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Nos. 623～669
(2007~2009)

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The Republic of China Constitutional Court Reporter

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Judicial Yuan, Republic of China
December, 2012

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(Grand Justices Council)
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J. Y. Interpretation No.623（January 26, 2007）*

ISSUE: Is Article 29 of the Child and Juvenile Sexual Transaction Prevention Act unconstitutional ?

RELEVANT LAWS:

Articles 11, 15, 23 and 152 of the Constitution（憲法第十一條、第十五條、第二十三條、第一百五十二條）; Articles 19 and 34 of the United Nations Convention on the Rights of the Child（兒童權利公約第十九條、第三十四條）; Articles 1, 2, 22, 23, 24 and 29 of the Child and Juvenile Sexual Transaction Prevention Act（兒童及少年性交易防制條例第一條、第二條、第二十二條、第二十三條、第二十四條、第二十九條）; Article 227 of the Criminal Code（刑法第二百二十七條）; Article 80 of the Social Order Maintenance Act（社會秩序維護法第八十條）; J.Y. Interpretations Nos. 414, 432, 521, 577, 594, 602 and 617（司法院釋字第四一四號、第四三二號、第五二一號、第五七七號、第五九四號、第六０二號、第六一七號解釋）.

KEYWORDS:

Freedom of speech（言論自由）, commercial speech（商業言論）, child（兒童）, juvenile（少年）, sexual transaction（性交易）, sexual exploitation（性剝削）, principle of proportionality（比例原則）, principle of clarity and defi

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

niteness of law（法律明確性原則）, offense of danger; Geahrdungsdelikte（危險犯）, offense of actual injury; Veretzungsdelikte（實害犯）, classified management（分級管理）, right of work（工作權）, freedom of occupation（職業自由）.**

HOLDING: Article 11 of the Constitution guarantees the people's freedom of speech for the purposes of ensuring the free flow of opinions and giving the people the opportunities to acquire sufficient information and to attain selffulfillment. Such protected speech may be political, academic, religious or commercial speech and, depending on the nature of the speech, the scope of protection and restraints may differ. In the case of commercial speech, if the information contained therein, which is provided for the purpose of lawful business and may help the consuming public to make economically sound decisions, is not false and misleading, it should then be subject to the constitutional protection of the freedom of speech. Nevertheless, the constitutional guarantee is not absolute.

解釋文：憲法第十一條保障人民之言論自由，乃在保障意見之自由流通，使人民有取得充分資訊及自我實現之機會，包括政治、學術、宗教及商業言論等，並依其性質而有不同之保護範疇及限制之準則。商業言論所提供之訊息，內容為真實，無誤導性，以合法交易為目的而有助於消費大眾作出經濟上之合理抉擇者，應受憲法言論自由之保障。惟憲法之保障並非絕對，立法者於符合憲法第二十三條規定意旨之範圍內，得以法律明確規定對之予以適當之限制，業經本院釋字第四一四號、第五七七號及第六一七號解釋在案。

To the extent that Article 23 of the Constitution is complied with, the lawmakers may impose adequate restrictions by enacting clear and unambiguous laws. The foregoing has been made clear by this Court in J.Y. Interpretations Nos. 414, 577 and 617.

Despite the fact that the information which induces people to engage in unlawful sexual transaction is a form of commercial speech, the legislators may nonetheless impose reasonable restraints on such information as dictated by public interests since it induces people to engage in an unlawful activity. Article 29 of the Child and Juvenile Sexual Transaction Prevention Act as amended and promulgated on June 2, 1999, provides, "A person who spreads, broadcasts or publishes information in any advertisement, publication, broadcasting, television, electronic signals, computer network or any other media which may seduce, serve as a medium for, suggest or by any other means induce a person to engage in unlawful sexual transaction shall be punished with imprisonment for not more than five (5)

促使人為性交易之訊息，固為商業言論之一種，惟係促使非法交易活動，因此立法者基於維護公益之必要，自可對之為合理之限制。中華民國八十八年六月二日修正公布之兒童及少年性交易防制條例第二十九條規定：「以廣告物、出版品、廣播、電視、電子訊號、電腦網路或其他媒體，散布、播送或刊登足以引誘、媒介、暗示或其他促使人為性交易之訊息者，處五年以下有期徒刑，得併科新臺幣一百萬元以下罰金」，乃以科處刑罰之方式，限制人民傳布任何以兒童少年性交易或促使其為性交易為內容之訊息，或向兒童少年或不特定年齡之多數人，傳布足以促使一般人為性交易之訊息。是行為人所傳布之訊息如非以兒童少年性交易或促使其為性交易為內容，且已採取必要之隔絕措施，使其訊息之接收人僅限於十八歲以上之人者，即不屬該條規定規範之範

years and, in addition thereto, may be subject to a fine of not more than NT$1,000,000.” By imposing punishment, the foregoing provision is intended to place a curb on the people who distribute any information whose content includes child and juvenile sexual transaction or any information that induces children or juveniles to engage in sexual activity, or to distribute to children or juveniles or the general majority of uncertain age any information that may induce the average person to engage in unlawful sexual transaction. Therefore, a person’s conduct will not be subject to the said provision if the information distributed by him or her neither contains child or juvenile sexual transaction nor is intended to induce children or juveniles to engage in sexual transaction and necessary precautionary measures have been taken to limit the recipients of such information to those who are eighteen years of age or older. The aforesaid provision is a rational and necessary means to achieve a significant state interest in deterring and eliminating the cases where children or juveniles be come objects of sexual transaction, which

圍。上開規定乃為達成防制、消弭以兒童少年為性交易對象事件之國家重大公益目的，所採取之合理與必要手段，與憲法第二十三條規定之比例原則，尚無牴觸。惟電子訊號、電腦網路與廣告物、出版品、廣播、電視等其他媒體之資訊取得方式尚有不同，如衡酌科技之發展可嚴格區分其閱聽對象，應由主管機關建立分級管理制度，以符比例原則之要求，併此指明。

is not inconsistent with the principle of proportionality embodied in Article 23 of the Constitution. However, it should be noted that, since there are different methods of obtaining information, including electronic signals, computer networks and such other media as advertisements, publications, broadcasting, television, etc., the competent authorities should design a classifyed management system if the readers and viewers can be strictly differentiated in light of the technological developments so as to comply with the principle of proportionality.

REASONING: Article 11 of the Constitution guarantees the people's freedom of speech for the purposes of ensureng the free flow of opinions and giving the people the opportunities to acquire sufficient information and to attain selffulfillment. Such protected speech may be political, academic, religious or commercial speech and, depending on the nature of the speech, the scope of protection and restraints may differ. In the case of commercial speech, if the information contained therein, which is provided for

解釋理由書：憲法第十一條保障人民之言論自由，乃在保障意見之自由流通，使人民有取得充分資訊及自我實現之機會，包括政治、學術、宗教及商業言論等，並依其性質而有不同之保護範疇及限制之準則。商業言論所提供之訊息，內容為真實，無誤導性，以合法交易為目的而有助於消費大眾作出經濟上之合理抉擇者，應受憲法言論自由之保障，惟憲法之保障並非絕對，立法者於符合憲法第二十三條規定意旨之範圍內，得以法律明確規定對之予以適當之限制，業經本院釋字第四一四號、第

the purpose of lawful business and may help the consuming public to make economically sound decisions, is not false and misleading, it should then be subject to the constitutional protection of the freedom of speech. Nevertheless, the constitutional guarantee is not absolute. To the extent that Artic-le 23 of the Constitution is complied with, the lawmakers may impose adequate restrictions by enacting clear and unambiguous laws. The foregoing has been made clear by this Court in J.Y. Interpretations Nos. 414, 577 and 617.

