the compulsory power to prohibit the persons concerned from exiting the country at its or their discretion, has gone beyond the necessary scope within which the Legislative Yuan may exercise its investigative power. Furthermore, such restrictions are not necessary to achieve the objective of ascertaining the truth, and thus are found to be contrary to constitutional intent provided for under Articles 10 and 23 of the Constitution.

[21] The provisions of the SCITA, to the extent that they are found to be contrary to constitutional intent, shall become null and void as of the date of the promulgation hereof.

[22] It should be noted that the Justices of the Judicial Yuan, in interpreting the Constitution, should do so based on the Justices' certainty of the law, and are not bound by the views held by petitioners or agencies concerned as to how the law should be applied. This Court is of the opinion that the SCITA is an extraordinary piece of legislation passed by the Legislative Yuan for the purpose of creating the SCIT in an attempt to ascertain the truth regarding the 319 Shooting. The SCIT should be categorized as a special commission designed to assist the Legislative Yuan in exercising the investigative power. Therefore, it is not an organization that does not belong to any constitutional organ, nor is it a hybrid organ that exercises the legislative, executive, judicial and control powers simultaneously. Accordingly, this interpretation is premised on the investigative power of the Legislative Yuan, which forms the basis of argument. Detailed reasoning is thus

given above as to whether the applicable provisions of the SCITA that involve the organization and authorities of the SCIT, the scope of investigation exercisable by the SCIT, as well as the methods, procedures and compulsory measures for the SCIT are consistent with the Constitution. Therefore, it should be noted that either the claim that the SCIT does not belong to any constitutional organ, as held by the Petitioners; or the claim that the SCIT, an *ad hoc* organization created for a special mission, stands apart from the constitutional five Yuans, as embraced by the agency concerned, namely, the Legislative Yuan; or the statements made by the respective parties in support of their claims, must be granted or dismissed by this Court one by one.

[23] Article 78 of the Constitution provides that the Judicial Yuan shall interpret the Constitution and shall have the authority to unify the interpretation of laws and regulations. Article 79 of the Constitution and Article 5, Paragraph 4 of the Amendments to the Constitution provide that the Justices of the Judicial Yuan shall have the authority to interpret the Constitution and form a Constitutional Court to adjudicate matters relating to the dissolution of political parties violating the Constitution. While independently exercising the foregoing essential judicial powers mandated by the Constitution, the Justices of the Judicial Yuan shall be considered judges under the Constitution. The purposes of constitutional interpretation are to ensure the supremacy of the State's Constitution in the legal hierarchy in a constitutional democracy and to render binding judgments for the protection of fundamental rights of the people and the preservation of such fundamental constitutional values as a free, democratic constitutional order. In order to serve the purpose of the judicial power, when exercising the power of constitutional interpretation, the judiciary should avoid the situation where the outcome of the interpretation may be in favor of the petitioner, but no meaningful benefits accrue to him or her due to passage of time or certain other factors. The preventive system used to ensure the effectiveness of the interpretations given or

judgments rendered by the judiciary is one of the core functions of the judicial power, irrespective of whether it involves constitutional interpretation, trial, or civil, criminal or administrative litigation.

[24] Although the preventive system is a core function of the judicial power, it should still be subject to the principle of legal reservation and formulated by the legislators by means of enactment because it is of importance for fundamental rights and public interests. Before the legislature specifies by law any preventive system for the procedure of constitutional interpretation, this Court, in exercising the power of constitutional interpretation, may grant a declaration of preliminary injunction in the event that the continuance of the doubt or dispute as to the constitutional provisions at issue, the application of the law or regulation in dispute or the enforcement of the judgment for the case at issue may cause irreparable or virtually irreparable harm to any fundamental right of the people or any fundamental constitutional principle, that the granting of a preliminary injunction on the motion of a petitioner prior to the delivery of an interpretation for the case at issue may be imminently necessary to prevent any harm, that no other means is available to prevent such harm, and that, after weighing the pros and cons of granting a preliminary injunction, the granting of the injunction definitively has more advantages than disadvantages. As an additional note, although the petition for preliminary injunction prior to the delivery of an interpretation for the case at issue is not in conflict with the Constitution, it nevertheless is no longer necessary to examine the issue now that an interpretation has been given for the case at issue.

Background Note by the Translator

This matter was brought to the attention of the Constitutional Court because ninety-three members of the Legislative Yuan, including Jian-Ming KE,

were of the opinion that the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting as promulgated and implemented on September 24, 2004, (hereinafter the "SCITA") had transgressed the authorities granted to the Legislative Yuan by the Constitution. They, therefore, by more than one third of the incumbent members of the Legislative Yuan, duly initiated a petition for constitutional interpretation in respect of the questions about the meanings of the constitutional provisions governing their functions and duties, as well as of the question as to the constitutionality of the SCITA. Simultaneously, they petitioned the Constitutional Court for a preliminary injunction (referred to by the Petitioners and hereinafter as "expeditious disposition") before an interpretation was delivered for this matter, declaring to the effect that the application of the SCITA be suspended for the time being. In respect of the petition for the constitutional interpretation, the Constitutional Court resolved to accept the case. Whereas, in respect of the petition for the expeditious disposition, the Constitutional Court, pursuant to Article 13, Paragraph 1 of the Constitutional Court Procedure Act, ordered that the representatives of the Petitioners, their agents *ad litem*, as well as the representatives appointed by the agency concerned, namely, the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCIT"), appear before the Constitutional Court for oral arguments on October 14, 2004. In addition, legal scholars were also invited to appear before the Constitutional Court to present their opinions as *amicus curiae*. Furthermore, in respect of the petition for the constitutional interpretation, the Constitutional Court ordered that the representatives of the Petitioners, their agents *ad litem*, as well as the representatives and agents *ad litem* appointed by the agency concerned, namely, the Legislative Yuan, appear before the Constitutional Court for oral arguments on October 27 and 29, 2004. In addition, representatives of the other agencies concerned, namely, the Control Yuan, Ministry of Justice and Ministry of the Interior, as well as legal scholars,

were also invited to appear before the Constitutional Court to present their opinions.

After the Constitutional Court declared parts of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting as promulgated and implemented on September 24, 2004 (hereinafter the "SCITA of 2004") unconstitutional in this J.Y. Interpretation No. 585, the Legislative Yuan made amendments to the SCITA of 2004 on April 11, 2006, by passing Articles 2 to 4, 8, 11 to 13, 15 and 17 thereof, while adding Articles 8-1 to 8-3 and deleting Article 16, all of which were promulgated on May 1 of the same year. Nevertheless, eighty-seven petitioners continued to challenge the constitutionality of the new SCITA, arguing that said amendments remained unconstitutional on the grounds that the entire design of the SCITA was seriously flawed and could not fit within with the constitutional order of freedom and democracy. Hence, they petitioned the Constitutional Court to declare the SCITA unconstitutional as a whole. Simultaneously, they also petitioned the Court for a preliminary injunction before an interpretation was delivered in regard to the matter so as to preserve the constitutionally recognized interest and public interest.

In this Interpretation No. 585, the Constitutional Court affirmed the constitutionality of those articles regarding reports and public announcements, secondment of officials from administrative organs, as well as the majority of the other articles of the SCITA. However, it found those articles regarding pecuniary fines contrary to the intent of J.Y. Interpretation No. 585, and also found Article 11, Paragraph 3 thereof contrary to the principles of the separation of powers and checks and balances to the extent that an administrative organ had no right to refuse the secondment.

J.Y. Interpretation No. 461 (July 24, 1998)*

Duty of the Chief of General Staff to Be Present and Answer Questions in Legislative Committees Case

Issue

May the Chief of General Staff refuse to be present or answer questions in Legislative committees?

Holding

[1] Article 3, Paragraph 2, Subparagraph 1 of the Additional Articles of the Constitution, which requires the Premier, the Ministers and the heads of other agencies under the Executive Yuan to be interpellated by the Legislators, does not apply to the Chief of General Staff, who is not a Minister or head of agency.

[2] However, the Chief of the General Staff is still a government official under Article 67, Paragraph 2 of the Constitution, who may not reject the invitation to be present in legislative committees unless there is a justifiable reason that relates to the execution of military activities concerning national security.

Reasoning

[1] In accordance with Article 3, Paragraph 2, Subparagraph 1 of Additional Articles of the Constitution, promulgated on July 21, 1997, the Executive Yuan has the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration. While the Legislative Yuan is in session, the Legislators may interpellate the Premier, the Ministers and the heads

* Translation and Note by Pijan WU

of other agencies under the Executive Yuan. This is an institutional design in the Constitution based on the principles of democracy and accountable government. Since the Ministry of National Defense is a ministry under the Executive Yuan and is in charge of affairs concerning national defense, the Legislators may interpellate the Premier and the Minister of National Defense on the policy statement and administration report involving the issues of national defense. The Chief of the General Staff is the chief of staff for, and reports directly to, the Minister of National Defense in the administrative system, and is not a Minister or agency head as referred to in Article 3, Paragraph 2, Subparagraph 1 of the Amendment to the Constitution. Therefore, this article does not apply to the Chief of the General Staff.

[2] The Legislative Yuan, consisting of Legislators elected among and by the people, is the highest legislature of the State and represents the people in exercising the legislative power. As separately provided for in Articles 62 and 63, the Legislative Yuan has the power to decide by resolution upon statutory and budgetary bills and motions concerning martial law, amnesty, declaration of war, conclusion of peace or treaties, as well as other important matters of the State. In accordance with Article 53 of the Constitution, the Executive Yuan is the highest administrative organ of the State. Article 3, Paragraph 2, Subparagraph 1, of the Additional Articles of the Constitution provides that the Executive Yuan shall be accountable to the Legislative Yuan. The Legislative Yuan may, pursuant to Article 67 of the Constitution, which remains unchanged after the Amendment to the Constitution, set up various committees in which government officials and private parties concerned are invited to be present and answer questions. Therefore, even though the Constitution has been amended many times, it is still based on the principles of democracy and accountable government. The principle of separation and equality of powers also remains unchanged. In order to exercise the above power conferred by the Constitution, the Legislative Yuan may invite

government officials and private parties concerned to be present and answer questions in the various committees by which the Legislators may understand the matters involved in the bills or motions through the statements of facts made or the opinions expressed in the answers. Furthermore, as stated in J.Y. Interpretation No. 325, the Legislative Yuan may request the relevant agencies to provide reference materials in respect of the matters involved in the bills or motions that need to be clarified through resolutions of the plenary meetings or the committee meetings; the requested agency may not reject without a legal basis or other justifiable reasons. [The rationale is that] Legislators may not know the existence of the relevant reference materials unless and until they conduct the interpellation; moreover, if the Legislators have questions regarding the contents of the reference materials provided by the related agencies, they may further interpellate for the purpose of clarification. In such case, the invited government officials may not turn down the request. In addition, since the central government system under the Constitution is different from a parliamentary system, and the Legislators shall not concurrently hold a government post, it is necessary for the government officials in charge of initiating or executing the bills to participate in the legislative process by answering questions. Consequently, the heads of ministries and their subordinates are under the obligation to be present and answer questions when requested by the various committees of the Legislative Yuan as provided by Article 67, Paragraph 2 of the Constitution, with the exception of those who discharge their duties independently and are free from external monitoring, such as prosecutors and Commissioners of the Fair Trade Commission. The Chief of the General Staff is the chief of staff for the Minister of National Defense under the Executive Yuan. The headquarters of the General Staff, Army, Navy and Air Force under his/her command are not agencies outside of the administrative system. Therefore, there is no doubt that although he/she is not a Minister or an agency head under Article 3, Paragraph 2, Subparagraph 1

of the Additional Articles of the Constitution, he/she is a government official as provided in Article 67, Paragraph 2 of the Constitution. In charge of important affairs concerning national defense, including the compilation and execution of budgets, the powers and duties of the Chief of the General Staff are closely related to the jurisdiction of the Legislative Yuan. The Chief of the General Staff may not reject the invitation by the various committees of the Legislative Yuan to be present in the committees unless there is a justifiable reason that relates to the execution of military activities concerning national security. Nevertheless, the Chief of the General Staff does not have to answer questions involving critical intelligence of national defense. With respect to the Judicial Yuan, Examination Yuan and Control Yuan, since they may present statutory bills for matters within their jurisdictions to the Legislative Yuan, which also reviews their budgetary bills, the subordinates of these Yuans who have administrative duties and are not mandated to independently exercise their functions shall also be subject to the above constitutional rule, *i.e.*, they must be present and answer questions when the statutory or budgetary bills proposed by their Yuans are concerned. Nevertheless, while the presidents of the Judicial Yuan, the Examination Yuan and the Control Yuan may be present in the plenary meeting of the Legislative Yuan and give opinions pursuant to Article 71 of the Constitution, they are not required to be present and answer questions in response to the request by the committees of the Legislative Yuan according to Article 67, Paragraph 2, i.e., requests for government officials to be present and answer questions. This is based on mutual respect between the five Yuans and constitutional practice. Also, this exemption applies to the personnel of the Judicial Yuan, Examination Yuan and Control Yuan who independently exercise functions and are free from external check, such as judges and members of the Examination Yuan and Control Yuan.

Background Note by the Translator

J.Y. Interpretation No. 461 (1998) was made following the fourth amendments (called Additional Articles) to the Constitution adopted on July 21, 1997. Article 3, Paragraph 2, Subparagraph 1 of the Additional Articles provides that "the Executive Yuan has the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration", and, "While the Legislative Yuan is in session, the Legislators may interpellate the Premier, the Ministers and the heads of other agencies under the Executive Yuan." A problem arose in regard to a situation when the Chief of General Staff, who was not a minister or a head of agency but was in charge of the military chain of command, was invited to be present and answer questions in the Legislative committees; whether or not he/she may refuse such invitation. J.Y. Interpretation No. 461 made clear that the Chief of General Staff is not under a duty to be interpellated by the Legislators according to Article 3, Paragraph 2, Subparagraph 1 of the Additional Articles. However, Article 67, Paragraph 2 of the Constitution, which remained intact after the amendments, requires the Chief of General Staff, as a government official, to be present and answer questions in legislative committees upon invitation.

Another issue in regard to the Legislative power to interpellate arose later, in 1999, with respect to the officials of local governments; whether or not they were under the duty to be present and answer questions in legislative committees according to Article 67, Paragraph 2 of the Constitution. J.Y. Interpretation No. 498 was issued to deal with that context.

J.Y. Interpretation No. 498 elaborated that, in consideration of the separation and equal division of powers between the central and local governments, the Legislative Yuan's power to invite and interpellate local government officials under Article 67, Paragraph 2 of the Constitution was to be subject to appropriate restrictions. Since each of the central government and local self-governments has its own legislative body, officials of the local self-

government are not obligated to be present at the Legislative Yuan's meetings, unless otherwise required by law. Nevertheless, such officials may, at their own discretion, determine if it is necessary to attend such meetings.

Meanwhile, J.Y. Interpretation No. 498 underscored that the central government shall provide appropriate aid to local self-governing bodies so as to enable local self-governing bodies to meet their basic financial requirements, to ensure the stability or livelihood of the people nationwide and to attain a balanced nationwide economic development. (*see* Article 147 of the Constitution, Article 69 of the Local Government Act and Article 30 of the Act Governing the Allocation of Government Revenues and Expenditures) Therefore, it held that the Legislative Yuan may not reduce, deny or table financial aids, simply because officials of the local self-governing body refuse to be present at the Legislative Yuan's meetings. By contrast, this part of the holding is not seen in J.Y. Interpretation No. 461, although the Legislative Yuan in practice has used its budgetary power to pressure the officials of the central government to be present and answer questions.

J. Y. Interpretation No. 435 (August 1, 1997)*

Speech Immunity of Legislators Case

Issue

What is the scope of legislative immunity of speech conferred by the Constitution, and how is it delineated?

Holding

Article 73 of the Constitution states: "No member of the Legislative Yuan shall be held responsible outside the Yuan for opinions expressed or votes cast in the Yuan." The purpose of the article is to preserve the power derived from the membership status in the Legislative Yuan that is granted by the people and to prevent intervention and influence by other government agencies that could obstruct the exercise of legislative functions. To ensure that a member does not feel inhibited when acting as a member, the boundaries of the immunity of speech conferred by the Constitution should be construed as liberally as possible. Accordingly, all statements, questioning, motions, voting and directly-related conduct made in sessions or committees, such as party negotiations and statements expressed in public hearings, should be protected. However, conduct beyond such extent that is irrelevant to the exercise of the member's authority is not protected, such as the use of an intentional physical movement that is obviously beyond the proper means of expressive conduct of opinions and undermines others' legally protected interests. Whether a member's conduct transgresses the protective boundaries in a case should be subject to the decision of the Legislative Yuan based upon its self-disciplinary practice in maintaining

* Translation and Note by Nigel N. T. LI

congressional order. But for the purpose of maintaining social order and protecting a victim's rights, the judiciary can also exercise its authority to investigate and adjudicate such conduct if necessary.

Reasoning

[1] Article 73 of the Constitution states: "No member of the Legislative Yuan shall be held responsible outside the Yuan for opinions expressed or votes cast in the Yuan." The purpose of the article is to preserve the power derived from the membership status in the Legislative Yuan that is granted by the people, and to prevent influence by other government agencies that could obstruct the exercise of legislative functions. Under such protection, which is meant to create an environment free from fear and concerns of communication obstacles, legislative members can freely express their viewpoints, substantially speak for their constituents, and represent different ideas emerging from a dynamic society. By doing so, the rational policy-making that is essential to a system of representative democracy and the duty to oversee government operations are fulfilled. The boundaries of the immunity of speech conferred by the Constitution should be construed as liberally as possible. Accordingly, all statements, questioning, motions, voting and directly-related conduct made in sessions or committees, such as party negotiations and statements expressed in public hearings, are protected. The phrase "no responsibility outside the Yuan" immunizes a member from civil liability or criminal prosecution resulting from opinions expressed or votes cast when exercising the member's duty. Only when a member's conduct violates the Yuan's internal self-discipline rules shall the member be liable for administrative responsibility (*see* J.Y. Interpretation No. 401).

[2] Since the purpose of the Constitution in protecting members' speech and immunizing them from various types of legal liabilities is to preserve their ability to exercise their duties, conduct beyond the abovementioned extent and

irrelevant to the exercise of their duties is not protected, such as the use of an intentional physical movement that is obviously beyond the proper means of expressive conduct of opinions and that undermines others' legally protected interests. Whether a member's conduct transgresses relevant boundaries and thus should carry criminal responsibility in a case should be subject to the decision of the Legislative Yuan based upon its self-disciplinary practice in maintaining congressional order. But whenever the situation becomes grave and/or obvious, or if the victim files a complaint or private prosecution, the judiciary can also exercise its authority to investigate and judge such conduct, for the purpose of maintaining social order and protecting the victim's rights.

[3] This interpretation is made upon the petition of the Legislative Yuan letter dated May 13, 1996. Another petitioner, Wei Yao CHIEN, petitioning for interpretation of Criminal Judgment E.T. No. 5120 (TPE D. Ct., 1996) and questioning the constitutionality thereof, does not meet the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. However, it is noted here that his petition is incidentally addressed by the above interpretation and need not be separately addressed.

Background Note by the Translator

In this case, there were two Petitioners seeking an interpretation from the court to delineate the applicable procedures and the scope of legislative immunity of speech conferred by the Constitution: the Legislative Yuan and a Legislative Yuan member who was convicted in court for criminal battery and assault against government officials during a committee meeting session in the Legislative Yuan. The Constitutional Court did not support the legislator's view that it is entirely up to the Legislative Yuan to decide the scope of legislative immunity of speech and to determine whether a legislator's speech or conduct is an indictable offence. Instead, the Court in its interpretation delineates the scope of legislative

immunity and draws a line between protected and unprotected expressive conducts in the context of legislative immunity of speech**.**

J.Y. Interpretation No. 632 (August 15, 2007)*

The Exercise of Constitutional Powers and the Duty of Loyal Cooperation of Constitutional Organs Case

Issue

Is it constitutional for the Legislative Yuan to not exercise its consent power over the President's nominations for the Members of the Control Yuan?

Holding

Article 7, Paragraphs 1 and 2 of the Additional Articles of the Constitution stipulate that "[t]he Control Yuan shall be the highest control body of the nation and shall exercise the powers of impeachment, censure and audit," and that "[t]he Control Yuan shall have twenty-nine Members, including a President and a Vice-President, all of whom shall serve a term of six years. All Members shall be nominated and, with the consent of the Legislative Yuan, appointed by the President of the Republic." As such, the Control Yuan is a constitutional organ with specific powers bestowed upon it by the Constitution. It is an integral and indispensable part of the regular operation of the constitutional system of the nation. Given that the President, Vice-President and the Members of the Control Yuan are all legal positions established by the Constitution, all constitutional organs have indispensable responsibilities to ensure the essential existence and regular operation of the Control Yuan. In order to ensure that the power of the Control Yuan can be exercised uninterruptedly, prior to the expiration of the term of the incumbent President, Vice-President and the Members of the Control Yuan, the President of the Republic shall nominate candidates to fill these positions in

* Translation by Wei-Sheng HONG, based upon the previous translation by Andy Y. SUN

a timely manner and seek the Legislative Yuan's consent. The Legislative Yuan, in turn, shall exercise such consent power in a timely manner to maintain the regular operation of the Control Yuan. A passive non-exercise of the nomination power by the President of the Republic or of the consent power by the Legislative Yuan that leads to an interruption of the exercise of the power and function of the Control Yuan is unconstitutional, as it jeopardizes the integrity of the constitutional system of the nation. The dispute that caused the present petition should be disposed of appropriately in accordance with this Interpretation.

Reasoning

[1] The terms of the President, Vice-President and Members of the Third Control Yuan expired on January 31, 2005. In accordance with Article 7, Paragraph 2 of the Additional Articles of the Constitution promulgated on April 25, 2000, the President of the Republic submitted an official message (Hua Tzong Yi Zhi No. 09310052491) to the Legislative Yuan on December 20, 2004, nominating Clement C. P. CHANG and twenty-eight other nominees to serve as the Members of the Fourth Control Yuan. Without complying with Article 29 of the Law Governing the Legislative Yuan's Power, which requires the power of consent over the Presidential Nominations of the Members of the Control Yuan to be exercised by direct review without discussion by the Committee of the Whole Yuan (Entire Members) and followed by a vote of the Members of the Legislative Yuan in the Yuan Sittings (Plenary Meeting). Instead, the Legislative Yuan first referred these Nominations to the Procedure Committee in accordance with Article 8, Paragraph 2 of the same Law for assignment to the legislative agenda. On December 21 of that year, when deliberating over the assignment of the legislative agenda for the Sixth Session, Twelfth Meeting of the Fifth Legislative Yuan, the majority of the Procedure Committee voted to prevent the Nominations as an item from being included on the agenda. The same Committee

then voted to resolve the same on December 28 of the same year, and on January 4, 10 and 18, 2005, respectively. Thus, no deliberation over the nominations was conducted during the prior session of the Fifth Legislative Yuan. The Members of the Sixth Legislative Yuan were inaugurated on February 1, 2005, and the President of the Republic once again submitted an official message (Hua Tzong Yi Zhi No. 09400046061) requesting that the Legislative Yuan exercise its consent power over the same slate of nominees, as proposed in the first message submitted by the President. These Nominations were once again referred to the Procedure Committee. That Committee, through internal consultation, agreed that the Nominations should be "suspended from being listed as an item to be announced" and voted to resolve the same on April 12, 19 and 26 and May 3, 17 and 24, 2005, respectively. As of the date this Interpretation is being announced, the Legislative Yuan has yet to act on these Nominations.

[2] The petitioners are William Ching-Te LAI and eighty-eight other Members of the Legislative Yuan. They believe that the Procedure Committee of the Legislative Yuan has abused its procedure by inappropriately preventing the Nominations from being voted on in a Plenary Meeting, which has resulted in the operation of the Control power of the nation being paralyzed, creating a dispute between the Legislative Yuan and the Control Yuan over the exercise of their respective constitutional powers, and causing the likelihood of undermining the constitutional separation of powers as well as jeopardizing the order of constitutional democracy. They filed a petition to this Yuan in accordance with Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act, questioning whether the Procedure Committee has arrogated the power of the Plenary Meeting by preventing the Plenary Meeting from voting on the Nominations; whether it is the Legislative Yuan's constitutional obligation to exercise its consent power over personnel nominations; and whether the Legislative Yuan has exceeded its self-regulatory power by not exercising its

consent power over the Nominations. Considering that Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act expressly stipulates that one-third or more of the Members of the Legislative Yuan may bring forth a petition for constitutional interpretation on constitutional controversies derived from the exercise of power, and the purpose of this petition is to request that this Court render an interpretation on the exercise of consent power over the Nominations of Control Yuan Members in accordance with Article 7, Paragraph 2 of the Additional Articles of the Constitution and the constitutionality of the exercise of such power being stalled by the Legislative Yuan, the petition meets the above-stated requirements and should, therefore, be accepted.

[3] The purpose of the establishment of various national organs by the Constitution is to ensure that all national organs can perform their respective and necessary constitutional functions without being interrupted for even a day due to any change of personnel. In order to avoid the essential existence and the regular operation of a national organ being affected by a temporary absence of a successor, various examples can be found around the world where either the Constitution or law clearly provide an adequate mechanism to maintain the continuation and regular operations of the government. For instance, the Constitution of the United States grants the President a temporary, recess appointment power when the Senate is not in session (Article II, Section 2 of the Constitution of the United States); in nations that adopt a Cabinet system, members of the incumbent cabinet shall carry on their duties until the new cabinet assumes its power (*see* Article 69, Paragraph 3 of the Basic Law of the Federal Republic of Germany and Article 71 of the Constitution of Japan). While our Constitution has similar provisions, for example, "[t]he term of office of the delegates to each National Assembly shall terminate on the day on which the next National Assembly convenes" (Article 28, Paragraph 2 of the Constitution, no longer active in accordance with Article 1, Paragraph 2 of the Additional Articles

of the Constitution), so that the powers and duties of National Assembly delegates can be carried on from one session to another; also, for example, "[i]n case the office of the President should become vacant, the Vice President shall succeed until the expiration of the original presidential term" (Article 49, First Sentence of the Constitution), and "[s]hould the offices of both the President and the Vice President become vacant, the Premier of the Executive Yuan shall exercise the official powers of the President and the Vice President. A new President and a new Vice President shall be elected in accordance with Paragraph 1 of this article and shall serve out each respective original term until its expiration" (Article 2, Paragraph 8 of the Additional Articles of the Constitution). Yet neither the Constitution nor any law provides an adequate mechanism to maintain the regular operations of the Control Yuan when the terms of its President, Vice-President and Members has expired and no successor can be inaugurated in a timely manner. Before the Constitution or laws can be amended to provide a clear solution to such circumstance, the regular operation of the constitutional order of the nation shall continue to rest on the constitutional organs which possess the power over personnel issues loyally carrying out their duties to deliver successors in a timely manner so as to avoid the constitutional order of the nation being affected.

[4] Article 7, Paragraphs 1 and 2 of the Additional Articles of the Constitution stipulate that "[t]he Control Yuan shall be the highest control body of the nation and shall exercise the powers of impeachment, censure and audit," and that "[t]he Control Yuan shall have twenty-nine members, including a President and a Vice-President, all of whom shall serve a term of six years. All Members shall be nominated and, with the consent of the Legislative Yuan, appointed by the President of the Republic." As such, the Control Yuan is a constitutional organ with specific powers bestowed upon it by the Constitution. It is an integral and indispensable part of the regular operation of the constitutional system of the

nation. Given that the President, Vice-President, and the Members of the Control Yuan are all legal positions established by the Constitution, all constitutional organs have indispensable responsibilities to ensure the essential existence and regular operation of the Control Yuan. In accordance with Article 7, Paragraph 2 of the Additional Articles of the Constitution, the President, Vice-President and Members of the Control Yuan shall be nominated and, with the consent of the Legislative Yuan, appointed by the President of the Republic. This design is based upon the consideration of separation of powers as well as checks and balances. While the President of the Republic is empowered to initiate the formation of the members of the Control Yuan, the Presidential nominations are subject to deliberation by the Legislative Yuan for checks and balances. In order to ensure that the power of the Control Yuan can be exercised uninterruptedly, prior to the expiration of the term of the incumbent President, Vice-President and Members of the Control Yuan, the President of the Republic shall nominate candidates to fill these positions in a timely manner and seek the Legislative Yuan's consent. The Legislative Yuan, in turn, shall exercise such consent power in a timely manner so as to maintain the regular operation of the Control Yuan. As long as the Legislative Yuan has actively exercised its consent power over the Presidential nominations, regardless of whether the outcome is approval or disapproval, the Legislative Yuan will have fulfilled its constitutional duty to exercise its consent power. Given that these are their respective constitutional obligations, if the disapproval of the Legislative Yuan results in an interruption of the exercise of power and the regular functioning of the Control Yuan, the President shall continue to nominate suitable candidates and submit the nominations to the Legislative Yuan for consent, and the Legislative Yuan shall also actively continue to engage in the exercise of its consent power. A passive non-exercise of the nomination power by the President of the Republic or of the consent power by the Legislative Yuan that leads to an interruption of the exercise

of power and function of the Control Yuan is unconstitutional, as it jeopardizes the integrity of the constitutional system. The dispute that caused the present petition should be disposed of appropriately in accordance with this Interpretation. Needless to say, when the terms of the incumbent President, Vice-President and Members of the Control Yuan have expired before their successors can be inaugurated, the Legislators may also expressly provide an adequate mechanism by legislation so as to maintain the regular operation of the Control Yuan amidst the circumstances.

[5] With regard to the petitioners' claim that this petition involves a dispute over the exercise of the respective constitutional power between the Legislative Yuan and Control Yuan, considering that the issue does not involve a constitutional controversy derived from the exercise of power of one-third or more of the Members of the Legislative Yuan; nor does it involve an application of law that raises doubt as to its constitutionality (*see* Article 5, Paragraph 1, Subparagraph 1, Second Sentence of the Constitutional Court Procedure Act), hence, it should be specified that such part of the petition does not meet the criteria set forth in Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and is therefore dismissed.

Background Note by Wei-Sheng HONG

J.Y. Interpretation No. 632 is widely considered a key interpretation on the constitutional principles of separation of powers and the duty of loyal cooperation between constitutional organs. In December 2004, soon after his inauguration for a second term and a few days following the election of the Members of the Sixth Legislative Yuan, President Shui-Bian CHEN nominated Clement C.P. CHANG and twenty-eight other nominees to serve as the Members of the Fourth Control Yuan ahead of the expiration of the terms of the President, Vice-President and Members of the Third Control Yuan. The nominations faced

strong resistance in the Legislative Yuan, where the majority was held by the coalition of the opposition Chinese Nationalist Party (Kuomintang or KMT) and the People First Party. By manipulating the legislative procedure, Members of the Legislative Yuan from the opposition parties managed to withhold the nominations in the Procedure Committee; no deliberation over the nominations was conducted during the final session of the Fifth Legislative Yuan, nor was there a vote by the Plenary Meeting on the nominations. The inauguration of the Members of the Sixth Legislative Yuan in February 2005 did not unlock the political deadlock, as the majority of the Legislative Yuan was still held by the coalition of the opposition parties. The deadlock soon developed into a constitutional controversy, given that the term of the Members of the Third Control Yuan expired in January 2005, yet no successors were able to be appointed in time. Several Members of the Sixth Legislative Yuan, mostly from the Democratic Progressive Party (DPP), brought the petition to the Constitutional Court in the hope of obtaining a clear interpretation in support of the President and the DPP as the key for resolving the political deadlock.

The Constitutional Court made it clear in J.Y. Interpretation No. 632 that whilst the Constitution conferred on constitutional organs different powers to realize the constitutional principles of separation of powers and checks and balances, those powers should not be exercised without restraint. In particular, constitutional organs that possess the power over personnel issues shall loyally carry out their constitutional powers—or, alternatively, duties—to deliver successors to another constitutional organ in a timely manner so that the regular operation of the constitutional order is not to be affected. Therefore, whilst it is accepted in a constitutional democracy that different political parties or constitutional organs may disagree with each other and may utilize their powers to confront their opposition, they shall not exercise, or refuse to exercise, their powers to the extent of a resultant deadlock interrupting the exercise of power

and function of any constitution organ, as it jeopardizes the integrity of the constitutional system.

Ironically enough, the Legislative Yuan seemed to yet again fail to fulfill its constitutional duty of loyal cooperation by not following this Interpretation of the Constitutional Court closely; it did not exercise its consent power over the nomination of the Members of the Fourth Control Yuan for nearly another year after this Interpretation was announced. The political deadlock was eventually resolved when the Legislative Yuan approved the majority of the nominees nominated by President Ying-Jeou MA, the successor to President Shui-Bian CHEN. In August 2008, twenty-five of the twenty-nine Members of the Fourth Control Yuan were finally able to take office after the vacancy has lasted two and a half years.

J.Y. Interpretation No. 329 (December 24, 1993)*

Treaties Subject to the Parliamentary Deliberation of the Legislative Yuan Case

Issue

What is the meaning of a “treaty” under the Constitution? What shall be sent to the Legislative Yuan for parliamentary deliberation accordingly?

Holding

The term “treaty” in the Constitution refers to an international written agreement concluded between the Republic of China (“R.O.C.”) and other States or international organizations. It includes those concluded under the designations of "Treaty" or "Convention"; it also includes agreements concluded under "Agreement" or like designations with legal effect and with their contents directly involving important matters of the nation and/or rights and duties of the people. Those concluded under the designations of “Treaty,” “Convention,” or “Agreement” and containing ratification clauses must certainly be sent to the Legislative Yuan for parliamentary deliberation. Other international written agreements shall also be sent to the Legislative Yuan for parliamentary deliberation unless their contents were authorized by law or with the prior approval of the Legislative Yuan, or if their contents are identical to what has been provided by municipal laws.

Reasoning

[1] The President shall, in accordance with the provisions of this Constitution,

* Translation by Wei-Sheng HONG, based upon the previous translation by Fort Fu-Te LIAO

exercise the power of concluding treaties; the Premier and Ministers shall refer treaties subject to the parliamentary deliberation of the Legislative Yuan to a Cabinet Meeting of the Executive Yuan for resolution; the Legislative Yuan shall have the power to deliberate on and approve treaties. All these mechanisms are stipulated in Article 38, and Article 58, Paragraph 2 and Article 63 of the Constitution accordingly. Treaties concluded according to constitutional provisions hold the same status as laws. Therefore, the term "treaty" in the Constitution refers to an international written agreement concluded between the R.O.C.—including its authorized institutions and groups—and other States—including their authorized institutions and groups—and/or international organizations. It includes those concluded under the designations of "Treaty" or "Convention"; it also includes agreements concluded under "Agreement" or like designations with legal effect and when their contents directly involve important matters—such as defense, diplomacy, finance and economics—of the nation and/or rights and duties of the people. Among them, those concluded under "Treaty", "Convention", "Agreement" or like designations and containing ratification clauses must certainly be sent to the Legislative Yuan for parliamentary deliberation. Other international written agreements shall also be sent to the Legislative Yuan for parliamentary deliberation unless their contents were authorized by laws or with the prior approval of the Legislative Yuan, or if their contents are identical to municipal laws, for instance, if the contents reiterate what laws have provided, or the contents have already been enacted into law. International written agreements that are not subject to the parliamentary deliberation of the Legislative Yuan or other agreements not considered as treaties but entered into by competent authorities or their authorized institutions or groups should be processed by competent authorities, depending on the nature of the agreement, following the regulation-setting procedure or general administrative procedure. Needless to say, the Regulations Governing the

Processing of Treaties and Agreements enacted by the Ministry of Foreign Affairs shall be amended in accordance with this Interpretation.

[2] Treaties involving an alternation of the boundaries of the nation, according to Article 4 of the Constitution, shall also be resolved by the National Assembly.[1] Agreements concluded between Taiwan and Mainland China are not regarded as international written agreements referred to in this Interpretation; therefore, it should also be specified that the issue of whether or not these agreements should be sent to the Legislative Yuan for parliamentary deliberation falls outside of the scope of this Interpretation.