五七七號及第六一七號解釋在案。

The information that induces people to engage in unlawful sexual transaction is a form of commercial speech that induces people to engage in sexual intercourse or obscene acts for a consideration (*See* Articles 2 and 29 of the Child and Juvenile Sexual Transaction Prevention Act). As for other speech that describes sexual transaction or relates to the study of sexual transaction, since it does not directly induce people to engage in sexual inter course or an obscene act, it is not considered as the kind of information that

促使人為性交易之訊息，乃促使人為有對價之性交或猥褻行為之訊息（兒童及少年性交易防制條例第二條、第二十九條參照），為商業言論之一種。至於其他描述性交易或有關性交易研究之言論，並非直接促使人為性交或猥褻行為，無論是否因而獲取經濟利益，皆不屬於促使人為性交易之訊息，自不在兒童及少年性交易防制條例第二十九條規範之範圍。由於與兒童或少年為性交易，或十八歲以上之人相互間為性交易，均構成違法行為（兒童及少年性交易防制條例第二十二條、第二十三

induces people to engage in unlawful sexual transaction, which is subject to Article 29 of the Child and Juvenile Sexual Transaction Prevention Act, regardless of whether any economic fruits are reaped from such speech. Since it constitutes an illegal conduct for a person to engage in sexual transaction with a child or juvenile or for a person who is eighteen years of age or older to engage in sexual trnsaction with another person eighteen years of age or older (*See* Articles 22, 23 and 24 of the Child and Juvenile Sexual Transaction Prevention Act; Article 227 of the Criminal Code; and Article 80 of the Social Order Maintenance Act), the information which induces a person to engage in such sexual transaction is information that induces a person to engage in an unlawful activity. Hence the legislators may impose reasonable restraints on such information as dictated by public interests. As a child or juvenile is mentally and intellectually immature, engaging in sexual transaction with a child or juvenile is sexual exploitation of him or her. More often than not, the experience of sexual exploitation will inflict permanent and

條、第二十四條、刑法第二百二十七條、社會秩序維護法第八十條參照），因此促使人為性交易之訊息，係促使其為非法交易活動，立法者基於維護公益之必要，自可對之為合理之限制。

兒童及少年之心智發展未臻成熟，與其為性交易行為，係對兒童及少年之性剝削。性剝削之經驗，往往對兒兒童及少年之心智發展未臻成熟，與其為性交易行為，係對兒童及少年之性剝削。性剝削之經驗，往往對兒童及少年產生永久且難以平復之心理上或生理上傷害，對社會亦有深遠之負面影響。從而，保護兒童及少年免於從事任何非法之性活動，乃普世價值之基本人權（聯合國於西元一九八九年十一月二十日通過、一九九０年九月二日生效之兒童權利公約第十九條及第三十四條參照），為重大公益，國家應有採取適當管制措施之義務，以保護兒童及少年之身心健康與健全成長。兒童及少年性交易防制條例第一條規定：「為防制、消弭以兒童少年為性交易對象事件，特制定本條例」，目的洵屬正當。

irrecoverable mental or physical damage on a child or juvenile while exerting a profoundly negative influence on the society. Therefore, to protect a child or juvenile from engaging in any unlawful sexual activity is a universally recognized fundamental right (*See* Articles 19 and 34 of the United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, and implemented on September 2, 1990) and thus a significant public interest. Hence the State should be obligated to take appropriate measures to safeguard the mental and physical health and sound development of children and juveniles. Article 1 of the Child and Juvenile Sexual Transaction Prevention Act provides, "This Act is enacted for the purpose of preventing and eliminating the events where children and juveniles are treated as sexual objects." The purpose of the law is rational and legitimate.

Article 29 of the Child and Juvenile Sexual Transaction Prevention Act as amended and promulgated on June 2, 1999, provides, "A person who spreads,

兒童及少年性交易防制條例第二十九條規定：「以廣告物、出版品、廣播、電視、電子訊號、電腦網路或其他媒體，散布、播送或刊登足以引誘、媒

broadcasts or publishes information in any advertisement, publication, broadcasting, television, electronic signals, computer network or any other media which may seduce, serve as a medium for, suggest or by any other means induce a person to engage in unlawful sexual transaction shall be punished with imprisonment for not more than five years and, in addition thereto, may be subject to a fine of not more than NT$1,000,000." By imposing punishment according to law on those who distribute information that induces people to engage in such sexual transaction, the foregoing provision is intended to outright eliminate the sexual exploitation of children and juveniles. Therefore, there is a crime where any information that induces a child or juvenile to engage in sexual transaction is distributed whose content includes child and juvenile sexual transaction, irrespective of whether sexual transaction occurs in actuality, because a child or juvenile is in danger of becoming the object of sexual transaction. Besides, in the case of in formation whose content does not include child or juvenile sexual transaction or inducement of same

介、暗示或其他促使人為性交易之訊息者，處五年以下有期徒刑，得併科新臺幣一百萬元以下罰金」，乃在藉依法取締促使人為性交易之訊息，從根本消弭對於兒童及少年之性剝削。故凡促使人為性交易之訊息，而以兒童少年性交易或促使其為性交易為內容者，具有使兒童少年為性交易對象之危險，一經傳布訊息即構成犯罪，不以實際上發生性交易為必要。又促使人為性交易之訊息，縱然並非以兒童少年性交易或促使其為性交易為內容，但因其向未滿十八歲之兒童少年或不特定年齡之多數人廣泛傳布，致被該等訊息引誘、媒介、暗示者，包括或可能包括未滿十八歲之兒童及少年，是亦具有使兒童及少年為性交易對象之危險，故不問實際上是否發生性交易行為，一經傳布訊息即構成犯罪。惟檢察官以行為人違反上開法律規定而對之起訴所舉證之事實，行為人如抗辯爭執其不真實，並證明其所傳布之訊息，並非以兒童及少年性交易或促使其為性交易為內容，且已採取必要之隔絕措施，使其訊息之接收人僅限於十八歲以上之人者，即不具有使兒童及少年為性交易對象之危險，自不屬該條規定規範之範圍。

to engage in sexual transaction, a child or juvenile is nevertheless in danger of becoming the object of sexual transaction because it is widely distributed to children and juveniles under eighteen years of age or the general majority of uncertain age, thus including or potentially including children and juveniles under eighteen years of age in the group that may be seduced by such information. Therefore, a crime will result once such information is distributed regardless of whether unlawful sexual transaction occurs in actuality. However, if an actor objects to the truthfulness of the indicated facts presented by the prosecutor in proving the actor's violation of the aforesaid law and, in so objecting, has proved that the information distributed by him or her neither contains child or juvenile sexual transaction nor is intended to induce children or juveniles to engage in sexual transaction and necessary precautionary measures have been taken to limit the recipients of such information to those who are eighteen years of age or older, such conduct will not be subject to the said provision because nei ther a child nor a juvenile is in danger of

becoming an object of sexual transaction.

To protect children and juveniles from being sexually exploited due to engaging in any unlawful sexual activity is a universally recognized fundamental right which should be treated as a significant interest to be legally protected by the State. By imposing criminal punishment, the aforesaid provision is designed to outright eliminate sexual exploitation of children and juveniles by means of eliminating the information that induces people to engage in unlawful sexual transaction. As such, it is an effective means to achieve the legislative purpose of deterring and eliminating the cases where children or juveniles become objects of sexual transaction. Furthermore, in light of the significant state interest in protecting a child or juvenile from engaging in any unlawful sexual activity as contrasted with the restraints imposed by law on the rights and interests of those who provide information regarding unlawful sexual transaction, the aforesaid provision does not go beyond the necessary and reason able scope by imposing criminal punishment to achieve the

保護兒童及少年免於因任何非法之性活動而遭致性剝削，乃普世價值之基本人權，為國家應以法律保護之重要法益，上開規定以刑罰為手段，取締促使人為性交易之訊息，從根本消弭對於兒童少年之性剝削，自為達成防制、消弭以兒童少年為性交易對象事件之立法目的之有效手段；又衡諸保護兒童及少年免於從事任何非法之性活動之重大公益，相對於法律對於提供非法之性交易訊息者權益所為之限制，則上開規定以刑罰為手段，並以傳布以兒童少年性交易或促使其為性交易為內容之訊息，或向未滿十八歲之兒童少年或不特定年齡之多數人傳布足以促使一般人為性交易之訊息為其適用範圍，以達防制、消弭以兒童少年為性交易對象事件之立法目的，尚未逾越必要合理之範圍，與憲法第二十三條規定之比例原則，並無牴觸。又系爭法律規定之「引誘、媒介、暗示」雖屬評價性之不確定法律概念，然其意義依其文義及該法之立法目的解釋，並非一般人難以理解，且為受規範者所得預見，並可經由司法審查加以確認，與法律明確性原則尚無違背（本院釋字第四三二號、第五二一號、第五九

legislative purpose of deterring and eliminating the cases where children or juveniles become objects of sexual transaction in that the law limits its application to the information whose content includes child or juvenile sexual transaction or inducement of same to engage in sexual transaction, or the distribution to children or juveniles who are eighteen years of age or younger or the general majority of uncertain age any information that may induce the average person to engage in unlawful sexual transaction. Therefore, it is not inconsistent with the principle of proportionality embodied in Article 23 of the Constitution. In addition, although the terms "seduce, serve as a medium for, suggest" as used in the law at issue are indefinite concepts of law, the meaning thereof is not incomprehensible to the general public or to those who are subject to regulation since it may be made clear by examining the literal meaning thereof and the construction of its legislative purposes, which may be ascertained through judicial review. Hence there should be no violation of the principle of clarity and definiteness of law (*See* J.Y. 四號、第六〇二號及第六一七號解釋參照）。

Interpretations Nos. 432, 521, 594, 602 and 617).

Article 29 of the Child and Juvenile Sexual Transaction Prevention Act provides for an offense of danger, whereas Articles 22, 23 and 24 of the said Act, Article 227 of the Criminal Code, as well as Article 80 of the Social Order Maintenance Act, provide for an offense of actual injury. As the two are different from each other in terms of their requisite elements and legislative purposes, it is difficult to compare the severity and methods of the respective penalties. Furthermore, it should be noted that, since there are different methods of obtaining information, including electronic signals, computer networks and such other media as advertisements, publications, broadcasting, television, etc., the competent authorities should design a classified management system if the readers and viewers can be strictly differentiated in light of the television, etc., the competent authorities should design a classified management system if the readers and viewers can be strictly differentiated in light of the tech

兒童及少年性交易防制條例第二十九條規定為危險犯，與同條例第二十二條、第二十三條、第二十四條、刑法第二百二十七條、社會秩序維護法第八十條規定之實害犯之構成要件不同，立法目的各異，難以比較其刑度或制裁方式孰輕孰重；另電子訊號、電腦網路與廣告物、出版品、廣播、電視等其他媒體之資訊取得方式尚有不同，如衡酌科技之發展可嚴格區分其閱聽對象，應由主管機關建立分級管理制度，以符比例原則之要求。至聲請人臺灣高雄少年法院法官何明晃聲請意旨主張兒童及少年性交易防制條例第二十九條規定有牴觸憲法第十五條及第一百五十二條疑義一節，僅簡略提及系爭法律間接造成人民工作權或職業自由之限制，惟就其內涵及其如何違反該等憲法規範之論證，尚難謂已提出客觀上形成確信法律為違憲之具體理由，均併此指明。

nological developments so as to comply with the principle of proportionality. In respect of the petition made by Judge Ho Ming-Huang of Taiwan Kaohsiung Juvenile Court, namely the Petitioner, which summarily claimed that Article 29 of the Child and Juvenile Sexual Transaction Prevention Act is in conflict with Articles 15 and 152 of the Constitution, the Petitioner merely mentioned that the law at issue has indirectly resulted in restraints on the people's right of work or freedom of occupation but failed to present any argument pertaining to how it is contrary to said constitutional provisions. Hence there is hardly any concrete reasonning in the Petitioner's objective belief in the unconstitutionality of the law.

Justice Tzu-Yi Lin filed dissenting opinion.

Justice Yu-Hsiu Hsu filed dissenting opinion in part.

Justice Tzong-Li Hsu filed concurring opinion in part and dissenting opinion in part.

本號解釋林大法官子儀提出不同意見書；許大法官玉秀提出部分不同意見書；許大法官宗力提出部分協同與部分不同意見書。

EDITOR'S NOTE:

Summary of facts:(1) The four Petitioners respectively published information and messages on the web or disseminated similar advertisements sufficient to induce individuals to engage in sexual transactions, and were conclusively convicted under Article 29 of the Child and Youth Sexual Transaction Prevention Act, which provides that whoever publishes information on a computer network sufficient to seduce, broker, suggest or encourage a person to engage in sexual transactions in any way shall be penalized. The Petitioners believed that the applicable provision above on which the final judgment is based was inconsistent with the principle of equity under Article 7, the freedom of speech under Article 11, the principle of clarity and definiteness of law and the principle of proportionality under Article 23 of the Constitution, and requested an interpretation.

(2) On a case involving a teenager publishing information sufficient to induce, imply or encourage others to engage in sexual transactions through computer

編者註：

事實摘要：（一）四位聲請人分別因在網路上刊登足以引誘人為性交易之訊息、留言；或散發相類之廣告，被依兒童及少年性交易防制條例第二十九條規定以電腦網路刊登足以引誘、媒介、暗示或促使人為性交易之訊息處以刑罰確定，聲請人等認確定終局判決所適用之前開條文，有牴觸憲法第七條平等原則、第十一條言論自由、第二十三條比例原則及明確性原則之疑義，聲請解釋。

（二）臺灣高雄少年法院法官因審理少年使用電腦網路之方式刊登足以引誘暗示或促使人為性交易之訊息案件，認其所應適用兒童及少年性交易防

network, the judge of the Kaohsiung Juvenile Court believes the applicable Article 29 of the Child and Youth Sexual Transaction Prevention Act may violate the freedom of speech under Article 11, the property right under Article 15, and the principle of proportionality under Article 23 of the Constitution and filed a petition for interpretati on.

制條例第二十九條以電腦網路刊登足以引誘、媒介、暗示或促使人為性交易之訊息，處以刑罰規定，有違反憲法第十一條言論自由、第十五條財產權、第二十三條比例原則之疑義，聲請解釋。

J. Y. Interpretation No.624（April 27, 2007）*

ISSUE: Is it contrary to the principle of equality to deny compensation to those who were wrongfully imprisoned as a result of military trials?

RELEVANT LAWS:

Articles 7, 9, 77 and 80 of the Constitution（憲法第七條、第九條、第七十七條、第八十條）; Articles 1, 4, 11, and 17-IV of the Act of Compensation for Wrongful Detentions and Executions（冤獄賠償法第一條、第四條、第十一條、第十七條第四項）; Article 13 of the State Compensation Act（國家賠償法第十三條）; Article 6 of the Act Governing the Redress of Damages Inflicted on Individual Rights during the Period of Martial Law（戒嚴時期人民受損權利回復條例第六條）; Article 15-1(iii) of the Act of Compensation for Wrongfully Handled Rebellion and Communist Espionage Cases during the Period of Martial Law（戒嚴時期不當叛亂暨匪諜審判案件補償條例第十五條之一第三款）; Article 2 of the Act Governing the Handling of and Compensation for the 228 Incident（二二八事件處理及補（賠）償條例第二條）; Points 2, 5, 13 and 14 of the Precautionary Matters on Handling Compensation for Wrongful Detention and Execution Cases（辦理冤獄賠償事件應行注意事項第二點、第五點、

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

第十三點、第十四點）; J. Y. Interpretations Nos. 436 and 477（司法院釋字第四三六號、第四七七號解釋）; Article 1 of the Military Justice Act（軍事審判法第一條）; Article 8 of the Martial Law（戒嚴法第八條）; Article 2 of the Regulation Governing the Division of the Power of Adjudication between Military Courts and Ordinary Courts during the Period of Martial Law in the Taiwan Area (as repealed by the Executive Yuan on July 15, 1987)（臺灣地區戒嚴時期軍法機關自行審判及交法院審判案件劃分辦法（行政院於七十六年七月十五日廢止）第二條）.

KEYWORDS:

Principle of equality（平等原則）, state compensation（國家賠償）,compensation for wrongful imprisonment（冤獄賠償）, criminal procedure（刑事訴訟）, military trial（軍事審判）, period of national mobilization for suppression of the communist rebellion（動員戡亂時期）, period of martial law（戒嚴時期）.**

HOLDING: Article 7 of the Constitution provides that all citizens of the Republic of China shall be equal before the law. In enacting the Act of Compensation for Wrongful Detentions and Executions, the Legislature gives the people whose personal freedom, life or property is infringed upon the right to

解釋文：憲法第七條規定，人民在法律上一律平等。立法機關制定冤獄賠償法，對於人民犯罪案件，經國家實施刑事程序，符合該法第一條所定要件者，賦予身體自由、生命或財產權受損害之人民，向國家請求賠償之權利。凡自由、權利遭受同等損害者，應受平等之保障，始符憲法第七條規定之意

seek compensation from the State where the State has enforced criminal procedure against the people in criminal cases and if the requirements set forth in Article 1 of said Act are satisfied. The intent of Article 7 of the Constitution will not be fulfilled unless all those whose freedoms or rights have been infringed upon in a like manner are subject to equal protection.