Background Note by Wei-Sheng HONG

The Constitution of the Republic of China (Taiwan), like that of many other States, provides provisions governing the competence of and procedure for the conclusion of treaties. Whilst it is not uncommon for a State to include in its Constitution provisions that govern the key issues surrounding the conclusion of treaties, due to Taiwan's unique status domestically and internationally, the interpretation and application of these provisions became difficult and controversial. The difficulty and controversy stem from the term that triggers the entire constitutional mechanism—a "treaty". Article 2, Paragraph 2(a) of the 1969 Vienna Convention of the Law of Treaties defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation[,]" yet such a definition fell short of tackling the unique situation facing Taiwan. In short, given that most States do not formally recognize Taiwan and maintain only unofficial

[1] Translator's note: The National Assembly was later abolished in 2005 and the procedure provided by Article 4 of the Constitution has been replaced by Article 1, Paragraph 1 of the Additional Article of the Constitution.

diplomatic relations with Taiwan, a substantial part of the foreign affairs of Taiwan are governed by instruments concluded between the government of Taiwan or its authorized groups or institutions and foreign governments or their authorized groups or institutions. Shall those instruments be regarded as treaties as defined in the Constitution and be governed by the constitutional regime set up for treaties? Similar questions arise from the conclusion of instruments between the government of Taiwan or its authorized groups or institutions and the government of China or its authorized groups or institutions.

For a long period of time, even though the Legislative Yuan had made several resolutions demanding that the Executive Yuan send these instruments to the Legislative Yuan for deliberation, those resolutions were not strictly followed. The determination of the nature of these instruments and whether to process them in accordance with the constitutional regime governing treaties fell largely to the discretion of the executive branch, leaving the controversy unresolved. The fact that the Ministry of Foreign Affairs enacted the Regulations Governing the Processing of Treaties and Agreements to govern the issue further added to the controversy, as the Legislative Yuan considered the content of this regulation as falling beyond the competence of the Ministry of Foreign Affairs and unconstitutionally interfering with the power conferred by the Constitution on the Legislative Yuan for the conclusion of treaties. In 1992, the Mainland Affairs Council of the Executive Yuan authorized the Straits Exchange Foundation to enter into four written agreements with the Association for Relations across the Taiwan Straits, the authorized institution of Mainland China, in Singapore, escalating the controversy even further. Though the executive Yuan merely intended to submit these four agreements to the Legislative Yuan for record, Members of the Legislative Yuan requested that the four agreements be sent to the Legislative Yuan for the parliamentary deliberation in accordance with the Constitution. This incident later led to the petition for this Interpretation, whose

holding and reasoning are shown above.

The fact that four of the fifteen Justices of the Constitutional Court added four Dissenting Opinions to this Interpretation—a rare situation in that era—hinted at the degree of controversy over the issue. Readers may consider that this Interpretation offers a rather ambiguous answer to the controversy. Further still, by excluding agreements concluded between Taiwan and China from the scope of this Interpretation, the Constitutional Court offered no response to the situation that precisely led to this Interpretation and left the controversy unsettled.

The Regulations Governing the Processing of Treaties and Agreements enacted by the Ministry of Foreign Affairs referred to by this Interpretation were eventually replaced by the Conclusion of Treaties Act enacted by the Legislative Yuan in 2015, more than two decades after the announcement of this Interpretation. Nevertheless, the Conclusion of Treaties Act adopted a similar approach to that which this Interpretation adopted, excluding the application of the Act to those agreements concluded between the government of Taiwan or its authorized institutions and the government of Mainland China or its authorized institutions. The lack of a clear mechanism governing the competence and procedure over the conclusion of these agreements was considered one of the underlying causes for the historical student-led protests resulting in the occupation of the Legislative Yuan in 2014—the Sunflower Movement, a turning point of cross-strait relations in the recent history of Taiwan. Nevertheless, an Act for the Supervision of Cross-Strait Agreements that governs agreements concluded between the government of Taiwan or its authorized institutions and the government of China or its authorized institutions has not yet been legislated at the time of the publication of this book.

J.Y. Interpretation No. 627 (June 15, 2007)*

Presidential Immunity and Secret Privilege Case

Issue

Does presidential immunity, under Article 52 of the Constitution, prevent the president from being investigated in the president's own and/or others' criminal cases? Does the president enjoy state secret privilege although there is no statutory basis in the Constitution?

Holding

[1] I. Presidential Criminal Immunity

[2] Article 52 of the Constitution provides that, without being recalled or relieved of presidential role, the President shall not be liable to criminal prosecution, unless the president is prosecuted for rebellion or treason. The said provision is to respect and protect the President, as the Head of State, for commanding the military and assuming other important duties domestically, and representing the Republic of China externally. This Court has so held in J.Y. Interpretation No. 388.

[3] As J.Y. Interpretation No. 388 of this Court has explained, presidential immunity temporarily prevents the president from being prosecuted for crimes other than rebellion or treason; nevertheless, it does not prevent the application of the Criminal Code or other criminal punishment to the president so that the president would enjoy substantive immunity for crimes committed. Therefore, presidential immunity is a temporary procedural barrier. Accordingly, the phrase

* Translation by Wen-Yu CHIA, based upon the previous translation by Chung-Hsi Vincent KUAN

"not…liable to criminal prosecution," as Article 52 of the Constitution provides, shall be so construed as to mean that the criminal investigation authorities and the trial courts may not treat the President as a suspect or defendant and proceed with any investigation, prosecution or trial against the President during the presidency for any criminal offense committed by the President other than rebellion or treason. By contrast, measures that do not directly concern the esteemed status of the presidency and the exercise of presidential authority, or that relate to immediate inspection and investigation of the crime scene, may still be undertaken.

[4] Presidential criminal immunity does not extend to the evidentiary investigation and preservation directed at the President for a criminal case involving other individuals. If such investigation or trial leads to suspicion that the President was involved in criminal offenses, pursuant to the intent of this Interpretation, necessary evidentiary preservation may be conducted, although no investigation or prosecution may be commenced against the President. Thus, considering Article 52 of the Constitution and its intention to protect the esteemed status of the presidency and the exercise of presidential authority, the President may not be physically restrained when measure or evidentiary preservation is conducted for cases that are not subject to presidential immunity. Detention or physical search, inspection or examination may be conducted only if it does not impede the normal exercise of the presidential authorities. The legislature should formulate additional provisions that govern the search of places concerning the President to make necessary arrest of a specific individual or seizure of a specific object or electronic record, as well as a special procedure of judicial review and objection for the President. Prior to the enactment of such legislation, the competent prosecutor shall file a motion for search and seizure regardless of whether the aforementioned place, object, or electronic record involves state secrets, unless the President's consent is given. This motion should

be reviewed for its adequacy and necessity by a special tribunal at the High Court (or its branch) with five judges and presided over by a senior division chief judge. No search or seizure may be conducted without the special tribunal's affirmative ruling, and the search should not be conducted at the President's residence and working places as a matter of principle. The relevant provisions of the Code of Criminal Procedure shall apply *mutatis mutandis* to the procedure for filing an interim appeal.

[5] Nor does the presidential criminal immunity extend to his or her duty to testify as a witness in a criminal case involving another person. Nevertheless, in a criminal proceeding involving another individual as a defendant, Article 304 of the Code of Civil Procedure ("Where the witness is the Head of State, the examination shall be conducted at the place of his/her choosing") shall apply *mutatis mutandis* out of respect for the presidency, when the criminal investigation authority or the trial court lists the President as a witness.

[6] The presidential privilege or immunity from criminal prosecution is designed for the office of the President. Therefore, the President is the only person who enjoys such privilege, and an individual who serves as President may not waive the said privilege as a matter of principle.

[7] II. Presidential State Secrets Privilege

[8] Pursuant to the scope of presidential executive powers granted by the Constitution and the Additional Articles of the Constitution, the President has the power to decide not to disclose any information relating to national security, defense and diplomacy if the President believes that the disclosure of such information may jeopardize national security and national interests and hence should be classified as state secrets. Such power is known as the presidential state secrets privilege and should be given due respect by the other state organs if the exercise of their official authorities involves any such information.

[9] Based on the presidential state secrets privilege, the President should have the right to refuse to testify as to matters concerning state secrets during a criminal proceeding, and refuse to produce the relevant evidence to the extent that the President may refuse to so testify. The legislative should formulate additional provisions regarding the President in respect of the requisite elements and applicable procedures for the refusal to testify and refusal to produce relevant evidence. Prior to the enactment of such law, the President should provide a preliminary showing that the inquiry and statements relating to state secrets would fall within the scope of the presidential state secrets privilege, or that the production and submission of the relevant evidence would jeopardize national interests. If the preliminary showing fails to persuade, the competent prosecutor or trial court should consider the circumstances on an *ad hoc* basis and make a disposition or ruling in accordance with Article 134, Paragraph 2, Article 179, Paragraph 2 and Article 183, Paragraph 2 of the Code of Criminal Procedure. The President may raise an objection or interim appeal, pursuant to the intent of this Interpretation, if the President is not satisfied with the prosecutor's disposition or the trial court's disposition or ruling to overrule the President's refusal. The President's objection or appeal should be heard by the aforementioned special tribunal at the High Court (or its branch) by five judges and presided over by a senior division chief judge. Prior to the issuance of any ruling by the special tribunal, the enforcement of the original disposition or ruling should stand. The applicable provisions of the Code of Criminal Procedure should apply to the remainder of the objection or interim appeal proceedings. If the President provides the preliminary showing in writing, claiming that the relevant testimony or production of evidence would likely jeopardize national interests, the prosecutor and the court should defer to such claim. As to the determination of the likelihood that the President's testimony and production of relevant evidence in a confidential proceeding may jeopardize national interests,

only the prosecutor or trial judge may proceed with the review in a confidential proceeding. Even in the context of a confidential proceeding, when the prosecutor or the court uses the President's testimony or evidence that potentially jeopardizes national interests as a basis to justify the conclusion of the investigation or judgment, the President's testimony or evidence should be deemed as jeopardizing national interests.

[10] In determining whether the relevant provisions of the State Secrets Protection Act and the Regulation Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets should apply to the trial proceedings in any particular case where information already submitted by the President is involved, the trial court should consider whether the President has duly classified the relevant information and determined the classification period in accordance with Articles 2, 4, 11 and 12 of the State Secrets Protection Act. If the information is not classified as state secrets, the aforementioned confidential proceedings will not be applicable. Nevertheless, if, during the trial, the President reclassifies the information in question as state secrets, or provides other duly classified state secrets, the court should nonetheless continue the trial in accordance with the proceeding method mentioned above. As for proceedings already conducted, there should be no violation of the relevant provisions of the State Secrets Protection Act and the Regulation Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets. Meanwhile, in determining whether the testimony or evidence classified as state secrets by the President may jeopardize national interests, the aforementioned principles should be followed. Furthermore, the prosecution's investigative proceedings should also be conducted under the same principles.

[11] III. Preliminary Injunction

[12] It should be noted that it is no longer necessary to review the petition for

preliminary injunction in question since this Interpretation is rendered for the case at issue as a final decision.

Reasoning

[1] I. Presidential Criminal Immunity

[2] The exercise of the criminal judicial power is intended to fulfill criminal justice. The criminal prosecution immunity (or privilege) for the Head of State originated from the concept of a divine and inviolable kingship during the autocratic era. Modern democracies that observe rule of law have different rules regarding presidential criminal immunity, and its contents and scope have no direct relation with the type of the central government of the state. In other words, instead of a legal requirement of constitutional law, presidential criminal immunity is a matter of constitutional policy that may vary from one country to another.

[3] Known as the presidential criminal immunity, Article 52 of the Constitution provides that "The President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason." In a country that observes rule of law, the nature of presidential immunity is an exception to the principle of equal application of law that curbs the state's power to administer criminal justice and thus grants the President the privilege not to be subject to criminal prosecution without having been recalled or having been relieved of his functions, unless the President is charged with having committed an act of rebellion or treason. This exception is a policy of constitutional design to provide respect and protection for the President, because of the President's special status as the Head of State who commands the military and assumes other important duties domestically, and who represents the Republic of China externally.

[4] The first part of the holding of J.Y. Interpretation No. 388 of this Court as announced on October 27, 1995, reads, "Article 52 of the Constitution provides that the President shall not, without having been recalled, or having been relieved of his functions, be liable to criminal prosecution unless he is charged with having committed an act of rebellion or treason. The said provision is so formulated to provide respect and protection for the President because of the President's special status as the Head of State who commands the military and assumes other important duties domestically, and who represents the Republic of China externally." The first paragraph of the reasoning of said Interpretation reads, "Article 52 of the Constitution provides that the President, unless he is recalled or discharged, shall not be liable to any criminal prosecution except being charged with crimes in relation to rebellion or treason. This provision is so formulated in order to provide respect and protection for the President because of the President's special status as the Head of State who commands the military, promulgates laws, appoints and discharges civil and military officers domestically, and who represents the Republic of China externally. This provision thus ensures that the President's exercise of powers, political stability and the normal development of foreign relations may be maintained. The Presidential criminal immunity (or privilege), which excludes the President from criminal prosecution, nevertheless, is designed for the office of the President instead of the person, and it is not granted without limitation. If the President commits rebellion or treason, the President shall be subject to criminal prosecution; if the President commits a crime other than rebellion and treason, the prosecution for such crime is to be only temporarily withheld. The application of the Criminal Code or relevant laws which provide for criminal punishment is not permanently excluded." The said Interpretation has already delivered a binding opinion on the purpose of Article 52 of the Constitution, the nature of presidential criminal immunity, the person to be protected, and the effects thereof.

Based on the intent of said interpretation, the President's immunity from criminal prosecution is a temporary procedural barrier, rather than a substantive immunity from any criminal liability of the President.

[5] The Constitution has been amended many times since October 27, 1995, with numerous changes of central government design, e.g., direct presidential election, the President's sole power to appoint the Premier, the abolition of the National Assembly, the Legislative Yuan's vote of no confidence against the Premier, the presidential power to dissolve the Legislative Yuan upon the latter's vote of no confidence against the Premier, and the legislative power to impeach the President and review by the Justices of the Judicial Yuan (Constitutional Court), etc. However, from the perspective of the current Constitution, the President still enjoys the powers enumerated in the Constitution and the Additional Articles of the Constitution, while the executive power is, in general, vested in the Executive Yuan in accordance with Article 53 of the Constitution; and the countersignature rule, provided by Article 37 of the Constitution, was only mildly modified. Moreover, as mentioned above, the scope of presidential criminal immunity does not necessarily correlate with the institutional design of the central government, while the nature of presidential criminal immunity remains unchanged, i.e. to curb the state's power to administer criminal justice and to provide respect and protection for the special status of the President. Accordingly, the construction of Article 52 of the Constitution need not be changed among the numerous constitutional amendments. Hence, J.Y. Interpretation No. 388 of this Court requires no modification.

[6] In light of J.Y. Interpretation No. 388 of this Court, presidential immunity from criminal prosecution is a temporary procedural barrier, rather than a substantive immunity from any criminal liability on the part of the President. Accordingly, the phrase "not…liable to criminal prosecution" provided by Article 52 of the Constitution shall be so construed as to mean that the criminal

investigation authorities and the trial courts may not treat the President as a suspect or defendant and proceed with any investigation, prosecution or trial against the President during the presidency for any criminal offense committed by the President other than rebellion or treason. Therefore, no criminal investigation or trial which involves the President as suspect or defendant shall begin after he or she takes office, if such investigation or trial has not been commenced prior to the inauguration. If such criminal investigation or trial has begun prior to the inauguration of the President and has treated the President as a suspect or defendant, it shall be suspended on the day of the inauguration. Nevertheless, since the President would be subject to such criminal prosecution should the President be recalled, relieved, or retired from the presidential role, measures that do not directly concern the esteemed status of the presidency and exercise of the presidential authorities, or that involve immediate inspection and investigation of a crime scene, may still be conducted by the criminal investigation authorities or the trial courts in a case where the President is considered as a suspect or defendant. Those measures include, for instance, that prosecutors may accept and register a case filed by criminal complaint, information, or transfer, and that courts may do the same for a file under private prosecution. If a criminal investigation or trial has begun prior to the inauguration of the President and has treated the President as a suspect or defendant, it shall be suspended on the inauguration day; if a criminal trial has begun prior to the inauguration of the President, a ruling to stay the trial should be made on the inauguration day. The suspended investigation or trial may resume its proceedings only after the President is recalled, relieved or retired from the presidential role.

[7] Presidential immunity is merely a procedural barrier that temporarily prevents criminal prosecution. When the President is suspected of having committed a crime, prosecution may still be conducted according to law should

the President be recalled, relieved or retired from the presidential role. Therefore, although criminal investigative authorities and trial courts may not treat the President as a suspect or defendant and proceed with any investigation, prosecution or trial against the President during the presidency for any criminal offense other than rebellion or treason, immediate inspection and investigation of a crime scene is not excluded by presidential immunity and thus may still be conducted. (*see* Article 230, Paragraph 3 and Article 231, Paragraph 3 of the Code of Criminal Procedure). Meanwhile, presidential immunity only refers to a temporarily curb on prosecution against the President's individual commission of a crime. Such immunity does not extend to the evidentiary investigation and preservation directed at the President during an investigation or trial of a criminal case involving another person. If such investigation or trial leads to suspicion that the President was involved in criminal offenses, pursuant to the intent of this Interpretation, necessary evidentiary preservation may be conducted in order to avoid any cover-up of evidence that would thus make the prosecution and trial against the President impossible after the President be recalled, relieved or retired from the presidential role, although no investigation or prosecution may be commenced against the President. Such evidentiary preservation may include, for instance, object or electronic records inspection, crime scene investigation, document and object review, and biological sample collection from persons other than the President. However, considering Article 52 of the Constitution and its intention to protect the esteemed status of the presidency and the exercise of the presidential authorities, the President may not be physically restrained when measures or evidentiary preservation is conducted. For instance, detention or physical search, inspection or examination may be conducted only if it does not impede the normal exercise of the presidential authorities. The Legislature should formulate additional provisions that govern the search of places concerning the President to make necessary arrest of specific individuals or

seizure of specific objects or electronic records, as well as a special procedures of judicial review and objection for the President. Prior to the enactment of such law, the competent prosecutor shall file a motion for search and seizure regardless of whether the aforementioned places, objects, or electronic records involve state secrets, unless the President's consent is given. This motion should be reviewed for its adequacy and necessity by a special tribunal at the High Court (or its branch) by five judges and presided over by a senior division chief judge. No search or seizure may be conducted without the special tribunal's affirmative ruling, and the search should in principle not be conducted at the President's residence and working places. The relevant provisions of the Code of Criminal Procedure shall apply *mutatis mutandis* to the procedure for filing an interim appeal.

[8] Since the President's duty to testify as a witness in a criminal case involving another person does not fall within the scope of "criminal prosecution" under Article 52 of the Constitution, it is not covered by presidential criminal immunity. Nevertheless, when the criminal investigation authorities or the trial courts consider the President as a witness in a criminal proceeding involving another individual as a defendant, Article 304 of the Code of Civil Procedure shall apply *mutatis mutandis* so as to show respect for the presidency. The said provision reads, "Where the witness is the Head of State, the examination shall be conducted at the place of his/her choosing." However, the President may waive this privilege by appearing and testifying before the court as a witness.

[9] In light of the intent of J. Y. Interpretation No. 388 of this Court, the purpose of presidential privilege or immunity from criminal prosecution is designed for the office of the President. Therefore, in principle, the individual who serves as the President may not waive the privileges covered by and protected under presidential criminal immunity. The said non-waiver of the privileges means that the President, in principle, should not make a general waiver of his immunity in

advance so as to protect the esteemed status of the presidency and the effective exercise of his authorities and functions from unforeseeable interference via criminal investigation and trial procedure. Nevertheless, the presidential criminal immunity is, in essence, a constitutional privilege of the President. A person who serves as president should have the discretion to determine whether any particular evidentiary investigation may in fact result in damage to or interference with the esteemed status of the presidency and the effective exercise of his or her authorities and functions. Thus, unless the President is treated as a defendant in a criminal prosecution or trial, or the esteemed status of the presidency or any interference with the exercise of his authorities and functions would be objectively and inevitably damaged in the evidentiary investigation, when the President waives the immunity and voluntarily cooperates with an evidentiary investigation on an *ad hoc* basis, it should be deemed consistent with the purpose of Article 52 of the Constitution, because the President does not consider that the particular evidentiary investigation would in fact result in any damage to the esteemed status of the presidency or any interference with the exercise of his or her authorities and functions while the investigation may or may not fall within the scope of presidential immunity. Nevertheless, it is apparent that the President may terminate such waiver and restore the immunity whenever the President wishes. As to the issue of whether the President's waiver of criminal immunity is contrary to the intent of this Interpretation, it should be determined by the court once the case is already prosecuted. In addition, since presidential criminal immunity is designed for the office of the president, the President is the only person who enjoys such privilege, and it does not extend to any other person. A principal co-offender, or a person who abets or assists, or other participants in the commission of a crime in which the President is involved, are not protected under presidential criminal immunity. Naturally, the criminal investigation and trial procedure conducted by the criminal investigation authorities and trial courts

against such third persons should not be affected by presidential criminal immunity.

[10] II. Presidential State Secrets Privilege

[11] No clear textual foundation specifically provides the President with "state secrets privilege" in the Constitution. However, the principles of separation of powers and checks and balances dictate that an executive chief, within the scope of the office's functions and powers, should enjoy the power to decide not to disclose any classified information regarding national security, national defense and diplomacy. Such power is part of the executive privileges of the chief, as was clearly declared in J.Y. Interpretation No. 585, and is thus recognized under our constitutional law.

[12] The following is a summary of the powers granted to the President by the Constitution and the Additional Articles of the Constitution: Head of State (Article 35 of the Constitution), the supreme commander of the military (Article 36 of the Constitution), promulgating laws and orders (Article 37 of the Constitution, Article 2, Paragraph 2 of the Additional Articles of the Constitution), concluding treaties, declaring war and making peace (Article 38 of the Constitution), declaring martial law (Article 39 of the Constitution), granting amnesty and pardon (Article 40 of the Constitution), appointing and removing officials (Article 41 of the Constitution), conferring honors (Article 42 of the Constitution), issuing emergency decrees (Article 43 of the Constitution, Article 2, Paragraph 3 of the Additional Articles of the Constitution), calling a meeting of consultation (Article 44 of the Constitution), determining major policies for national security and setting up national security organs (Article 2, Paragraph 4 of the Additional Articles of the Constitution), declaring the dissolution of the Legislative Yuan (Article 2, Paragraph 5 of the Additional Articles of the Constitution), nomination (Article 104 of the Constitution, Article 2, Paragraph

7, Article 5, Paragraph 1, Article 6, Paragraph 2 and Article 7, Paragraph 2 of the Additional Articles of the Constitution) and appointment (Article 56 of the Constitution, Article 3, Paragraph 1 and Article 9, Paragraph 1, Subparagraphs 1 and 2 of the Additional Articles of the Constitution). As such, the presidency is part of the executive branch under the Constitution. Subject to the scope of the executive powers granted by the Constitution and the Additional Articles of the Constitution, the President is the highest executive officer and has a duty to preserve national security and national interests. The presidential state secret privilege is thus defined, within the authorities and functions of the office, as the President's power to classify information involving national security, national defense, and diplomacy when the disclosure of such information may jeopardize national security and national interests. As reference, the Legislature authorizes the President to unilaterally classify state secrets and keep them confidential permanently, as is clearly stated in Article 7, Paragraph 1, Subparagraph 1 and Article 12, Paragraph 1 of the State Secrets Protection Act. When other state organs operate and classified information is involved, presidential secret privilege should be duly respected by other state organs. Nevertheless, since the state secrets privilege is derived from the power intrinsic to the executive branch, the exercise of such power should follow the fundamental constitutional principles of separation of powers and checks and balances, as it is not an absolute power under the Constitution.

[13] Based on the presidential state secrets privilege, the President should have the right to refuse to testify as to matters concerning state secrets during a criminal proceeding, and refuse to produce the relevant evidence to the extent that the President may refuse to so testify. The Legislature should formulate additional provisions regarding the President in respect of the requisite elements and applicable procedures for the refusal to testify and refusal to produce relevant evidence. Prior to the enactment of such law, the President should provide a

preliminary showing that the inquiry and statements relating to state secrets would fall within the scope of the presidential state secrets privilege, or that the production and submission of the relevant evidence would jeopardize the national interest. If the preliminary showing fails to persuade, the competent prosecutor or trial court should consider the circumstances on an *ad hoc* basis and make a disposition or ruling in accordance with Article 134, Paragraph 2, Article 179, Paragraph 2 and Article 183, Paragraph 2 of the Code of Criminal Procedure. The President may raise an objection or interim appeal, pursuant to the intent of this Interpretation, if the President is not satisfied with the prosecutor's disposition or the trial court's disposition or ruling to overrule the President's refusal. The President's objection or appeal should be heard by the aforementioned special tribunal at the High Court (or its branch) by five judges and presided over by a senior division chief judge. Prior to the issuance of any ruling by the special tribunal, the enforcement of the original disposition or ruling should stand. The applicable provisions of the Code of Criminal Procedure should apply to the remainder of the objection or interim appeal proceedings. If the President's preliminary showing is provided in writing and claims that the relevant testimony or production of evidence would reasonably jeopardize national interests, the prosecutor and the court should defer to it. As to the determination of the likelihood that the President's testimony and production of relevant evidence in a confidential proceeding may jeopardize national interests, only the prosecutor or trial judge may proceed with the review under confidential proceedings. Even under confidential proceedings, when the prosecutor or the court uses the President's testimony or evidence that potentially jeopardizes to the national interest as a basis to justify the conclusion of the investigation or judgment, the President's testimony or evidence should be deemed as jeopardizing national interests.

[14] In determining whether the relevant provisions of the State Secrets

Protection Act and the Regulation Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets should apply to the trial proceedings in a particular case where information already submitted by the President is involved, the trial court should consider whether the President has duly classified the relevant information and determined the classification period in accordance with Articles 2, 4, 11 and 12 of the State Secrets Protection Act. If the information is not classified as state secrets, the aforementioned proceedings will not be applicable. Nevertheless, if, during the trial, the President reclassifies the information in question as state secrets, or provides other duly classified state secrets, the court should nonetheless continue the trial in accordance with the proceedings mentioned above. As for proceedings already conducted, there should be no violation of the relevant provisions of the State Secrets Protection Act and the Regulation Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets. Meanwhile, in determining whether the testimony or evidence classified as state secrets by the President may jeopardize the national interest, the aforementioned principles should be followed. Furthermore, the prosecution's investigatory proceedings should also be conducted under the same principles.

[15] III. Preliminary Injunction

[16] It should be noted that it is no longer necessary to review the petition for preliminary injunction in question since this Interpretation is rendered for the case at issue as the final decision. In addition, the petition at issue claims the President's exercise of authority conflicts with the trial of the Taipei District Court Criminal Case 95-Chu-Chung-Su-4 (2006) regarding the application of Article 52 of the Constitution. As to the petition of the alleged contradiction between the application of Article 63, Paragraph 1, Subparagraphs 1&2 of the Court Organization Act, Article 176-1 of the Code of Criminal Procedure, and Article 52 of the Constitution, the petition should be dismissed, for it is

inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act.

Background Note by Wen-Yu CHIA

The president involved in this case was Mr. Shui-Bian CHEN. Elected in 2000, he was the first president representing the Democratic Progressive Party (DPP) that ended the Kuomintang's (KMT) rule of Taiwan over five decades following World War II, including the KMT's authoritarian governance of four decades. In 2004, President CHEN barely won his second term by a margin of 0.2 percent of the popular vote. Politics in Taiwan became increasingly polarized after the 2004 election.

Together with the controversies regarding policies, polarization was also fueled by accused scandals and distrust of President CHEN, his team, and his family. Several people of the inner-circle of the President, including the first lady (Ms. Shu-Chen WU), were implicated in corruption, which was exposed by the media from August 2005. Eventually the President himself was also accused of being involved in the scandal, including embezzlement with respect to a presidential special fund on the pretext of secret diplomatic missions. In September 2006, led by a former chairperson of the DPP, hundreds of thousands of people, naming themselves as the "Red-Shirt Army," protested the alleged scandals in front of the Presidential Office Building in Taipei for two months, demanding CHEN's resignation from the presidency. The KMT and other opposition parties even threatened a motion of impeachment.

In response to the pressure from the political frontline, from June 29, 2006, prosecutors from the Investigation Task Force for Criminal Profiteering Crimes, Taiwan High Prosecutors Office, launched their investigations into the alleged scandals. Then prosecutors demanded documents from the President and

questioned the President. By November, Taiwan Taipei District Court Prosecutors Office formally indicted Ms. WU under the Anti-Corruption Act for the crime of forgery as a co-offender with President CHEN. The President himself was not formally indicted (though he was cited repeatedly alongside the first lady's alleged criminal actions in the prosecutorial motion), pursuant to the immunity granted to the President. The Taipei District Court proceeded with the trial against the first lady and other defendants. Nonetheless, the Office of President filed a constitutional petition in January 2007 according to Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act. The petition argued that the presidential immunity should extend to the first lady, and the District Court's request for the petitioner's (*i.e.* President CHEN) testimonies of the facts of the pending case would violate the state secrets privilege implicitly granted to the President according to Article 52 of Constitution. The Constitutional Court rendered J.Y. Interpretation No. 627 on June 15, 2007.

The prosecution against President CHEN immediately resumed on the day of his retirement from the presidency on May 20, 2008. For the original case that this constitutional petition was based on, Mr. CHEN and Ms. WU were convicted by the district court in 2009, but this verdict was later reversed by the Supreme Court and remanded for retrial by the High Court (Court of Appeal). In 2016, the High Court suspended the retrial of CHEN's case on the ground that CHEN was unable to attend court procedures because of sickness. As of September 2020, CHEN's case is still pending and yet to be finalized. However, CHEN was found guilty in several other scandal cases. He was put in custody in 2008 and then imprisoned in 2010. In 2015, CHEN was released on bail for out-of-prison medical treatment, which led to the suspension of the above-mentioned and other pending trials in 2016.

As to J.Y. Interpretation No. 627, it not only defines the scope and nature of presidential criminal immunity, but also recognizes and clarifies the scope of

presidential power. After the constitutional amendment in 1997 that cancelled the parliamentary confirmation power over the President's nominee to become the Premier of the Executive Yuan, many legal scholars considered that the structure of the central government had shifted from a parliamentary system to a semi-presidential system. However, the constitutional provision that designated the Executive Yuan (instead of the President) "the highest administrative organ of the State" (Article 53 of the Constitution) was not amended. Questions emerge with regard to the extent and scope of the presidential exclusive powers from and shared powers with the Premier. In support of the newly recognized of presidential state secrets privilege, this J.Y. Interpretation No. 627 explicitly recognizes that the president does wield the exclusive and highest powers with regard to the matters concerning national security, national defense and diplomacy. In these regards and to these extents, the president shall be considered the highest chief executive of government, while being the Head of State.

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

Vice President Concurrently Assuming Office of Premier Case

Issue

Is it constitutional if the Vice President concurrently assumes office of Premier? Is the Premier constitutionally required to resign once the President-elect assumes office? Is the Legislature's resolution constitutionally binding on the President when requesting that the nomination process of the Premier be expedited?

Holding

[1] The Constitution does not explicitly specify whether the Vice President may concurrently assume the office of Premier of the Executive Yuan. While the nature of the duties of the two offices is not apparently incompatible, the Constitution's purpose of setting two separate offices, i.e. Vice President and Premier, would not be fully served because the order of presidential succession and the rules of action for the presidency would be affected, should the office of President be vacant or the President be unable to attend to office. The situation that led to the present Interpretation should be properly attended to according to the principles mentioned above.

[2] It is a matter of courtesy, instead of a constitutional requirement, that on the occasion of the new President's inauguration, the Premier tenders a general resignation on behalf of the Cabinet to demonstrate their respect and deference to the Head of State. Accordingly, it is a political question, and thus this Court shall not review its constitutionality, that the President enjoys full discretion to

* Translation by Wen-Yu CHIA, based upon the previous translation by Andy Y. SUN

attend to the Premier's resignation, which is not constitutionally required.

[3] In accordance with the Constitution, the Executive Yuan is responsible to the Legislative Yuan. The Legislative Yuan does not have the authority to request the President's action or inaction by passing a resolution, unless the Constitution stipulates otherwise. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting the President to nominate the candidate for the Premier of the Executive Yuan and to submit such nomination for the Legislative Yuan's confirmation in the most expedited fashion" exceeded the constitutional authority of the Legislative Yuan and thus shall be considered advisory and carry no constitutional binding power over the President.

Reasoning

[1] This Interpretation results from four respective petitions: (1) a petition filed by Legislator Lung-Bin HAU along with eighty-one other members of the Legislative Yuan on the constitutional question of whether the Vice President may concurrently assume the office of Premier of the Executive Yuan; (2) a petition filed by Legislator Chun-Hsiung CHANG along with fifty-six other members of the Legislative Yuan regarding the question of whether the fact that Vice President Chan LIEN also serves as Premier of the Executive Yuan violates, among other provisions, Article 49 of the Constitution; (3) a petition filed by Legislator Ting-Kuo FONG along with sixty-one other 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 re-nomination and re-confirmation by the Legislative Yuan; furthermore, whether the Vice President may concurrently assume the office of Premier of the Executive Yuan; and (4) a petition filed by Legislator Ying-Chi YAO along with seventy-nine other members of the Legislative Yuan regarding the questions of

whether the Premier must resign, be re-nominated by the President and approved by the Legislative Yuan in light of presidential re-election, whether the Vice President may also assume the office of Premier of the Executive Yuan, whether the Legislative Yuan's resolution of June 11, 1996, "requesting the President to nominate the candidate for the Premier of the Executive Yuan and to submit such nomination for the Legislative Yuan's confirmation in the most expedited fashion" exceeds the constitutional authority bestowed on the Legislative Yuan, and whether such a resolution has legal binding force over the President. The Constitutional Court granted these four petitions and resolved to consolidate them into a single case for review. Be it noted that, first, in accordance with Article 13, Paragraph 1 of the Constitutional Court Procedure Act, notices were served to the legal representatives and counsels of the petitioners, as well as to the designated representative and counsels of the related agency, the Executive Yuan. Oral argument was held in the Constitutional Court on October 16 and November 1, 1996. Second, after the conclusion of the oral argument, petitioner Legislator Ying-Chi YAO moved for another oral argument on November 26. Having reviewed the information collected, the Justices of the Constitutional Court considered the materials sufficient and ruled that no further oral argument was necessary.