旨。

According to Article 1 of the Act of Compensation for Wrongful Detentions and Executions, where the State implements criminal procedure and thus causes damage to the people's personal freedom, life or property that is recoverable by resorting to state compensation, such compensation shall be limited to those people whose freedoms or rights were infringed upon in cases that were heard by judicial authorities pursuant to the laws and rules of criminal procedure, but excluding those aggrieved persons wrongfully sentenced to imprisonment in cases heard by military courts according to the Military Justice Act. The foregoing provision has thus discriminated against those people whose freedoms or rights were infringed

冤獄賠償法第一條規定，就國家對犯罪案件實施刑事程序致人民身體自由、生命或財產權遭受損害而得請求國家賠償者，依立法者明示之適用範圍及立法計畫，僅限於司法機關依刑事訴訟法令受理案件所致上開自由、權利受損害之人民，未包括軍事機關依軍事審判法令受理案件所致該等自由、權利受同等損害之人民，係對上開自由、權利遭受同等損害，應享有冤獄賠償請求權之人民，未具正當理由而為差別待遇，若仍令依軍事審判法令受理案件遭受上開冤獄之受害人，不能依冤獄賠償法行使賠償請求權，足以延續該等人民在法律上之不平等，自與憲法第七條之本旨有所牴觸。司法院與行政院會同訂定發布之辦理冤獄賠償事件應行注意事項（下稱注意事項）第二點規定，雖符合冤獄

upon in a like manner and who should be entitled to seek compensation for imprisonment without justifiable cause. If an aggrieved person sentenced to wrongful imprisonment in a case handled under military justice laws and regulations is denied the right to claim compensation pursuant to the Act of Compensation for Wrongful Detentions and Executions, the state of inequality suffered by such a citizen before the law would continue, and hence would be in violation of Article 7 of the Constitution. Although Point 2 of the Precautionary Matters on Handling Compensation for Wrongful Detention and Execution Cases as jointly established and issued by the Judicial Yuan and Executive Yuan (hereinafter referred to as the "Precautionary Matters") is consistent with the intent of Article 1 of the Act of Compensation for Wrongful Detentions and Executions, the provisions thereof have denied those citizens subjected to wrongful imprisonment in cases handled under military justice laws and regulations the right to claim compensateon pursuant to the Act of Compensation for Wrongful Detentions and Executions. As such, it is

賠償法第一條之意旨，但依其規定內容，使依軍事審判法令受理案件遭受冤獄之人民不能依冤獄賠償法行使賠償請求權，同屬不符平等原則之要求。為符首揭憲法規定之本旨，在冤獄賠償法第一條修正施行前，或規範軍事審判所致冤獄賠償事項之法律制定施行前，凡自中華民國四十八年九月一日冤獄賠償法施行後，軍事機關依軍事審判法令受理之案件，合於冤獄賠償法第一條之規定者，均得於本解釋公布之日起二年內，依該法規定請求國家賠償。

also contrary to the principle of equality. In order to serve the constitutional purpose first above mentioned, in respect of those cases heard by the military courts subsequent to the enforcement of the Act of Compensation for Wrongful Detentions and Executions on September 1, 1959, a claim for state compensation may be filed according to the Act of Compensation for Wrongful Detentions and Executions within two years as of the date of this Interpretation if the requirements set forth in Article 1 of said Act are satisfied prior to the amendment to said Article 1 or the enactment and enforcement of any law regulating the compensation for wrongful detentions and executions resulting from military trials.

REASONING: Article 7 of the Constitution provides that "all citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." In enacting the Act of Compensation for Wrongful Detentions and Executions, the Legislature gives the people whose personal freedom, life or

解釋理由書：憲法第七條規定：「中華民國人民，無分男女、宗教、種族、階級、黨派，在法律上一律平等」。立法機關制定冤獄賠償法，對於人民犯罪案件，經國家實施追訴、審判及刑罰執行等刑事程序，符合該法第一條所定要件者，賦予身體自由、生命或財產權受損害之人民，向國家請求賠償之權利。凡自由、權利遭受同等損害

property is infringed upon the right to seek compensation from the State where the State has implemented criminal procedure against the people in criminal cases and if the requirements set forth in Article 1 of said Act are satisfied. The intent of Article 7 of the Constitution will not be fulfilled unless all those whose freedoms or rights have been infringed upon in a like manner are subject to equal protection.

者，應受平等之保障，始符憲法第七條規定之意旨。

The criminal procedures enforced by the State against the people in criminal cases are further divided into judicial trial procedures and military trial procedures in this nation. The former is implemented by the judicial authorities under the Code of Criminal Procedure whereas the latter is enforced by the military authorities according to the Military Justice Act. Yet the functionality and purpose of both are to carry out prosecutions and punishments against crimes. The judicial trial procedure originates from the judicial power provided under Article 77 of the Constitution. In contrast, the military trial procedure is enacted by the Legislature

國家對人民犯罪案件所實施之刑事訴訟程序，在我國有司法審判與軍事審判程序之分，前者係由司法機關依據刑事訴訟法實施，後者則由軍事機關依據軍事審判法實施，但兩者之功能及目的，同為對犯罪之追訴、處罰。司法審判程序源自憲法第七十七條規定之司法權，軍事審判程序則係由立法機關依據憲法第九條：「人民除現役軍人外，不受軍事審判」之規定，以現役軍人負有保衛國家之特別義務，基於國家安全與軍事需要，對其所為特定犯罪而設之特別刑事訴訟程序（軍事審判法第一條參照）；惟軍事檢察及審判機關所行使對特定犯罪之追訴、處罰權，亦屬國家刑罰權之一種，具司法權之性質，其發動

according to Article 9 of the Constitution, which provides, “Except for those in active military service, no person shall be subject to trial by a military tribunal,” because those who are in active military service are under a special obligation to defend the nation and a special criminal procedure against specific offenses committed by military personnel in active service is necessitated by considerations of national security and military demands (*See* Article 1 of the Military Justice Act). Nevertheless, the powers of the military prosecution and trial authorities to prosecute and punish such specific offenses are also a form of penal power exercisable by the State, which, in essence, is part of the judicial power whose initiation and operation should not run counter to the constitutional rationales regarding the judicial power as embodied in Articles 77, 80 etc. of the Constitution. Where such powers concern the restrictions of the rights of the military personnel, the applicable constitutional provisions shall still be followed (*See* J.Y. Interpretation No. 436). Therefore, the judicial trial procedure and military trial procedure—both criminal proce-

與運作，不得違背憲法第七十七條、第八十條等有關司法權建制之憲政原理，其涉及軍人權利之限制者，亦應遵守憲法相關規定（本院釋字第四三六號解釋參照）。是則司法審判與軍事審判兩種刑事訴訟程序，在本質上並無不同，人民之自由、權利於該等程序中所受之損害，自不因受害人係屬依刑事訴訟法令或依軍事審判法令受理之案件而有異，均得依法向國家請求賠償，方符憲法上平等原則之意旨。

dures-do not differ in nature, and, hence, the injuries inflicted upon the people's freedoms or rights in such procedures do not differ simply because the aggrieved persons are parties in cases tried under criminal procedural laws and regulations or under military justice laws and regulations. The constitutional principle of equality will not be followed unless all such aggrieved persons may seek state compensation under the law.

As described above, the Military Justice Act is a special criminal procedure law. Article 1 of the Act of Compensation for Wrongful Detentions and Executions provides, "An aggrieved person involved in any case prosecuted under criminal procedural laws or regulations may request state compensation if one of the following applies: (i) he or she has been detained before a final non-prosecutorial disposition or judgment of acquittal is rendered; or (ii) he or she has been detained or served a sentence before a judgment of acquittal is rendered in a retrial or an extraordinary appeal proceeding (Paragraph I). An aggrieved person detained by means

如上所述，軍事審判法既屬特別之刑事訴訟法，冤獄賠償法第一條規定：「依刑事訴訟法令受理之案件，具有左列情形之一者，受害人得依本法請求國家賠償：一、不起訴處分或無罪之判決確定前，曾受羈押者。二、依再審或非常上訴程序判決無罪確定前，曾受羈押或刑之執行者（第一項）。不依前項法令之羈押，受害人亦得依本法請求國家賠償（第二項）」，其規範國家對犯罪案件實施刑事訴訟程序致人民身體自由、生命或財產權遭受損害而得請求國家賠償之範圍，依文義解釋，固可包含依軍事審判法令受理之案件遭致上述冤獄之受害人，而符合憲法平等原則之要求。惟依立法者明示之適用範圍及立

other than in accordance with the above-mentioned laws or regulations may also request state compensation (Paragraph II).” The foregoing provisions are intended to define the scope of compensation claimable by the aggrieved persons whose personal freedom, life or property is infringed upon in criminal cases prosecuted under criminal procedural laws or regulations. Although, by its literal construction, the law could have included the aggrieved persons wrongfully imprisoned in cases prosecuted under military justice laws or regulations, the legislators have so unambiguously formulated the scope of application and legislative plan for the law that the Act of Compensation for Wrongful Detentions and Executions only applies to the people whose personal freedom, life or property is infringed upon in criminal cases heard by the judicial authorities under criminal procedural laws or regulations, but not to those people whose personal freedom, life or property is infringed upon in a like manner in cases tried by the military authorities under military justice laws or regulations. As such, the said construction is not necessary.

法計畫，冤獄賠償法之適用僅限於司法機關依刑事訴訟法令受理案件所致身體自由、生命或財產權受損害之人民，不包括軍事機關依軍事審判法令受理案件所致上開自由、權利受同等損害之人民，故無須為上開之解釋。蓋立法機關制定冤獄賠償法，自四十一年十二月提案，至四十八年六月二日三讀通過（立法院公報第十二會期第四期第二十九、三十九至四十四頁；第二十三會期第十五期第五十九、七十二頁參照），依其審議內容及過程，立法者係為對人民犯罪案件因國家實施刑事程序，符合該法第一條所定要件者，賦予遭受冤獄之人民向國家請求賠償之權利，以維人權，以拯無辜（立法院公報第十二會期第四期第三十九頁；第二十三會期第十一期第十一、二十九、四十、四十八、五十頁；第十二期第十二、三十九、四十八頁參照），但以其時國家情勢動盪，尚處動員戡亂及戒嚴時期，為維持軍令、軍紀，遷就當時環境，不宜將軍事審判冤獄賠償事項同時訂入冤獄賠償法（立法院公報第二十三會期第十一期第八頁；第十二期第六、三十五、三十七、三十八頁參照），遂認軍事機關依軍事審判法令與司法機關依刑事訴訟法令受理案件所致冤獄之賠償，應分別規範，

According to the legislative history of the enactment of the Act of Compensation for Wrongful Detentions and Executions, the bill was first proposed in December 1952 and passed the third reading on June 2, 1959 (*See* the Legislative Yuan Gazettes, 12th Session, Vol. 4, p. 29, pp. 39-44; 23rd Session, Vol. 15, pp. 59, 72). In light of the discussions and the process, the lawmakers' intent was to give the people who are wrongfully imprisoned the right to seek compensation from the State where the State has enforced criminal procedure against the people in criminal cases and if the requirements set forth in Article 1 of said Act are satisfied so as to preserve human rights and protect the innocent (*See* the Legislative Yuan Gazettes, 12th Session, Vol. 4, p. 39; 23rd Session, Vol. 11, pp. 11, 29, 40, 48, 50; and Vol. 12, pp. 12, 39, 48). Nevertheless, given the turmoil and commotion during the periods of national mobilization for suppression of the communist rebellion and the martial law, the lawmakers decided that it would be inappropriate to include provisions regarding compensation for wrongful imprisonment resulting from

因而於該法三讀通過時，決議函請行政院擬定軍事審判之冤獄賠償法案函送立法院審查（立法院公報第二十三會期第十五期第七十二頁參照）。足見冤獄賠償法第一條所規定冤獄賠償之範圍，不包括軍事機關依軍事審判法令受理案件所致冤獄之受害人。惟人民包括非軍人與軍人，刑事冤獄包括司法審判與軍事審判之冤獄，除有正當理由外，對冤獄予以賠償，本應平等對待，且戒嚴時期軍事審判機關審理之刑事案件，因其適用之程序與一般刑事案件所適用者有別，救濟功能不足，保障人民身體自由，未若正常狀態下司法程序之周全（本院釋字第四七七號解釋參照），對於其致生之冤獄受害人，更無不賦予賠償請求權之理。是根據冤獄賠償制度之目的，立法者若對依軍事審判法令受理案件所致身體自由、生命或財產權，遭受與依刑事訴訟法令受理案件所致同類自由、權利同等損害之人民，未賦予冤獄賠償請求權，難謂有正當理由，即與憲法平等原則有違。

military trials in the Act of Compensation for Wrongful Detentions and Executions in order to ma intain military orders and military discipline and to adapt the law to the social environment of the time (*See* the Legislative Yuan Gazettes, 23rd Session, Vol. 11, p. 8; Vol. 12, pp. 6, 35, 37, 38). Accordingly, the legislators decided that separate norms should be prescribed in respect of the co-mpensation for wrongful imprisonment arising from cases heard by the military authorities under the military justice laws and regulations and cases tried by the judicial authorities under the criminal procedural laws and regulations. Hence, when the said law passed the third reading, the Legislative Yuan resolved that the Executive Yuan should draft a bill in respect of the compensation for wrongful imprisonment arising from military trials and submit same to the Legislative Yuan for its review (*See* the Legislative Yuan Gazettes, 23rd Session, Vol. 15, p. 72). In light of the foregoing, it is clear that the scope of compensation for wrongful imprisonment provided in Article 1 of the Act of Compensation for Wrongful Detentions and Executions does not cover

the aggrieved persons wrongfully imprisoned in cases prosecuted under military justice laws or regulations. However, the citizens are either in the military service or not. Wrongful imprisonment in criminal cases may include both judicial trials and military trials. Failing any justifiable cause, equal treatment should be given to the aggrieved persons in a wrongful imprisonment cases, whether tried by the judicial or military authorities. Moreover, the applicable proceedings of a military trial were different from those of an ordinary criminal case during the period of martial law, were inadequate in their remedial functions and were not as sound as the judicial proceedings under normal circumstances in safeguarding the people's personal freedom (*See* J.Y. Interpretation No. 477). Therefore, it would be irrational to deny an aggrieved person wrongfully imprisoned under such proceedings the right to claim compensation. Therefore, in light of the purposes of the system for the compensation for wrongful detentions and executions, if the legislators failed to give those people whose personal freedom, life or property

is infringed upon in a like manner in cases tried by the military authorities under military justice laws or regulations the same right to claim compensation as those people whose personal freedom, life or property is infringed upon in cases prosecuted under the criminal procedural laws or regulations, there should be hardly any justifiable cause and the constitutional principle of equality would hence be violated.

It should be noted that a separate law that should govern the compensation for wrongful imprisonment arising from military trials has yet to be enacted. Consequently, whether in military service or not, those who had suffered wrongful imprisonment had no legal basis whatsoever to seek state compensation from September 1, 1959, when the Act of Compensation for Wrongful Detentions and Executions came into effect, till June 30, 1981. Although, as of July 1, 1981, state compensation could be sought pursuant to Article 12 of the State Compensation Act, which provides, “If an employee of the Government having the duty of a trial judge or a

查規範軍事審判所致冤獄賠償之法律，迄今仍未制定，致使遭受該等冤獄之軍人或非軍人，自冤獄賠償法於四十八年九月一日施行後，至七十年六月三十日，全無法律得據以請求國家賠償，迨同年七月一日之後，雖得依國家賠償法第十三條：「有審判或追訴職務之公務員，因執行職務侵害人民自由或權利，就其參與審判或追訴案件犯職務上之罪，經判決有罪確定者，適用本法規定」之規定，請求國家賠償；但該條規定之請求賠償要件，顯較冤獄賠償法第一條嚴格，以致依軍事審判法令受理案件遭受冤獄之人民，極難請求國家賠償，其與依刑事訴訟法令受理案件遭受冤獄之人民相較，仍屬未具正當理由之

prosecutor infringes upon the freedoms or rights of persons while acting within the scope of his or her office or employment, and is adjudicated to have committed a crime when he or she performed the duty of trial or prosecution, the provisions of this Act shall apply," the requirements for seeking compensation as set forth in said article are apparently stricter than those set forth in Article 1 of the Act of Compensation for Wrongful Detentions and Executions. As a result, it is exceedingly difficult for a person suffering wrongful imprisonment due to a case prosecuted under the military justice laws and regulations to claim state compensation. In contrast to those who were wrongfully imprisoned in cases prosecuted under the criminal procedural laws and regulations, it is clearly unjustified discrimination. If an aggrieved person wrongfully imprisoned in a case prosecuted under the military justice laws and regulations still could not claim compensation under the Act of Compensation for Wrongful Detentions and Executions, the inequality before the law would continue for such a person. In this sense, it is contrary to the

顯著差別待遇，若仍令因依軍事審判法令受理案件遭受冤獄之受害人，不能依冤獄賠償法行使賠償請求權，益足延續人民在法律上之不平等，就此而言，自與憲法第七條之本旨有所牴觸。至於司法院與行政院會同訂定發布之前開注意事項，乃主管機關為適用冤獄賠償法，依職權訂定之解釋性行政規則，其第二點規定：「本法第一條第一項所稱受害人，指司法機關依刑事訴訟法令執行羈押之被告，或裁判確定後之受刑人，具有該項第一款或第二款之情形者而言。第二項所稱受害人，指非依刑事訴訟法令所拘禁之人而言。但仍以法院就其案件有審判權者為限」，雖符合冤獄賠償法第一條規定之意旨，但依其規定內容，使依軍事審判法令受理案件遭受冤獄之受害人，不能依冤獄賠償法行使賠償請求權，同屬不符平等原則之要求。

intent of Article 7 of the Constitution. As for the aforesaid Precautionary Matters as jointly established and issued by the Judicial Yuan and Executive Yuan, they are an interpretative administrative regulation *ex officio* established by the competent authorities for the purpose of applying the Act of Compensation for Wrongful Detentions and Executions. Point 2 thereof provides, "The aggrieved person referred to in Article 1-I of the Act is either a defendant detained by the judicial authorities pursuant to the criminal procedural laws and regulations or a convicted person upon final judgment who has experienced the situation described in Subparagraph 1 or 2 of said Paragraph. The aggrieved person referred to in Paragraph II thereof is one who is detained by means other than in accordance with the criminal procedural laws or regulations; provided that the court shall have jurisdiction over the cases concerned." Although the said article is consistent with the intent of Article 1 of the Act of Compensation for Wrongful Detentions and Executions, the provisions thereof have denied the aggrieved persons subjected to wrongful

imprisonment in cases handled under military justice laws and regulations the right to claim compensation pursuant to the Act of Compensation for Wrongful Detentions and Executions. As such, it is also contrary to the principle of equality.