[2] Arguments from the first through the third petitions may be summarized as follows: (1) The political question doctrine is not applicable when answering whether the Vice President may also serve as Premier. No constitutional disputes may be resolved by the Judiciary if the present issue is constitutionally unreviewable for its political nature, *i.e.*, applying political question doctrine to this constitutional petition, since most, if not all constitutional disputes are "political" *per se*, and the Justices of the Constitutional Court have already rendered many Interpretations (*e.g.* J.Y. Interpretation Nos. 261 and 387, etc.) with political connotations. Meanwhile, the Constitutional Court has already

rendered more than ten Interpretations in respect of the constitutionality of holding more than one public office simultaneously. It would be contradictory in itself if the Justices of the Constitutional Court consider "Vice President also Serving as Premier" a case that should be dismissed by the political question doctrine. Moreover, gradually generalized from American court cases, the political question doctrine's content is vague and criticized by scholars, which makes it inappropriate for the Court to adapt hastily. Also, since advisory constitutional interpretation is legally recognized, the Justices of the Constitutional Court are obligated to render their decision to a given question whenever the petition has met the legal requirements. (2) Thus, the question of whether the same individual assuming both the offices of Vice President and Premier is incompatible is forbidden. According to Articles 37 and 57 of the Constitution and Article 2, Paragraph 4 of the Additional Articles of the Constitution, the Constitution adopted a Parliamentary system whereby, according to constitutional theory, the President represents but does not govern the country, and the Premier should act otherwise; thus, the President is forbidden from assuming the Premier's office simultaneously in order for the two offices to keep each other in check. The candidate for the vice presidency, according to Article 2, Paragraph 4 of the Additional Articles of the Constitution, shall register together with the presidential candidate in a given election as a running mate, and they shall be placed on the same ticket. In accordance with the same Article, Paragraph 7, should the office of the Vice President become vacant, the President is to nominate a candidate and call forth the National Assembly to elect him or her. Therefore, the Vice President is forbidden from concurrently assuming the Premier's office if the President is also so forbidden, considering the fact that they are in close relationship, share the same vision and serve as one. The Executive Yuan, according to Article 53 of the Constitution, is the highest organ of the state's executive branch, whereas the Premier of the Executive Yuan and

its Cabinet are responsible to the Legislative Yuan. While the Vice President by nature is to serve as a contingency to the President, the Constitution does not clearly delineate powers and duties bestowed to the President. Yet, as a counselor to the President, the Vice President has *de facto* power to carry out the President's orders on a daily basis and serve as an assistant to the President. If the Vice President also serves as the Premier, the chief of the Cabinet would become the chief of staff to the President, who would then possess the entire executive power, thereby destroying the constitutional design of the check-and-balance mechanism completely and rendering the Premier's concurring and countersignature powers meaningless. Also, serving in two offices would in fact damage public interest and trust; the required time commitment would preclude one individual from serving in multiple offices, since each carries a heavy workload. Moreover, from the perspective of administrative legal theory, in order to uphold the integrity of constitutional branches, the Vice President is responsible for serving the President even if the Vice President is not considered a subordinate of the President, and thus the Vice President should not serve as the Premier in the meantime. Moreover, in principle, no two constitutional offices may be occupied by the same individual, and exceptions must be stipulated by the Constitution (as under the U.S. Constitution where the Vice President also serves as President of the Senate, for instance.) Article 49 of the Constitution and Article 2, Paragraph 8 of the Additional Articles of the Constitution respectively provide that the Vice President shall succeed until the expiration of the original presidential term in case the office of the President is vacant; in case of both of the offices of the President and Vice President becoming vacant, the Premier is to serve as the Acting President until a new president is elected. In case the President is incapable of carrying out the duties, the Vice President is to act on behalf of the President, and in case both the President and Vice President are incapable of fulfilling their duties, the Premier is to be the Acting President. In

order to constitutionally guarantee a continuing succession of the presidency, the Vice President is set separately from the Premier as a double insurance. Were the Vice President also the Premier, it would not only reduce the number of available successors, but also create a "trinity" that an individual would simultaneously occupy three offices once the office of President were to become vacant, and those situations intrinsically jeopardize the spirit of the Constitution. Were the office not vacant but the President unable to fulfill his or her duties, the "trinity" would still inevitably take place, and it would be confusing and difficult to determine who – the Vice President or the Premier – is acting as President, and whether the three-month limit of Article 51 of the Constitution were to apply in such a situation. Also, the impeachment procedures and consequences are different for the Vice President and the Premier: the former follows Article 6, Paragraph 5 of the Additional Articles of the Constitution, while the latter follows Paragraph 3 of the same Article that is applicable to civil servants in general. Should the Vice President also serve as the Premier and commit impeachable offenses, the Control Yuan would find no applicable measure to execute its impeachment power. Conversely, as the chief executive of the government, should the Premier be sanctioned by the Control Yuan due to negligence in discharging his or her duties, or even resign or be removed from office, it is also questionable whether this Premier would still be fit for the office of Vice President. Meanwhile, since the Vice President is responsible to the National Assembly, conflicts would occur if the Vice President were to assume the office of the Premier and the National Assembly has different propositions from the Legislative Yuan, to which the Premier is responsible. Furthermore, in addition to the check and balance relationships among the three or five branches, the President and Vice President act as the Head of the State that resides above the executive, the legislative, and the judicial branches, and operate on a neutral and objective proposition to coordinate and resolve disputes between the Five Yuans

pursuant to Article 44 of the Constitution. The Vice President would not be able to coordinate and resolve disputes neutrally and objectively should the Vice President also serve as the Premier and become a party of a certain dispute. Finally, as to whether serving multiple offices concurrently is constitutionally forbidden, the answer depends exclusively on whether the nature and scope of their respective duties are compatible or involve any conflict of interest. The aforementioned situations should demonstrate that serving in both offices of the Vice President and the Premier violates the compatibility standard and thus is constitutionally forbidden. (3) No conventional constitution for the Vice President to concurrently assume the office of the Premier: to acquire the status of constitutional convention or customary constitutional rule, both repeating recurrences and *opinio juris* among the general populace in regard to a certain action are required. 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 their constitutionality in question, and consequently fail to acquire the status of constitutional convention or customary constitutional rule. (4) The newly-inaugurated President should not retain or return the general resignation by the Premier along with the Cabinet, but must proceed with re-nomination and seek confirmation by the Legislative Yuan: Under the constitutional design of the Five-Power Division, the Premier is not subordinate to the President and *vice versa*; thus, the Premier's resignation is subject to no one's approval. The Presidential Order for the Premier's Discharge of Duties is only a *pro forma* matter instead of a substantive power; thus, after receiving the general resignation from the Premier, the newly-inaugurated President should proceed with the re-nomination of the Premier and seek confirmation by the Legislative Yuan at once. While the previous Premier was indeed confirmed by the Legislative Yuan, the person who served as Premier then

became the Vice President, which significantly changed the conditions that the Legislature previously confirmed. Consequently, the previous confirmation does not justify the extension of the previous Premier's continuing to serve until after the inauguration of the new President. In sum, by concurrently assuming the office of the Premier, the Vice President would violate the Constitution, and the Judicial Yuan should forbid this action via its Interpretation; if the concurrent occupation of multiple offices had already been established, resignation from either office would need to be rendered as of the next day after the issuance of the Interpretation; if no resignation was rendered before that date, one should be relieved from the office later assumed.

[3] Arguments from the fourth petition and the concerned organ, i.e., the Executive Yuan, may be summarized as follows: (1) The Legislative Yuan's resolution of June 11, 1996, requesting the President to re-nominate the Premier of the Executive Yuan and to submit said re-nomination in the most expedited fashion for the Legislative Yuan's confirmation, exceeded its constitutional authority and is thus not binding upon the President: the Constitution sets no limit on the length of a term of the Premier of the Executive Yuan; it only provides that the Premier is to be nominated by the President and confirmed by the Legislative Yuan. J.Y. Interpretation No. 387 determined that the Premier should resign before the first session of the newly-elected Legislators. The then incumbent Premier LIEN had tendered the general resignation on January 25, 1996, and was later nominated by the President and confirmed by the Legislative Yuan to begin his second tenure as Premier. This is in conformity with the Constitution. Hence, before the next Legislative Yuan election, the President is not required to re-nominate, nor is there any need for the Legislative Yuan to re-confirm the appointment. Furthermore, according to Article 57 of the Constitution, the Premier, instead of the President, is responsible to the Legislative Yuan, and thus the Legislative Yuan cannot supervise the President

without exceeding its authority. Also, under various provisions of the Constitution, no power is granted to the Legislative Yuan to require the President to conduct a certain act by passing a resolution. While Article 63 of the Constitution authorizes the Legislative Yuan 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 clear that the aforementioned resolution is non-binding, since it constitutes neither another important affair of the State nor a bill of act via the Three Readings process. (2) The question regarding the Vice President concurrently assuming the office of Premier is highly political: It is a common practice among most countries that political questions should be resolved by political branches, i.e., the executive and the parliament themselves, under the constitutional design, and it is inappropriate for the judicial branch to intervene. J.Y. Interpretation No. 328 also excludes political questions from judicial review. Nevertheless, it is the very function of the Justices of the Constitutional Court's interpretation to settle a given controversy or dispute; thus, decision on whether an Interpretation on a political question should be rendered is subject to judicial discretion, and the concerned organ defers to this decision. (3) The Constitution does not prohibit the Vice President from concurrently assuming the office of Premier, and the two offices are compatible: From the "May 5th Constitution Draft" issued by the Nationalist Government in 1936, to the Political Consultative Conference, to the Constitution-making Conference of the National Assembly, the discussions focused on the interactions between the President and the Premier, and never touched upon the proposition of the Vice President, since the Vice President is only a standby position. As far as the legislative history of the Constitution is concerned, no prohibition against the Vice President serving concurrently as the Premier was considered. On the question of whether concurrently serving multiple offices created by the Constitution or by statutes is prohibited, the

answer, generalized from relevant Interpretations rendered by the Justices of the Constitutional Court, depends mainly on whether the nature and scope of their respective duties are compatible or involve any conflict of interest. Based upon such standard, since the office of the Vice President is purely of a standby nature which does not carry any substantive, legally-discharged duties, under no circumstances is it not compatible or in conflict with the nature and duties of the Premier of the Executive Yuan. Note that the Constitution does not adopt a parliamentary system in a strict sense for the central government, and thus the Premier's bestowed countersignature power is different from that of those countries with pure parliamentary systems in which the Prime Minister countersigns with the figurehead of the state in order to promulgate a given law. The real checks-and-balances mechanism in this Constitution is designed between the Executive and Legislative Yuans, and the Vice President would not jeopardize this constitutional mechanism by assuming the office of the Premier concurrently. Moreover, according to Article 2, Paragraph 1 of the Additional Articles of the Constitution, and the Act of Election and Recall of the President and Vice President, the Vice President is elected on the same ticket with the President, not commissioned by the President, so the President also may not discharge the Vice President. The President and Vice President only campaigned "as one", but they do not share duties and functions "as one", and the relationship between the President and the Vice President is neither hierarchical nor supervisory-subordinate. The presidential immunity, guaranteed by the Constitution, does not extend to the Vice President; neither the Constitution nor statutory law, i.e., the ROC Office of the President Organization Act, mention the duties assigned to the Vice President, nor are there any regulations similar to those of an executive organ on how a deputy assists the affairs of the chief. Thus, when the Vice President assumes the office of the Premier concurrently, it does not mix the roles of "subordinate" and "balancer" together, and it does not create

a constitutionally-conflicted role as a result. With regard to the opposition's argument that allowing concurrent and simultaneous occupation will cause an overlay of functions in case the office of the President becomes vacant, or if the President becomes incapable of fulfilling the duties, this situation may be resolved when the Vice President assumes the office of the President according to Article 49 of the Constitution, with the vacancy of the Premier's office being filled by the new President's nomination of a new candidate for Premier and seeking confirmation from the Legislative Yuan; the office of the Vice President shall have another elected pursuant to Article 2, Paragraph 7 of the Additional Articles of the Constitution. The so called "Trinity" may occur before the nomination or reelection; nevertheless, the situation would be the same should both offices of the President and the Vice President be concurrently vacant, with the Premier thus acting as President for three months. Since the latter is sanctioned by the Constitution, the former, following the same logic, should not be prohibited. The aforementioned process can also resolve the situation when the President is unable to fulfill the duties and an acting President is needed. 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 be committed, or that it will cause confusion of roles in the event the President should need to coordinate and settle a dispute between different Yuans according to Article 44 of the Constitution. Yet, should a motion of impeachment be launched for neglect of duties or violation of law, the subsequent procedure should be determined based on the nature of the impeachable offense, i.e., whether it relates to the duties and functions of the Vice President or the Premier; should a motion of impeachment be launched for causes irrelevant to the office's function (e.g. moral turpitude), the Control Yuan should decide upon an applicable procedure without difficulties and obstacles. With regard to the issue

under Article 44 of the Constitution, the coordination power is designated to the President as a neutral agent; when the office of the President is fully functioning, the Vice President does not have the constitutional power to settle disputes among Yuans on the Vice President's own initiative, and thus this does not create a contradiction of being the coordinator and the coordinated. While the President may choose to act on his or her own initiative, or delegate the Vice President or other proper personnel to coordinate and settle disputes between the Executive Yuan and other Yuans, it would be inappropriate if the President were to delegate such authority to the Vice President in the event the Vice President also serves as the Premier. To avoid such delegation would also avoid conflict of roles. (4) There are precedents where the Vice President has served as the Premier, and the compatibility standard is not violated when considering instances from other countries: To date, two Vice Presidents have also served as Premier for a total of eleven years since the promulgation of the Constitution, which caused no constitutional difficulties or obstacles: Mr. Cheng CHEN from July 1958 to December 1963, and Mr. Chia-Kan YEN from May 1966 to May 1972. These two instances, although occurring during the Period of National Mobilization for the Suppression of the Communist Rebellion, qualify as references given that the Constitution, especially the relevant provisions governing the relationship between the President and Vice President and the standby position of the vice presidency, is no different between then and now. Meanwhile, examples from comparative constitutional perspectives are not many since our Constitution adopts neither a parliamentary nor a presidential system for the central government; the only proper reference is the United States, where the Vice President also serves as the President of the Senate. It demonstrates a certain flexibility for a standby Vice President to serve in another office with substantive power, *i.e.*, allowing one to serve in offices from both the Executive and Legislative branches, even as the U.S. Constitution adopts strict separation

between the Executive and Congress. (5) The President, after the inauguration, may retain the Cabinet in response to the general resignation tendered by the Premier: J.Y. Interpretation No. 387 created a new constitutional order, which requires that the Premier submit a general resignation before the newly-elected members of the Legislative Yuan convene their first session. Premier LIEN's resignation was tendered on January 25, 1996, to fulfill this constitutional requirement. Since the terms of the President and the Legislators are staggered under the current Constitution, Premier LIEN's resignation after President LEE was re-elected was a political courtesy out of political ethics. Whether to accept the resignation, to re-nominate the incumbent or to nominate other candidates, after weighing political losses and gains, falls within the scope of the President's discretion. The opposition claims that because the candidate approved for the Premier position by the Legislative Yuan in February 1996 was "a Premier who had 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. Nevertheless, the confirmation process conducted by the Legislative Yuan is to review and decide on a certain nominee's qualifications without any strings or conditions attached, and thus no so-called change of condition or nominee has occurred. Also, since the Legislators that conducted the previous confirmation process are still incumbent, there is indeed no need to repeat the same confirmation process.

[4] Considering the overall arguments, this Interpretation is rendered with the following rationale:

[5] (1) To decide on the constitutionality of the Vice President's concurrent service in the office of Premier; whether and how the political question doctrine applies to this issue is a prerequisite question to resolve. The political question

doctrine (and other similar theories) refers to the theory that determines that certain issues involving political judgments should be made by the constitutionally-created political branches (including the executive and legislative branches), and they are not reviewable by the Judiciary. By generalizing from political practice in many constitutional democracies, numerous instances of the implementation of this theory are available as references. J.Y. Interpretation No. 328, rendered by this Court, set a precedent of how the political question doctrine applies: It determined that the definition of existing national territorial boundaries under Article 4 of the Constitution was a matter of political question and decided that the Constitutional Court, as part of the judicial power, should not interpret that specific provision. Yet, in regard to the constitutionality of the Vice President's concurrent service in the office of Premier, the issue involves a legal question of whether serving in two constitutional offices simultaneously violates the Constitution, not personnel arrangement in politics. Considering the many Interpretations (e.g. J.Y. Interpretation Nos. 1, 15, 17, 20, 30, 74, 75 and 207) this Court has rendered, the constitutional question in this petition concerning the Vice President's concurrently serving as the Premier, therefore, cannot avoid substantive judicial review on the basis of the political question doctrine or other similar theories. The petition, by arguing that simultaneous service in multiple offices is not a political question, is thus granted.

[6] Constitutional conventions are constantly important in countries that have no written constitutions, and the conventions' normative status is beyond question. In countries that do have written constitutions, however, constitutional conventions are only complementary to the written constitutions and thus less important. To become a part of customary law, a so-called convention is a repeating practice that is followed and considered binding upon actions over time. If the binding power of a practice is in question because contradictory action also

exists or because the practice may violate written law, the practice, accordingly, does not become convention as a binding norm. In the present case, while two instances have been found in which the Vice President concurrently assumed the office of Premier, one individual resigned from the Premier's office immediately after being elected as Vice President; moreover, the constitutionality of the former situation was controversial. As a result, those cases have not acquired normativity and become a constitutional convention in this Country.

[7] In regard to the issue of whether occupying two constitutionally-created offices concurrently is permitted: When the Constitution explicitly prohibits such practice, such as the prohibitions on Legislators and Control Yuan Members according to Articles 75 and 103 of the Constitution for example, the prohibitions shall be followed; also, when the two offices are indeed incompatible, the prohibition shall be applicable, and this Court had repeatedly sustained this standard in J.Y. Interpretation Nos. 20, 30 and 207. Since the Constitution is silent on whether the Vice President may concurrently assume the office of Premier and no explicit prohibition may be found, this present case should be decided on the compatibility of the two offices. Incompatibility means that occupying both offices would violate the fundamental principles of a constitutional democracy or create the concern of conflict of interest. The U.S. Constitution of 1787 established a strict system of separation of powers among three branches as its fundamental principle, and in France, Article 16 of the 1789 Declaration of the Rights of Man and of the Citizen proclaimed, "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." Since then, checks and balances of powers have become the paradigm of every constitutional democracy. Therefore, whether the two constitutional offices are compatible first depends upon whether the principle of checks and balances of powers is violated. Once it is, unless the Constitution provides exceptions (such as the Vice President also serving as President of the Senate under the U.S.

Constitution or a member of the Parliament being permitted to serve as a member of the Cabinet in a cabinet system), such practice is deemed unconstitutional. The scope of each branch (e.g. the legislative, executive, and judicial branches) is determined by the principle of checks and balances; when the function within one branch requires services from different individuals in two organs, holding two offices concurrently would be prohibited as well. For instance, when a Congress adopts bicameralism, a bill is required to be passed by both chambers before enactment. In this case, one person serving in both chambers would violate the Constitution's intent to separate the legislative power into two chambers, and thus concurrent service in two offices would be prohibited by the Constitution. Pursuant to the aforementioned logic, J.Y. Interpretation No. 30 ruled that a Legislator may not serve as a member of the National Assembly concurrently and explained that "if a Legislator may also serve as a member of the National Assembly, it would mix the powers of constitution and bill proposition and referendum, as two incompatible duties, to one person." As to the compatibility issue among the offices of the Head of State, the Premier, and the Cabinet members within the executive branch, the institutional designs of different countries may provide different standards: in a country adopting a parliamentary or semi-presidential system, an individual must not serve in multiple offices concurrently, for a balancing mechanism should be in place between the Head of State and the Premier. In most countries that adopt a presidential system (e.g. the U.S. and Latin American countries), the Head of State is also the chief of the executive branch, so an office of Prime Minister is not part of the governmental design. While the President rarely also serves as a cabinet member (Minister of certain department), the Vice President usually serves in an office of the Minister of certain department concurrently (such as in Costa Rica and Panama). In Switzerland, which adopts what is generally known as a council system, its Federal Council (Conseil Fédéral or Bundesrat) consists

of seven ministers, and the Offices of the President and Vice President of the Confederation are rotated among those ministers. Since the rotation only concerns the internal division of executive duties, it does not violate the basic principle of checks and balances of powers and naturally does not entail an issue of constitutionality. As to the separation of powers between the central and local governments, serving in two offices concurrently is not illegal *per se*. For instance, it is not unusual for the Premier or a Minister to also serve as a mayor or other elected local officer concurrently in France. Our central governmental design is not exactly the same as any one of the abovementioned systems, yet the principle of checks and balances of powers is no less critical than it is in other countries. That the Judiciary, the Examination [Yuan], and the Control [Yuan] operate separately and independently is beyond question. The Executive and the Legislature are clearly separated from each other, and their members may not serve concurrently in another branch – it is the rationale behind Article 75 of the Constitution that prohibits Legislators from serving as an executive officer concurrently. Unlike the constitutions of other countries that require the Speaker of the Parliament to succeed to the office of 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 requires the Premier to serve as Acting President for a term of no more than three months should the offices of both the President and the Vice President become vacant, or if the President and Vice President have not yet been elected when the term of the previous incumbent expires, or if they have been elected but not yet inaugurated (Article 2, Paragraph 8 of the Additional Articles of the Constitution and Articles 50 and 51 of the Constitution). Our Constitution holds the separation principle strictly and keeps the succession within the executive branch, since it is an internal exercise of the executive power; and the

proposal during the enactment of the Constitution that the position of Acting President be rotated among the presidents of the Yuans was rejected. Our Constitution provides that the Premier is to be nominated by the President and confirmed by the Legislative Yuan (Article 55, Paragraph 1), that presidential approval is required before the Premier should veto a given resolution already enacted by the Legislative Yuan (Article 57, Subparagraphs 2 and 3), that the Premier's countersignature is necessary before the President may promulgate a law or issue an executive order, and that, if in the form of an emergency decree, even the approval of the Executive Yuan Meeting is required (Article 37 of the Constitution; Article 2, Paragraph 4 of the Additional Articles of the Constitution). The Executive Yuan, both in theory and in practice, is an institution that operates in the form of a hierarchy led by the Premier; arguments that claim a checks-and-balances mechanism between the offices of the President and the Premier are reasonably sound. Thus, it is obvious that the same individual may not serve in the office of President and the office of Premier. 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-Power Division and unconstitutional if the Vice President were also to serve as the chief of the Judicial, Examination or Control Yuan. Nevertheless, since it is not an apparent violation of the Principle of the Five-Power Division if the Vice President serves as the Premier concurrently, it is indeed difficult for this to be abruptly considered unconstitutional from the point of view of checks and balances.

[8] The next issue to be examined is whether there is any division of duties between the Vice President and the Premier, and whether there is a mechanism of checks and balances or conflict of interest between the two offices. From the Draft Constitution issued on May 5, 1936, (commonly known as the May 5th 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, and only to, succeed the President in case that office became vacant, or to serve as Acting President in order to carry out its duties. There were no other powers and duties bestowed upon the Vice President under ordinary circumstances. The legislative history is not only evidenced by the related documents concerning the history of the constitution being made but also confirmed in the Petition for Constitutional Interpretation of June 15, 1996, submitted by Legislator Chun-Hsiung CHANG and other Legislators. 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, and in case the President should be unable to attend to office due to any cause, the Vice President shall be the Acting President. No other provision of the Constitution is relevant to the Vice President's duties and status. Except for Articles 3 and 4 of the Organization Act of the National Security Council, which provide that the Vice President and the heads of all Five Yuans shall be members of the National Security Council, and that the Vice President shall be 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 perspective of legal authority, there are no relationships between the two offices in terms of division of duties, nor can it be said that there is any check and balance mechanism or conflict of interest. This is different from the aforementioned situation where respective legal authorities, either between members of the National Assembly and the Legislative Yuan or between the President and the Premier, are incompatible or cause confusion of roles. Since the Vice President is designed as a backup position that possesses no substantive power except in the case of succession or in an acting capacity, the arguments claiming that time commitment issue might damage to the public interest and trust are thus unfounded.

[9] As mentioned above, while the vice presidency is esteemed, and while it enjoys a certain level of political influence, the Constitution does not bestow substantive and specific authority to this office. Were the Vice President to carry out constitutional power or duties reserved to the President without succeeding or acting in the office of President according to the Constitution, such action would be legally unwarranted. By contrast, according to written law or unwritten convention, a deputy certainly has a duty to assist the chief in an administrative agency, and this practice is not analogous to the Vice President's legal status. In fact, no instances may be found where, under the President's authorization while the President is neither in absence nor unable to serve in the role's functions and duties, the Vice President carries out presidential functions or duties from Articles 35 to 44 and other provisions of the Constitution. Based on a relationship of trust, while serving as a standby, the Vice President inevitably carries out certain temporary or ceremonial functions for the President. Nevertheless, this practice does not entail that the Vice President has legal duties in which to assist the President, thereby meaning it is not the same relationship as between the deputy and the chief of an administrative agency. Accordingly, when the President is in office and able to serve in the role's functions and duties, no conflict of interest would occur if the Vice President were to assume the Premier's office concurrently. In addition, while the Vice President assists and supports the President in a *de facto* sense, the Vice President is not, as the petition claims, the President's subordinate or assistant who is responsible to carry out the President's orders, thus meaning that concurrent service in the two offices would lead to a conflict of interest. With respect to the claim that concurrent service would jeopardize the integrity of constitutional organs' functioning: Since the very function of the Vice President is to be in a standby position to ensure that the continuation of the Head of State may always be continuous, such position would not diminish solely because the Vice President serves concurrently as the Premier.

[10] Article 2, Paragraph 1 of the Additional Articles of the Constitution provides, "The presidential and vice presidential candidates shall register jointly and be listed as a pair on the ballot." That the elected President and Vice President belong to the same party or political affiliation with shared political visions is, therefore, a reasonably normal presumption. Nevertheless, to win the election, it is also possible that two individuals with different political visions and affiliations may work across the party lines and register jointly and be listed as a pair on the ballot. Especially when the Vice Presidency becomes vacant, according to the same Article, Paragraph 7, the President is to nominate a candidate and summon the National Assembly for reelection, the President would most likely name one who is, instead of having a shared vision with the President, acceptable to the majority of the National Assembly – it would be similar to the situation where the President nominates a candidate for Premier who needs to be confirmed by the Legislative Yuan. As a result, the President and the Vice President are not necessarily in close relationship and do not necessarily share the same vision. Even if they are in close relationship and they do share the same vision, the Vice President still may neither exercise the power of the Head of State concurrently with the President, nor share the constitutional privilege of the Head of State, not to mention that the President and the Vice President are not in a relationship of daily mutual agency – therefore, it would be absurd to consider them "as one." Thus, the concerned organ's argument is not without merit by claiming that the idea of "as one" carries no weight outside the scenario of the election campaign. This situation also explains the relationship between the President and the Premier: when the President has no influence over the majority party (or parties) in the Legislative Yuan, the President's Premier nomination would have to hinge upon the preference of the majority party (or parties). By contrast, if the President is the chair of the majority party, or the President has enough influence over the majority party (or parties), the President

would most likely nominate a preferable candidate (for Premier) who shares the President's vision, and it would not be controversial on the constitutional level even if the Premier exercises the executive power while closely adhering to the President's agenda and direction. Still, the President and the Premier would not be deemed "as one." Inferring from the idea of "as one", the petition's conclusion argues that the idea that "Whatever the President cannot do, the Vice President cannot do, either" should be rejected. Given the aforementioned relationship between the Vice President and the President, 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 Additional Articles of the Constitution and other related provisions should hardly be deemed compromised if the Vice President concurrently serves as the Premier. The checks and balances between the President and the Premier depend upon a system under which two different individuals occupy each position respectively, rather than being determined by the incumbent's political affiliations or propositions. It is definitely not the case that the occupants of the Offices of the President and Premier must uphold conflicting political visions or policies in order to comply with the design of the Constitution and to be deemed constitutional. Furthermore, while the recall and reelection of the Vice President concerns the power of the National Assembly, the Additional Articles of the Constitution do not require the Vice President to report on the state of the Republic to the Assembly or take advice from it. This would not naturally result in a conflict between the National Assembly and the Legislative Yuan, as argued in the petition that the Vice President's concurrent service as Premier would require the incumbent be responsible to both bodies.

[11] Article 49 of the Constitution provides that, in case the office of the President should become vacant, the Vice President is to succeed until the expiration of the original presidential term, and in case the President should be

unable to attend to office due to any cause, the Vice President is to become the Acting President. In case both the President and Vice President should be unable to attend to office, the Premier is to act for the President. In case the offices of both the President and Vice President should become vacant, in accordance with Article 2, Paragraph 8 of the Additional Articles of the Constitution, the Premier is to 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 the positions of the President, Vice President and Premier will devolve to the same individual if the Vice President concurrently serves as the Premier if the office of the President becomes vacant or if the President cannot attend to his or her duties, as illustrated above, this obviously is not permitted by the Constitution under normal circumstances. Yet this so-called "trinity" scenario does not happen only when the Vice President also serves as the Premier: Article 49 of the Constitution, Article 2, Paragraph 8 of the Additional Articles of the Constitution, and Article 50 of the Constitution, are all designed to deal with the possibility of three positions being consolidated in one individual. Article 51 expressly limits the Premier's term as Acting President to no more than three months. Once the office of the President becomes vacant, the Vice President who concurrently serves as the Premier should succeed the President, nominate a new candidate for Premier, and seek the Legislative Yuan's confirmation immediately. Should this situation occur during a recess of the Legislative Yuan, Article 55, Paragraph 2 of the Constitution applies, which requires that the Vice Premier is to be the Acting Premier and shall submit a request within forty days to the Legislative Yuan to convene and to exercise their power of confirmation. If the succession is not due to vacancy but the President's inability to attend to office, 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, and Article 55,

Paragraph 2 of the Constitution is applicable to this situation as well. As analyzed above, since those questions concerning the acting duties of a Vice President who concurrently serves as Premier and succeeds the President are solved to a certain extent, thus the petitioner's argument, which claims that the obstacles created by the concurrent holding of two positions has apparently reached the level of unconstitutionality, needs further supporting justification. As for the matter of impeachment, the Additional Articles of the Constitution, i.e., Article 6, Paragraphs 3 and 5, have different procedural designs for civil servants in general and for the President and the Vice President. In the case that a Vice President who concurrently holds the office of 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 determined. If the impeachable offense is not related to legal functions or duties, the Control Yuan shall enjoy the discretion of deciding the appropriate process for impeachment. Consequently, while it is a situation where the application of law may be questionable, it would be much less convincing to abruptly conclude that the two offices, i.e., the Vice President and the Premier, are apparently incompatible. As to the petitioner's claim that if the Premier is impeached by the Control Yuan or even resigns due to negligence in carrying out his or her duties, whether one can still serve as the Vice President appropriately is questionable: it is a matter of political concern, not a legal issue.

[12] As Article 44 of the Constitution provides, "In case of disputes between two or more Yuans other than those concerning which there are relevant provisions in the Constitution, the President may call a meeting of the Heads of the Yuans concerned for consultation with a view to reaching a solution." Some consider this the Head of State's power of neutrality; the petitioners also argue that this is a power bestowed to the Head of State and makes it above the Five Powers; thus, the Vice President would become both the "coordinator" and the

"coordinated" if the Vice President also serves as the Premier concurrently, and the Head of State would no longer be neutral. While it is unclear whether this constitutional provision is equal to the power of the Head of State or the power of neutrality, the so-called "power of the Head of State" (pouvoir royal), also known as power of neutrality or power to intermediate (pouvoir neutre, intermédiaire et régulateur), is a theory that was advocated by a few French scholars (such as Clermont-Tonnerre and B. Constant) in the early nineteenth century, which reserves limited power to the monarchy as the head of state (*see* Carl Schmitt, Der Hüter der Verfassung, 3 Aufl., 1985, S. 133ff.). Nevertheless, this theory did not fit well with the practice of a representative democracy in later developments of politics, and has been thus criticized as a fictional concept (*see* Klaus von Beyme, Die Parlamentarischen Regierungssysteme in Europa, 2. Aufl., 1973, S. 89). Meanwhile, another constitutional scholar has argued that the Head of State, be that a King or a President, enjoys a political power of coordination *per se*, and explicit constitutional provision is unnecessary (*see* Carl Schmitt, Verfassungslehre, 8 Aufl., 1993, S. 287). Hence, whether the power of neutrality has become the cornerstone of modern constitutions remains controversial and has not become a widely accepted principle for the separation of powers. It naturally does not affect the constitutional interpretation of the present case. Even if the President's exercise of the power under Article 44 of the Constitution may be deemed as the power of neutrality for the Head of State, there is no contradiction created between the coordinator and the coordinated.

[13] Determining an act to be unconstitutional is similar to determining an act to be 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 (known as Gravitaets-bzw. Evidenztheorie). If such level is not reached, then the legal effect of the specific act is determined by the nature and substance of the flaw, respectively. Therefore,

for countries (*e.g.* Germany and Austria) that establish a constitutional court to conduct judicial review, the court's holdings are not simply dichotomized as constitutional-unconstitutional or valid-invalid. There may be a wide variety of cases where a law is not in conformity with the constitution yet not declared invalid, declared unconstitutional but rendered invalid only after a certain period of time or declared constitutional yet with an admonition to the concerned agency to take certain precautionary actions due to the likelihood that it may become unconstitutional. This Court does not adopt the dichotomy approach either; rather, we build up a diversity of types of holdings that is similar to the German and Austrian models, and many precedents may be found as references. When there are no express constitutional provisions to rule 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* J.Y. Interpretation No. 342)."Grossly" means the flaw violates the basic principles of the Constitution, such as popular sovereignty, separation of powers, institutional guarantee of autonomy of local governments, or that the restriction on the liberties and rights of the people has encroached on their fundamental nature and exceeded the degree of necessity. "Clearly" means free from any doubts or rational controversy 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. Each side has different but valid points on the issue of concurrent service; the present issue can hardly be deemed as grossly and clearly flawed and hence, to have clearly reached the level of being unconstitutional. Moreover, in accordance with Article 2, Paragraph 3 of the Additional Articles of the Constitution, the discharge order for the original Premier does not take effect until the Legislative Yuan confirms the new Premier. If the original Premier joins the presidential

campaign as the candidate for Vice President and is elected, while there is no doubt that the Constitution does permit the Vice President to serve concurrently as the Premier before the Legislative Yuan is to confirm a new Premier nominated by the President in accordance with the law, naturally such a constitutionally permissible act under that particular circumstance cannot be abruptly interpreted as being unconstitutional. Perspectives provided by the ruling and opposition parties varying on the constitutionality of the concurrent service issue are due, primarily, to the current constitutional design of the Five-Power Division, which adopts several institutional features from parliamentary and presidential systems, and thus naturally conflicting yet sound arguments may be made according to one's institutional preference or genuine belief. Yet, instead of the Constitutional Court, any adjustment of the constitutional design shall be left to the authorized body with the power to amend the Constitution that can consider all facets in response to the needs of the epoch. Nevertheless, since the Constitution intentionally set three offices, i.e., the President, the Vice President and the Premier separately, the original intent was supposedly to assign different individuals to serve in each office. Furthermore, although the original text of the Constitution provides no provision for the re-election of the Vice President should that office become vacant, Article 2, Paragraph 7 of the Additional Articles of the Constitution 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 additional point is sufficient to demonstrate that the Constitution drafters valued the office of the Vice President enough to ensure that it is not subject to prolonged vacancy so that there would be an immediate successor in case the office of the President should become vacant, and the functions of the Head of State would thus not be interrupted. While a Vice President who concurrently serves as 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 practice can hardly dispel the concerns, as repeatedly argued in the petitioner's arguments, that the "double insurance mechanism" for [power] succession is weakened. In the event that a Vice President who concurrently serves as Premier should encounter the situation that the President cannot attend to his or her duties, the constitutional provisions do not offer a direct solution. This is because under normal circumstances where two different individuals respectively serve as Vice President and Premier, the Vice President can naturally be the Acting President until the cause of such inability diminishes. But if the same individual is both the Vice President and the Premier, the issue of incompatibility of duties will occur with undertaking the actions of the presidential power, because as long as the actions are not taken purely under the auspices of the status of the Premier, there is then a discrepancy with Article 51 of the Constitution, which exclusively stipulates the situation where the Premier serves as the Acting President. It is clear that the situation above is not within the scope of the powers and duties of the succession mechanism under the Constitution and may barely be resolved by cross applications of different provisions. But after all, cross applications would not be in line with the design for normal circumstances under which different individuals should serve in the three constitutionally mandated offices, respectively, and would affect the constitutional mechanism of power succession or action. There are merits in the petitioner's repeated criticisms in this regard.

[14] In sum, the two offices, i.e., the Vice President and the Premier, are not fundamentally incompatible. Yet if these two offices are assumed by the same individual, then the succession or acting mechanism, designed by the Constitution, will be affected in case the office of the President becomes vacant or the President is incapable of carrying out his or her duties. Accordingly, having

the Vice President concurrently serve as the Premier is not completely in conformity with the Constitution's intent of setting separate individuals in 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. The situation that led to the present Interpretation should be properly attended to according to the principles mentioned above.

[15] (2) The Constitution does not set a specific limit on the Premier's term, which leaves no clear direction regarding when the Premier should be retained or relieved of duties. Article 57 indeed requires the Executive Yuan be responsible to the Legislative Yuan, but since no general and regular election had taken place in the past, the results of partial re-elections could not reflect the public's will on whether the Premier and the subordinates (as well as the Vice Premier and ministers without portfolio) should resign or be retained. To avoid allowing a Premier without term limits, the Premier together with the Premier's colleagues tenders a general resignation to the new President after each presidential election – this more than forty years of practice has gradually become a norm. Nevertheless, no clear basis can be found in current Constitution for the Executive Yuan's general resignation at the inauguration of the new President. In 1992, the Legislative Yuan had begun regular re-election, so the Premier immediately tendered the resignation after the second Legislative Yuan was elected the next February. This Court rendered J.Y. Interpretation No. 387 on October 13, 1995, which declared that as a constitutional obligation, the Premier shall tender the 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; at the same time, the Executive Yuan may, upon presidential approval, exercise

the veto power and transmit the resolution back [to the Legislative Yuan] for reconsideration; also, if the Executive Yuan deems the Legislative Yuan's resolution on a given statute, budget or treaty too difficult to carry out, it may, upon presidential approval, exercise the veto power and transmit the resolution back to the Legislative Yuan for reconsideration. If two-thirds of the Members of the Legislative Yuan decide to maintain the original resolution, the Premier tenders the resignation to the President if the Premier decides not to accept the resolution, and this is also a resignation as a matter of constitutional obligation. There is no reason why the President should not approve of a Premier's resignation for fulfilling their constitutional obligations. There may be a wide variety of other reasons to resign, such as physical health, political scenarios, leadership style, and so forth. Yet those are not constitutional obligations to resign, as is the Premier's resignation at the inauguration of the new President. Since the nineteenth century, regardless of whether in a constitutional monarchy or republic, a typical parliamentary or semi-presidential system under the French Fifth Republic, there have been numerous examples in European states where the cabinet submits its resignation to the newly-inaugurated Head of State, hence the so-called courtesy resignation. There is no common practice among different countries 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 a Premier's resignation that is not constitutionally required, with all things considered including the political situation and other factors, the President may decide to approve the resignation, return the resignation, or retain the incumbent, if the President deems it appropriate. All these choices fall within the scope of the President's constitutional duties and reasonable discretion. As a governing act, it is not a matter subject to constitutionality review by this Court.

The petitioners' argument regarding this issue claims that the President and the Premier do not have a superior-subordinate relationship under the framework of the Five-Power Division Constitution, and there is no superior to approve the Premier's resignation. This argument is not in conformity with the Constitution, since Article 2, Paragraphs 2 and 3 of the Additional Articles of the Constitution stipulate that 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 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 regarding a Premier, who has resigned, being inaugurated as the Vice President along with the President, this Court has already explained elsewhere in this Interpretation and will not repeat here.

[16] (3) The Legislative Yuan is the highest legislative organ of the country, as Article 62 of the Constitution expressly stipulates. Article 63 of the Constitution provides the powers of the Legislative Yuan in general: "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 Auditor-General of the Control Yuan in accordance with Article 104 are both subject to the Legislative Yuan's confirmation. Moreover, both the Constitution and rules with equal effect expressly prescribe a broad scope of powers to the Legislative Yuan; for instance, among other matters, the resolution to request that the President 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 question 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 Executive Yuan's veto under the same Article, Subparagraphs 2 and 3; the right to review the Auditor-General'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; also, in accordance with Article 2, Paragraph 4 of the Additional Articles of the Constitution, any emergency decree promulgated by the President must be submitted to the Legislative Yuan within ten days for ratification. Furthermore, in accordance with J.Y. Interpretation No. 325 of this Court, the General Conference of the Legislative Yuan may resolve to retrieve the original documents from the related agencies on matters related to a given agenda. These powers that constitutionally belong to the Legislative Yuan and the various resolutions made by the Legislative Yuan through the legislative process in their very nature have a binding effect on the people or related agencies. Yet there is a constitutional boundary to be followed by every governmental agency in exercise of its functions. If certain powers are transferred to other governmental agencies from the legislative, the executive or the judicial branches by the Constitution pursuant to the principle of separation of powers, or a certain design was purposely not adopted by the framers of the Constitution, every government agency is obliged to abide by such arrangements. 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 the Constitution; in the latter, for instance, our Constitution does not adopt the parliamentary no-confidence vote to the Cabinet and the Cabinet's countermeasure to dissolve the parliament. 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 that the President must nominate and request confirmation from the Legislative Yuan first before the Legislature carries 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 that the Legislative Yuan 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's drafters to substitute for the no-confidence vote and dissolution of parliament mechanisms found in a parliamentary system country, and the various amendments of our Constitution over the years never sought to change it. If the Legislative Yuan were able to pass a resolution, with readings and over half of the votes cast in favor, to request that the President nominate a new Premier candidate so that it could exercise the power of confirmation, and the President did so accordingly, then it would be like creating the type of no-confidence voting system that the Constitution drafters rejected. Furthermore, in accordance with the Constitution, it is the Executive Yuan that is responsible to the Legislative Yuan, and thus the Legislative Yuan does not have the authority to pass a resolution requesting the President's action or inaction, unless the Constitution stipulates otherwise. Therefore, the Legislative Yuan's resolution of June 11, 1996, "requesting that the President to nominate the candidate for the Premier of the Executive Yuan and submit such nomination for the Legislative Yuan's confirmation in the most expedited fashion" exceeded the constitutional authority of the Legislative Yuan and thus shall be considered advisory and carry no constitutional binding power

over the President.

Background Note by Wen-Yu CHIA

On March 23, 1996, Mr. Teng-Hui LEE won the first popular presidential election in the history of the Republic, and the then-Premier, Mr. Chan LIEN was his running mate. On behalf of the whole Cabinet, Mr. LIEN tendered the general resignation to President LEE after their inauguration on May 20. Nevertheless, the President did not "accept" the resignation; instead, he issued a statement in June claiming that it was "unnecessary" to decide on the resignation, and demanded Vice President LIEN to continue his service as the Premier concurrently. The Office of the President justified President LEE's decision by claiming that Mr. LIEN was recently confirmed by the Legislative Yuan on February 24, after he submitted general resignation to the third term of the Legislative Yuan before it convened its first session on February 1. In other words, Mr. LIEN, as the Premier, had acquired the people's confidence as represented by the newly elected parliament in February, and since President LEE did not re-nominate but retain Mr. LIEN, the Legislature would have no candidate to confirm. From the perspective of law, while the February resignation was a constitutional requirement defined by J.Y. Interpretation No. 387 (*see* later paragraph), the May resignation was deemed as an act of courtesy by the concerned organ.

Nevertheless, most Legislators from opposition parties were not persuaded by the President. From late May to mid-June, they filed several constitutional petitions to the Court to question the constitutionality of President LEE's statement and inaction, as well as Vice President LIEN's concurrent services in two offices. The Court scheduled October 16 and November 1 for oral arguments and rendered this J.Y. Interpretation No. 419 on December 31, 1996. Since the holding and reasoning of this Interpretation were written in a rather subtle tone,

especially on the concurrent service issue, both petitioners and the Secretary-General to the President "welcomed" the outcome but offered contradictory interpretations of the Court's conclusion. Mr. LIEN eventually retired from the office of Premier on August 21, 1997.

Other historically relevant information is provided as follows:

Months before the election of the third term of the Legislative Yuan, the Constitutional Court rendered J.Y. Interpretation No. 387 on October 13, 1995, to define the Premier's general resignation after the election of each term of the Legislative Yuan, pursuant to the general will and political accountability, as a constitutional obligation. That Interpretation is relevant to J.Y. Interpretation No. 419 in the sense that it established a general standard, i.e., the general will and political accountability, to determine whether the Premier's general resignation is constitutionally required or an act of courtesy. The question left to J.Y. Interpretation No. 419 was, then, whether and how this standard was to apply when a new president (instead of a new parliament) was sworn into office. While J.Y. Interpretation No. 387 could have been considered a binding precedent to J.Y. Interpretation No. 419 in common law jurisdictions, constitutional decisions made by the Taiwan Constitutional Court, like in many other civil law tradition countries, are not legally binding to later cases. Instead, they are persuasive authority with *de facto* influence and frequently cited as references in petitions and the court's own reasoning.

Last but certainly not least, the Additional Articles of the Constitution, including the design of the central government and the checks and balances mechanism between the Executive and the Legislative, were significantly changed in the 1997 constitutional amendments. The most important change was that, while the Executive Yuan remained the highest executive organ and responsible to the Legislative Yuan, the legislative power of confirming the Premier's nomination was cancelled then. Many constitutional scholars

considered this a shift from a parliamentary system to a semi-presidential system, yet other changes strongly supported different characterizations of the 1997 amendments. For instances, the 1997 amendments introduced the no-confidence vote to the Legislative Yuan, we well as the power to dissolve the parliament to the President (with the request of the Premier) as a countermeasure. Also, the Legislature could override the Premier's veto with more than one-half of the total number of Legislators (the original requirement was two-thirds of the Legislators who were present at the meeting). Whether this J.Y. Interpretation No. 419 is still a binding precedent after the 1997 amendments remains an issue to be clarified.

J.Y. Interpretation No. 520 (January 15, 2001)*

Withholding of the Fourth Nuclear Power Plant Budget Case

Issue

May the Executive Yuan Unilaterally Withhold the Statutory Budget for the Fourth Nuclear Power Plant?

Holding

A budgetary bill, after being approved by the Legislative Yuan and promulgated, becomes a statutory budget. It is comparable in form to a statute. In J.Y. Interpretation No. 391, this Court referred to it by its academic term and called it a law of measures, in light of its differences from an ordinary statutory bill in terms of content, regulatory objects, and deliberation process. Whether it is constitutional or lawful for a competent authority to withhold, *ex officio*, a portion of the spending items in a statutory budget, depends upon the circumstances in question. For funds designated for the maintenance of an agency's normal operations or for carrying out its legally authorized duties, such withholding is not lawful if it should affect the existence of that agency. For funds not involving a change in any important national policy, the competent authority, exercising its discretion consistent with its obligations, may either reduce the spending amount or adjust its implementation, as long as such withholding conforms to the requirements of the Budget Act. The Executive Yuan shall be responsible to the Legislative Yuan as required by the Constitution. It shall also respect the Legislative Yuan's power to participate in the decision-making of important national policies. With regard to a withholding of statutory budget

* Translation by Jau-Yuan HWANG, based upon the previous translation by Andy Y. SUN

involving a change in either the statement of the administrative policies or an important policy, the Premier or Ministers and Commission Chairpersons concerned of the Executive Yuan shall report, in due time, to the Legislative Yuan and answer questions therefrom, in accordance with Additional Article 3 of the Constitution and Article 17 of the Act on the Exercise of the Legislative Yuan's Powers. In light of its impacts on energy reserves, the environment and ecology, and related industries, as well as its policy-making process over the years and the complexity of its resultant effects, the withholding of this statutory budget item by the resolution of the Executive Yuan Meeting shall be considered a change in an important national policy. Therefore, the above procedural requirement of reporting and interpellation shall be undertaken as soon as possible. When the Executive Yuan submits its report, the Legislative Yuan is obligated to hear such report. After the report by the Executive Yuan, it may continue to carry out its previous withholding of the budget concerned, if its policy change is supported by the majority of members of the Legislative Yuan. If the Legislative Yuan passes a resolution against or modification of such withholding, all of the government authorities concerned shall, in accordance with this Interpretation, consider the contents of the said resolution and then negotiate a solution or choose an appropriate approach from among the existing constitutional mechanisms, in order to end the stalemate.

Reasoning

[1] This petition for constitutional interpretation was filed by the Executive Yuan in regard to the question of the constitutionality of its decision to halt the construction of the Fourth Nuclear Power Plant and to withhold its related budget, and in regard to the constitutional dispute between itself and the Legislative Yuan on the exercise of the latter's powers. The Executive Yuan also filed a petition for uniform interpretation on the ground that it held a position different from the

Legislative Yuan in regard to the application of the same law. As for the issue of constitutional interpretation, this petition should be granted review since it is in conformity with Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act (CCPA), which requires that there be a dispute on the application of the Constitution between two central government agencies concerning the exercise of their respective powers. As for the issue of uniform interpretation, this Court finds it does not specify the particular provision[s] of the Budget Act on which the Executive Yuan held a different position from the Legislative Yuan. Therefore, this part of petition does not meet the requirements of Article 7, Paragraph 1, Subparagraph 1 of the abovementioned CCPA. Yet no denial is issued in that this part of the petition is based on the same facts as the part of petition for constitutional interpretation. Furthermore, this case involves a dispute on the application of the Constitution between the Executive Yuan and the Legislative Yuan on the issue of the former's withholding of a statutory budget. As to the issue of whether the electricity supply in question should be provided by nuclear power or other energy, it should be subject to the professional judgment of the energy policy and not be decided by the Constitutional Court exercising the judicial power. Thus this policy issue is not within the scope of this Interpretation. It is so noted.

[2] The budgetary system is a constitutional mechanism by which the executive branch pursues its policy goals, with the participation of the legislative branch in its decision-making. The legislature has the power and duty to deliberate on the budget and supervise its execution. A budgetary bill, after being approved by the Legislative Yuan and promulgated, becomes a statutory budget. It is comparable in form to a statute. In J.Y. Interpretation No. 391, this Court referred to it by its academic term and called it a law of measures, in light of its differences from an ordinary statutory bill in terms of content, regulatory objects and deliberation process. That is why it is so named. While the execution of both statutory budgets

and administrative regulations is within the competence of the executive branch, there is still a difference: For a regulation providing the executing authority to an administrative agency, its legal effect will occur when all of its requirements are met. If a law does not authorize any discretion in decision-making or choice of options, the competent agency is obligated to act as mandated by the legal effects concerned. On the other hand, the statutory budget adopted by the Legislative Yuan is an authorizing regulation for the annual spending, annual revenue and future commitment of government agencies (*see* Articles 6 to 8 of the Budget Act). Its legal effects are to provide for the ceiling amount and appropriation purposes of spending items on the part of the executing agencies. The executing agencies are also required to follow the accounting and execution procedures as set forth by the Budget Act, and to be supervised by the final accounting procedures and auditing agencies. With regard to the execution of annual revenues, its implementation will depend on the relevant provisions of various tax laws and public bonds acts. Whether a withholding of certain annual spending automatically constitutes a violation of the Constitution or law should depend upon the circumstances. If it does not involve any change in important national policies and conforms to the conditions provided for under the Budget Act, such as occurrences of special incidents or changes in private economic administration due to management strategies or market factors, the competent authority may, out of discretion consistent with its obligations, either reduce the amounts spent or adjust their implementation. This is the so-called "flexibility of budget execution."

[3] For funds designated for the maintenance of an agency's normal operations or the carrying out of its legally authorized duties, withholding such funds at the discretion of the competent authority is not lawful, if it should affect the existence of that agency. In regard to the withholding of a statutory budget that would have the effect of changing either the statement

of administrative policies or an important policy, it is not in conformity with the constitutional mandate that accords to the legislative branch the power to participate in the decision-making process, if the Legislative Yuan is excluded from participation in the withholding process. Hence, the abovementioned flexibility of budget execution does not mean that an administrative agency may, by itself, pick and decide whether to execute any item without regard to the fact that the statutory budget is adopted by the Legislative Yuan with certain normative effects. Under the Budget Act, the execution of appropriated budgets for annual spending must be reviewed period-by-period and level-by-level, and the review reports must be submitted to the Legislative Yuan for record (*see* Article 61 of the Budget Act). There is an express prohibition against commingling of funds among various agencies, divisions, projects or business items during the execution of budgets (*see* Article 62 of the Budget Act). Moreover, the supervising personnel shall be subject to disciplinary sanctions in accordance with relevant regulations, if the agency does not discharge at least ninety percent of its annual programmed budgets (*see* Item 4, Clause 2 of the Operation Guidelines on the Examination, Reward, and Discipline of the Execution of Programmed Budgets by the Executive Yuan and All of Its Subordinated Agencies, revised and promulgated by the Executive Yuan on August 3, 2000). All of the above stipulations are mechanisms for monitoring the execution of budgets, in order to enforce fiscal discipline. J.Y. Interpretation No. 391 addressed the issue involving the review process of budgetary bills. While it indeed differentiated the nature of statutory budgets from that of statutory laws, it did not negate the binding force of statutory budgets. The said Interpretation only indicated that the binding target of budgetary bills adopted by the legislature is the state agencies and not the general public. Thus, it is not well-justified that an

administrative agency always has the power to withhold a statutory budget regardless of the type and nature of spending. While the Budget Act does not expressly prohibit the withholding of statutory budgets, it cannot be abruptly concluded that any administrative agency may arbitrarily decide not to execute the budget. Although the Additional Articles of the Constitution revised Article 57 of the Constitution concerning the provision mandating the Executive Yuan be responsible to the Legislative Yuan, Additional Article 3, Paragraph 2, Subparagraph 2 nevertheless provides: "Should the Executive Yuan deem a statutory, budgetary, or treaty bill passed by the Legislative Yuan difficult to execute, the Executive Yuan may, with the approval of the President and within ten days of the bill's submission to the Executive Yuan, request that the Legislative Yuan to reconsider the bill. The Legislative Yuan shall adopt a resolution on the returned bill within fifteen days after it is received. Should the Legislative Yuan be in recess, it shall convene a special session by its own accord within seven days and adopt a resolution within fifteen days after the session begins. If the Legislative Yuan fails to adopt a resolution within the said period of time, the original bill shall become invalid. Should a majority of the total number of the Legislative Yuan members uphold the original bill, the Premier of the Executive Yuan shall immediately accept the said bill." It follows that, if the Executive Yuan considers difficult and does not intend to execute a budgetary bill adopted by the Legislative Yuan in accordance with its contents, it is to follow the above-mentioned reconsideration process before a budgetary bill is promulgated and becomes a statutory budget. The petition agency argues that the execution of statutory budgets should fall within the core area of the executive power and that administrative agencies wield the discretion on whether or not to execute a statutory budget. Such argument would enable the administrative agencies to

not execute the statutory budget or to exercise any other discretion after its promulgation whenever the administrative agencies maintain it is difficult to execute the budget concerned. If the above submission holds valid, there is no need for the Constitution to provide for the above reconsideration process in regard to budgetary bills.

[4] On top of the function to provide specific figures for the needed funding for the normal operations of state agencies and the execution of their legally authorized duties, a budgetary bill also includes the necessary financial resources for the implementation of various kinds of policy projects. In accordance with modern fiscal and economic theories, a budget also carries the functions of guiding the economic development and affecting the cycles of prosperity and depression. Under the constitutional system of representative democracy, the legislature wields the authority to decide, after deliberation, the budget. Such authority allows the elected representatives to supervise the fiscal spending and alleviate the taxation burdens of citizens. It also enables the legislature to participate in the formation of state polices and administration projects through its deliberation on budgets. In academia, it is known as the parliamentary power to participate in decision-making. After the adoption of the budgetary bill on the nuclear power plant in question, the Legislative Yuan, in its 15th Meeting of the First Session of the Third Term on May 24, 1996, passed a resolution to terminate the construction plan of this nuclear power plant immediately, halt its then on-going constructing process, and to cease execution of the budget concerned, in accordance with the then-applicable Article 57, Subparagraph 2 of the Constitution, which allowed the Legislative Yuan to challenge by resolution the important policies of the Executive Yuan. Then the Executive Yuan, after expressing its

disagreement with the change of this important policy, requested the Legislative Yuan to reconsider the said resolution on June 20 of the same year. It is apparent, therefore, that the withholding in question is a change in an important national policy, considering the impact of the construction of this nuclear power plant on energy reserves, the environment and ecology, and the input-output, as well as the scale of the spending amount and the complexity of coping with the aftermath of such withholding. In the oral arguments, representatives from the Executive Yuan and the Legislative Yuan did not present different opinions on this issue. Hence, the Legislative Yuan had either participated in or adopted relevant resolutions on the compilation of the budget for this nuclear power plant, the previous withholding, and the reconsideration on the resumption of budget execution. Accordingly, the Legislative Yuan shall be given the same opportunity to participate in or adopt a resolution on the second withholding of this budget. Since this statutory budget involves an important policy, its change is obviously different from a change in a budget that does not involve an important policy. The petitioner maintains that, since the execution of a statutory budget is a type of administrative action in substance, it shall wield the discretionary power to make a decision and implement it, or may approve the withholding based upon the Guidelines on the Budget Execution of the Affiliated Units of the Central Government Agencies, which is self-issued without review by the Legislative Yuan. Such submission is not justified. In the same vein, the Legislative Yuan's argument that such withholding is a unilateral decision is not completely groundless.

[5] Democratic politics is a political system governed by public opinion. The path to realize the goal of being governed by public opinion includes the re-election of the President and the members of the Legislative Yuan upon the

expiration of their respective terms. It is also a common phenomenon of party politics that an elected president, through his appointed Premier of the Executive Yuan, may change any previous administrative plan or policy inconsistent with the president's campaign platforms. Notwithstanding a change in party or the reorganization of the Executive Yuan, any change to the plan of the administration or an important policy shall abide by the checks and balances of powers that sustain the constitutional order. Under the rule-of-law principle, even substantive legitimacy is no substitute for procedural lawfulness. Article 57 of the Constitution is designed to provide for the checks and balances of powers between the Executive and Legislative Yuans. Subparagraph 2 of the said Article, providing that the Legislative Yuan may pass a resolution to change an important policy while the Executive Yuan may request reconsideration, was removed by the Additional Articles of the Constitution promulgated on July 21, 1997. Additional Article 3, Paragraph 2, Subparagraph 3 of the Constitution, adopted on the same date, further confers a new power on the Legislative Yuan to cast a vote of no-confidence against the Premier of the Executive Yuan. Nevertheless, other mechanisms of the checks and balances remain parts of the said Additional Article 3, Paragraph 2, and thus the powers of the Legislative Yuan, as provided for in Article 63 of the Constitution, remain intact. Therefore, Article 16 of the Act on the Exercise of the Legislative Yuan's Powers, promulgated on January 25, 1999, still provides that the Executive Yuan shall submit its administration guidelines and administration report to the Legislative Yuan each session. Article 17 of the same Act provides: "[Paragraph 1] With the occurrence of a major event or change in the administration guidelines, the Premier of the Executive Yuan or Department Ministers concerned shall submit a report to the Legislative Yuan at its floor meeting and answer interpellation. [Paragraph 2] At the occurrence of an event stated in the previous Paragraph, the Legislative Yuan may adopt a resolution to invite the Premier of the Executive Yuan or Department Ministers

concerned to submit a report to the Legislative Yuan at its floor meeting and answer interpellation, if and when any member of the Legislative Yuan proposes the above invitation, co-signed or seconded by no less than thirty members." The so-called "occurrence of a major event" refers to the important national affairs as indicated in Article 63 of the Constitution. The so-called "change in the administration guidelines" includes changes in important policies after a change in party. In response to changes in important affairs or important policies, the Executive Yuan shall submit to the Legislative Yuan the statutory amendment bills, if a statutory revision is needed, or the revised or new regulations after their issuance. The said Article further imposes on the Executive Yuan the obligation to report to the Legislative Yuan and to answer interpellation. As stated above, a statutory budget is different from a statute that is to be enforced repeatedly. The former covers only a specific fiscal year and does not have to be revised by another bill. Upon the occurrence of the said changes, the Premier of the Executive Yuan or Department Ministers concerned shall report to the Legislative Yuan at its floor meeting and answer interpellation. The Legislative Yuan may also, *sua sponte*, adopt a resolution to invite the Premier of the Executive Yuan or Department Ministries to submit their reports and answer interpellation at its floor meeting in accordance with Paragraph 2 of the same Article. Such reporting shall be submitted prior to the changes, except for emergency circumstances or those unforeseeable events. The withholding in this case is procedurally flawed, since it involves a change in an important national policy and was not done in accordance with the abovementioned procedures. On the other hand, the authority concerned [the Legislative Yuan] has not conform to the usual procedures for safeguarding the normal operation of the Constitution either, as it has simply resorted to an outright boycott against the Executive Yuan without requesting those competent heads of agencies to submit their reports in accordance with the procedures governing the exercise of the Legislative Yuan's

powers. The Executive Yuan shall promptly undertake the abovementioned reporting and interpellation process after announcement of this Interpretation, while the authority concerned is also obligated to hear the Executive Yuan's report.

[6] After reporting to the Legislative Yuan in accordance with the abovementioned Additional Article 3 of the Constitution and Article 17 of the Act on the Exercise of the Legislative Yuan Powers, the Premier of the Executive Yuan and/or Department Ministries concerned may continue to implement their policy changes, if such policy changes are supported by the majority of the Legislators, under the constitutional principle of representative democracy. Should the Legislative Yuan adopt an opposing or different resolution after hearing the reports, such a resolution is considered an objection to the policy change, with the force of reaffirming the effect of the statutory budget. It is different from an advisory resolution with no binding force. Depending on the content of such resolution, all authorities concerned may proceed to settle the dispute in accordance with the appropriate procedures as follow here: The Executive Yuan may either accept the majority opinion of the Legislative Yuan and continue to execute the statutory budget, or may negotiate with all party caucuses for a solution. If no solution can be reached through negotiation, the respective authorities concerned shall act in a proper way pursuant to the existing mechanisms under the Constitution. For example, the Premier of the Executive Yuan may resign *sua sponte* to shoulder the responsibility on the grounds that his or her administration lacks democratic legitimacy and has failed to fulfill the mandates from the President, as he or she could not win the support of the Legislative Yuan for important polices and administration guidelines. Or the Legislative Yuan may propose a vote of no-confidence in order to remove the Premier of the Executive Yuan, pursuant to Additional Article 3, Paragraph 2, Subparagraph 3 of the Constitution. Once a vote of no-confidence is passed, the

Legislative Yuan itself may be dissolved as well. All political parties may take this opportunity of re-election to appeal to the public directly. It is one of the common avenues to settle major political conflicts in a representative democracy. Otherwise, the Legislative Yuan may further enact a statutory bill for the construction of power plants. Although the content of such statute may include provisions applicable to a specific case only, it is considered a special type of statute, *i.e.*, private legislation [or *Einzelfallgesetz* in German] which is not prohibited by the Constitution. It is up to the decisions of the respective authorities concerned as to the choice of a proper avenue. This Court cannot make such a decision, by Interpretation, on their behalf. It necessitates the good faith effort by the ruling government and the opposition, and their willingness to promote the public welfare and maintain the constitutional order. Only with such will can the constitutional democracy then resume normal operation and the social development be guided in the proper direction.

Background Note by Jau-Yuan HWANG

From the beginning, the plan to build the Fourth Nuclear Power Plant (hereinafter the Fourth Plant) has been a highly controversial issue, hotly debated among the government, the opposition parties, and society. In July 1994, the Legislative Yuan (L.Y.) approved its budget. However, after the L.Y. election in December 1995, some Legislators of the then-ruling party, the KMT (Kuomintang), cooperated with the members of the then-opposition party, the DPP (Democratic Progressive Party), and other small opposition parties, against its construction. In May 1996, the L.Y. passed a resolution calling for termination of the construction of all nuclear power plants from then on. This resolution was binding on the Executive Yuan (E.Y.) under then-effective Article 57, Subparagraph 3 of the Constitution. In response, the E.Y. requested the L.Y. to reconsider (*i.e.*, to revoke) the said resolution in June 1996. In October of the

same year, the L.Y. revoked its previous resolution against the construction of nuclear power plants and authorized again the continuous execution of the budget for the Fourth Plant. In May 2000, Taiwan witnessed its first ever party turnover at the presidential level, as Mr. Shui-Bian CHEN of the DPP became the President after winning the presidential election in March. To implement one of his campaign platforms, President CHEN asked the E.Y. to reevaluate the pros and cons of the construction of the Fourth Plant. After several months of public hearings and deliberation, on October 27, 2000, the E.Y. ordered a halt to its construction immediately. At that time, the opposition, including the KMT and PFP (People First Party), still controlled more than two-thirds of the seats of the L.Y. So the opposition-controlled L.Y. quickly passed a resolution demanding that the E.Y. resume its construction, and further boycotted the DPP government by refusing the then-Premier CHANG to submit his report and answer interpellation at the L.Y. On November 10, 2000, the E.Y. filed a petition to the Constitutional Court, seeking to settle this dispute between the E.Y. and the L.Y. About two months later, the Constitutional Court announced J.Y. Interpretation No. 520.

In this Interpretation, the Constitutional Court ruled that the L.Y. shall have the power to participate in the decision-making of important national polices. This Interpretation differentiates budgetary bills into three categories: (1) Statutory Funds: Funds designated for specific agencies or projects, (2) Funds for important national policies, and (3) Funds for non-important national policies. For the first category, the E.Y. and other competent agencies are obliged to spend, as such funds are designated by statutes and not merely by budgetary bills. As to the last category, the competent agencies shall enjoy a wide discretionary power on whether and when to withhold the budget concerned. The second category involving the important national policies is the most curious type. The Constitutional Court held that the budget for the Fourth Plant indeed involved an

important national policy, and that the L.Y. was to enjoy a shared power in regard to its decision-making. Therefore, the E.Y. was to report to the L.Y. "in due time" and answer interpellation by the members of the L.Y. Further, this Interpretation suggests several mechanisms to resolve this specific dispute between the E.Y. and the L.Y. Some commentators offered criticism that this part of reasoning was indeed an advisory opinion.

Pursuant to this Interpretation, the L.Y. convened a special session to hear the report by Premier Chang, followed by interpellation on January 30 and 31, 2001. On January 31, the L.Y. passed a resolution against the withholding of the budget in question and demanded the immediate resumption of the construction of the Fourth Plant. Between February 2 and 13, the E.Y. negotiated with the L.Y. for settlement. On February 13, the opposition parties finally reached a four-point conclusion, which was accepted by the E.Y. Accordingly, the E.Y. announced, on February 14, 2001, the resumption of the construction of the Fourth Plant.

However, J.Y. Interpretation No. 520 and its subsequent implementation did not foreclose further challenges against the Fourth Plant. Particularly, after the 311 Eastern Japan earthquake and tsunami of 2011, popular suspicions against nuclear power plants mounted radically. While the L.Y. continued to appropriate extra funds for the Fourth Plant, it also imposed several safety requirements for the business operation of the Fourth Plant, to be conducted after completion of its construction, in order to make sure that the Plant could withstand the force of huge earthquakes and tsunamis. In 2014, the E.Y. decided to seal and hold the actual operation of the Fourth Plant, after its safety inspection, for three years. After the DPP won the 2016 presidential and parliamentary elections and returned to power, the E.Y. finally, in March 2018, decided to close down the Fourth Plant permanently. The E.Y. also set a policy goal to terminate the operation of all existing nuclear power plants in 2025, and to develop more green and renewable energies (such as wind power, solar power and hydropower)

as the substitute sources of power.

J.Y. Interpretation No. 613 (July 21, 2006)*

Legislative Authority over Executive Personnel Case

Issue

Are the provisions of Articles 4 and 16 of the Organization Act of the National Communications Commission unconstitutional?

Holding

[1] It is clearly stipulated in Article 53 of the Constitution that the Executive Yuan is the highest administrative organ of the state. Under the principle of administrative unity, the Executive Yuan must be held responsible for the overall performance of all the agencies subordinate to the said Yuan, including the National Communications Commission (hereinafter referred to as the "NCC"), and shall have the power to decide upon personnel affairs in respect of members of the NCC, because the success or failure of the NCC will hinge closely on the candidates for membership in the NCC. Under the principle of separation of powers, the Legislative Yuan, which exercises the legislative power, is not precluded from imposing certain restrictions on the Executive Yuan's power to decide on personnel affairs in respect of members of the NCC for purposes of checks and balances. However, there are still some limits on such checks and balances. For instance, there should be no violation of an unambiguous constitutional provision, nor should there be any substantial deprivation of the power to decide on personnel affairs nor a direct takeover of such power. Article 4, Paragraph 2 of the Organization Act of the National Communications Commission (hereinafter referred to as the "NCC Organization Act") provides

* Translation and Note by Chung-Hsi Vincent KUAN

that candidates for membership in the NCC "shall first be recommended by people from all walks of life to the various political parties (groups) which, in turn, shall recommend a total of fifteen members based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, who, together with the three members to be recommended by the Premier, shall be reviewed by the Nomination Review Committee (hereinafter referred to as the "NRC"), and that the various political parties (groups) shall complete their recommendations within fifteen days as from the date of the promulgation hereof." Paragraph 3 thereof further provides that "the NRC shall consist of a total of eleven scholars and experts as recommended by the various political parties (groups) based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan within ten days as from the date of the promulgation hereof, that the NRC shall, within twenty days upon receipt of the recommended list, complete the review, which shall be conducted by means of public hearings and put to vote in the form of open balloting, and that the NRC shall first vote for approval of the candidates by more than three-fifths of its total members and, if the total number of candidates so approved does not reach thirteen, candidates to fill the vacancies shall subsequently be approved by more than one-half of its total members." And Paragraph 4 thereof provides, "[t]he recommendations referred to in the two preceding paragraphs shall be deemed as waived if not made by the respective political parties (groups) before the applicable deadlines." The foregoing provisions deal with the procedure for the selection of members, whereas Paragraph 6 of said Article provides for the nomination of new members to succeed outgoing members upon expiration of their term and the nomination of same in case of any vacancy, which reads as follows: "Three months before the expiration of the term for members of the NCC, members for the new term shall be nominated in accordance with the procedure set forth in Paragraphs 2 and 3 hereof; if vacancies reach more than

half of the total number of members, such vacancies shall be filled in accordance with the procedure set forth in Paragraphs 2 and 3 hereof, and the term of the succeeding members shall last till the expiration of the original term." The foregoing provisions nearly deprive the Executive Yuan of substantially all of its power to decide on personnel affairs, which transgresses the limits on the checks and balances exercisable by the legislature on the Executive Yuan's power to decide on personnel affairs, thus violating the principles of politics of accountability and separation of powers. In addition, the aforesaid provisions have, in essence, transferred the Executive Yuan's power to decide on personnel affairs to the various political parties (groups) of the Legislative Yuan and the NRC, which is composed of members recommended by such political parties (groups) based on the percentages of the numbers of their seats in the Legislative Yuan, thus affecting the impartiality and reliability of the NCC in the eyes of the people, who believe that it should function above politics. As such, the purpose of establishing the NCC as an independent agency is defeated, and the constitutional intent of safeguarding the freedom of communications is not complied with. Therefore, the foregoing provisions shall become void no later than December 31, 2008. Prior to the voidance of the aforesaid provisions due to their unconstitutionality as declared by this Court, the legality of any and all acts performed by the NCC will remain unaffected, as will the transfer of personnel and affairs.

[2] As for the second sentence of Article 4, Paragraph 3 of the NCC Organization Act regarding the appointment of members of the NCC by the Premier, as well as Paragraph 5 thereof, which provides that "this Commission shall be convened on its own initiative three days after the appointment of its members, who shall elect the Chairperson and Vice-Chairperson from among themselves, and the Premier shall appoint the same within seven days upon their election, that the Chairperson and Vice-Chairperson shall be candidates who

were recommended by different political parties (groups), and that the members recommended by the Premier shall be deemed as having been recommended by the ruling party," no violation of Article 56 of the Constitution is found in respect of such provisions.

[3] Article 16, Paragraph 1 of the NCC Organization Act provides, "During the period from the date of implementation of the Basic Act for Communications till the day when this Commission is established, in respect of any and all decisions made by the original authorities in charge of the applicable laws and regulations regarding communications on the matters listed below, the aggrieved party, whether a corporation or an individual, may file an application to this Commission for review within three months upon its establishment except for those cases for which procedures for administrative remedies have already been brought: (i) Policies regarding the supervision and management of communications; (ii) The supervision and management of, and license approval, issuance and replacement for, communications enterprises, as well as the suspension of broadcasting, license approval, issuance and replacement for, or invalidation of license for, television enterprises; (iii) The review of the qualifications for broadcasting and television enterprises, as well as their responsible persons and managers; (iv) The review and examination of communications systems and equipment; and (v) The approval of establishment of broadcasting and television enterprises, as well as the annulment of such approval; modification of the power of electric waves; suspension of broadcasting or invalidation of license; share transfer; approval of the change of name or responsible person." The said provision is designed by the lawmakers to serve as a special relief system in respect of a special matter based on such policy considerations as the reform of the legal system, and it does not go beyond constitutional limits. Furthermore, when the NCC accepts an application for review, it is unclear whether it should revoke the original administrative act, since

no specific criteria are found in the NCC Organization Act. Therefore, the proviso of Article 117 of the Administrative Procedure Act shall still govern. Paragraph 2 of the aforesaid article provides, "Where rehabilitation is required by the decision made upon review, the government shall so rehabilitate forthwith; where rehabilitation is not practicable, compensation shall be given." The said provision is a complementary design made by the legislators with a view to operating in coordination with the aforesaid special relief system after they considered factors such as the preservation of the stability of the law and the principle of reliance protection, which also falls within the constitutionally permissible scope.

[4] Additionally, though the Petitioner has petitioned this Court for a preliminary injunction before an interpretation for the case at issue is made, it is no longer necessary to examine the issue now that an interpretation has been rendered for the case at issue.