Despite the legislative discretion exercisable by the lawmakers, in order to serve the constitutional purpose first above mentioned, in respect of those cases heard by the military courts subsequent to the enforcement of the Act of Compensation for Wrongful Detentions and Executions on September 1, 1959, a claim for state compensation may be filed according to the Act of Compensation for Wrongful Detentions and Executions if the requirements set forth in Article 1 of said Act are satisfied prior to the amendment to said Act or the enactment and enforcement of any law regulating the compensation for wrongful detentions and executions resulting from military trials. The two year statute of limitations set forth in Article 11 of said Act should start to run as of the date of this Interpretation. Article 4-I of

為符首揭憲法規定之本旨，立法者固有其自由形成之空間，在冤獄賠償法修正施行前，或規範軍事審判所致冤獄賠償事項之法律制定施行前，凡自四十八年九月一日冤獄賠償法施行後，軍事機關依軍事審判法令受理之案件，如合於冤獄賠償法第一條之規定者，均得依該法規定請求國家賠償，該法第十一條所定聲請期限二年，應從本解釋公布之日起算。至於冤獄賠償法第四條第一項規定：「冤獄賠償，由原處分或判決無罪機關管轄。但依第一條第二項規定請求賠償者，由所屬地方法院管轄」，注意事項第五點亦僅規定冤獄賠償由普通法院或檢察署管轄，於本解釋公布後，該等管轄規範均有不足，依軍事審判法令受理案件致生之冤獄賠償事件，其原處分或判決無罪或原受理之軍事檢察或審判機關，已因軍事審判法於八十八年十月二日修正公布而裁撤或改組，

the Act of Compensation for Wrongful Detentions and Executions provides, "The authorities issuing the original disposition or rendering the judgment of acquittal shall have jurisdiction over the claims for compensation for wrongful imprisonment; provided, however, that any claim made pursuant to Article 1-II shall be subject to the jurisdiction of the competent district court." Also, Point 5 of the Precautionary Matters merely provides that the ordinary court or prosecutor's office shall have jurisdiction over the claims for compensation for wrongful imprisonment. Upon the issuance of this Interpretation, said jurisdictional provision would no longer be adequate. In respect of the claims for compensation for wrongful imprisonment resulting from cases prosecuted under the military justice laws and regulations, since the military prosecutor's offices or tribunals issuing the original disposition or rendering the judgment of acquittal were either dissolved or reorganized when the Military Justice Act was amended on October 2, 1999, the respective military prosecutor's offices or courts which assumed their duties shall hence

自應由承受其業務之軍事檢察署或法院管轄，有關該類冤獄賠償事件之初審組織、決定方式及決定書之送達，得依注意事項第十三點、第十四點規定意旨，準用軍事審判法相關規定。俟相關法令修正或制定施行後，上開程序事項則依修正或制定之法令辦理。

have jurisdiction over said claims. As for the organization of the first instance, methods of decision-making and the service of the written decisions, the applicable provisions of the Military Justice Act may apply *mutatis mutandis* based on the intent of Points 13 and 14 of the Precautionary Matters. Once the relevant laws and regulations are amended or enacted, the aforesaid procedural matters shall be handled in accordance with such amended or enacted laws or regulations.

In addition, Article 17-IV of the Act of Compensation for Wrongful Detentions and Executions provides, "If an aggrieved person has been compensated for the same cause through other legal means, the compensated amount so received shall be deducted from the compensation payment awarded under this Act." The provisions of Article 6 of the Act Governing the Redress of Damages Inflicted on Individual Rights during the Period of Martial Law, Article 15-1(iii) of the Act of Compensation for Wrongfully Handled Rebellion and Communist Espionage Cases during the Period of Martial Law, and Article 2 of

又冤獄賠償法第十七條第四項規定：「受害人就同一原因，已依其他法律受有損害賠償者，應於依本法支付賠償額內扣除之」，戒嚴時期人民受損權利回復條例第六條、戒嚴時期不當叛亂暨匪諜審判案件補償條例第十五條之一第三款、二二八事件處理及補（賠）償條例第二條等規定，均與冤獄賠償法第一條規定部分競合，而人民於戒嚴時期犯內亂、外患、懲治叛亂條例或檢肅匪諜條例等罪，依戒嚴法第八條及行政院訂定發布之臺灣地區戒嚴時期軍法機關自行審判及交法院審判案件劃分辦法（按已經行政院於七十六年七月十五日廢止）第二條規定，係屬軍事審判，本

the Act Governing the Handling of and Compensation for the 228 Incident partially merge with Article 1 of the Act of Compensation for Wrongful Detentions and Executions. Where a person commits any offense against internal or external security or any offense proscribed by the Punishment for Betrayers Act, or Anti-Communist Espionage Act, he or she shall be subject to the jurisdiction of the military tribunal according to Article 8 of the Martial Law and Article 2 of the Regulation Governing the Division of the Power of Adjudication between Military Courts and Ordinary Courts during the Period of Martial Law in the Taiwan Area (as repealed by the Executive Yuan on July 15, 1987). It should also be noted that, as of the date of this Interpretation, the relevant provisions described above shall be heeded when handling the claims for compensation for wrongful imprisonment resulting from military trials based on the intent hereof so as to avoid double indemnity or compensation for identical cause and facts.

解釋公布後，依本解釋意旨辦理上開軍事審判冤獄賠償事件時，自應注意該等相關規定，以避免同一原因事實重複賠償或補償，併予敘明。

Justice Yu-Hsiu Hsu filed concurring opinion in part and dissenting opinion in

本號解釋許大法官玉秀提出部分協同與部分不同意見書。

part.

EDITOR'S NOTE:

Summary of facts: (1) The Petitioner was suspected of being involved in corruption and was detent for 316 days by a ruling of the district military court. The Military High Court subsequently and conclusively acquitted the Petitioner.

The Petitioner then requested compensation for wrongful imprisonment but was denied by the military court on the ground that the detention was not a case being prosecuted under the Criminal Procedure Code in accordance with Article 1 of the Act of Compensation for Wrongful Detentions and Executions.

(2) The Petitioner was suspected of illegally using Class II narcotics before his compulsory military service, and was subject to a month of rehabilitation and observation in accordance with Article 20 of the Narcotics Endangerment Prevention Act and ordered to enter the rehabilitation facility for mandatory treatment for 1 year by the Military District Court. The

編者註：

事實摘要：（一）聲請人因涉嫌貪污，經地方軍事法院裁定予以羈押計三百一十六日。嗣該案經高等軍事法院改判無罪確定。

聲請人遂請求冤獄賠償，均經以軍事法院依軍事審判法裁定羈押，非屬冤獄賠償法第一條第一項所謂依刑事訴訟法令受理之案件，駁回聲請。

（二）聲請人於服兵役前因涉嫌非法施用二級毒品，於服役中遭地方軍事法院依毒品危害防制條例第二十條規定，裁定觀察勒戒一個月、令入戒治處所施以強制戒治一年。聲請人不服，提起抗告，經高等軍事法院認該證明書之鑑定過程有瑕疵且無從補正，應無證據能力，將原裁定撤銷。嗣軍事檢察官亦就該案件作成不起訴處分確定。

Petitioner appealed, and the Military High Court revoked the original ruling, believing that the assessment process by which the certificate was issued was flawed and could not be corrected. Therefore, the certificate should carry no evidentiary weight. The military prosecutor subsequently decided not to seek indictment and it was final.

The Petitioner argued that the mandatory treatment after the expiration of rehabilitation constitutes wrongful imprisonment, and petitioned for compensation. However, based on Point 2 of the Precautionary Matters on Handling Compensation for Wrongful Detention and Execution Cases, the court dismissed the petition on the ground that the Petitioner was not detained in accordance with the Criminal Procedure Code, nor does the case subject to the jurisdiction of the court.