Reasoning

[1] 1. A petition for the interpretation of the Constitution has been filed by the Petitioner, i.e., the Executive Yuan, since the Petitioner, in exercising its functions and duties, has doubt as to the constitutionality of Article 4 of the NCC Organization Act concerning the organization of the NCC and the procedures by which members are appointed, as well as Article 16 thereof. Furthermore, it also has doubt as to the application of constitutional provisions while exercising its functions and duties in applying Articles 53 and 56 of the Constitution. Additionally, it has disputes with the Legislative Yuan concerning the application of a constitutional provision over the issue of whether the latter has the authority to pass any enactment regarding the Executive Yuan's power to decide on personnel affairs in respect of an agency subordinate to it, thus substantially depriving the Premier of his or her nomination power. We are of the opinion that

this matter should be heard since it is consistent with the provisions of Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act.

[2] 2. The purposes of the administration shall be to implement the law, handle public affairs, shape social policy, pursue well-being for all, and realize national goals. Due to the complexity and diversity of these missions, various departments must be established so as to implement different tasks individually and separately based on different areas of specialization. However, the diversified offices and positions were not established so that each department could do things in its own way. Rather, the overall focus is on the division of labor. The administration must consider things from all perspectives. No matter how the labor is to be divided, it is up to the highest administrative head to devise an overall plan and to direct and supervise so as to boost efficiency and enable the state to work effectively as a whole. The foregoing is the essence of the principle of administrative unity. Article 53 of the Constitution clearly provides that the Executive Yuan shall be the highest administrative organ of the state. The intent of the article is to maintain administrative unity, thus enabling all of the state's administrative affairs, except as otherwise provided for by the Constitution, to be incorporated into a hierarchical administrative system where the Executive Yuan is situated at the top, and to be ultimately subject to the direction and supervision of the highest-standing organ, the Executive Yuan, via hierarchical control. Democracy consists essentially in politics of accountability. A modern rule-of-law nation, in organizing its government and implementing its governmental affairs, should be accountable to its people either directly or indirectly. According to Article 3, Paragraph 2 of the Additional Articles of the Constitution, the Executive Yuan shall be responsible to the Legislative Yuan, which is an institutional design under our constitution based on the doctrine of political accountability. Therefore, the principle of administrative unity as revealed by Article 53 of the Constitution is also intended to hold the Premier responsible for all the administrative affairs

under the direction and supervision of the Executive Yuan, thus making into a reality the constitutional requirement that the Executive Yuan answers to the people via the Legislative Yuan.

[3] Accordingly, when the Legislative Yuan establishes an independent agency through legislation, separating a particular class of administrative affairs from the tasks originally entrusted to the Executive Yuan, removing it from the hierarchical administrative system and transferring it to an independent agency so as to enable the agency to exercise its functions and duties independently and autonomously pursuant to law, the administrative unity and the politics of accountability will inevitably be diminished. Nevertheless, the primary purpose of recognizing the existence of an independent agency is merely to preclude the direction and supervision of the superior agency over the decisions made in respect of particular cases through the administrative hierarchy to the extent prescribed by law, thus maintaining the independent agency's freedom from political interference and giving it more autonomy to make independent decisions based on its expertise. Under our constitutional framework, where the Executive Yuan is the highest administrative organ of the state, certain power to decide on personnel affairs in respect of important positions for an independent agency should still be reserved for the Premier even if the independent agency is accorded independence and autonomy, in order that the Premier may be responsible for the overall performance of all the agencies subordinate to the said Yuan, including the independent agency, by means of entrusting the exercise of the independent agency's authorities to important personnel of such agency, thus realizing the concepts of administrative unity and political accountability. If the commissioners of an independent agency need not step down along with the Premier due to a guaranteed term of office, there is no violation of the politics of accountability despite the fact that the Premier has no method of re-appointing the commissioners of the independent agency. Besides, pursuant to the

provisions of Article 4, Paragraph 2 of the Public Functionaries Discipline Act, the Premier may still *ex officio* suspend the office of a commissioner of an independent agency in case of any major breach of law or dereliction of duty by the commissioner. Since the Premier may still exercise the power to supervise personnel affairs to the least degree, his accountability to the Legislative Yuan can nonetheless be maintained. However, since the existence of an independent agency will diminish administrative unity and politics of accountability, its establishment should be an exception. The constitutionality of establishing an independent agency will be upheld only if the purpose of its establishment is indeed to pursue constitutional public interests, if the particularity of the mission justifies the necessity of its establishment, if important matters are determined by means of hearings, if the performance of the execution of its mission is made transparent and public for purpose of public supervision, and if, owing to the vested authority of the Legislative Yuan to supervise the operation of the independent agency through legislation and budget review and having considered any and all factors on the whole, a certain degree of democratic legitimacy can be sufficiently preserved to compensate for the diminished administrative unity and politics of accountability.

[4] 3. The freedom of speech as guaranteed by Article 11 of the Constitution embodies the freedom of communications, namely, the freedom to operate or utilize broadcasting, television and other communication and mass media networks to obtain information and publish speeches. Communications and mass media are the means and platforms by which public opinions are formed. In a free democracy where the constitution is honored, they should serve such public functions as supervising any and all state organs that exercise public authority, including the executive (including the President), legislative, judicial, examination and control branches, as well as supervising the political parties whose objectives are to come into power and influence national policies. In light

of the said functions of mass media, the freedom of communications not only signifies the passive prevention of infringement by the state's public authority, but also imposes on legislators the duty to actively devise various organizations, procedures and substantive norms so as to prevent information monopoly and ensure that the pluralistic views and opinions of the society can be expressed and distributed via the platforms of communications and mass media, thus creating a free forum for public discussions. Therefore, if the lawmakers intend to make the NCC, which is in charge of the supervision and management of communications, an independent agency that may exercise its functions and duties independently pursuant to the law, thus removing it from the hierarchical administrative system of command and supervision while giving it more autonomy to make independent decisions based on its expertise, it should be considered to be consistent with the constitutional intent of protecting the freedom of communications in that it is conducive to the elimination of any potential political or inappropriate interference from superior agencies and political parties, thus ensuring the expression and distribution of diversified opinions of the society and serving the purpose of public supervision.

[5] 4. The Executive Yuan, as the highest administrative organ of the state, must be held responsible for the overall performance of all the agencies subordinate to the said Yuan, including the NCC, under the principle of administrative unity, and shall have the power to decide on personnel affairs in respect of members of the NCC, because the success or failure of the NCC will hinge closely on the candidates appointed to be members of the NCC. Nevertheless, the Legislative Yuan, which exercises the legislative power, is not precluded from imposing certain restrictions on the Executive Yuan's power to decide on personnel affairs in respect of members of the NCC for purposes of checks and balances so as to prevent the Executive Yuan from arbitrarily exercising the power to appoint personnel, thus jeopardizing the independence of the NCC. The principle of

separation of powers, as a fundamental constitutional principle, signifies not only the division of powers whereby all state affairs are assigned to various state organs with proper organization, system and function so as to enable state decisions to be made more appropriately, but also suggests the checks and balances of powers whereby powers are mutually containing and restraining so as to avoid infringement upon the people's freedoms and rights due to unrestrained misuse of the powers. However, there are still some limits on the checks and balances of powers. There should be no violation of an unambiguous constitutional provision, nor should there be any encroachment upon the core areas of the powers of various constitutional organs or restriction of the exercise of powers by other constitutional organs (*see* J.Y. Interpretation No. 585) or breach of the politics of accountability (*see* J.Y. Interpretation No. 391). An example may be the deprivation of the basic personnel and budget necessary for another constitutional organ to perform its constitutionally-mandated duties, or the deprivation of the core mission of another state organ entrusted to it by the Constitution, or direct takeover of another organ's power, thus resulting in an imbalance of powers between the organs involved.

[6] The checks and balances as imposed by the legislative power on the executive power in respect of the power to decide on the personnel affairs for an independent agency, in general, are manifested in restrictions on the personnel's qualifications, which are intended to ensure the specialization of the independent agency, and also in the formulation of conditions such as a guaranteed term of office and statutory grounds for removal from office, which are designed to maintain the independence of the independent agency with a view to shielding the members of such agency from external interference and enabling them to exercise their functions and duties independently. However, in light of the fact that the mass media under the supervision of the NCC serve the function of shaping public opinions to supervise the government and political parties, the

freedom of communications necessitates strong demand for an NCC that is free of political considerations and interference. As such, if the legislative power intends to further reduce the political influence of the Executive Yuan on the composition of the NCC to promote public confidence in the NCC's fair enforcement of the law by means of setting forth a ceiling on the number of NCC members who come from the same political party, or adding a provision in respect of overlapping terms of office, or even empowering the Legislative Yuan or diversified civil associations to participate in the decision-making process with the Executive Yuan regarding the candidates for membership on the NCC, it is permissible under the freedom of communications as guaranteed by the Constitution as long as the design of the checks and balances at issue may indeed help reduce or eliminate the political influence to promote the independence of the NCC and to further build up public confidence in the NCC's freedom from considerations and influence of partisan interests and its fair enforcement of the law. As to the question of how the Legislative Yuan or other diversified civil associations will participate in the decision-making process with the Executive Yuan regarding the candidates for membership in the NCC, the legislators are free to a certain extent to formulate the rules. Yet there should be no encroachment upon the core areas of the executive power, nor any restriction of the exercise of the Executive Yuan's power.

[7] According to Article 4, Paragraphs 2 and 3 of the NCC Organization Act, however, a total of fifteen members of the NCC will be recommended based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, and, together with the three members to be recommended by the Premier, shall be reviewed by the NRC, which is composed of eleven scholars and experts as recommended by the various political parties (groups) based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, via a two-round majority review by more than three-fifths and

one-half of the total members of the NRC, respectively. And upon completion of the review, the Premier shall nominate those who appear on the list as approved by the NRC within seven days and appoint the same upon confirmation by the Legislative Yuan. Given the fact that the Premier can recommend only three out of the eighteen candidates for membership in the NCC, that he has no say in personnel affairs during the review, that he is bound by the list as approved by the NRC, which is formed according to the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, and that he is obligated to nominate those appearing on the said list, to send the nominations to the Legislative Yuan for the latter's confirmation, and to appoint those candidates confirmed by the Legislative Yuan as members of the NCC, it is very clear that the Executive Yuan, in fact, has mere nominal authority to nominate and appoint and substantially limited power to recommend only one-sixth of the candidates for membership of the NCC during the entire selection procedure. In essence, the Premier is deprived of virtually all of his power to decide on personnel affairs. In addition, the executive is in charge of the enforcement of the laws, and the enforcement depends on the personnel. There is no administration without personnel. Therefore, it is only natural that the executive should have the authority by law to decide on specific personnel matters, irrespective of whether such matters concern general government employees or political appointees, and such authority should be an indispensable prerequisite for the executive power of a democratic rule-of-law nation to perform its functions to the utmost extent. Accordingly, the aforesaid provisions, in substantially depriving the Executive Yuan of virtually all its power to decide on specific personnel affairs in respect of the members of the NCC, are in conflict with the constitutional principle of politics of accountability and are contrary to the principle of separation of powers, since they lead to apparent imbalance between the executive and legislative powers.

[8] 5. As for the issue of whether the provisions that empower the various political parties (groups) to recommend candidates for membership in the NCC based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan and to recommend scholars and experts to form the NRC based on such percentages are unconstitutional, it depends on whether such participation provisions substantially deprive the Executive Yuan of its power to decide on personnel affairs. The aforesaid provisions have, in essence, transferred the power to decide on personnel affairs from the Executive Yuan to the various political parties (groups) of the Legislative Yuan and the NRC, which is composed of members recommended by such political parties (groups) based on the percentages of the numbers of their seats in the Legislative Yuan, and which clearly overstep the limits of participation and run counter to checks and balances by restricting the executive power to decide on personnel affairs. In addition, since the purposes of the aforesaid provisions are to reduce political clout over the exercise of the NCC's functions and duties and to further promote the public confidence in the NCC's fair enforcement of the law, it is questionable whether the means serve the said purposes. Although the lawmakers have certain legislative discretion to decide how to reduce political influence over the exercise of the NCC's authority and further build up the people's confidence in the NCC's fair enforcement of the law, the design of the system should move in the direction of diminished partisan interference and greater public confidence in the fairness of the said agency. Nevertheless, the aforesaid provisions have accomplished exactly the opposite by inviting active intervention from political parties and granting them a special status to recommend and, in essence, nominate, members of the NCC based on the percentages of the numbers of their seats, thus affecting the impartiality and reliability of the NCC in the eyes of the people, who believe that it is to function above politics. As such, the purpose of establishing the NCC as an independent agency is defeated, and the constitutional intent of

safeguarding the freedom of communications is not honored.

[9] 6. As for the provisions of Article 4, Paragraph 3 of the NCC Organization Act regarding the appointment of members of the NCC by the Premier, as well as Paragraph 5 thereof, which provides that the Chairperson and Vice-Chairperson will be elected by and from among the members before their appointment by the Premier, there is some doubt as to whether Article 56 of the Constitution is violated. Although the NCC is equivalent to a second-level organ such as a ministry or commission according to its organization, it cannot be considered as being on a par with the general ministries and commissions subordinate to the Executive Yuan which are under the hierarchical system, since it is an independent agency that exercises its functions and duties pursuant to law, and since its members, whose qualifications are limited so as to emphasize their areas of specialization, need not step down along with the Premier due to a legally prescribed term of office. Hence, one cannot jump to the conclusion that the aforesaid provisions are in violation of Article 56 of the Constitution even though the provisions that members of the NCC are appointed by the Premier and the Chairperson and Vice-Chairperson thereof are elected by and from among the members before their appointment by the Premier are distinct from Article 56 of the Constitution, which provides that the ministers and chairpersons of various commissions shall be appointed by the President of the Republic upon the recommendation of the Premier. The scope of said Article 56 does not extend so far as to cover an independent agency. Additionally, as long as the Executive Yuan is not substantially deprived of its power to decide on personnel affairs in respect of members of the NCC, there is no violation of the principles of separation of powers and politics of accountability even if the Chairperson and Vice-Chairperson are elected by and from among the members themselves. Furthermore, as the NCC is an independent agency which, in nature, differs from general ministries and commissions, it goes without saying that Article 56 of the

Constitution, which provides that the Vice Premier, Ministers and Chairpersons of various Commissions and Ministers without Portfolio shall be appointed by the President of the Republic upon the recommendation of the Premier, will remain unaffected by the fact that the Legislative Yuan or other diversified civil associations are allowed to participate in the selection of members of the NCC.

[10] 7. Article 16, Paragraph 1 of the NCC Organization Act provides, "During the period from the date of implementation of the Basic Act for Communications until the day when this Commission is established, in respect of any and all decisions made by the original authorities in charge of the applicable laws and regulations regarding communications on the matters listed below, the aggrieved party, whether a corporation or an individual, may file an application to this Commission for review within three months upon its establishment except for those cases for which procedures for administrative remedies have already been brought: (i) Policies regarding the supervision and management of communications; (ii) The supervision and management of, and license approval, issuance and replacement for, communications enterprises, as well as the suspension of broadcasting, license approval, issuance and replacement for, or invalidation of license for, television enterprises; (iii) The review of the qualifications for broadcasting and television enterprises, as well as their responsible persons and managers; (iv) The review and examination of communications systems and equipment; and (v) The approval of establishment of broadcasting and television enterprises, as well as the annulment of such approval; modification of the power of electric waves; suspension of broadcasting or invalidation of license; share transfer; approval of the change of name or responsible person." The foregoing provision entitles those who were subjected to unfavorable administrative decisions but failed to initiate the procedures for administrative remedies to file an application to the NCC for review within three months upon its establishment. In granting those who were

subjected to unfavorable administrative decisions the right to file an appeal after the lapse of the period for filing an administrative appeal, the provision should be considered as a special form of relief, which does not necessarily preserve the stability of the law but nonetheless falls within the constitutionally-permissible scope. Article 16 of the Constitution guarantees the people's right to lodge complaints. The specific contents thereof, as well as whether there will be adequate protection, will depend on the active formulation and institution by the lawmakers, who thus shall have broad discretion in respect of the system of administrative appeals. Except where the legislators fail to actively set forth the requirements for filing an administrative appeal or fail to provide the people with minimal due process protection, this Court will show its utmost deference to the legislative discretion of the lawmakers.

[11] It should be noted that, if the person subject to an administrative disposition failed to file for administrative relief or filed an administrative appeal only after the lapse of the statutory period, the original agency that made the administrative disposition or its superior agency, having considered relevant factors such as public and private interests, may *ex officio* withdraw the original disposition, and also that the person subject to an administrative disposition may in addition apply to the administrative agency for withdrawal, abolishment or modification of the original disposition. Article 80 of the Administrative Appeal Act, as well as Articles 117 and 128 of the Administrative Procedure Act, are examples of such provisions set forth based on the aforesaid intention. According to Article 128 of the Administrative Procedure Act, the person subject to an administrative disposition may apply to the administrative agency for withdrawal, abolishment or modification of the original disposition only if the following conditions are met: (1) (a) Where the facts on which an administrative disposition with continuous force was based have subsequently changed to the advantage of the person subject to the disposition or the person affected thereby; or (b) Where new

facts have occurred or fresh evidence has been discovered provided that, upon consideration, a more advantageous disposition is available [for the person subject to the disposition or the person affected thereby]; or (c) Where there are other causes similar to those set forth in the Administrative Court Procedure Act for retrial, which are sufficient to affect the administrative disposition; (2) The person subject to the disposition or the person affected thereby did not fail to make a statement regarding any of the abovementioned causes during the administrative procedure or the remedial proceeding out of his or her gross negligence (*see* Paragraph 1 of said Article); and (3) An application under the preceding paragraph shall be filed within three months after the lapse of the statutory period of remedy. If the cause occurs or is known thereafter, the period shall begin from the time it occurs or is known; provided, however, that no application may be made within five years after the lapse of the statutory period of remedy (*see* Paragraph 2 of said Article). The aforementioned Article 16, Paragraph 1 of the NCC Organization Act, when compared with the clauses above, does not set forth similar conditions, but rather allows a person subject to unfavorable disposition who has failed to resort to administrative remedies to apply to the NCC within a certain period for a new decision on the same matter. Despite the fact that more opportunities for administrative relief are available for such persons when compared with other people subject to unfavorable dispositions, no constitutionally-defined limits have been exceeded, since the lawmakers have intended to design a special relief system in respect of a special matter based on such policy considerations as the reform of the legal system. Furthermore, where the NCC accepts an application for review, it is unclear whether it should revoke the original administrative act, since no specific criteria are found in the NCC Organization Act. Therefore, the proviso of Article 117 of the Administrative Procedure Act shall still govern. Paragraph 2 of the aforesaid article provides, “Where rehabilitation is required by the decision made upon

review, the government shall so rehabilitate forthwith; where rehabilitation is not practicable, compensation shall be given." The said provision is a complementary design made by the legislators with a view to operating in coordination with the aforesaid special relief system after their consideration of factors such as the preservation of the stability of the law and the principle of reliance protection, which also falls within the constitutionally-permissible scope.

[12] 8. Given the above, the Premier is substantially deprived of his power to decide on personnel affairs in respect of members of the NCC based on Article 4, Paragraph 2 of the NCC Organization Act, which provides that the various political parties (groups) shall recommend members of the NCC based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, who shall be reviewed by the NRC; Paragraphs 3 and 4 thereof, which provide that the NRC shall consist of scholars and experts as recommended by the various political parties (groups) based on the percentages of the numbers of seats of the respective parties (groups) in the Legislative Yuan, who will review candidates for membership in the NCC pursuant to the procedure specified therein, and that the Premier shall nominate those who appear on the list as approved by the NRC and send said list to the Legislative Yuan for the latter's confirmation; and Paragraph 6 thereof, which provides that, in case of expiration of term of office or vacancy for any member of the NCC, the nomination or complementary election for new members shall be conducted in accordance with the procedure set forth in Paragraphs 2 and 3 thereof. Thus, the foregoing provisions are contrary to the constitutional principles of the politics of accountability and separation of powers. Nevertheless, in light of the fact that amending the law will take some time and that, if the said provisions become null and void forthwith, the exercise of the NCC's authority will inevitably come to a halt and thus such circumstances may not necessarily be conducive to the people's exercise of the freedom of communications as

guaranteed by the Constitution, it is only appropriate that a reasonable period of adaptation and adjustment should be provided. The said provisions of Article 4, Paragraphs 2, 3, 4 and 6 of the NCC Organization Act shall become void no later than December 31, 2008. Prior to the voidance of the aforesaid provisions due to their unconstitutionality as declared by this Court, the legality of any and all actions taken by the NCC will remain unaffected, as will the transfer of personnel and affairs. As for Article 4, Paragraphs 3 and 5 of the NCC Organization Act, which provide that the members of the NCC shall be appointed by the Premier whereas the Chairperson and Vice-Chairperson shall be elected by and from among the members themselves before their appointment by the Premier, they are not found to be in violation of Article 56 of the Constitution. Article 16 of the NCC Organization Act provides a special relief designed by lawmakers, which is not subject to Article 128 of the Administrative Procedure Act. Besides, the NCC may merely review whether the original disposition is lawful when an application for review is filed. Thus, it is not inconsistent with the constitutional intent to protect the rights of the people.

[13] 9. Although the Petitioner has petitioned this Court for a preliminary injunction before an interpretation for the case at issue is made, it is no longer necessary to examine that issue now that an interpretation has been rendered for the case.

Background Note by the Translator

The Petitioner, i.e., the Executive Yuan, in exercising its functions and duties, had doubt as to the constitutionality of Article 4 of the NCC Organization Act, enacted and promulgated on November 9, 2005, concerning the organization of the NCC and the procedures by which members were appointed, as well as Article 16 thereof. Furthermore, it also had doubt as to the application of constitutional provisions while exercising its functions and duties in applying

Articles 53 and 56 of the Constitution. Additionally, it had disputes with the Legislative Yuan concerning the application of a constitutional provision over the issue of whether the latter maintained the authority to pass any enactment regarding the Executive Yuan's power to decide on personnel affairs in respect of an agency subordinate to it, thus substantially depriving the Premier of his or her nomination power. Hence, the matter was brought to the attention of the Constitutional Court for interpretation in accordance with Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act.

J.Y. Interpretation No. 530 (October 5, 2001)*

Administrative Supervision of the Supreme Judicial Institution Case

Issue

Can the Judicial Yuan as the supreme judicial institution enact trial rules or supervisory regulations of judges without proper authorization of law?

Holding

[1] Article 80 of the Constitution prescribes that judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference. This Article is to ensure that judges are to be bound only by laws and free from any other forms of interference, hold office without considering the outcome of their judgments, and make judgments based on their conscience and in accordance with law. Judicial independence is one of the fundamental principles regarding the separation of powers in the constitutional structure of a democracy. To realize the principle of judicial independence, the judiciary shall preserve judicial autonomy. Based on judicial autonomy, the supreme judicial institution shall retain the power of rulemaking to govern its practice and judicial matters. Furthermore, in order to guarantee the right to judicial remedy in accordance with legal proceedings and the right to fair and efficient trials, the supreme judicial institution shall have the supervisory power of judicial administration for the purpose of guaranteeing the beneficiary the right to judicial access. Both the preservation of judicial autonomy and the exercise of judicial supervisory powers shall aim at safeguarding judicial independence. As a result, while the supreme judicial institution may prescribe rules governing

* Translation and Note by Wen-Chen CHANG

judicial practice within the scope and for the purpose of judicial administration and supervision, it shall not undermine judicial independence. Based upon judicial autonomy, the supreme judicial institution may prescribe and amend rules governing the details and technical matters of judicial procedures. Within its supervisory powers, the supreme judicial institution may lawfully provide, in addition to rules addressing judicial administrative matters, rules regarding interpretative materials within its jurisdiction, or legal opinions governing judicial practice for lower courts and judicial staff in their legal enforcement and application. However, judicial rules shall not be inconsistent with laws, and these rules shall not add any further restrictions on individuals' freedoms and substantive rights without concrete and detailed delegation from law. Furthermore, J.Y. Interpretation No. 216 rendered by this Court has made it clear that when making judgments in concrete cases, judges shall not be bound by judicial rules that are involved with legal opinions. Nor shall enforcement rules and precautionary matters prescribed by the Judicial Yuan within its supervisory power of judicial administration undermine the principle of judicial independence.

[2] With regard to prosecutors' duty to investigate criminal cases, under the principle of prosecutorial coordination, the Prosecutor General and chief prosecutors shall retain the power to issue orders regarding prosecutorial matters according to Articles 63 and 64 of the Court Organization Act. Thus, unlike judges who make judgments independently, prosecutors executing their duties in accordance with the Code of Criminal Procedure are to be placed under the authority and supervision of the Prosecutor General and chief prosecutors. As for the administrative supervision of prosecutors' offices in the courts of all levels, because Article 111, Subparagraph 1, of the Court Organization Act prescribes that the Minister of Justice shall have supervisory power over prosecutors' offices in the courts of all levels, the Minister of Justice may lawfully issue orders

concerning administrative and supervisory matters of prosecution in order to facilitate criminal policies and expedite the execution of prosecutorial matters.

[3] Article 77 of the Constitution prescribes that the Judicial Yuan shall be the supreme judicial institution in charge of civil, criminal, and administrative cases, and in cases concerning disciplinary measures against public officials. According to the current Judicial Yuan Organization Act, however, the Judicial Yuan shall have seventeen Justices in charge of constitutional interpretation and unified interpretations of statutes and regulations; Justices form a Constitutional Court to adjudicate cases concerning the dissolution of unconstitutional parties, and under the Judicial Yuan, the courts of all levels, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries are established. Consequently, the Judicial Yuan, other than Justices with the aforesaid adjudicative powers, has become merely the highest judicial administrative organ, resulting in the separation of the highest adjudicative organ from the highest judicial administration. In order to be consistent with the intent of the framers of the Constitution that considered the Judicial Yuan as the highest judicial adjudicative organ, the Judicial Yuan Organization Act, the Court Organization Act, the Administrative Court Organization Act, and the Organization Act of Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years from the date of announcement of this Interpretation.

Reasoning

[1] Article 80 of the Constitution prescribes that judges shall be above partisanship and shall make judgments independently in accordance with laws and free from any interference, establishing the principle of judicial independence. The principle of judicial independence entails judges' independence both in making judgments and in holding office. The former means

that judges shall be bound only by laws and free from any other forms of interference; the latter entails that judges holding office shall not be affected by their judgments. Based upon this principle, Article 81 of the Constitution ensures that judges shall hold office for life, that no judges shall be removed from office unless found guilty of criminal offenses, subject to disciplinary measures, or declared to be under interdiction, and that no judges, except in accordance with laws, shall be suspended, transferred, or have their compensation diminished during their continuance in office. Judicial independence, in establishing that judges shall base their judgments on their conscience and hold trials and make judgments in accordance with laws, is one of the most important mechanisms regarding the separation of powers and checks and balances in the constitutional structure of a free democracy. To realize the principle of judicial independence, the judiciary shall preserve judicial autonomy, including the independence of judges, judicial administration, and judicial rulemaking. Among them, judicial rulemaking ensures that the supreme judicial institution shall have its adjudicative members prescribe rules governing the details or technical matters involved in the procedures of litigation or non-litigation of cases in order to ensure the litigation process is both fair and efficient and to guarantee the beneficiary the right to judicial access. Furthermore, the Constitution guarantees the right to judicial remedy, and the State shall ensure that individuals have the right to judicial remedy in accordance with legal proceedings and the right to fair and efficient trials, so the supreme judicial institution shall have the supervisory power of judicial administration. Yet, both the preservation of judicial autonomy and the exercise of judicial supervisory powers shall aim at safeguarding judicial independence. Thus, while the supreme judicial institution may prescribe rules governing judicial practice within the scope of judicial administration and supervision, it shall not violate the aforementioned principle of judicial independence. Rules concerning judicial administration and supervision

prescribed by the supreme judicial institution, in addition to rules addressing judicial administrative matters, may lawfully provide concerned laws and rules, interpretative materials within its jurisdiction, or legal opinions governing judicial practice for lower courts and judicial staff in their legal enforcement and application. Judicial rules, however, shall not be inconsistent with laws, and these rules shall not add any further restrictions on individuals' freedoms and substantive rights without concrete and detailed delegation from law. Furthermore, J.Y. Interpretation No. 216 rendered by this Court has made it clear that when making judgments in concrete cases, judges shall not be bound by judicial rules that are involved with legal opinions.

[2] To sufficiently and efficiently guarantee individuals' beneficiary right to judicial access, to the extent that it does not undermine the principle of judicial independence, the judicial administrative organ can exercise its supervisory power over judges concerning their duties. Judges shall have the responsibility to lawfully, fairly, and promptly handle cases before them. If judges violate their duties or are negligent in the execution of their duties, they shall be notified, cautioned, or even punished according to relevant laws. Such cases may be exemplified as when judges apply laws or rules that have been abrogated, or when judges leave the courtroom without due cause during hearings held by a tribunal en banc, thus resulting in the suspension of trials, or when judges prolong trial procedures, or the completion of judgments has been considerably delayed. Besides, it is necessary to exercise supervisory power when judges cannot provide reasonable explanations for the delays of the cases before them, and this supervision is consistent with the principle of judicial independence. Furthermore, it does not involve the core of trial nor is it in violation of judicial independence when the judicial administration prescribes objective standards to review and monitor judges' litigation management and job performance or to supervise judges' execution of judicial administrative matters other than handling

cases, such as their participation in judicial conferences or other courts' routine meetings.

[3] According to the current legal system, the Judicial Yuan, based upon its supervisory powers of judicial administration, has prescribed many rules regarding civil and criminal, litigation and non-litigation matters for the courts and their branches to hold trials, including the Precautionary Matters on Handling Civil Procedure, the Precautionary Matters on Handling Compulsory Enforcement, the Guidelines for Handling Civil Injunctive Procedures, the Precautionary Matters on the Courts' Handling of Civil Mediations and Small Claims Litigation (issued on August 20, 1990, and abrogated on April 8, 2000, due to the revision of the Precautionary Matters on Handling Civil Procedures), the Guidelines for Compensation Received by the Witness(es) and Expert Witness(es) for Their Services, Travel Expenses and Testimonies, the Precautionary Matters on the Courts' Application of the Act Governing Dispute Mediation of Cities, Towns and Suburban Communities, the Precautionary Matters on Courts' Handling Criminal Procedures, the Guidelines for the Courts' Handling of Defendants' Bail in Criminal Procedures, the Guidelines for the Courts' Handling of Expedited Cases in Criminal Procedure, the Guidelines for Facilitating Deadlines of Case Handling for All Courts, the Precautionary Matters on the Courts' Expedited Handling of Serious Criminal Offenses, and the Guidelines for Handling Compulsory Enforcement Regarding Properties Unregistered after Succession. These rules are consistent with the Constitution, if they are only for cautioning judges to execute duties lawfully, appropriately, and efficiently and to prevent biased decisions due to flawed deliberations, and they are not in violation of laws and do not add further restrictions to individuals' rights. In order to sustain the principle of judicial independence, whether or not these rules violate this Interpretation shall be determined in a timely manner, and the said rules shall be reviewed and revised accordingly. Concerning the

Regulations Governing Matters of Family, the Rules Governing the Courts' Handling of Attorneys' Requests for Case Files, and the Measures Governing the Compulsory Enforcement of Lands and Houses in the Taiwan Area, if they involve the restriction of individual rights and freedoms, they should certainly be based upon a concrete and detailed delegation of law and published in accordance with the procedures prescribed by Article 3 of the Central Regulation Standard Act.

[4] With regard to prosecutors' duty to investigate criminal cases, under the principle of prosecutorial coordination, the Prosecutor General and chief prosecutors shall retain the power to direct and supervise prosecutors under their authority according to Article 63 of the Court Organization Act. Article 64 of the same Act prescribes further that the Prosecutor General and chief prosecutors may handle prosecutorial matters directly or delegate them to prosecutors under their authority. When prosecutors carry out their duties in accordance with the Code of Criminal Procedure such as conducting investigations, indictments, and executions, under the principle of prosecutorial coordination, they are placed under the authority and supervision of the Prosecutor General and chief prosecutors, thus making prosecutors different from judges who independently make judgments. As for the administrative supervision of prosecutors' offices in the courts of all levels, Article 111, Subparagraph 1, of the Court Organization Act prescribes that the Minister of Justice shall have supervisory power over prosecutors' offices in the courts of all levels. According to Subparagraph 2 of the same provision, the Prosecutor General of the Prosecutors' Office in the Supreme Court shall supervise only the prosecutor's office under his/her authority, and, are to matters of administrative supervision, Articles 112 and 114 shall apply accordingly. Regarding matters of prosecutorial administration, the Minister of Justice may lawfully prescribe precautionary rules in order that criminal policies and prosecutorial matters may be carried out promptly and

efficiently. The Guidelines for the Prosecutors' Offices Handling Compensation Received by Witness(es) and Expert Witness(es) for Their Services, and Travel Expenses and Testimonies in Criminal Cases, laid down by the Ministry of Justice, are based upon the supervisory and administrative power of the Ministry of Justice and do not violate the Constitution within the scope of this Interpretation.

[5] Article 77 of the Constitution prescribes that the Judicial Yuan shall be the supreme judicial institution in charge of civil, criminal, administrative cases, and also cases concerning disciplinary measures against public officials. Yet, according to the current Judicial Yuan Organization Act, the Judicial Yuan shall have seventeen Justices in charge of constitutional interpretation and unified interpretations of statutes and regulations, and the Justices shall form a Constitutional Court to adjudicate cases concerning the dissolution of unconstitutional parties. Although Article 4 of the Judicial Yuan Organization Act promulgated on March 31, 1947, prescribed that the Judicial Yuan should have a civil, a criminal and an administrative tribunal, and a commission on the disciplinary sanction of functionaries, before going into effect, this Act was revised on December 25, 1947. This revision adhered to the previous court system of the tutelage period and established the Supreme Court, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries under the Judicial Yuan. When the Judicial Yuan Organization Act was revised on June 29, 1980, it still prescribed that the Judicial Yuan should establish the Supreme Court, the Administrative Court, and the Commission on the Disciplinary Sanction of Functionaries. Consequently, the Judicial Yuan, other than Justices vested with the power of judicial interpretation and the adjudication of cases concerning the dissolution of unconstitutional parties, has become merely the highest judicial administrative organ, resulting in the separation of the highest adjudicative organ from the highest level of judicial

administration. In order to be consistent with the intent of the framers of the Constitution, the Judicial Yuan Organization Act, the Court Organization Act, the Administrative Court Organization Act, and the Organization Act of the Commission on the Disciplinary Sanction of Functionaries must be reviewed and revised in accordance with the designated constitutional structure within two years from the date of announcement of this Interpretation.

Background Note by the Translator

This Interpretation was requested by the Control Yuan in 1996, arguing that the Judicial Yuan's issuance of rules governing lower courts and trial practices without legal delegation violated the principle of *Gesetzesvorbehalt*, statutory preservation. However, the Constitutional Court held that the Judicial Yuan indeed had such power, but nevertheless cautioned that the separation of the highest adjudicative organ from the highest level of judicial administration as resulting from the then-current Judicial Yuan Organization Act was never intended by the constitutional framers and needed to be revised within two years from the date of announcement of the Interpretation. Nearly twenty years have since gone by, but what was demanded by this Interpretation has not yet been implemented.

It should also be noted that following this Interpretation, another interpretation, J.Y. Interpretation No. 539, also dealt with the issue of judicial independence. It concerned whether constitutional protection of judgeship should be extended to the holder of an office as a division's leading judge of lower courts. Because the duty of a leading judge is to supervise the ministerial business of a court, the Constitutional Court held that the purpose of Article 81 of the Constitution is to ensure that judges decide cases above partisanship, and thus such protection does not extend to the office of a division's leading judge.

J.Y. Interpretation No. 216 (June 19, 1987)*

Judicial Review of Administrative Ordinances Case

Issue

Are the Ministry of Judicial Administration letters requiring courts to indicate on an auction notice the unpaid duties on imported goods with outstanding customs duties and requiring the purchaser to pay said duties before the goods may be delivered congruous with the intent of the Constitution to protect the people's property rights?