(3) The two Petitioners then argued that Article 1 of the Act of Compensation for Wrongful Detentions and Executions, which limits physical injuries to the

聲請人認觀察勒戒期滿後之強制戒治係屬冤獄，聲請冤獄賠償，經依辦理冤獄賠償事件應行注意事項第二點規定非依刑事訴訟法令執行羈押之被告，亦不屬法院就其案件有審判權者，駁回其聲請。

（三）兩位聲請人乃以冤獄賠償法第一條因實施刑事程序損害身體自由及辦理冤獄賠償事件應行注意事項第二點以法院就其案件有審判權者為限之規

enforcement of criminal procedures, and Point 2 of the Precautionary Matters on Handling Compensation for Wrongful Detention and Execution Cases, which limits the application to cases over which the court has jurisdiction, contradict the forcement of criminal procedures, and right of equality under Article 7, personal freedom under Article 8, and state compensation under Article 24 of the Constitution, and petitioned for interpretation.

定，有牴觸憲法第七條平等權、第八條人身自由及第二十四條國家賠償之疑義，聲請解釋。

J. Y. Interpretation No.625（June 8, 2007）*

ISSUE: Are the Ministry of Finance directives constitutional in denying the refund of land value tax overpaid by reason of decrease in land area as a result of resurvey carried out in the case of overlapping boundaries of land ?

RELEVANT LAWS:

The Constitution, Article 143, Paragraph 1, the last sentence（憲法第一四三條第一項後段）; Tax Collection Act, Article 28（稅捐稽徵法第二十八條）; Land Tax Act, Articles 14, 15 and 16（土地稅法第十四條、第十五條、第十六條）; Ministry of Finance Directive Tai-Tsai-Shui-35521, August 9, 1979（財政部六十八年八月九日台財稅第三五五二一號函）; Ministry of Finance Directive Tai-Tsai-Shui-33756, May 10, 1980（財政部六十九年五月十日台財稅第三三七五六號函）; J.Y. Interpretations Nos. 420, 460, 496 and 597（司法院釋字第四二0、四六0、四九六、五九七號解釋）.

KEYWORDS:

land value tax（地價稅）, register of land value of owners（地價歸戶冊）, notification of cadastral changes（地籍異動通知）, cadastral resurvey（地籍重測）, modified land description registration（土地標示變更登記）, overlap of

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposes only.

boundary（界址重疊）, adjacent land（鄰地）, farmland tax（田賦）, assessed land value（規定地價）, re-assessed land value（重新規定地價）, progressive tax rate（累進稅率）, basic point of land value subject to progressive taxation（累進起點地價）, re-measurement（複丈）. **

HOLDING: The land value tax is levied on the basis of the total land value computed on the value and acreage of all lands owned by the landowner and lying within the same county (or municipality) or municipality under direct jurisdiction of the Executive Yuan and is assessed according to the register of land value of owners and details of notification of cadastral changes prepared by the land administration agency. If the result of the cadastral resurvey carried out under the law shows any variation in the acreage from the area described in the land registration, the acreage shown in the modified land description registration effected upon ascertainment by the resurvey shall prevail unless the result of the resurvey is repudiated or it is found positively that the resurvey operation is defective. Where the

解釋文：地價稅之稽徵，係以土地所有權人在同一直轄市或縣（市）所有之土地之地價及面積所計算之地價總額為課稅基礎，並按照地政機關編送之地價歸戶冊及地籍異動通知資料核定之。因地籍依法重測之結果，如與重測前之土地登記標示之面積有出入者，除非否定重測之結果或確認實施重測時作業有瑕疵，否則，即應以重測確定後所為土地標示變更登記所記載之土地面積為準。而同一土地如經地政機關於實施重測時發現與鄰地有界址重疊之情形而經重測後面積減少者，即表示依重測前之土地登記標示之面積為計算基礎而核列歸戶冊之地價總額並不正確，其致土地所有權人因而負擔更多稅負者，亦應解為係屬稅捐稽徵法第二十八條所規定之「因計算錯誤溢繳之稅款」，方與實質課稅之公平原則無違。

boundary of a plot of land is found upon resurvey conducted by the land administration agency to be overlapping with the boundary of an adjacent plot of land and its acreage is thus decreased after the resurvey, it means that the total land value entered into the register of land value of owners and computed on the basis of the acreage described in the land registration prior to such resurvey is incorrect, and the resultant extra tax burden imposed on the landowner must be regarded as "tax overpaid due to errors in computation" under Article 28 of the Tax Collection Act so as to be consistent with the principle of equality of actual taxation.

The interpretation made by the Ministry of Finance in its Directive Tai-Tsai Shui-35521 of August 9, 1979, and in the first sentence of paragraph 2 of its Directive Tai-Tsai-Shui-33756 of May 10, 1980, to the effect that Article 28 of the Tax Collection Act in respect of tax refund is not applicable to the situation where the land area is decreased due to overlapping of its boundary with an adjacent plot of land discovered upon cadastral resurvey is

財政部中華民國六十八年八月九日台財稅第三五五二一號函主旨以及財政部六十九年五月十日台財稅第三三七五六號函說明二前段所載，就地籍重測時發現與鄰地有界址重疊，重測後面積減少，亦認為不適用稅捐稽徵法第二十八條規定退稅部分之釋示，與本解釋意旨不符，應自本解釋公布之日起不再援用。依本解釋意旨，於適用稅捐稽徵法第二十八條予以退稅時，至多追溯至最近五年已繳之地價稅為限，併此指明。

inconsistent with this Interpretation and must be rendered inoperative as of the date of delivery hereof. It is also pointed out *en passant* that applications allowable by this Interpretation for tax refund under Article 28 of the Tax Collection Act may be made retroactively for the land value tax paid within the past five years only.

REASONING: The Constitution provides in Article 143, Paragraph 1, the last sentence: "Privately owned land shall be liable to taxation according to its value ……" Accordingly, the Land Tax Act provides in Article 14 that "land of an assessed value shall be liable to payment of land value tax, except where farmland tax is levied thereon under Article 22 hereof," and in Article 15 that "land value tax is levied on the basis of the total land value of all lots of land owned by each landowner and lying within each county (or municipality) or municipality under direct jurisdiction of the Executive Yuan," and that "the term 'total land value' referred to in the preceding paragraph denotes the aggregated land value entered into the register of land value of owners

解釋理由書：憲法第一百四十三條第一項後段規定，「私有土地應照價納稅」，本此意旨，土地稅法第十四條規定「已規定地價之土地，除依第二十二條規定課徵田賦者外，應課徵地價稅。」同法第十五條並規定「地價稅按每一土地所有權人在每一直轄市或縣（市）轄區內之地價總額計徵之。」「前項所稱地價總額，指每一土地所有權人依法定程序辦理規定地價或重新規定地價，經核列歸戶冊之地價總額。」又地價稅係採累進稅率課徵，土地所有權人之地價總額超過土地所在地之直轄市或縣（市）累進起點地價者，即累進課徵，超過累進起點地價倍數愈高者，稅率愈高（同法第十六條參照），故土地所有權人在同一直轄市或縣（市）之所有土地，面積愈多及地價總額愈高者，其地價稅之負擔將愈重，藉此以促

upon verification of the assessed or re-assessed land value as duly effected by each landowner." The land value tax is levied on a progressive rate, which is applicable if the total value of the land owned by a landowner exceeds the basic point of land value subject to progressive taxation applicable to the municipality (or city) or the municipality under direct jurisdiction of the Executive Yuan, wherein the land lies, and the more the percentage of land value is in excess of such basic point, the higher the tax rate is (*See* Article 16 of the Land Tax Act). Consequently, the more the acreage and the higher the total value are of all lots of land owned by a landowner in the same municipality (or city) or municipality under direct jurisdiction of the Executive Yuan, the heavier the land value tax burden will be upon him/her. Therefore, the landowner is encouraged to either make full exploitation of his/her land or release and convey to others the land which he/she may not need. Besides, as we have made clear in our Interpretations Nos. 420, 460, 496 and 597, where a competent agency has any doubt in connection with the application

使土地所有權人充分利用其土地或將不需要之土地移轉釋出。又主管機關於適用職權範圍內之法律條文發生疑義者，本於法定職權就相關規定為闡釋，如其解釋符合各該法律之立法目的及實質課稅之公平原則，即與租稅法律主義尚無違背，本院釋字第四二０、四六０、四九六、五九七號解釋已闡示有案。

of any statutory provision within its scope of power, the rendering of an interpretation by the agency in line with its statutory functions is not against the doctrine of taxation per legislation insofar as such interpretation is consistent with the legislative intent of the statute and the principle of equality of actual taxation.