Holding

[1] The requirement that judges shall adjudicate independently according to law is specifically prescribed in Article 80 of the Constitution. Administrative rules adopted by various government agencies obligated to seek proper construction of laws may be applied by judges in the course of adjudication, who, not being bound thereby, may in a proper manner express their opinions in light of the law, as stated in Interpretation No. 137 of this Court. Ordinances issued by a judicial administration involving legal issues in adjudication are merely for the reference of judges, who, again, are not bound thereby in the course of adjudication. However, the rules cited by judges during the course of their adjudication may be subject to a party's application for constitutional interpretation under Article 4, Paragraph 1, Subparagraph 2, of the Council of Grand Justices Procedure Act.

[2] In respect of a mortgage created on any merchandise whose customs duties

* Translation and Note by Nigel N. T. LI

have not been paid, the mortgage interest certainly does not extend to what is covered by the unpaid customs duties on the merchandise, as Article 31, Paragraphs 2 and 3 of the Customs Act have clearly prescribed. Letter Ref. No. (65) Ming-Tze-09982, dated November 15, 1976, and Ref. No. Tai (67) Ming-Tze-06392, dated July 22, 1978, issued by the Ministry of Judicial Administration (former name of the Ministry of Justice), stipulate that the court of enforcement proceedings, when conducting a public auction of imported goods with outstanding customs duties, should state on the notice for public auction that there are unpaid customs duties on the goods, and that the purchaser must make the duty payment before the goods may be delivered and transferred. These two letters are in accordance with the provisions of the Customs Act and are not subject to the application of Article 55, Paragraph 3 of the same Act; thus, they have not encroached upon the interest of the mortgagee of movables and are necessary to secure the imposition of customs duties, and therefore they are not contrary to the constitutional safeguarding of property rights.

Reasoning

[1] The requirement that judges shall adjudicate independently according to law is specifically prescribed in Article 80 of the Constitution. Administrative rules adopted by various government agencies obligated to pursue the proper construction of laws may be applied by judges in the course of adjudication, who, not being bound thereby, may in a proper manner express their opinions in light of the law, as stated in Interpretation No. 137 of this Court. The provision that administrative ordinances issued by a judicial administration shall not intervene in adjudication is found in Article 90 of the Court Organization Act. Judicial administrations shall not put forth their own legal views and order judges to follow them in the course of adjudication. If any legal views are presented, they are for the judges' reference only and shall not bind judges in the course of

adjudication. However, the rules cited by judges during the course of their adjudication may be subject to a party's application for constitutional interpretation under Article 4, Paragraph 1, Subparagraph 2 of the Council of Grand Justices Procedure Act. We take the case accordingly.

[2] Article 31, Paragraphs 2 and 3 of the Customs Act clearly prescribes that imported goods, with either duties to be paid in installments or on credit, may not be transferred before the duties are fully paid, and that if a transfer is made through compulsory execution or by a specific permit, the transferee is allowed to continue paying the duties in installments or pay the duties on credit. Accordingly, in respect of a mortgage created on any goods whose customs duties have not been paid, the mortgage interest certainly does not extend to what is covered by the unpaid customs duties on the goods. If the transferee who may receive goods through compulsory enforcement proceedings is not granted permission to continue paying the duties in installments or place the duties on credit, he or she must make the duty payment before gaining custody of such goods. This mechanism differs from what is prescribed in Article 55, Paragraph 3 of the Customs Act, under which outstanding or unpaid duties take priority over common creditors' claims. Letters Ref. No. (65) Ming- Tze-09982, dated November 15, 1976, and Ref. No. Tai (67) Ming-Tze-06392, dated July 22, 1978, issued by the Ministry of Judicial Administration (former name of the Ministry of Justice), stipulate that the court of enforcement proceedings, when conducting a public auction of imported goods whose customs duties are on credit, shall state on the notice of public auction that there are unpaid customs duties on the goods, and that the purchaser must pay the duties before the goods may be delivered and transferred. These letters are in accordance with Article 31, Paragraph 2 and not subject to the application of Article 55, Paragraph 3; thus, they have not encroached upon the interest of the mortgagee of movables as a necessity to secure the imposition of customs duties, and they are therefore not contrary to

the constitutional safeguard of property rights.

Background Note by the Translator

In 1982, the Customs Administration cited two administrative ordinances of the Ministry of Justice to rule against the Petitioner, a bank, in a matter in which Customs Agency claimed that outstanding customs duties should prevail over the bank's right, which must be set aside, as the customs duties was a priority claim over the bank's claim for the same debtor's commodities. The bank filed a petition with the Constitutional Court for a ruling to invalidate the two ordinances as unconstitutional. The Constitutional Court found constitutional the views expressed in the two ordinances, but pointed out that in cases where an administrative ordinance is applicable, courts are not bound by the ordinance when exercising judicial powers, although they may base a judgment on an ordinance if they find the ordinance compliant with the laws. This interpretation is considered monumental, as it clarifies a longtime misunderstanding of J.Y. Interpretation No. 137, in which the Constitutional Court stated that a judge, who may not simply refuse to apply an administrative ordinance if it is indeed applicable to a case, can express his or her point of view as to the correct interpretation of law. In this J.Y. Interpretation No. 216, the Constitutional Court confirms that Interpretation No. 137 should be understood as espousing the same principle as Interpretation No. 216. It helps to vindicate judicial independence from the executive branch while deferring to the court undertaking judicial review to decide whether an administrative ordinance complies with existing laws.

J.Y. Interpretation No. 601 (July 22, 2005)*

Deletion of the Budget Appropriated as a Specialized Payment for the Justices Case

Issue

Is it unconstitutional for the Legislative Yuan to delete the budget appropriated as a specialized payment for the Justices?

Holding

[1] The Justices of the Constitutional Court are nominated by the President of the Republic and appointed by the same upon confirmation by the Legislative Yuan, and are judges under Article 80 of the Constitution, as has been made clear by past opinions delivered by this Court, including J.Y. Interpretations Nos. 392, 396, 530 and 585. In order to carry out the intent of Article 80 of the Constitution, which reads, "Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference," a Justice, regardless of his or her profession or occupation prior to taking the office, shall be protected during the term of his or her office by Article 81 of the Constitution, providing, *inter alia*, that no judge shall be removed from office unless he or she has been found guilty of a criminal offense or subjected to disciplinary action, or declared to be under interdiction; nor shall he or she, except in accordance with law, be suspended or transferred or have his or her salary diminished. As the office of a judge in relation to the State is directly regulated and specially protected by the Constitution, it is different from that of either a political appointee or an ordinary

* Translation by Ya-Wen YANG, based upon the previous translation by Chung-Hsi Vincent KUAN

public functionary.

[2] In respect of the provision of Article 81 of the Constitution that no judge shall, except in accordance with law, have his or her salary diminished, it shall be construed based on the constitutional guarantee that a judge shall hold trials independently, and thus shall mean that no constitutional organ may diminish the salary of a judge for grounds other than those connected to disciplinary action as prescribed by legislation mentioned in Article 170 of the Constitution.

[3] In view of such various provisions as Article 2 of the Provisional Act Governing the Salary and Allowance for the President, Vice-President and Special Political Appointees promulgated on January 17, 1949, the first sentence of Article 5, Paragraph 4 of the Judicial Yuan Organization Act as well as Article 40, Paragraph 3 and Article 38, Paragraph 2 of the Act Governing Judicial Personnel, the remuneration for a Justice shall consist of base salary, public expenses and specialized payment, all of which are statutory funds paid and received pursuant to law. When reviewing the Central Government's general budget for the 2005 fiscal year, the Legislative Yuan deleted the budget for the specialized payments for judicial personnel to be paid to the Justices, thus decreasing the remuneration for the Justices. The Legislative Yuan, in so doing, has acted against the constitutional intent of Article 81 of the Constitution as mentioned above.

[4] Under Article 5 of the Additional Articles of the Constitution, the President and Vice-President of the Judicial Yuan serve concurrently as Justices, and they shall receive the same specialized payments for judicial personnel as other Justices, the budget for which shall not be deleted by the Legislative Yuan when reviewing budgetary bills. It should also be noted that, as for the Secretary General of the Judicial Yuan, who is responsible for judicial administration, one should refer to the provisions of Article 39 of the Act Governing Judicial

Personnel and other applicable laws and regulations to determine whether he or she may receive the specialized payment for judicial personnel.

Reasoning

[1] I. Procedure for Acceptance of the Petition at Issue

[2] First, it should be noted that the petition for an interpretation of Article 81 of the Constitution has been duly filed with this Court by the petitioners pursuant to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act, as they had doubts as to the constitutionality of the Legislative Yuan's act in deleting the budget for the specialized payments for judicial personnel payable to the President, Vice-President, Justices and Secretary General of the Judicial Yuan while reviewing the Central Government's general budget for the 2005 fiscal year.

[3] A judge shall independently perform his or her constitutionally and legally mandated duties in good conscience while hearing a legally accepted case. Except as expressly provided by law, no person shall recuse the judge without due cause, nor shall the judge himself or herself refuse to hear the case for any personal reason. The phrase "expressly provided by law" shall refer to, in the context of procedural law, the recusal system, in addition to "jurisdiction."

[4] In respect of the exercise of any public authority by the State, a conflict of interest on the part of a person implementing his or her official duty should always be prevented so as not to affect a governmental agency's soundness and neutrality in performing its functions. Therefore, an adequate recusal system is a necessity where such circumstances exist, as in the case of judges who are in charge of trials. (*see* Articles 32 and 33 of the Administrative Procedure Act, as well as Article 17 of the Public Functionary Service Act,) Nonetheless, since a judicial trial is the final judgment passed on a matter in a dispute according to

law, the legitimacy of the judgment, above all, hinges upon the impartiality and neutrality of a judge while he or she is performing his or her duties. The recusal system is hence particularly vital for judges. By the same token, the Justices, while exercising their authority and hearing various cases, are no exceptions. Article 3 of the Constitutional Court Procedure Act provides that the applicable provisions of the Administrative Court Procedure Act shall apply *mutatis mutandis* in regard to the grounds for the recusal of a Justice. In light of Article 19 of the Administrative Court Procedure Act, which provides the grounds for a judge to recuse him or herself, Subparagraphs 2 through 6 of the said Article do not concern the petition at issue. As for Subparagraph 1 thereof, which provides, "where any of the situations described in Subparagraphs 1 through 6 of Article 32 of the Code of Civil Procedure occurs," only the first subparagraph of the said Article may require further inquiry, and it provides, "where the judge is a party to the case at issue." According to Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act, when one-third or more of the legislators have any doubt as to the meaning of a constitutional provision governing their functions and duties, or any question on the constitutionality of a statute at issue, a petition for interpretation of the Constitution may be initiated. The parties to such a petition shall be the petitioners, and the subject matter of the petition shall be the constitutional provision or statutory provision in question. Therefore, the focus is placed on the preservation of the objective constitutional order rather than the subjective remedy of the rights of the legislators or any other nationals. Consequently, even if certain nationals (including the legislators and members of the constitution-interpreting organ) enjoy an increase or endure a decrease to their economic benefits as a result of the constitutional interpretation made by the Justices, as the organ entrusted with the duty to interpret the Constitution, based on the petition initiated by the legislators, it is merely an indirect outcome reflecting the constitutional interpretation. Since those who experience an

increase or decrease to their economic benefits are not the subject matter of the petition for interpretation, they should accordingly not be considered as parties to the petition at issue.

[5] The recusal system is designed to prevent a conflict of interest on the part of a government employee or public functionary while performing his or her official duties. If the mission of an agency is likely to result in gains or losses on the part of government employees or public functionaries no matter who is assigned to perform the duty, it will not be necessary to recuse any such government employee or public functionary, nor will it be possible to do so. There is no solving the issue in relation to reflected interests unless adequate arrangements are made as to the exercise of authority by the agency concerned. For instance, if the Executive Yuan is formulating an annual plan to adjust the salaries of public functionaries, it is not necessary for the person exercising such authority to recuse him or herself even if he or she, too, will thereby be benefited. Another example would be the Legislative Yuan reviewing the Central Government's general budget, which inevitably will include the budget for the Legislative Yuan itself. It goes without saying that the Legislative Yuan need not recuse itself from reviewing the budgets concerned in such a case.

[6] "Recusal" in the context of procedural law is a system as provided by law under which a judge is precluded on a motion of his/her own or on a motion of a party to a case from hearing the case, in order that justice may be ensured. Therefore, the subject of recusal is a particular judge, rather than the organ to which the judge belongs, *i.e*., the court. In other words, only an individual judge is to be recused. This thesis has been made clear by the applicable provisions of the various procedural laws regarding recusal, prescribing that "judges" be the subject of recusal. (*see* Articles 19 and 20 of the Administrative Court Procedure Act; Article 32 et seq. of the Code of Civil Procedure; and Article 17 of the Code of Criminal Procedure.) Thus, a motion to recuse the court, which is an organ of

the State in nature, should not be recognized under the system of recusal. As for the motion to recuse the judges of the Supreme Court (or the Supreme Administrative Court or the Commission on the Disciplinary Sanction of Functionaries) *en bloc* or the Justices of the Constitutional Court *en bloc*, it would run counter to the nature of the recusal system not only because no other organ may take over the function of hearing the trial in case of recusal of the judges or justices *en bloc*, but also because no other person may give a ruling as to the motion for recusal. The foregoing is true when it involves a motion for recusal, so is it true in a case where a judge recuses him or herself. In addition, if and when a particular judge is recused, another competent judge must take his or her place to perform his or her duty by continuing the trial so as to preserve the trial functions of the court. If no judge remains to exercise the authority to try a case due to recusal of judges, the trial may not be denied for reason of recusal.

[7] The petition for the interpretation at issue involves Articles 63, 80 and 81 of the Constitution, as well as Article 5 of the Additional Articles of the Constitution. The relevant issues include, *inter alia*: whether the Justices are judges in the constitutional context, whether Articles 80 and 81 of the Constitution apply to the Justices and whether the principle of judicial independence should serve as a constitutional limit on the Legislative Yuan in exercising its power to review government budgets. All of the foregoing issues are essential questions of the fundamental constitutional system in relation to separation of powers, judicial independence and constitutional review. Under Article 78, 79 and Article 171, Paragraph 2 of the Constitution and Article 5, Paragraph 4 of the Additional Articles of the Constitution as amended and promulgated on June 10, 2005, the Justices shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders, to engage in constitutional review, as well as to hear matters regarding the impeachment of the President and Vice-President and dissolution of a political party violating the Constitution. In a case that falls

within the purview of their authority, *e.g.*, the case at issue, the Justices are in indeed the final and only competent authority to interpret or hear it. If the Justices opt to recuse themselves from hearing the case due to the concern of indirect outcome implicated by constitutional interpretation, it is tantamount to a total failure of the judicial system to resolve any dispute between the judicial power and the executive or legislative power, or any case on the review of the constitutionality of a law or regulation involving interests of all of society (including, naturally the Justices). If such were the case, the purpose of the recusal system would be defeated on its face, and thus the institution of constitutional interpretation expressly prescribed under the Constitution would inevitably be paralyzed, which would be no different from the Justices refusing to exercise their constitutional authority. As a result, the fundamental constitutional order of separation of powers as contemplated by a constitutional state would no longer exist.

[8] For more than fifty years, the remuneration of the Justices has been disbursed pursuant to laws or orders prescribed by the competent authorities. Since the applicable laws or orders have been neither amended nor repealed, the question as to whether the Legislative Yuan, when deliberating on the Central Government's general budget for the 2005 fiscal year, may delete the budget for the specialized payments for judicial personnel to be paid to the Justices for the 2005 fiscal year, involves a dispute as to the applicable constitutional provisions described above. The case at issue involves a dispute arising out of applicable provisions of the Constitution that has been brought to the Justices' attention pursuant to statutory procedure, which is an objective review conducted for the purpose of preserving the constitutional order. It was not the Justices that took the initiative by offering any interpretation regarding their remuneration, nor would the outcome of the interpretation increase in any manner the remuneration payable to the Justices under existing laws and orders. Thus, it should be

rightfully differentiated from a situation where a competent agency, for the benefit of the agency itself or any individual of the agency, makes a decision on its own initiative and authority that increases its own pecuniary gains.

[9] The subject of the petition at issue is the "Resolution of the Budgetary Bill" with respect to the specialized payments for judicial personnel to be paid to the President, Vice-President and Justices of the Judicial Yuan, listed under "Personnel Expenses" in the first item of "General Administration" for the "Judicial Yuan," falling within the fifth subparagraph of the Central Government's general budget for the 2005 fiscal year, i.e., "Budget for Matters relating to the Judicial Yuan." The purport of the petition at issue indicates that the Petitioners believed that the Legislative Yuan, in deleting the budget for the specialized payments for judicial personnel to be paid to the President, Vice-President, Justices and Secretary General of the Judicial Yuan for the 2005 fiscal year while reviewing the Central Government's general budgets for the 2005 fiscal year, may have violated the Constitution, and they thus petitioned this Court for an interpretation of Article 81 of the Constitution. Even if the remuneration for the Justices is affected by an indirect outcome reflecting the constitutional interpretation at issue, the Justices themselves still are not parties to the petition at issue. Furthermore, as mentioned earlier, the outcome of the interpretation would not increase in any manner the remuneration payable to the Justices under existing laws and regulations. In view of the foregoing explanations, there is no issue of recusal of the Justices in regard to the petition at issue.

[10] II. The Justices Are Judges in the Constitutional Context

[11] The purpose of constitutional interpretation is to ensure the supremacy of the Constitution in the hierarchy of all laws in a democratic and constitutional state, where a binding judicial judgment will be made to protect fundamental

human rights, as well as to preserve such basic constitutional values as the constitutional structure of free democracy. In order to realize the people's right to initiate legal proceedings, to protect their constitutional or legal rights and to preserve the constitutional order, the Justices, based on the petitions made by the people or governmental agencies in respect of individual cases, will render final and conclusive judgments on the constitutional disputes or doubts as to such cases, whose interpretations will bind all agencies, as well as all the people, of the State. The effects are, in nature, the adjudicative function of the State, which is the core realm of the judicial power. Therefore, the Justices, like ordinary judges, are judges in the constitutional context, as has been made clear by this Court in J.Y. Interpretation Nos. 392, 396, 530 and 585.

[12] Article 80 of the Constitution expressly provides, among other matters, that judges shall, in accordance with the law, hold trials independently. However, since the force and effect of the Constitution prevail over those of laws, judges shall be obligated to follow the Constitution over all laws. As such, in a trial over a particular case, a judge shall always interpret and construe the applicable law as dictated by constitutional intent so that the application of the law will abide by the fundamental values of the Constitution in its entirety, and he or she shall, further, review the constitutionality of the law and, once he or she firmly believes that the law is unconstitutional, the court at various levels may regard the constitutionality, or unconstitutionality, of the law as a prerequisite issue and decide to suspend the litigation procedure and petition this Court for constitutional interpretation pursuant to Article 5, Paragraph 2 of the Constitutional Court Procedure Act as well as J.Y. Interpretation Nos. 371, 572 and 590. The court hearing the case at issue may not resume the procedure to try the case based on the prerequisite issue until the Justices reach a binding, constitutional judgment on such issue. Furthermore, under Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act, when an individual,

a juristic person or a political party, whose constitutional rights have been infringed upon and whose remedies provided by law for such infringement have been exhausted, has any question on the constitutionality of the statute or regulation relied thereupon by the court of last resort in its final judgment, a petition for interpretation of the Constitution may be initiated. When the Justices conclude in an interpretation that the law or regulation applied in a final and binding judgment is contrary to the Constitution, the party prejudiced by such final and binding judgment may file a motion for retrial or extraordinary appeal on the basis of such interpretation, which shall bind the court receiving the case. The foregoing has been established through J.Y. Interpretation Nos. 177 and 185. Additionally, according to Article 7, Paragraph 1, Subparagraph 2, when an individual, a juristic person or a political party whose rights have been infringed upon and whose remedies provided by law for such infringement have been exhausted, opines in good conscience that the court rendering its final decision has construed the law or regulation at issue differently from another judicial body in its previous decision that has applied the same law or regulation, a petition for uniform interpretation of the law or regulation at issue may be made. If a final and conclusive adjudication has been made in respect of the case giving rise to such difference in opinions and the view expressed by the court on the application of any law or regulation is held by an interpretation of this Court to be inconsistent with the intention of such law or regulation, the relevant interpretation of this Court may be invoked to support a motion for retrial or extraordinary appeal. The foregoing has been made clear in J.Y. Interpretation No. 188. Accordingly, it goes without saying that, under the current judicial system of the State, courts at various levels (including the Commission on the Disciplinary Sanction of Functionaries) are a link in the chain of constitutional interpretation when it comes to the application of law to a particular case. And it is clear that, in the case of the Justices, the constitutional review or uniform

interpretation of the law or regulation in response to the petition initiated by an individual, a juristic person or a political party, as well as the review or uniform interpretation of the law based on a petition made by a court of law, albeit not directly concerned with the determination of facts in a particular case, are also a link in the chain of a trial of a specific case. With respect to Article 79, Paragraph 2 of the Constitution and Article 5, Paragraph 4 of the Additional Articles of the Constitution, which expressly provide that the Justices shall have the final authority to interpret and construe the Constitution and laws and regulations, they merely stipulate a division of labor among different courts under the judicial system, which makes no difference as to the fact that Justices and judges alike react passively to a case brought to their attention pursuant to statutory procedure and independently and neutrally deliver a final, authoritative opinion as to the Constitution or law in respect of the constitutional, legal or factual issues in a particular case. Consequently, the Justices, like ordinary judges, are also judges in the constitutional context who are mandated to exercise the judicial power.

[13] Article 5, Paragraph 2 of the Additional Articles of the Constitution unambiguously provides, *inter alia*, that the Justices shall serve a term of eight years and may not be reappointed for a consecutive term. Article 5, Paragraph 3 thereof further provides that, among the Justices nominated by the President in the year 2003, eight of them shall serve for a term of four years. Although the aforesaid provisions regarding terms of service are different from Article 81 of the Constitution, which provides that judges shall hold office for life, the definite terms for the Justices, as well as the indefinite term for judges, are both designed to protect their status. It should not be inferred that the Justices are not judges simply because they hold office for a definite term. Given the fact that the Justices are also the final authorities to interpret the Constitution when a central or local governmental agency or the Legislative Yuan has any doubt as to the application of the Constitution while performing their duties, the judgeship of the Justices

shall not be denied and affected because they are empowered to hear the aforesaid type of cases. Article 2 of the Constitutional Court Procedure Act reads, "The Justices of the Constitutional Court shall be in session *en masse* and adjudge the petitions concerning interpretation of the Constitution and uniform interpretation of laws and regulations; the Justices may form as well a Constitutional Court to declare the dissolution of a political party whenever it violates the Constitution." There are two ways for the Justices to exercise their powers and authority, namely, in the forms of meetings or open courts; both of which, however, are, in nature, designed to try and hear legally received cases *en masse*. Besides, while interpretations and adjudications are different from each other as far as their names are concerned, they are no different when it comes to form - both of them consist of a holding and reasoning. Additionally, the Justices and judges alike react passively to a case brought to their attention pursuant to statutory procedure and deliver a final and binding judicial decision in respect of the case. The judgeship of the Justices shall not be denied because they exercise their powers and authorities in the form of meetings, nor because the binding judicial decisions they make are called interpretations, rather than judgments. Another suitable example would be the Commission on the Disciplinary Sanction of Functionaries. Article 16 of the Directives for the Operational Procedure of the Commission on the Disciplinary Sanction of Functionaries reads, "Any and all disciplinary matters handled by a member of this Commission shall be resolved in a review meeting." A binding judicial decision made by the said Commission is, under Article 28 of the Public Functionaries Discipline Act, called a resolution. However, the aforesaid provisions do not affect the judgeship of members of the Commission on the Disciplinary Sanction of Functionaries. As for the Second Sentence of Article 5, Paragraph 1 of the Additional Articles of the Constitution, which provides, "Except those Justices who are transferred from the bench, a Justice shall not enjoy lifetime tenure

protection as provided in Article 81 of the Constitution," it is merely intended to exclude the status protection for those Justices who are not transferred from the bench after they leave the office. Although it is not advisable to omit a reasonable alternative provision, the aforesaid provision, however, has been set forth on the premise that the Justices are also judges in the constitutional context. Otherwise, the exclusionary provision would not be necessary. It is not plausible to deny the Justices their judgeship for the aforesaid reason. Therefore, Article 5, Paragraph 4, First Sentence of the Judicial Yuan Organization Act as amended and promulgated on May 23, 2001, provides, "Any Justice who, upon expiration of his or her term, is not reappointed, shall be deemed as a judge who has ceased taking cases, to whom the provisions of Article 40, Paragraph 3 of the Act Governing Judicial Personnel shall apply". The said provision is formulated on the basis that the Justices, in essence, exercise the same powers and authorities as judges of ordinary courts do.

[14] Article 5, Paragraph 4 of the Additional Articles of the Constitution as amended and promulgated on June 10, 2005, further provides that the Justices shall form a Constitutional Court to hear matters regarding the impeachment of the President and Vice-President and potential dissolution of a political party violating the Constitution. Under Paragraph 1, Second Sentence and Paragraph 3 of Article 5 the Constitutional Court Procedure Act, the Justices also serve as the judicial mechanism to resolve any dispute arising between central and local governmental agencies or between the minority and majority of the Legislative Yuan with respect to the Constitution. Therefore, the Justices will not be able to make a final and binding judicial adjudication independently as to any particular case according to the Constitution and the laws unless their judgeship is recognized. Failing such recognition, the Justices' exercise of powers and authorities would be seriously flawed for lack of substantive legitimacy, which, of course, would be in conflict with the constitutional principle of separation of

powers.

[15] Given the above, there is no doubt that the Justices are judges in the constitutional context in view of the applicable constitutional and statutory provisions, as well as interpretations of this Court.

[16] III. The Legislative Yuan, in Deleting the Budget for the Specialized Payments for Judicial Personnel Payable to the Justices, Has Acted against the Constitutional Intent of Article 81 of the Constitution

[17] As the office of a judge in relation to the State is directly regulated and specially protected by the Constitution, it is different from that of either a political appointee or an ordinary public functionary. In order to enable judges to withstand pressures of all sorts from all directions while making final and conclusive adjudications as to the Constitution and the laws, every democratic and constitutional state has offered institutional protection to judges. Article 80 of the Constitution reads, "Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference." The said provision is intended to require a judge to exercise his or her authority independently and justly in conducting trials so that the parties seeking judicial remedies can be certain that the person entrusted with the power to adjudicate, regardless of whether his or her title is "judge" or "justice", is a neutral third party who is objective, detached and able to show a good judgment as long as he or she is accorded adequate institutional protection. In particular, more often than not, a state organ is a party to a case heard by the Justices, who must especially regard the provisions of Article 80 of the Constitution as their constitutional obligations so as to facilitate a fair trial and preclude any interference. As judicial independence and status protection are closely connected with each other, Article 81 of the Constitution provides, "Judges shall hold office for life, and no judge shall be removed from office unless he or she has been guilty of a criminal

offense or subjected to disciplinary action, or declared to be under interdiction, nor shall he or she, except in accordance with law, be suspended or transferred or have his or her salary diminished." Furthermore, Article 5, Paragraph 1, Second Sentence of the Additional Articles of the Constitution provides, "Except those Justices who have been transferred from the bench, a Justice shall not enjoy lifetime tenure protection as provided in Article 81 of the Constitution." It is merely aimed to exclude the status protection for those Justices who have not been transferred from the bench after they leave the office. Having considered the intention of the provision, it does not mean the provision that "[no judge] shall be removed from office unless he or she has been guilty of a criminal offense or subjected to disciplinary action, or declared to be under interdiction, nor shall he or she, except in accordance with law, be suspended or transferred or have his or her salary diminished" should not apply to the Justices. It is, in fact, an interpretation of the aforesaid provision of the Additional Articles of the Constitution based on the principle of judicial independence. Otherwise, will it not mean that those Justices who are transferred from the bench may not be subjected to disciplinary action or have their salaries diminished except in accordance with law, but that other Justices may be disciplined or undergo salary decrease at will? Consequently, all Justices, regardless of their profession or occupation prior to taking office, shall be protected during the term of their offices by the provisions of Article 81 of the Constitution regarding the protection of the status and remuneration of judges.

[18] A literal reading of Article 81 of the Constitution, providing, *inter alia*, that no judge shall have his or her salary diminished except in accordance with law, would lead to the conclusion that a judge's salary may not be diminished except in accordance with a law referred to in Article 170 of the Constitution. No contrary construction is allowed to so interpret the said provision as to infer that a judge's salary may be diminished as long as such reduction is done pursuant to

law. In particular, since the said provision is designed to ensure the security of the status of a judge for the purpose of judicial independence, it shall not be so construed as to run counter to the constitutional purpose by enabling a state organ to decrease a judge's existing remuneration through an *ex post facto* law or by non-enactment of any law. In other words, where it concerns the remuneration for a judge, the existing amount thereof shall not be diminished except in accordance with a law referred to in Article 170 of the Constitution, as the formality so requires; and, in substance, any and all laws so enacted shall follow the constitutional intent to afford institutional protection to judges so as to ensure judicial independence. Additionally, in light of the constitutional intent of Articles 80 and 81 of the Constitution to provide institutional protection to judges for the purpose of judicial independence, the provision of Article 81 of the Constitution that no judge shall have his or her salary diminished except in accordance with law, shall mean that no constitutional organ may delete or diminish the remuneration for a judge unless there is any ground for discipline, in which case the salary of a judge may be diminished in accordance with a law referred to in Article 170 of the Constitution. Article 37 of the Act Governing Judicial Personnel provides, "A commissioned judge may not be demoted or have his or her salary diminished unless so disciplined in accordance with law." The said provision was designed by following the foregoing intent. Otherwise, if a state organ could, for any other reason, decrease a judge's existing remuneration either on its initiative or through legislation or by non-enactment of any law, it would be impossible to realize the constitutional intent to provide institutional protection to judges so as to ensure their independence. (International examples include the second sentience of Article 3, Section 1 of the Constitution of the United States; Section 72, Subsection 1(iii) of the Australian Constitution; Article 79, Paragraph 6 and Article 80, Paragraph 2 of the Constitution of Japan; Article 106 (1) of the Constitution of the Republic of

Korea; and Section 176(3) of the Constitution of South Africa. In order to ensure judicial independence, express provisions are set forth by the aforesaid constitutions to the effect that the remuneration of judges may not be reduced during their offices, or that their remuneration shall not be diminished except for disciplinary action.)

[19] The appointment of a public functionary is not necessarily connected with the function of his or her office. For instance, under Article 5, Paragraph 1, Article 6, Paragraph 2 and Article 7, Paragraph 2 of the Additional Articles of the Constitution, the President, Vice-President and Justices of the Judicial Yuan, the President, Vice-President and Examiners of the Examination Yuan, as well as the President, Vice-President and Ombudsmen of the Control Yuan, shall be nominated and, upon confirmation by the Legislative Yuan, appointed by the President of the Republic. It does not mean, however, that all those public functionaries who are so appointed have the same functions of office. The Justices, who are nominated and, upon confirmation by the Legislative Yuan, appointed by the President, are judges as referred to in Article 80 of the Constitution. Although the appointment procedure and position of the Justices are different from those of ordinary judges, the function of the Justices' offices is no different from that of ordinary judges, which, as described above, should be regulated and protected under Articles 80 and 81 of the Constitution. As such, they are not the same as those political appointees who must take and leave office due to a change of government between political parties or a change of governmental policies, or those who are primarily appointed through special procedures for political needs and considerations. Various misunderstandings arise out of confusion as to the appointment procedure, position and function of the Justices. For instance, one person may regard the Justices as specially appointed public functionaries, instead of judges; another may believe that the Justices are judges and thus may not be specially appointed; and yet another may

deem the Justices as political appointees because they are appointed through a special appointment procedure.

[20] In order to honor the legal principle that the remuneration of a public functionary must be commensurate with his or her status and office, the remuneration of the Justices must either be included in a special law or in a special chapter of the law, or it must be expressly prescribed by law that the laws governing the remuneration for specially appointed public functionaries or judges shall apply *mutatis mutandis* or directly thereto. Nonetheless, if the competent authority in charge of the preparation of budgets, at a time when the relevant legal framework remains to be built, having considered the status, position and function of the Justices in the hierarchy of public functionaries as a whole, prescribes by law and/or regulation the remuneration legally receivable by the Justices in accordance with the applicable provisions of the existing and valid laws governing the remuneration for public functionaries, it will not be contrary to the Constitution and/or the laws so long as such law and/or regulation serves the purpose of the laws governing remuneration as well as constitutional intent.

[21] In order to establish a solid and sound system for the remuneration of judicial personnel, the Executive Yuan issued the Standards for Advanced Payment of Allowances for Judicial Personnel of Various Courts and the Ministry of Judicial Administration per Executive Yuan Directive Tai-(41)-Sui-San-51 on April 2, 1952. Paragraph 1, Subparagraph 1 thereof provides, "The allowances for judicial personnel shall be payable to the following personnel only: (1) Justices, Administrative Court judges and Commissioners of the Commission on the Disciplinary Sanction of Functionaries..." Accordingly, the allowances for judicial personnel have been paid to the Justices based on the nature of their function in exercising the judicial power. On the other hand, Subparagraph 2 thereof provides that, "Any person referred to in the first and second

Subparagraphs of the preceding paragraph with "senior commission or above" shall receive a monthly allowance of two hundred and eighty New Taiwan dollars..." The said provision has formulated the scope of application and standards of payment for the Justices based on the status of the Justices in the hierarchy of the entire judicial personnel, as well as the status they should enjoy under the Constitution. Not only is it in line with the purpose of the allowances payable to judicial personnel, which is not in conflict with the principle of substantive equality requiring that those with identical duties should receive identical allowances, but it is also consistent with the constitutional position of the Justices. It is not groundless for the Justices to receive the allowances for judicial personnel (later renamed as the specialized payment for judicial personnel). In addition, since such constitutional organs as the Executive Yuan, the Legislative Yuan and the Judicial Yuan have repeatedly applied the said law for a period of more than five decades, thus the law is believed to be a legally valid norm.

[22] Article 5, Paragraph 4, First Sentence of the Judicial Yuan Organization Act as amended and promulgated on May 23, 2001, provides, "Any Justice who, upon expiration of his or her term, is not reappointed, shall be deemed as a judge who has ceased taking cases, to whom the provisions of Article 40, Paragraph 3 of the Act Governing Judicial Personnel shall apply." Based on the systematic construction of the said provision and the constitutional intent of offering security of status to judges to ensure judicial independence, since a Justice who ceases to take cases upon expiration of his or her term may receive the specialized payment for judicial personnel pursuant to the provisions of Article 40, Paragraph 3 of the Act Governing Judicial Personnel, those incumbent Justices who are still handling cases, being required by the Constitution to try and hear cases independently, should receive such specialized payment for judicial personnel under the same law. Otherwise, if an incumbent Justice who is still handling

judicial trials cannot receive any specialized payment for judicial personnel, whereas a retired Justice who ceases to take any cases upon expiration of his term may instead receive such specialized payment for judicial personnel, it will inevitably defeat the purpose of paying the specialized payment to judicial personnel and violate the constitutional principle of equality, thus leading to an imbalance of the systems in regard to the status, function and remuneration of judges.

[23] Article 2 of the Provisional Act Governing the Salary and Allowance for the President, Vice-President and Special Political Appointees promulgated on January 17, 1949, provides, "The monthly remuneration for a special political appointee, Justice and Examiner shall be eight hundred dollars." Article 3, Paragraph 1 thereof further provides, "The monthly allowance for the Premier, Presidents of the Judicial Yuan and of the Examination Yuan, respectively, shall be two thousand dollars; for the Vice-Premier, Vice-Presidents of the Judicial Yuan and of the Examination Yuan, respectively, one thousand dollars; for any other special political appointee, Justice and Examiner, eight hundred dollars." The foregoing provisions, when read together with Article 5, Paragraph 4, First Sentence of the Judicial Yuan Organization Act as well as Article 40, Paragraph 3 and Article 38, Paragraph 2 of the Act Governing Judicial Personnel, shall be constitutionally interpreted to mean that the remuneration for a Justice shall consist of base salary, public expense and specialized payment, all of which are statutory funds paid and received pursuant to law (*see* Article 5, Paragraph 1, Subparagraph 3 of the Budget Act). When reviewing the Central Government's general budget for the 2005 fiscal year, the Legislative Yuan altered the remuneration structure for the Justices that had existed for more than fifty years by deleting the budget for the specialized payments for judicial personnel payable to the Justices. The Legislative Yuan has not done so according to any law, let alone any disciplinary law. If the Constitution should allow such act, it

would be tantamount to encouraging the authority in charge of the preparation of budgets, through the review of annual budgetary bills, to influence the Justices in exercising their powers. If the Justices, who are empowered to conduct judicial review of the Constitution, do not have any adequate guarantee of their remuneration, but instead are at the beck and call of the authority in charge of the preparation of budgets year after year, the stability and soundness of the democratic and constitutional order will be in jeopardy, which is not consistent with the constitutional intent to render institutional protection to judges to ensure their independence in holding trials, as the Justices should independently exercise their authority under the Constitution and the law to preserve the constitutional structure of free democracy and protect fundamental human rights.

[24] Article 5 of the Additional Articles of the Constitution provides, "The Judicial Yuan shall have fifteen Justices, including a President and a Vice-President [of the Judicial Yuan], who shall be nominated and, upon confirmation of the Legislative Yuan, appointed by the President of the Republic. The aforesaid provision shall take effect from the year 2003..." Accordingly, the incumbent President and Vice-President of the Judicial Yuan serve concurrently as Justices of the Constitutional Court and they shall receive a specialized payment for judicial personnel as other Justices, the budget for which shall not be deleted by the Legislative Yuan when deliberating on budgetary bills. It should also be noted that, as for the Secretary General of the Judicial Yuan, who is responsible for judicial administration, one should turn to the provisions of Article 39 of the Act Governing Judicial Personnel and other applicable laws and regulations to determine whether he or she may receive the specialized payment for judicial personnel.

Background Note by Ya-Wen YANG

The Legislative Yuan deleted the budget for the specialized payments for

judicial personnel payable to the President, Vice-President, Justices and Secretary General of the Judicial Yuan on January 20, 2005, when reviewing the Central Government's general budgets for the 2005 fiscal year. In monetary terms, the deletion resulted in a pay cut of approximately one-third of the monthly salary of the Justices.

The minority legislators who opposed the budget deletion filed the petition for an interpretation. They claimed that the Justices are judges in the context of the Constitution whose remuneration is constitutionally protected against a willful pay cut not following disciplinary law. The budget deletion thus violated Article 81 of the Constitution and contradicted judicial independence. Moreover, the specialized payments for judicial personnel had been paid to the Justices for more than five decades dating to World War II. Since the Justices and the Secretary General had accepted their appointments to the position based on the fact that the remuneration consisted of part of the pay package, the abrupt cancellation of the specialized payment violated the legitimate expectations of the Justices and the Secretary General.

The reason to delete the budget, as suggested by the congressional motion, was that the President, Vice-President, Justices and Secretary General of the Judicial Yuan were not judges. Therefore, they were thought not to be entitled to specialized payments offered to judicial personnel, namely judges and prosecutors. This reasoning, as curious as it might seem, had a certain historical and legal background. On the one hand, until the day of this case, the remuneration structure for the Justices had fallen short of being completely formalized through legislation. As made clear in this Interpretation, the legal basis of the Justices' allowance was an administrative directive made more than five decades ago, and that of their specialized payments was indirectly inferred from the relevant provisions of the Judicial Yuan Organization Act For a subject matter of such significance, the legal basis was surprisingly subtle. The absence

of an explicit statutory foundation hence left the pay package of the Justices vulnerable to challenges.

Additionally, the characterization of the power of constitutional review and the status of the Justices had previously been an issue, especially in the early days after the Constitution was implemented in Taiwan. The controversy partly arose from the practice of the life-time tenure protection for judges of ordinary courts under Article 81 of the Constitution. The tenure is taken to mean that judges cannot be mandated to retire; they can only cease to hear cases after a specific age. The Justices, whose service was confined within a fixed term, appeared to not be in line with this particular understanding of life tenure of judges. The somewhat perplexing question as to how the Justices should be treated after their terms if they were judges under Article 80 of the Constitution who could not be made to retired deepened the confusion. The debate surrounding the judgeship of the Justices, however, gradually faded away as the institution of judicial personnel became sounder and the authority of judicial review more established. This issue was likely further diminished in significance by the time of 1992 when the Additional Articles of the Constitution invested the Justices with the power to try cases of impeachment of the President and Vice-President and the dissolution of unconstitutional parties in the form of an open court. It is against this backdrop that some considered the rationale to delete the budget was somehow tainted by political motivation.

The budget deletion occurred in the aftermath of J.Y. Interpretation 585, issued on December 15, 2004. In that high-profile case, the majority parties of the Legislative Yuan sought to investigate a shooting incident on the day before of the presidential election day in 2004 through by establishing a special commission with an *ad hoc* law, the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting. Nonetheless, the J.Y. Interpretation 585 ruled that key provisions of the Act unduly expanded the

congressional investigation power and invalid for violating separation of powers. The budget deletion was considered by some to be one of the dramas following the political turmoil of the shooting incident.

In cases like this one involving the remuneration of Justices like this one, the concern of conflicts of interest unavoidably looms large. The Court's approach to meet the challenge in this case is formalistic. It indicates that no legal basis is available to recuse the Justices since they are not the petitioners; the Constitutional Court as a whole cannot be rescued either. Yet, two concurring opinions offered different routes. Justices Feng-Zhi PENG and Tzong-Li HSU indicated that the concern of conflicts of interest does not arise under the institution of objective judicial review. Justice Tzu-Yi LIN, on the other hand, is of the view that here comes a real dilemma has arisen and the concern of conflicts of interest cannot be dismissed. He nevertheless agrees that this case should be granted review because the weight that of a pressing constitutional controversy needing a mechanism to be finally resolved supersedes the concern of conflicts of interest.

As to the substantive issue, the Court (re)affirms the judicial nature of the power of abstract constitutional review and the judgeship of the Justices. It also points out that the remuneration of the Justices should be protected by statutes — non-enactment should not be an option. After the Interpretation, the deleted budgets of specialized payment for the Justices, including the President and Vice-President, were soon retrospectively recovered, while the specialized payment for the then-Secretary General of the Judicial Yuan were not recoverable since he was not a judge. Lastly, the full institutionalization of the payment structure of the Justices through legislation was not completed until the Judge Act was amended in 2019.

J.Y. Interpretation No. 185 (January 27, 1984)*

Remedies against Judgments that Rely upon Precedents Declared Unconstitutional Case

Issue

What are the effects of the Interpretations made by the Judicial Yuan? What remedies may be available against judgments relying upon precedents declared unconstitutional?

Holding

Pursuant to Article 78 of the Constitution, the Judicial Yuan is vested with the power to interpret the Constitution and to make uniform interpretations of statutes and administrative regulations. The Interpretations made by the Judicial Yuan shall be binding upon every government institution and person in the country, and each government institution shall follow these Interpretations when handling relevant matters. Precedents inconsistent with these Interpretations shall, of course, be null and void. Where a statute or regulation, or the interpretation of a statute or regulation, applied in a final judgment is declared inconsistent with the Constitution by an Interpretation made by the Judicial Yuan upon a petition filed by the aggrieved party of the judgment, the Interpretation is grounds for a retrial or an Extraordinary Appeal, and this should no longer be considered a mere different view on the construction of laws. Any part of the Administrative Court Precedent 62-P'an-610 (1973) that is inconsistent with this Interpretation shall no longer be applied.

* Translation by Chi CHUNG, based upon the previous translation by Wellington L. KOO

Reasoning

[1] Pursuant to Article 78 of the Constitution, the Judicial Yuan is vested with the power to interpret the Constitution and provide uniform interpretations with respect to statutes and ordinances. The intent of Article 78 of the Constitution is to have the Judicial Yuan assume the responsibility of clarifying and enunciating the correct meaning of the Constitution and statutes and ordinances. The interpretations thus rendered shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters. Previous precedents that are inconsistent with these Interpretations shall, of course, be null and void.

[2] According to Article 171, Paragraph 1 and Article 172 of the Constitution, a statute is null and void if it is inconsistent with the Constitution, and a regulation is null and void if it is inconsistent with the Constitution or a statute. In the case of a final judgment in which a statute or regulation, or the interpretation of such statute or regulation, applied in such judgment is alleged to be inconsistent with the Constitution and is later considered inconsistent with the Constitution by an Interpretation made by this Judicial Yuan upon the petition made by an interested person, grounds for filing a retrial or an extraordinary appeal with respect to such final judgment then arise. It is expressly stipulated in the Code of Civil Procedure, the Code of Criminal Procedure and the Administrative Litigation Act, and further developed by Interpretations Nos. 135 and 177 of Judicial Yuan, that if the application of laws in rendering a final judgment is manifestly erroneous or unlawful, the aggrieved party is entitled to file for retrial, extraordinary appeal or other legally-prescribed remedy. Therefore, based upon the Interpretation by the Judicial Yuan, the party aggrieved by a judgment is entitled to seek a retrial or other legally-prescribed remedy after the announcement of said Interpretation.

[3] Administrative Court Precedent 62-P'an-610 (1973) states that, "Article 24

of the Administrative Procedure Act provides that a party is entitled to file for a trial with respect to the judgment rendered by this Yuan if any of the circumstances listed under Subparagraphs of Article 496 of the Code of Civil Procedure exists. However, the phrase "an apparent error in the application of law" as referred to in Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure refers to the situations in which the laws applied in the rendition of the judgment in question are inconsistent with the prevailing laws that should have been applied to the case or were applied inconsistently with J.Y. Interpretations or previous precedents. Differences in legal opinions, even if the plaintiff for a retrial presents argument thereto, cannot be considered apparent errors in the application of law for which a re-trial should be granted." If the laws or previous precedents applied in rendering a final judgment are found to be inconsistent with the Constitution by an Interpretation by the Judicial Yuan upon a petition made by individual persons, then there exists grounds for a retrial or extraordinary appeal with respect to such final judgment. The party aggrieved by such final judgment may file for a retrial on the grounds of such Interpretation, and the competent court may no longer hold that the Interpretation presents differences in legal interpretations instead of an apparent error in the application of law and thereby refuse to apply the Interpretation. Any part of the aforementioned Precedent of the Administrative Court inconsistent with this Interpretation shall cease to be applied.

Background Note by Chi CHUNG

The petitioner for this J.Y. Interpretation No. 185, an individual person, filed a petition for Constitutional Interpretation on October 11, 1983. The petitioner argued that the legal effects of constitutional interpretation do not take place on the date of announcement of the J.Y. Interpretation but rather on the date on which the relevant statute was enacted. J.Y. Interpretation No. 185 was

announced on January 27, 1984.

Subsequent J.Y. Interpretation No. 188, announced on August 3, 1984, upon a petition made by the Control Yuan, is related to J.Y. Interpretation No. 185. The holding of J.Y. Interpretation No. 188 is that a uniform interpretation made by the Judicial Yuan with respect to any statute or regulation based upon a petition by a central or local government agency to resolve any difference in opinion held by such agencies on the application of such statute or regulation while discharging its duties shall become effective on the date on which the Interpretation was made, unless otherwise expressly stated therein. Such Interpretation shall bind both the cases giving rise to such difference in opinion and other similar cases dealt with by all other government agencies. If a final judgment, however, has been made with respect to the case that gives rise to such difference in opinion and the viewpoint expressed by the court on the application of any statute or regulation is held by Judicial Yuan Interpretation to be inconsistent with the intent of such statute or regulation, the Judicial Yuan Interpretation may, of course, be invoked to support a motion for a retrial or an extraordinary appeal.

J.Y. Interpretation No. 177 (November 5, 1982)*

Permissibility of Retrial When a Relevant Provision of Law Not Applied Affects the Judgment Case

Issue

Does Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure, permitting an action for retrial if a final judgment is based upon "an apparent error in the application of law," cover a situation in which the court fails to apply a relevant provision of law in its final judgment, and that failure affects the judgment?

Holding

[1] The meaning of "an apparent error in the application of law" described in Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure shall include a case of failure to apply a relevant provision of law in a final judgment if such failure obviously affects the outcome of the said judgment. In such an instance, the protection of the individual persons' rights and interests guaranteed by the Constitution should dictate that the party thus aggrieved be permitted to initiate an action for retrial. To the extent the Supreme Court Precedent 60-T'ai-Tsai-170 (1971) is inconsistent with the above view, it shall no longer be relied upon. On the other hand, when failure to apply a relevant provision of law has no prejudicial effect on the outcome of the judgment, no retrial should be permitted. In this respect, the said Supreme Court Precedent is not inconsistent with the Constitution.

* Translation by Chi CHUNG, based upon the previous translation by Wellington L. KOO

[2] An Interpretation given by this Court in response to a petition brought by individual persons shall also govern the original case for which the individual persons are making the petition.

Reasoning

[1] In its Precedent 60-T'ai Tsai-170 (1971), the Supreme Court held that "the phrase 'an apparent error in the application of law' provided in Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure refers to cases in which the application of a provision of law or regulation in a final judgment is manifestly contrary to a statute, any of the Interpretations by the Judicial Yuan or the Grand Justices Council that may be applicable, or the Precedents of the Supreme Court that may be applicable, but not to cases in which the court fails to apply a relevant provision of law. The foregoing is deduced from a textual interpretation of the said Article 496 and further supported by reference to Article 468 of the said Act, in which 'the failure to apply a legal provision' and 'the improper application of a legal provision' are listed as two different types of 'judgments contrary to law.' " According to Precedent 60-T'ai-Tsai-170 (1971), a litigating party could not pursue relief through a retrial with respect to a final judgment in which the court fails to apply a relevant provision of law.

[2] The phrase "an apparent error in the application of law" shall refer to both a situation in which certain legal provisions that should have been applied were not applied and a situation in which certain legal provisions that should not have been applied were nonetheless erroneously applied. To realize the protection of individual persons' rights and interests under the Constitution, Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure was amended with reference to the Grounds for Second Appeal prescribed in the Code of Civil Procedure and the Grounds for Extraordinary Appeal prescribed in the Code of Criminal Procedure. As the fact that a judgment, or a final judgment, is contrary

to law is one of the statutory grounds for permitting a Second Appeal in civil cases and for permitting an Extraordinary Appeal in criminal cases, such "judgment contrary to law" includes both the failure to apply a provision of law and the improper application of a provision of law. Therefore, the phrase "an apparent error in the application of law" in Article 496 shall also include in its meaning both "the failure to apply a provision of law" and "the improper application of a provision of law."

[3] However, for the aggrieved party to seek relief through retrial in accordance with the aforementioned clauses, the failure to apply a provision of law must have resulted in an apparent impact on the outcome of a judgment. If such a failure has not had an apparent prejudicial effect on the judgment, then no protection is necessary, and, accordingly, it cannot be grounds for a retrial.

[4] In conclusion, if a failure to apply a relevant provision of law in a final judgment has an apparent impact on the outcome of said judgment, it is within the scope of the phrase "an apparent error in the application of law" in Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure. In such an instance, to protect individuals' rights and interests guaranteed by the Constitution, the aggrieved party should be permitted to initiate an action for retrial. To the extent that the Supreme Court Precedent 60-T'ai Tsai-170 (1971) is inconsistent with the above view, it shall no longer be relied upon. On the other hand, when such failure to apply a relevant provision of law has no prejudicial effect on the outcome of the judgment, no retrial should be permitted. In this respect, the said Supreme Court Precedent is not inconsistent with the Constitution.

[5] Furthermore, as Article 4, Paragraph 1, Subparagraph 2 of the Council of Grand Justices Procedure Act allows individual persons to petition for constitutional interpretation, if the resulting Interpretation is in favor of the

petitioner, the resulting Interpretation shall govern the original case for which the individual persons made the petition. The petitioner may seek relief pursuant to the applicable legal procedure.

Background Note by Chi CHUNG

The petitioner bought a house in 1976 (hereafter referred to as the "first sale") and occupied and lived in the house. However, the ownership of the house was not registered in the name of the petitioner in accordance with law. In a foreclosure action against the registered owner of the house in 1978, the petitioner submitted a bid, paid the bid price (hereafter referred to as the "second sale") and became the registered owner thereafter. In 1977, when the house suffered damage, the petitioner, albeit himself not an owner, took the place of the registered owner of the house to sue the alleged tortfeasor. The court dismissed the suit on the basis of the second sale. The petitioner later initiated a proceeding for retrial but lost, as the judgment was considered "passively not applying the law that should have been applied", instead of "an apparent error in the application of law." The petitioner then petitioned to the Constitutional Court for Interpretation.

J.Y. Interpretation Nos. 193, 686 and 209 are related to this Interpretation No. 177, the first Interpretation that deals with the remedies available to petitioners. In J.Y. Interpretation No. 193, announced on February 8, 1985, it was held that "the statement in J.Y. Interpretation No. 177 that 'interpretations announced by the Constitutional Court upon individual persons' petitions shall also be applicable to the original case for which the individuals filed the petitions,' is applicable to the other cases that the petitioner has petitioned for an Interpretations for the same claim that a particular statute or regulation is inconsistent with the Constitution."

J.Y. Interpretation No. 686, announced on March 25, 2011, purports to supplement J.Y. Interpretation No. 193. In Interpretation No. 686, it was held that "when, prior to the date on which the Judicial Yuan makes an Interpretation ('the subject Interpretation') in response to a particular petition ('the subject case'), an individual other than the petitioner of the subject case has also filed a petition to challenge the constitutionality of the same statute or regulation, and the Council of Grand Justices has resolved that such petition satisfies the statutory requirements but has not been consolidated with the subject case as a single case, the holding of Judicial Yuan Interpretation No. 177 that 'an interpretation given by this Yuan in response to a petition shall also be applicable with respect to the original case for which the original petitioner seeks Interpretation' also applies to make the subject Interpretation applicable to the aforesaid individual's case."

J.Y. Interpretation No. 209, announced on September 12, 1986, pertains to the statutory period required for initiating a proceeding of retrial or for filing a motion for retrial. It held that when a court's application of a statute or regulation in a final judgment or court order is held by our interpretation to be inconsistent with the correct intent of a statute or regulation, if the aggrieved party initiated a retrial or filed a motion for retrial under Article 496, Paragraph 1, Subparagraph 1 of the Code of Civil Procedure, the statutory period for initiating such proceeding of retrial or for filing a motion for retrial shall commence from the date on which the Interpretation was announced, which is similar to the rule set out by the proviso of Article 500, Paragraph 2 of the of Code of Civil Procedure, so that the individuals' rights may be adequately protected. If a civil judgment, however, has become final for more than five years, no action of retrial may be instituted and no motion for retrial may be filed under Article 500, Paragraph 3 of the Code of Civil Procedure on the grounds of an apparent error in the application of a statute or regulation.

J.Y. Interpretation No. 741 (November 11, 2016)*

Scope of Original Cases Eligible for Extraordinary Remedies under Interpretations Declaring Laws Unconstitutional but Valid for a Prescribed Period of Time Case

Issue

When an individual person petitions this Court for an interpretation of the Constitution and this Court declares a statute or regulation that has been applied by the court of last instance in its final judgment or ruling to be unconstitutional but invalid only after the expiration of a prescribed period of time, may the petitioner rely on the Interpretation announced by this Court to seek a retrial of the case or other redress? May the Prosecutor General rely on the Interpretation rendered by this Court to make an extraordinary appeal?

Holding

When this Court, upon a person's petition for an Interpretation of the Constitution, declares a statute or regulation that has been applied by a court of last instance in its final judgment or ruling unconstitutional but invalid only after expiration of a prescribed period of time, the petitioner may rely on the Interpretation rendered by this Court to seek a retrial of the case or other redress. The Prosecutor General may rely on the Interpretation rendered by this Court to make an extraordinary appeal. The purpose of this is to protect the rights and interests of the petitioner for a constitutional interpretation. The same also applies to the original cases that led to the constitutional interpretations that were made before J.Y. Interpretation No. 725. Thus, J.Y. Interpretation No. 725 is thereby

* Translation and Note by Chi CHUNG

supplemented.

Reasoning

[1] When the litigating parties are uncertain about an Interpretation rendered by the Constitutional Court as applied by a court of last instance in its final judgment or ruling and petition for supplementary interpretation, the Constitutional Court should consider whether there exist legitimate grounds, and, if there are legitimate grounds, it should consider the case on its merits rather than dismiss the petition as a matter of procedure (*see* J.Y. Interpretation No. 503). The petitioner in this case concerning urban renewal appealed to the Supreme Administrative Court, which, as the court of last instance, applied J.Y. Interpretation No. 725 (hereinafter referred to as the disputed Interpretation) in its final ruling. The disputed Interpretation does not explicitly define the phrase "petitioner's case for which he or she is requesting an interpretation of the Constitution". Therefore, this Court ruled favorably in regard to the petition for a supplementary interpretation.

[2] J.Y. Interpretations Nos. 177 and 185 allow petitioners for constitutional interpretations to rely on the constitutional interpretations that rule in their favor when seeking a retrial or extraordinary appeal. As J.Y. Interpretations Nos. 177 and 185 did not clearly set out whether a constitutional interpretation declaring a statute or regulation unconstitutional but invalid only after a prescribed period affects the disposition of the case for which the petitioner sought a constitutional interpretation, the disputed interpretation supplements J.Y. Interpretations Nos. 177 and 185 as follows: "When this Court, upon a person's petition for a constitutional interpretation, declares a statute or regulation that has been applied by a court of last instance in its final judgment or ruling unconstitutional but invalid only after the expiration of a prescribed period of time, the petitioner may rely on the interpretation rendered by this Court to seek a retrial of the case or

other redresses. The Prosecutor General may rely on the Judicial Interpretation to make an extraordinary appeal. The relevant courts may not dismiss such a retrial or extraordinary appeal for the reason that the disputed statute or regulation is still in effect. If a specific remedy is announced in the Judicial Interpretation for the case for which the petitioner sought a constitutional interpretation, such announcement should be followed. If no such announcement is made, then the relevant courts should wait for the promulgation of a new statute or regulation and make the judgment or ruling in accordance with that new statute or regulation after it takes effect. J.Y. Interpretations Nos. 177 and 185 are thereby supplemented."

[3] When this Court declares a statute or regulation unconstitutional, the petitioner may rely on the constitutional interpretation rendered by this Court to seek a retrial of the case for which the petitioner sought a constitutional interpretation, or the Prosecutor General may file an extraordinary appeal or take other legal actions. The purpose of granting remedies in the case for which the petitioner sought a constitutional interpretation is to protect the rights and interests of petitioners and to recognize their contributions to upholding the Constitution (*see* the Reasoning part of the disputed Interpretation). This purpose does not differ depending on whether the unconstitutional statute or regulation becomes invalid immediately or after the expiration of a prescribed period of time. The disputed Interpretation, therefore, announced that when a statute or regulation applied by a court of last instance in its final judgment or ruling becomes invalid after the expiration of the prescribed period of time, the petitioner may seek a retrial and other forms of redress for the case for which the petitioner sought a constitutional interpretation. Although the disputed Interpretation did not explicitly define the phrase "the case for which the petitioner sought a constitutional interpretation", the Holding part of the disputed Interpretation stated that "this Court, at the request of an individual applying for

a constitutional interpretation, declares that the statute or regulation applied by a court of last instance in its final judgment or ruling becomes invalid after the expiration of the prescribed period of time." Therefore, all cases giving rise to Judicial Interpretations that declare a statute or regulation applied by a court of last instance in its final judgment or ruling invalid after the expiration of a prescribed time period should be given a retrial or other remedy. In addition, the disputed Interpretation sets out a systematic rule that applies to all Judicial Interpretations made by this Court that declare a statute or regulation invalid after the expiration of a prescribed period of time, including Judicial Interpretations that were made before J.Y. Interpretation No. 725. All of these petitioners for such Judicial Interpretations may seek redress in the cases for which the petitioner sought a constitutional interpretation, so that the rights and interests of the petitioners for J.Y. Interpretations will be protected. The disputed Interpretation does not limit itself to the petitioner for the disputed Interpretation; rather, it enables all petitioners for Judicial Interpretations to obtain the redresses that they deserve after the statute or regulation was declared unconstitutional and invalid following the expiration of the prescribed period of time. The aforementioned understanding is consistent with the right to litigate protected by the Constitution, and it recognizes the petitioners' contributions to upholding the Constitution. J.Y. Interpretation No. 725 is, hereby, supplemented. Of course, courts still must review whether the petitioners satisfy the relevant filing deadlines and whether other procedural requirements for retrial have been met, as well as judge whether the petitioners' cases have merit.

[4] The petitioner also petitions for a supplementary interpretation of J.Y. Interpretation No. 709, but the petitioner fails to point out specifically which part of Interpretation No. 709 is unclear in language or unsound in reasoning. Therefore, the application for supplementary interpretation of Interpretation No. 709 is inconsistent with Article 5, Paragraph 1, Subparagraph 2 of the

Constitutional Court Procedure Act and, therefore, it is dismissed in accordance with Article 5, Paragraph 3 of the same Act.

Background Note by the Translator

Mr. PENG and three other petitioners jointly appealed their case to the Supreme Administrative Court, but their appeal was dismissed by Judgment 100-Pan-2092 (2011). One of the four petitioners applied to this Court for Judicial Interpretation. On April 26, 2013, this Court rendered J.Y. Interpretation No. 709, declaring that Article 10, Paragraphs 1 and 2 and the first half of Article 19, Paragraph 3 of the Urban Renewal Act were unconstitutional. J.Y. Interpretation No. 709 required the relevant government agencies to review and revise such provisions within one year of the announcement of Interpretation No. 709. The petitioners instituted an action for retrial. The Supreme Administrative Court dismissed the action for retrial by Judgment 102-Pan-580 (2013) on September 12, 2013, on the grounds that the unconstitutional provisions remained valid within the one-year period prescribed by Interpretation No. 709. This Court announced J.Y. Interpretation No. 725 on October 24, 2014, and the petitioners relied upon J.Y. Interpretation No. 725 to initiate an action for retrial. The action for retrial was dismissed by the Supreme Administrative Court in Ruling 104-Ts'ai-470 (2015).

Mr. CHEN and two other petitioners appealed to the Supreme Administrative Court, but the case was dismissed in Judgment 100-Pan-2004 (2011). One of the three petitioners applied to this Court for Judicial Interpretation. This Court, on April 26, 2013, rendered J.Y. Interpretation No. 709, declaring unconstitutional Article 10, Paragraphs 1 and 2 and the first half of Article 19, Paragraph 3 of the Urban Renewal Act. J.Y. Interpretation No. 709 required the relevant government agencies to review and revise the said provisions within one year of the announcement of Interpretation No. 709. The

petitioners initiated an action for retrial. The Supreme Administrative Court dismissed the action for retrial in Judgment 102-Pan-538 (2013) on August 23, 2013, on the grounds that the unconstitutional provisions remained valid within the one-year period prescribed by Interpretation No. 709. This Court announced J.Y. Interpretation No. 725 on October 24, 2014, and the petitioners relied upon Interpretation No. 725 to initiate an action for retrial. The action for retrial was dismissed by the Supreme Administrative Court in Ruling 104-Ts'ai-546 (2015).

The Constitutional Court released J.Y. Interpretation No. 725 on October 24, 2014. It was established in J.Y. Interpretation No. 725 that when the Constitutional Court declares a statute or regulation unconstitutional, the petitioner may rely on the constitutional interpretation rendered by the Constitutional Court to seek a retrial of the original case for which the petitioner sought a constitutional interpretation, or the Prosecutor General may file an extraordinary appeal or take other legal actions. J.Y. Interpretation No. 725, however, does not state explicitly whether the petitioners for Interpretations announced before J.Y. Interpretation No. 725 could also rely upon Interpretation No. 725 to seek a retrial of the original case.

In this Interpretation No. 741, the Constitutional Court addresses the above issue and reasons as follows: The purpose of granting remedies in the case for which the petitioner sought a constitutional interpretation is to protect the rights and interests of petitioners and to recognize their contributions to upholding the Constitution. This purpose does not differ according to whether the unconstitutional statute or regulation becomes invalid immediately or after the expiration of a prescribed period of time. Nor does the holding of J.Y. Interpretation No. 725 distinguish between Interpretations made before or after Interpretation No. 725. Therefore, all cases giving rise to Judicial Interpretations that declare a statute or regulation applied by a court of last instance in its final judgment or ruling invalid after the expiration of a prescribed period of time

should be given a retrial or other remedies. In addition, J.Y. Interpretation No. 725 set out a systematic rule that applies to all Judicial Interpretations made by this Court that declare a statute or regulation invalid after the expiration of a prescribed period of time, including Judicial Interpretations that were made before J.Y. Interpretation No. 725. All the petitioners for these Judicial Interpretations may seek redress in the cases for which the petitioners sought constitutional interpretations so that the rights and interests of the petitioners for Judicial Interpretations are protected. In addition, in J.Y. Interpretation No. 741, the Constitutional Court holds that the aforementioned understanding is consistent with the right to litigate as protected by the Constitution.

J.Y. Interpretation No. 599 (June 10, 2005)*

Injunction against Mandatory Fingerprinting for Identity Cards Case

Issue

Is it necessary to enjoin the application of Article 8 of the Household Registration Act by granting an injunction?

Holding

[1] The Justices of the Judicial Yuan (the Constitutional Court) are empowered by the Constitution to independently interpret the Constitution and exercise jurisdiction over constitutional disputes. The provisional remedy [injunctive relief] system is one of the core functions of the judicial power, irrespective of whether it involves constitutional interpretations or adjudications, or concerns civil, criminal or administrative adjudications. To ensure the effectiveness of the interpretations or judgments rendered by the Constitutional Court, the Court should be able to exercise this function. In the event of any continuance of doubt or dispute regarding constitutional provisions, the application of a law or regulation in dispute, or the enforcement of a judgment from which a constitutional dispute originated, which may cause irreparable harm to any fundamental right of the people, fundamental constitutional principle, or any other major public interest, the Constitutional Court may, on the motion of the petitioner, grant provisional remedies to provide injunctive relief prior to the delivery of an interpretation if it is imminent and necessary and no other means is available to prevent the harm, and the interests in granting the provisional

* Translation by Ting-Chi LIU, based upon the previous translation by Chung-Hsi Vincent KUAN

remedies clearly outweigh those in not granting the remedies. Accordingly, the motion for an injunction against Article 8, Paragraphs 2 and 3 of the Household Registration Act should be granted. The application of said provisions and relevant regulations, stipulating that the new national identity card will not be issued or replaced without the applicant being fingerprinted, should be enjoined pending the interpretation of this Court. This injunction shall cease to be in effect either upon the delivery of the interpretation for the case at issue or, at the latest, upon the expiry of six months as of the date of the delivery of this injunction.

[2] Furthermore, it should be noted that as of July 1, 2005, with regard to those people who, by law, shall or may apply for national identity cards, or who, for a legitimate reason, apply for the reissue or replacement of the same, the authorities concerned shall still produce and issue the national identity card in its present format or promptly devise other expedient measures so as to enable such applicants to obtain a document proving their identity while the application of Article 8, Paragraphs 2 and 3 of the Household Registration Act is enjoined.

[3] The motion by the Petitioner for an injunction in respect to Article 8, Paragraph 1 of the Household Registration Act shall be overruled.

Reasoning

[1] The Justices of the Judicial Yuan (the Constitutional Court) are empowered by the Constitution to independently interpret the Constitution and exercise jurisdiction over constitutional disputes. The provisional remedy [injunctive relief] system is one of the core functions of the judicial power, irrespective of whether it involves constitutional interpretations or adjudications, or concerns civil, criminal or administrative adjudications. To ensure the effectiveness of the interpretations or judgments rendered by the Constitutional Court, the Court should be able to exercise this function. In the event of any continuance of doubt

or dispute regarding constitutional provisions, the application of a law or regulation in dispute, or the enforcement of the judgment that a constitutional dispute originated from, which may cause irreparable harm to any fundamental right of the people, fundamental constitutional principle or any other major public interest, the Constitutional Court may, on the motion of the petitioner, grant provisional remedies to provide injunctive relief prior to the delivery of an interpretation if it is imminent and necessary and no other means is available to prevent the harm, and the interests in granting the provisional remedies clearly outweigh those in not granting the remedies. The same rationale has been made clear by this Court in J. Y. Interpretation No. 582. The current case has been brought by more than one-third of the members of the Legislative Yuan, who consider that Article 8 of the Household Registration Act runs afoul of the Constitution [have doubts about the constitutionality of Article 8 of the Household Registration Act], and who have petitioned this Court for a constitutional interpretation based on Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act. The Petitioner also sought to temporarily enjoin the application of Article 8 of the Household Registration Act, pending the interpretation of this Court.

[2] Fingerprints are important personal biometric features, and fingerprint verification is a method to verify a person's identity. Article 8 of the Household Registration Act as amended and promulgated on May 21, 1997, states, "Any national who reaches fourteen years of age shall apply for a national identity card; any national who is under fourteen years of age may apply for the same (Paragraph 1). When applying for a national identity card pursuant to the preceding section, an applicant shall be fingerprinted for record keeping, provided that no applicant shall be fingerprinted until he or she reaches the age of fourteen (Paragraph 2). No national identity card will be issued unless the applicant is fingerprinted in accordance with the preceding section (Paragraph

3).” Whether the foregoing provisions may be the basis for periodic and nation-wide replacement of national identity cards by the government, whether the aforesaid Paragraphs 2 and 3 still apply when there is a nation-wide replacement of the identity cards, whether fingerprinting can be a condition of the issuance of national identity cards, and whether mandatory collection and storage of fingerprint information infringes upon individuals’ fundamental rights guaranteed by the Constitution, all of these questions may cause major disputes in constitutional interpretation. The Ministry of the Interior issued an Implementation Plan for the Processing of the Nation-wide Replacement of National Identity Cards in 2005 based on its Letter No. Tai-Nei-Hu-0940072472 of March 4, 2005, whereby the replacement of identity cards is to begin as of July 1, 2005. Consequently, starting from July 1, 2005, people must be fingerprinted in order to receive the new national identity cards. Therefore, the harm that may result therefrom is widespread and imminent, and it cannot be prevented by any other means. The government contended that in light of the long period for the replacement of new national identity cards, those who are reluctant to subject themselves to fingerprinting may await the result of the constitutional interpretation of the current case. However, since people have a right as well as the practical need to apply for a new national identity card or apply for the replacement of the same as of July 1, 2005, the government’s argument that the harm that may result from the fingerprinting requirement is not imminent should be rejected. In light of the fact that the legislature has yet to establish a provisional remedy system in respect of the constitutional interpretation procedure, this Court, in exercising its authority to interpret the Constitution, shall consider whether the petition for an injunction should be granted in accordance with J.Y. Interpretation No. 585. Assuming that Article 8, Paragraphs 2 and 3 of the Household Registration Act are later found to be unconstitutional by this Court, the substantial harm to individuals’ fundamental

rights that may result from the collection and storage of their fingerprints by the authorities concerned should be regarded as irreparable. In addition, implementing the collection and storage of fingerprint files by the government will necessarily incur administrative costs such as costs of human and material resources, and if the fingerprint files are to be destroyed subsequently due to the fact that the underlying law is found unconstitutional, the considerable amount of administrative resources so wasted will negatively affect the public interest to a great extent.

[3] On the other hand, the result of the temporary enjoinment of Article 8, Paragraphs 2 and 3 of the Household Registration Act pending the interpretation of the current case, is merely the extension of the status quo for the household registration administration system. Even if this Court later considers the substantive disputes of the case and concludes that the statutory provisions at issue are constitutional, no major interruption or harm will be caused to the household registration system. As for the people who already hold national identity cards, their daily activities will not be adversely affected either. Moreover, even though the authorities concerned must devise certain expedient measures and thus incur administrative costs, the potential harm remains relatively insignificant when compared with the harm [that may be caused by the disputed provisions] to the fundamental rights of the people. Lastly, during the period of the injunction, people can only apply for the issuance or replacement of the national identity cards in the present format based on this Interpretation. In the event that the disputed provisions are found to be constitutional by this Court, the authorities concerned should proceed to issue the new national identity cards, and there would be no problem in collecting the fingerprints of people who received the cards in the present format at that time. Given the above, the motion by the Petitioner for an injunction against Article 8, Paragraphs 2 and 3 of the Household Registration Act should be granted. The application of said provisions

and relevant regulations, stipulating that the new national identity card will not be issued or replaced without the applicant being fingerprinted, should be enjoined pending the interpretation of this Court. This injunction shall cease to be in effect either upon the delivery of the interpretation for the case at issue or, at the latest, upon the expiry of six months as of the date of the delivery of this injunction.

[4] Furthermore, it should be noted that as of July 1, 2005, with regard to those people who, by law, shall or may apply for national identity cards or who, for a legitimate reason, apply for the reissuance or replacement of the same, the authorities concerned shall still produce and issue the national identity card in the present format or promptly devise other expedient measures so as to enable such people to obtain a document proving their identity while the application of Article 8, Paragraphs 2 and 3 of the Household Registration Act is enjoined.

[5] The national identity card is an important means to verify the identity of citizens. For those people who have not yet received national identity cards or who lose possession of their cards, the inability to obtain identity cards will cause them immediate and significant inconveniences in their social life. In addition, Article 8, Paragraph 1 of the Household Registration Act is merely a general provision, which prescribes the age for the right and obligation to obtain a national identity card, and the Petitioner has failed to elaborate on how Article 8, Paragraph 1 of the Household Registration Act infringes upon the fundamental rights guaranteed by the Constitution. Accordingly, the motion by the Petitioner for an injunction in respect to Article 8, Paragraph 1 of the Household Registration Act shall be overruled.

Background Note by Ting-Chi LIU

Article 8, Paragraphs 2 and 3 of the Household Registration Act were

amended and promulgated on May 21, 1997, stipulating that when applying for a national identity card, an applicant shall be fingerprinted for record keeping, and no national identity card will be issued unless the applicant is fingerprinted in accordance with the sections. The Executive Yuan believed that the above-mentioned provisions intruded upon the basic rights of the people and thus submitted a bill to amend Article 8 of the Household Registration Act to the Legislative Yuan in accordance with the Resolution of its Conference No. 2934, dated April 6, 2005. However, the legislative process was stalled, and the Bill was not referred to the committee for consideration before the end of the First Session of the Sixth Legislative Yuan. As a result, it was not possible for the Bill to finish the legislative process before the scheduled date (July 1, 2005) for the Ministry of the Interior to issue the new national identity cards in accordance with the then-existing Article 8 of the Household Registration Act.

Mr. Ching-Te LAI and eighty-four other members of the Legislative Yuan petitioned the Constitutional Court for a constitutional interpretation based on Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act and sought to temporarily enjoin the application of Article 8 of the Household Registration Act, pending the interpretation of the Court. However, J.Y. Interpretation No. 599 only addressed the issue on whether said provision should be enjoined.

J.Y. Interpretation No. 599 is a landmark decision in which the Constitutional Court for the first time temporarily enjoined the application of a law under review, pending the announcement of its interpretation. It is also the only case, so yet, in which the Court has granted such a petition. It should be noted that the provisional remedy system for constitutional interpretation was recognized earlier by the Court in J.Y. Interpretation No. 585, and the petition for an injunction was denied in that case even though the Constitutional Court Procedure Act was silent on such authority. It was not until the promulgation of

the Constitutional Court Procedure Act of 2019 did the legislature explicitly stipulate the Court's authority and relevant legal elements to make a ruling.

For an extended period of time, whether the Justices of the Constitutional Court enjoyed the status of judges prescribed and protected by the Constitution was highly contested. This was because the Justices serve a fixed term rather than life tenure, exercise their authority primarily in a conference setting, not in an open court, and their binding rulings are called interpretations instead of judgments. J.Y. Interpretation No. 599 affirms that the Constitutional Court is a judicial institution and exercises judicial power, including that of provisional remedies, just as civil, criminal and administrative courts do. Together with J.Y. Interpretation No. 585, these interpretations paved the way to an even more significant decision. Only two interpretations later, in J.Y. Interpretation No. 601, the Constitutional Court settled the dispute by explicitly affirming that Justices of the Constitutional Court are judges in the constitutional sense and should enjoy similar constitutional protection afforded to ordinary judges, such as Article 81 of the Constitution, which states that "…No judge shall be removed from office unless he/she has been found guilty of a criminal offense or subjected to disciplinary measures, or declared to be under interdiction. No judge shall, except in accordance with the law, be suspended or transferred or have his/her salary reduced."

J.Y. Interpretation No. 328 (November 26, 1993)*

The Boundaries of National Territory Case

Issue

Can the Constitutional Court interpret the delimitation of the boundaries of national territory?

Holding

Instead of enumerating its components, Article 4 of the Constitution provides that the national territory of the Republic of China is determined "according to its existing national boundaries." Based on political and historical reasons, a special procedure is also required for any change of territory. The delimitation of national territory according to its history is a significant political question, and is thus beyond the reach of judicial review.

Reasoning

How to delimit the boundaries of national territory is purely a political question. The delimitation of the boundaries has been recognized as "an act of state" and is not subject to judicial review according to the constitutional principle of separation of powers. Article 4 of the Constitution provides: "The territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly." Instead of enumerating the components of national territory, a general provision was adopted, and a special procedure for any change of national territory was

* Translation by Marietta Sze-Chie FA, based upon the previous translation by Jyh-Pin FA

concurrently provided. It is understandable that this legislative policy was based upon political and historical reasons. Since the meaning of "according to its existing national boundaries" is closely related to the delimitation of national territory, accordingly, it is a significant political question. Based on the above explanation, this petition for interpretation is denied.

Background Note by Marietta Sze-Chie FA

J.Y. Interpretation No. 328 is the first case that adopted "political-question" doctrine. It set a precedent that the definition of existing national territorial boundaries under Article 4 of the Constitution is a matter of political question, which is not subject to judicial review.

The "political-question" doctrine has been developed by the Constitutional Court. Based on this doctrine, issues involving a political question or its similar concept should be left for political consideration by the political branches (including the executive and legislative branches), and are thus not to undergo judicial review. The "political-question" doctrine was mentioned again in J.Y. Interpretation No. 419. J.Y. Interpretation No. 419 involved the issue of whether the Vice President may hold the office of Premier of the Executive Yuan concurrently. The Constitutional Court held that it was not a political question, but rather a question of law concerning the validity of holding more than one public office under the Constitution. Therefore, the issue of whether the Vice President could hold the office of Premier of the Executive Yuan concurrently was an issue that was subject to substantive judicial review.

J.Y. Interpretation No. 553 (December 20, 2002)*

Judicial Review and the Local Government Act Case

Issue

Is the decision of the Taipei City Government to postpone the election of its chiefs of villages legal?

Holding

[1] The Taipei City Government filed a petition in accordance with Article 75, Paragraph 2 of the Local Government Act, alleging that the governing authority of the central government, the Ministry of the Interior and subsequently the Executive Yuan, erroneously relied on Article 75, Paragraph 1 of the above Act by revoking the municipality's decision to postpone the election of its chiefs of villages for the reason that such a decision was in violation of Article 83 of the same Act. Because the city of Taipei is a protected local self-government entity under Article 118 of the Constitution and in light of the fact that the focus of the present petition is the delineation of jurisdictional boundaries and the dispute resolution mechanism between the central and local governments, it is not a controversy merely involving the interpretation of statutes among different government agencies. To the contrary, it gives rise to a question at the constitutional level as to connections between democratic principles and the autonomy of local governments. Consequently, a constitutional interpretation is warranted.

[2] Article 83, Paragraph 1 of the Local Government Act stipulates, "In the

* Translation by Ching-Yi LIU, based upon the previous translation by Andy Y. SUN

event an election is needed to fill the office of municipality councilmen, municipality mayors, county councilmen, county magistrates, township representatives, township mayors, and chiefs of villages due to term expiration or vacancy created, such an election may be postponed in light of special circumstances." Conceptually, the so-called "special circumstances" cannot possibly be completely illustrated by listing every potential specific event, and shall be generally considered to be unforeseeable and extraordinary events that lead to the result that an election is not held at the legally mandated time. It also refers to situations where sufficient evidence suggests that an incorrect outcome or clear and present danger may ensue, or that may be contrary to reasonable and necessary administrative purposes for the realization of autonomy of local governments, if and when the election is to be held on time. Furthermore, "special circumstances" are not limited to situations that have national impacts or that have impacts on the entire jurisdiction within a county or city, that is, specific events occurring within a specific electoral district that fit into consideration of the proportionality principle are also included. The indeterminate legal concept employed in the Provision at issue leaves a certain degree of discretion to the authorized governing agency, since matters of local self-government are different from matters being delegated from the governing agency. In the former situation, the agency's supervisory authority is confined only to the issue of legality, which is similar to the court's exercise of its investigatory power in an administrative lawsuit (s*ee* Article 79, Paragraph 3 of the Administrative Appeal Act). In the latter situation, in addition to the question of legality, the governing agency may exercise a comprehensive supervisory power over whether an administrative practice is in conformity with its objectives. Since the present petition is related both to matters of local self-government and the indeterminacy of legal concepts, the governing agency should, in accordance with the law, respect the judgment of legality made by the

local governing entity while retaining its power to revoke or modify that judgment or decision made by the local governing entity, if it is rendered arbitrarily or capriciously or on other unlawful grounds.

[3] One of the purposes of the Constitution in establishing this constitutional interpretation system is to authorize the constitutional interpretation body with the power of statutory review (s*ee* Article 78 of the Constitution). Except for those matters involving the potential dissolution of a political party due to its unconstitutional acts, whose decision is to be rendered by the Constitutional Court consisting of all the Justices (*see* Article 5, Paragraph 4 of the Additional Articles of the Constitution), such power does not include the review of the constitutionality or legality of a specific administrative disposition. In this petition, since the Executive Yuan's decision to override the holding to postpone the election of chiefs of villages by the Taipei City Government touches on the fact findings of a specific case and statutory interpretation on the applicability of a national statute over local self-governance, it is considered a disposition that carries legal consequences, or an administrative disposition. This is, therefore, a public law dispute between the central government and a local government. Because this petition indeed concerns the review of lawfulness of an administrative disposition, and has been initiated for the sake of preserving the self-governance function of local governing entities, the resolution of such a dispute certainly should follow administrative dispute resolution proceedings. As a result, when the Taipei City Government considers that the Executive Yuan's revocation decision has encroached upon its self-governance power or other public law interests, it should file a grievance petition in accordance with Article 1, Paragraph 2 of the Administrative Appeal Act and Article 4 of the Administrative Procedure Act, as well as request the agency and the Administrative Court having jurisdiction over the matter to render a final ruling on the legality of such an administrative disposition.

Reasoning

[1] The Taipei City Government filed the present petition in accordance with Article 75, Paragraph 2 of the Local Government Act, alleging that the central governing authority, the Ministry of the Interior and subsequently the Executive Yuan, erroneously relied on Article 75, Paragraph 1 of that Act by revoking the municipality's decision to postpone the election of chiefs of villages for the reason that such a decision was in violation of Article 83 of the Act. Because the city of Taipei is a protected local self-government entity under Article 118 of the Constitution and in light of the fact that the focus of this petition is the delineation of jurisdictional boundaries and the dispute resolution mechanism between the central and local governments, this petition is not a controversy involving the interpretation of statutes among different government agencies. To the contrary, it gives rise to a question at the constitutional level as to connections between democratic principles and the autonomy of local governments. As a result, an interpretation is warranted. This petition concerns a local self-government dispute between the central government and a local government over the interpretation of the applicable national statutes, which does not fall within the scope of J.Y. Interpretation No. 527 and has no bearing on that interpretation. The petition is hereby granted in accordance with Article 75, Paragraph 8 of the Local Government Act.

[2] Under Article 83, Paragraph 1 of the Local Government Act, the so-called "special circumstances" cannot possibly be completely illustrated by listing every potential specific event, and shall be generally referred to as unforeseeable and extraordinary events that lead to the result of an election not being held at a legally mandated time. It also refers to situations where sufficient evidence suggests that an incorrect outcome or clear and present danger may ensue, or that may be contrary to reasonable and necessary administrative purposes for the realization of autonomy of local governments, if and when the election is to be

held on time. Furthermore, "special circumstances" are not limited to situations that have national impacts or that have impacts on the entire jurisdictions within a county or city. Specific events occurring within a specific electoral district that fit into consideration of the proportionality principle are also included. The indeterminate legal concept employed in the Provision at issue leaves a certain degree of discretion to the authorized governing agency, since matters of local self-government are different from matters being delegated from the governing agency. In the former situation, the agency's supervisory authority is confined only to the issue of legality, which is similar to the court's exercise of its investigatory power in an administrative litigation (s*ee* Article 79, Paragraph 3 of the Administrative Appeal Act). In the latter situation, in addition to the question of legality, the governing agency may exercise a comprehensive supervisory power over whether an administrative practice is in conformity with its objectives. Since the present petition is related both to matters of local self-government and indeterminacy of legal concepts, the governing agency should, in accordance with the law, respect the judgment of legality made by the local governing entity while retaining its power to revoke or modify that judgment or decision made by the local governing entity, if it is rendered arbitrarily or capriciously or on other unlawful grounds. Theoretically, several factors may be helpful in the determination of the level of scrutiny for this type of case: 1. The nature of the issue determines the level of scrutiny. The degree of deference to the original judgment on the interpretation of solely indeterminate legal concepts can be different from those simultaneously involving science and technology, environmental protection, medical pharmacology, capability or aptitude tests. A higher level of scrutiny must be adopted if the original judgment concerns the fundamental rights of the people. 2. Whether the head of the administrative agency is solely in charge of the original decision-making process or it is a resolution reached by a professional and independent committee. 3. Whether

there is a required legal process of decision-making and whether the decision is made in compliance with the required legal process the decision maker. 4. Whether there is any error of subsumption when the legal concept involves a matter of fact. 5. Whether the interpretation of the legal concept clearly contradicts the rules of interpretation or norms of a higher hierarchy. 6. Whether the decision is made while failing to take into consideration other important factors. While there is a design for the election of chiefs of villages under exceptional circumstances such as the selection process stipulated in Article 59, Paragraph 2 of the Local Government Act, the usual procedure for the investiture of chiefs of villages should not preclude the application of the fundamental democratic principles of the Constitution. At the same time, whether this controversy is sufficient to be a "special circumstance" for a postponed election shall be taken into account so that the balance between democracy and the protection of autonomy of local governments can be maintained. As the application of an indeterminate legal concepts here is inseparable from the administrative disposition revoked by the governing agency, the Administrative Court should grant the petition for review and render its judgment in accordance with the result of this interpretation while taking into consideration the totality of the circumstances, if and when an administrative action is brought before the Administrative Court.

[3] This petition is a controversy of public law between the governing agency of the central government and the Taipei City Government, who challenged the decision made by the Executive Yuan, which, in accordance with Article 75, Paragraph 2 of the Local Government Act, revoked its decision to postpone the election of chiefs of villages. This petition is permitted in accordance with Article 75, Paragraph 8 of the Local Government Act. However, the entire focus of this petition is about the constitutionality or legality of a reversal of a decision made by a central supervisory agency, and the purpose of the Constitution in

establishing a constitutional interpretation system is to authorize the constitutional interpretation body with the power of statutory review (s*ee* Article 78 of the Constitution). Except for those matters involving the potential dissolution of a political party due to its unconstitutional acts, whose decision is to be rendered by the Constitutional Court consisting of all the Justices (s*ee* Article 5, Paragraph 4 of the Additional Articles of the Constitution), such power does not include the review of the constitutionality or legality of a specific administrative disposition (s*ee* the Reasoning of J.Y. Interpretation No. 527). In this petition, since the Executive Yuan's decision to interfere with the exercise of local self-government and override the Taipei City Government's decision to postpone the election of chiefs of villages touches on the specific fact findings and statutory interpretations on the applicability of a national statute over the exercise of local self-government, it is considered a disposition that carries legal consequences, or an administrative disposition, instead of merely an exchange of viewpoints between administrative agencies, or a supervisory agency giving an order to one of its subordinate agencies. As such, the proper dispute resolution process for the local government is to engage in an administrative litigation on the subject matter of legality over whether it is legal for the supervisory agency to give an order to one of its subordinate agencies. The subject matter of the litigation is the controversy between the central government and the local government over the question of legality arising from the exercise of autonomy of the local government. Furthermore, the local government has a vested legal interest in whether the supervisory action, taken with the view of legality, of the central supervisory agency is legal. In this petition, the Mayor of the Taipei City Government shall represent the local government to present an administrative litigation challenging the legality of the supervisory agency's action and requesting the removal of that action in accordance with Article 1, Paragraph 2 and Article 4 of the Administrative Procedure Act. The proper agency and

administrative court having jurisdiction over the petition shall receive the case and render judgment accordingly. The present petition may be considered as an objection to the original administrative disposition and the statute of limitations for administrative petition has not been tolled (Cf. Yuan Tzu Interpretation No. 422 and Article 61 of the Administrative Appeal Act). The statute of limitations shall begin to run as of the date this Interpretation is publicly issued. However, even though the Local Government Act has indeed provided some supervisory means, the lack of mechanisms for communication and coordination between local governments and their supervisory agencies in the institutional design of the Local Government Act leads to the failure of the functions of the autonomy of the local government. For the sake of the institutional protection offered by the Constitution over the autonomy of the local government, the legislature ought to strengthen appropriate mechanisms in accordance with the meaning and purpose of the Constitution.

[4] With regard to the petitioner's assertion that Article 75, Paragraph 2 of the Local Government Act is likely to be unconstitutional, its review is denied as this portion of the petition is not in conformity with Article 5, Paragraph 1 of Constitutional Court Procedure Act. At the same time, the petition for uniform interpretation is related to those already being interpreted and shall not be further reviewed by this Court.

Background Note by Ching-Yi LIU

The Taipei City Government filed a petition alleging that the governing authority of the central government, the Ministry of the Interior and subsequently the Executive Yuan, erroneously revoked its decision to postpone the election of its chiefs of villages. The city of Taipei is a protected local self-government entity under Article 118 of the Constitution, and the focus of the petition is the delineation of jurisdictional boundaries and the dispute resolution mechanism

between the central and local governments. Therefore, it is not a controversy merely involving the interpretation of statutes among different government agencies. To the contrary, it gives rise to a question at the constitutional level as to connections between democratic principles and autonomy of local governments.

J.Y. Interpretation No. 553 addresses a controversy of local self-government between the central and local governments over the interpretation of the applicable national statutes. The petition, filed in regard to an issue relating to the so-called "special circumstances" stipulated by Article 83, Paragraph 1 of the Local Government Act, is related both to matters of local self-government and indeterminate legal concepts. The proper dispute resolution process for this case is an administrative litigation on the subject matter of legality over whether it is legal for the supervisory agency to give an order to one of its subordinate agencies. However, even though the Local Government Act did indeed provide some supervisory means, the lack of mechanisms for communication and coordination between local governments and their supervisory agencies in the institutional design of the Local Government Act led to the failure of the functions of the autonomy of the local government. In addition, the Constitutional Court emphasized that in order to fulfill the institutional protection for the autonomy of the local government, the legislature ought to strengthen appropriate mechanisms in accordance with the meaning and purpose of the Constitution.

It is noteworthy to also mention that J.Y. Interpretation No. 467, one of the important constitutional interpretations on matters regarding local self-government and clarifying the status of the provincial level of government after the 1997 Amendments to the Constitution came into effect. J.Y. Interpretation No. 467 affirmed that even after the 1997 constitutional reform, provincial governments were still local governments. However, it is equally noticeable that

the provincial level of government no longer has jurisdiction over matters regarding local self-government and has been deprived of the organic right of self-government; it is not recognized as a public legal person of local self-government. However, if in the future the Legislative Yuan, in accordance with the spirit and purpose of the Amendments to the Constitution, empowers the provincial government to exercise exclusive power of local self-government and to have certain legal rights and responsibilities, it certainly may acquire the status of a public legal person.

J.Y. Interpretation No. 527 (June 15, 2001)*

Petition for Interpretation of the Local Government Act Case

Issue

What are the meanings of the applicable provisions of the Local Government Act prescribing that petitions for interpretation may be filed with the Judicial Yuan?

Holding

[1] A local self-governing entity shall have its autonomy of internal organization and its authority to formulate rules and regulations in respect of self-governing affairs and implementation of the same under the premise that such autonomy and authority are subject to the Constitution and the law. The organization of a local self-governing entity and its subdivisions shall be prescribed by the local legislative body by drawing up self-governing statutes for such organizations based upon the guidelines formulated by the central competent authority, which is clearly set forth in Article 28, Subparagraph 3, Article 54 and Article 62 of the Local Government Act. Upon the promulgation and implementation of the said Act, the establishment of any and all offices and positions of a self-governing entity shall follow the aforesaid procedure. However, where the establishment of a position has been explicitly prescribed by law, it is not against the law for the respective local administrative agencies to establish and appoint relevant personnel pursuant to the applicable provisions of the Local Government Act with the practical purpose of handling their business on an interim basis, if it will take a considerable amount of time to formulate

* Translation by Ching-Yi LIU, based upon the previous translation by Chung-Hsi Vincent KUAN

relevant rules and regulations. As far as the positions that may be established by law, since a self-governing entity has the discretionary power to determine whether or not such positions will be established, a self-governing entity shall be able to appoint and employ relevant personnel under applicable self-governing statutes.

[2] Article 43, Paragraph 1 through Article 43, Paragraph 3 of the Local Government Act provides that the resolutions passed by local legislative bodies at various levels regarding self-governing affairs, as well as the self-governing laws and regulations described in Article 30, Paragraph 1 through Article 30 Paragraph 4 of the said Act, that are in conflict with the Constitution, laws, central rules and regulations, or self-governing laws and regulations promulgated by a superior self-governing entity, shall be null and void. Article 43, Paragraph 5 and Article 30, Paragraph 5 both provide to the effect that, when doubt arises as to whether or not there is a conflict under the aforesaid circumstances, petitions for interpretations thereof may be filed with the Judicial Yuan. The said provisions are intended to address such circumstances where the competent authority, at various levels, in charge of the supervision of self-governing entities concerning relevant affairs still has doubts as to whether a particular resolution or self-governing statute is in conflict with the Constitution, the laws or any other superior legal norm, and thus has filed a petition for interpretation with this Court instead of forthrightly declaring such resolution or self-governing statute null and void pursuant to Paragraph 5 of the respective articles. If a local self-governing entity has a different opinion as to the contents that are declared null and void, it may, depending on whether the subject matter that is declared null and void is a self-governing statute or self-governing rule, file a petition with this Court for constitutional interpretation or uniform interpretation of laws or regulations through its legislative body or administrative agency, respectively, based on the nature of the matter at issue. Article 8, Paragraph 1 and Article 8, Paragraph 2 of

the Constitutional Court Procedure Act shall apply to the procedure for filing the aforesaid petitions, respectively. Article 9 of the Constitutional Court Procedure Act therefore is not applicable under such circumstances. When there arises any dispute between a local administrative agency and the legislative body at the same level in regard to the enforcement of a resolution passed by the said legislative body, it shall be resolved in accordance with Article 38, 39 and other applicable provisions of the Local Government Act, but not through petitions to this Court for interpretations. In addition, a local legislative body that has passed a resolution or self-governing rule or regulation may not file a petition for interpretation on the grounds that it has doubts as to whether the originally-passed resolution is in conflict with the Constitution, laws, central rules and regulations or self-governing laws and regulations promulgated by a superior self-governing entity.

[3] If the competent authority at various levels in charge of the supervision of local self-governing entities has any doubt as to whether the administrative agency of a local self-governing entity (namely, the government of a municipality under direct jurisdiction of the Executive Yuan, a county or city or office of a township, town or city), in handling a particular self-governing affair under Paragraphs 2, 4 and 6 of Article 75 of the Local Government Act, has violated the Constitution, a law or any other superior legal norm, it may file a petition for interpretation with this Court according to Paragraph 8 of said Article when it chooses not to revoke, amend, repeal or suspend the implementation of the same pursuant to the respective provisions of said paragraphs. When the administrative agency of a local self-governing entity believes that the decision made by the aforesaid competent authority involves the validity of a self-governing law or regulation upon which self-governing affairs are handled due to its conflict with a superior legal norm, but a petition for interpretation may not be made pursuant to Article 30, Paragraph 5 of the said Act because the self-governing law or

regulation at issue is not declared by the competent authority as null and void, the administrative agency of a self-governing entity may directly file a petition for interpretation with this Court in accordance with Article 75, Paragraph 8 of the said Act. If the decision at issue leads to a doubt or dispute contemplated by Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act, a petition for constitutional interpretation may be otherwise made thereunder. If the aforesaid decision gives rise to infringement upon the rights or legal interests of a local self-governing entity, its administrative agency thereof may, on behalf of the local self-governing entity, file an administrative lawsuit pursuant to law. If there remains doubt as to whether a law or any other superior legal norm is unconstitutional after any and all remedies through litigation procedures at all levels are exhausted, a petition for interpretation may nonetheless be made with this Court if the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act are met. As for those issues that neither involve the validity of a resolution or self-governing statute of a local self-governing entity, nor give rise to any uncertainty about matters for which an administrative lawsuit may be filed, but instead are in their nature only disputes of authority between the central government and a local self-governing entity, or between local self-governing entities at different levels, they shall be resolved in accordance with Article 77 of the Local Government Act, and consequently no petition may be directly made with this Court.

Reasoning

[1] A local self-governing entity shall have its autonomy of internal organization and the authority to formulate rules and regulations in respect of self-governing affairs and implementation of the same, which has been made clear by this Court in J.Y. Interpretation No. 467. The autonomous power of internal organization refers to such authority of the legislative body and

administrative agency of a local self-governing entity to determine and implement such matters as whether a particular organ (or enterprise) or relevant positions or prescribed number of staff for an internal unit should be established based on the jurisdiction, population and other conditions of the self-governing entity on the premise that such power and authority are subject to the Constitution and the laws (s*ee* Article 28, Paragraph 3 of the Local Government Act). Dating to January 25, 1999, when the Local Government Act was promulgated and implemented, the procedure for the establishment of the organs and positions of a local self-governing entity has been required to be prescribed by the local legislative body through its drafting of self-governing statutes respecting such organs and positions based on the guidelines formulated by the central competent authority, which are unambiguously set forth in Articles 28, 54 and 62 of the Local Government Act. If any organ is established and staff employed in violation of the aforesaid procedure, the local legislative body may, of course, delete all of the relevant budget for the organ and its staff, and the auditing authority may eliminate and pursue the repayment of all of its expenditures. However, where the establishment of a position has been clearly prescribed by law and thus leaves no discretion for the local legislative body to decide against the establishment of the position or to decide on the number of the staff, it is not against the law for the respective local administrative agencies to establish and appoint relevant personnel with the consent of the central competent authority for the practical purpose of handling their business on an interim basis, if it will take a considerable amount of time to formulate relevant rules and regulations. As for such positions that may be established by law, a self-governing entity shall, of course, be able to appoint and employ relevant personnel under applicable organic self-governing statutes, because the self-governing entity has the discretionary power to determine whether or not such positions are to be established.

[2] Article 43, Paragraph 1 through Article 43, Paragraph 3 of the Local Government Act provides that the resolutions passed by local legislative bodies at various levels regarding self-governing affairs, as well as the self-governing laws and regulations described in Article 30, Paragraph 1 through Article 30, Paragraph 4 of the said Act, that are in conflict with the Constitution, laws, central rules and regulations, or self-governing laws and regulations promulgated by a superior self-governing entity, shall be null and void. Where a resolution, law or regulation is perhaps to be declared null and void as outlined above, the Executive Yuan shall, according to Article 43, Paragraph 4 of the said Act, issue a written notice to that effect in the case of a resolution passed by the city council of a municipality. The respective central competent authority shall issue the same written notice in the case of a resolution passed by the council of a county or city, and the county government shall do the same in the case of a resolution reached by the assembly of a township (town or city). Article 43, Paragraph 5 thereof provides that "when doubt arises as to whether or not there is a conflict between resolutions as to the self-governing affairs referred to in Paragraphs 1 through 3 and the Constitution, the laws, central laws and regulations, or county ordinances, petitions for interpretation thereof may be filed with the Judicial Yuan," and Article 30, Paragraph 5 thereof reads that "when doubt arises as to whether or not there is a conflict between self-governing laws or regulations and the Constitution, the laws, rules and regulations authorized by law, or self-governing laws and regulations promulgated by a superior self-governing entity, petitions for interpretation thereof may be filed with the Judicial Yuan." The above provisions are both intended to refer to such circumstances where the competent authorities at various levels in charge of the supervision of self-governing entities concerning relevant affairs still have doubts as to whether a particular resolution or self-governing statute is in conflict with the Constitution, the laws or any other superior legal norm, and therefore has chosen to file a petition for interpretation

with this Court instead of forthrightly declaring such resolution or self-governing statute null and void pursuant to the applicable provisions. If a local self-governing entity holds a different opinion as to the declared contents, its legislative body may, depending on the nature of the matter at issue, file a petition for interpretation with this Court for constitutional interpretation or uniform interpretation of laws or regulations through its adoption of a resolution when a self-governing statute is declared null and void, and thus Article 8, Paragraph 1 or Article 8, Paragraph 2 of the Constitutional Court Procedure Act will apply to the form and procedure for such a petition. At the same time, in the case of a self-governing rule, the supreme administrative organ thereof (namely, government of a municipality under direct jurisdiction of the Executive Yuan, a county or city, or office of a township, town or city) may file a petition with this Court for constitutional interpretation or uniform interpretation of laws or regulations without having to go through the administrative hierarchy as referred to in Article 9 of the Constitutional Court Procedure Act. Under such situation, the subject matter of the interpretation is the self-governing authority of a local self-governing entity that is declared null and void by the central competent authority or the superior government. Therefore, it would not be logical for the central competent authority or the superior government concerned to submit the petition on behalf of the self-governing entity, because the central competent authority or the superior government concerned has become a party to the dispute. If the self-governing rule or ordinance declared null and void is a delegation rule, it will not have become effective unless and until approved by the superior delegating agency, whose decision must be accepted by the local administrative agency pursuant to Article 29 of the Local Government Act. In this case, no petition for interpretation may be made to this Court. Furthermore, where there exists any dispute between the local administrative agency and the legislative body at the same level in respect of the enforcement of a resolution passed by the said

legislative body, it shall be resolved in accordance with the applicable provisions of Article 38 and Article 39 of the Constitutional Court Procedure Act, but not by way of filing petitions with this Court for interpretation. In addition, since the Local Government Act does not contain any provisions similar to that of Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Court Procedure Act requiring a specific number of councilors or representatives of a local legislative body to cite and file a petition for interpretation with this Court if they have doubts as to the meaning of a constitutional provision governing their functions and authorities or when they have questions on the constitutionality of a statute at issue, a local legislative body that has passed a resolution may not file a petition for interpretation on the grounds that it has doubts as to whether the originally-passed resolution is in conflict with the Constitution, laws or any other superior norm, thus resulting in violation of the legal doctrine of estoppel.

[3] If the competent authorities at various levels in charge of the supervision of local self-governing entities have doubts as to whether the administrative agency of a local self-governing entity (namely, government of a municipality under direct jurisdiction of the Executive Yuan, a county or city, or office of a township, town or city), in handling a particular self-governing affair under Paragraphs 2, 4 and 6 of Article 75 of the Local Government Act, has violated the Constitution, the laws or any other superior legal norm, and at the same time does not revoke, amend, repeal or suspend the implementation of the decision of the above administrative agency of a local self-governing entity pursuant to the respective provisions of said paragraphs, it may file a petition for interpretation with this Court according to Paragraph 8 of Article 75. The said Paragraph 8, however, does not specify whether a local self-governing entity may initiate a petition with this Court for interpretation if it disagrees with any revocation, amendment, repeal or suspension of implementation made by the aforesaid competent authority, which did not file a petition with this Court prior to making the

aforesaid disposition. It should be emphasized that the system of our constitutional interpretation has been designed to impart authority to the constitutional interpretation organ to review various norms (*see* Article 78 of the Constitution). Though the Justices shall form a Constitutional Court to adjudicate matters relating to the dissolution of a political party violating the Constitution (*see* Article 5 of the Additional Articles of the Constitution), their authority does not extend to the review of the constitutionality or legality of a specific decision or disposition. Therefore, the administrative agency of a self-governing entity may directly file a petition for interpretation with this Court in accordance with Article 75, Paragraph 8, of the said Act only when the disposition made by the aforesaid competent authority gives rise to doubts as to the validity of a self-governing law or regulation based on which self-governing affairs are handled that may be in conflict with a superior legal norm; a petition for interpretation may not be made pursuant to Article 30, Paragraph 5 of the Local Government Act because the self-governing law or regulation at issue is not declared by the competent authority to be null and void. If a disposition made by a superior competent authority infringes upon the rights or legal interests of a local self-governing entity, the administrative agency thereof may, on behalf of the local self-governing entity, file an administrative lawsuit pursuant to law. If, after all remedies through litigation procedures are exhausted, doubt remains as to whether a law or any other superior legal norm is unconstitutional, a petition for interpretation may nonetheless be made with this Court if the requirements of Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act are met. As for those issues neither concerning the validity of a resolution or self-governing statute of a local self-governing entity, nor respecting matters for which an administrative lawsuit may be filed, but instead involving a dispute of authority between the central government and a local self-governing entity, or between local self-governing entities at different levels, they shall be resolved in

accordance with Article 77 of the Local Government Act, and therefore no petition may be forthrightly made with this Court.

[4] When a local self-governing entity intends to file a petition for constitutional interpretation or uniform interpretation of laws in respect of matters not falling within the aforementioned categories while exercising its functions and authorities, the procedures for filing such a petition shall be differentiated as follows: (I) Upon the passage of a resolution by the local legislative body, it may make a petition with this Court for constitutional interpretation or uniform interpretation in accordance with Article 5, Paragraph 1, Subparagraph 1 or Article 7, Paragraph 1, Subparagraph 1, respectively, of the Constitutional Court Procedure Act without having to go through the administrative hierarchy (*see* J.Y. Interpretations Nos. 260, 293 and 307); (II) If the administrative agency of a municipality under direct jurisdiction of the Executive Yuan, or a county (or a city) (namely, the respective government thereof), in handling a particular self-governing affair, has any doubts or disputes as referred to in Article 5, Paragraph 1, Subparagraph 1 of the Constitutional Court Procedure Act, or any difference of opinion as referred to in Article 7, Paragraph 1, Subparagraph 1 thereof, and, depending on the nature of the matter at issue, such administrative agency is not bound by the opinions expressed by the central competent authority as to the Constitution or laws or regulations, the respective local government may forthrightly file a petition for interpretation with this Court without having to go through the administrative hierarchy in light of the constitutional intent to establish an institutional guarantee of local self-government; and (III) In implementing delegated affairs entrusted by the central government, the administrative agency of a municipality under direct jurisdiction of the Executive Yuan, or a county (or a city) shall be subject to the direction and supervision of the central competent authority, and consequently, where there is any doubt as to the application of a constitutional provision or difference of

opinion on the application of a law, it shall still file a petition for interpretation with this Court pursuant to the procedure prescribed in Article 9 of the Constitutional Court Procedure Act. By the same token, the aforesaid procedure shall be applicable to the administrative agency of a local self-governing entity enforcing a central law or regulation by its own power that does not concern the self-governing authority of the local self-governing entity.

Background Note by Ching-Yi LIU

The Taichung City Government, a local self-governing entity, nominated and appointed its deputy mayor after the confirmation of the Taichung City Council without first creating the deputy mayor position pursuant to Article 62, Paragraph 2 of the Local Government Act. The Ministry of the Interior, the central competent authority, issued a written notice on the meaning of the Article, but members of Taichung City Council had different opinions as to the issued content. The Taichung City Council, through its adoption of a resolution, filed a petition for interpretation with the Constitutional Court for uniform interpretation of laws or regulations according to Article 8, Paragraph 2 of the Constitutional Court Procedure Act.

At the same time, the Taichung City Council passed its budget, containing the salary of the deputy mayor under the condition that no self-governing statute for the Taichung City Government had been passed, and thus there were no prescribed position and staff for the deputy mayor. The Taichung City Council filed a petition, pursuant to Article 43, Paragraph 2 of the Local Government Act, for interpretation with the Constitutional Court to decide whether Article 43, Paragraph 2 of the said Act had been violated.

J.Y. Interpretation No. 527 is widely considered a significant interpretation of the Constitutional Court on the meanings of the applicable provisions of the

Local Government Act in regard to the circumstances under which petitions for interpretation may be filed with the Judicial Yuan. This interpretation is pivotal for our understanding as to the constitutional meaning and institutional arrangement of the Local Government Act.