The collection of land value tax is processed by determination by the competent tax office of the municipality (or city) or municipality under direct jurisdiction of the Executive Yuan of the amount of land value tax payable by the taxpayer for each term according to the register of land value of owners and details of notification of cadastral changes prepared by the land administration agency. A land value tax payment form is then served upon each taxpayer for payment of the tax to the designated office of the government treasury within the time limit specified (*See* Articles 40, 43 and 44 of the Land Tax Act). Since the land value tax is levied on the basis of the total land value computed on the acreage and value of all lands owned by the landowner and lying within the

地價稅之稽徵程序，係由直轄市或縣（市）主管稽徵機關按照地政機關編送之地價歸戶冊及地籍異動通知資料核定，於查定納稅義務人每期應納地價稅額後，填發地價稅稅單，分送納稅義務人，限期向指定公庫繳納（同法第四十、四十三、四十四條規定參照）。而地價稅既以土地所有權人在同一直轄市或縣（市）所有之土地之地價及面積所計算之地價總額為課稅基礎，並採累進稅率，則課徵地價稅自應以正確之土地面積作為課稅基礎，始與實質課稅之公平原則無違。是因地籍依法重測之結果，如與重測前之土地登記標示之面積有出入者，除非否定重測之結果或確認實施重測時作業有瑕疵，否則，即應以重測確定後所為土地標示變更登記所記載之土地面積為準。而同一土地如經地政機關於實施重測時發現與鄰地有界址

same municipality (or city) or municipality under direct jurisdiction of the Executive Yuan and is charged on a progressive scale, it must be levied on the basis of the correct acreage of the land so as to be consistent with the principle of equality of actual taxation. Thus, if the result of cadastral resurvey carried out under the law shows any variation in the acreage from the area described in the land registration, the acreage shown in the modified land description registration effected upon ascertainment by the resurvey shall prevail unless the result of the resurvey is repudiated or it is found positively that the resurvey operation is defective. Where the boundary of a plot of land is found upon resurvey conducted by the land administration agency to be overlapping with the boundary of an adjacent land and its area is thus decreased after the resurvey, it means that the total land value entered into the register of land value of owners and computed on the basis of the area described in the land registration prior to such resurvey is incorrect, and the resultant extra tax burden imposed on the landowner must be regarded as “tax over

重疊之情形而經重測後面積減少者，即表示依重測前之土地登記標示之面積為計算基礎而核列歸戶冊之地價總額並不正確，其致土地所有權人因而負擔更多稅負者，亦應解為係屬稅捐稽徵法第二十八條所規定之「因計算錯誤溢繳之稅款」。

paid due to errors in computation" under Article 28 of the Tax Collection Act.

The interpretation given by the Ministry of Finance in its Directive Tai-Tsai-Shui-35521 of August 9, 1979 that provides "where the acreage of a plot of land of a landowner is found upon resurvey or remeasurement carried out by the land administration agency or due to division of the land to be at variance with its area entered in the general register of land value of owners based on which the original tax office levied the land tax, the tax office must reassess the tax based on the new acreage as of the year or term after such new acreage is ascertained by resurvey, re-measurement or division of the land; any overpayment or underpayment of the tax due to increase or decrease of the acreage by comparing the original and the new land area need not aptly be refunded or made good, as the case may be, by application of Article 21 and Article 28 of the Tax Collection Act." And the Ministry of Finance Directive Tai-Tsai-Shui-33756 of May 10, 1980, states in the first sentence of paragraph 2 thereof that "Article

財政部六十八年八月九日台財稅第三五五二一號函主旨：「土地所有權人之土地，因地政機關重測、複丈或分割等結果，致其面積與原移送稅捐機關據以課徵土地稅之土地總歸戶冊中所載者不符，稅捐機關應自土地重測、複丈或分割等確定後之年期起改按新面積課稅；其因新舊面積之增減相較之下，致有多繳或少繳稅款情事者，未便適用稅捐稽徵法第二十一條及第二十八條之規定予以追繳或退稅。」以及財政部六十九年五月十日台財稅第三三七五六號函說明二前段：「土地所有權人之土地，因地政機關重測、複丈或分割等結果，致其面積與原移送稅捐機關據以核課土地稅之面積不符，因其既非地政機關作業上之疏失所致，又未經地政機關依法定程序更正登記，其面積業經確定，自無稅捐稽徵法第二十一條及第二十八條之適用」，就地籍重測時發現與鄰地有界址重疊，重測後面積減少，亦認為不適用稅捐稽徵法第二十八條規定退稅部分之釋示，與本解釋意旨不符，應自本解釋公布之日起不再援用。依本解釋意旨，於適用稅捐稽徵法第二十八條予以

21 and Article 28 of the Tax Collection Act are certainly inapplicable to the situation where the area of the land of a landowner is found upon resurvey or remeasurement carried out by the land administration agency or due to division of the land to be at variance with its area entered in the general register of land value of individual landowners based on which the original tax office levied the land tax because it is not attributable to fault in the operation of the land administration agency, nor has the area registered been duly corrected by the land administration agency, and the area has thus been already ascertained." The Ministry of Finance interpretation given in the above-cited directives denying the applicability of Article 28 of the Tax Collection Act in respect of tax refund to the situation where the land area is decreased due to overlapping of its boundary with an adjacent plot of land discovered upon cadastral resurvey is inconsistent with this Interpretation and must be rendered inoperative as of the date of delivery hereof. It is also pointed out *en passant* that applications allowable by this Interpretation for tax refund under

退稅時，至多追溯至最近五年已繳之地價稅為限。又本件解釋之適用，僅限於地價稅之稽徵，不及於其他，均併此指明。

Article 28 of the Tax Collection Act may be made retroactively for the land value tax paid within the past five years only, and that this Interpretation is not applicable to taxes other than the land value tax.

EDITOR'S NOTE:

Summary of facts: The Internal Revenue Service assessed the land value tax of the Petitioner's forty-five parcels of land to be more than NT$1,000,000. The Petitioner disagreed and claimed that the area of ten parcels of his land had decreased significantly after the resurvey in early 1999, and the levy of property tax based on the originally recorded area was unfair to the tax payers. The Petitioner requested for a refund of the various excessive land and property taxes over the years and eventually filed an administrative appeal but was dismissed by the Supreme Administrative Court.

The Petitioner then requested an interpretation on the ground that the two administrative interpretations by the Ministry of Finance relied upon by the above judgment, Tai Tsai Shui No. 35521 of

編者註：

事實摘要：聲請人所有之四十五筆土地，經稅捐稽徵處核定八十八年地價稅新臺幣壹佰餘萬元，聲請人不服，主張其所有土地中十筆土地之面積，於八十八年初實施土地重測後確已嚴重減少，如以原土地登記簿登記之土地面積計繳地價稅，對納稅人不公，因此請求核退其多年溢繳之各項土地稅賦。最後提起行政訴訟，亦遭最高行政法院駁回。

聲請人乃以上開判決所適用之財政部六十八年八月九日台財稅第三五五二一號及六十九年五月十日台財稅第三三七五六號函釋，土地重測後面積減少，不適用退稅之規定，有牴觸憲法第

August 9, 1979, and Tai Tsai Shui No. 33756 of May 10, 1980, in that the regulation on tax refund does not apply to the decrease of land area after the resurvey, present the question of violation of Article 15 of the Constitution.

十五條財產權之疑義，聲請解釋。

J. Y. Interpretation No.626（June 8, 2007）*

ISSUE: Is it unconstitutional to deny color-blind people the opportunity to be enrolled in the Central Police Academy under the general regulation issued by said school in respect of student admission ?

RELEVANT LAWS:

Articles 7, 11, 21, 22, 23 and 159 of the Constitution（憲法第七條、第十一條、第二十一條、第二十二條、第二十三條、第一百五十九條）; J.Y. Interpretations Nos. 380, 382, 450 and 563（司法院釋字第三八0號、第三八二號、第四五0號、第五六三號解釋）; Article 5-I (ii) of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）; Article 8 of the Organic Act of the Ministry of the Interior（內政部組織法第八條）; Article 2 of the Organic Act of the Central Police University（中央警察大學組織條例第二條）; Central Police University General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs（中央警察大學九十一學年度研究所碩士班入學考試招生簡章）.

KEYWORDS:

General regulation for student admission（招生簡章）, university self-government（大學自治）, qualifications for

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* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

school admission（入學資格）, principle of legal reservation（法律保留原則）, self-government rules（自治規章）, right to education（受教育權）, right of equality（平等權）, criteria for classification（分類標準）, discrimination（差別待遇）, biological defects（生理缺陷）, strict scrutiny（較為嚴格之審查）, important public interest（重要公共利益）, substantial relevance（實質關聯）.**

HOLDING: Article 7 of the Constitution provides that all citizens of the Republic of China shall be equal before the law. Article 159 thereof further provides that all citizens shall have an equal opportunity to receive education, which is intended to ensure that the people shall have a fair opportunity to receive education at various stages. According to Point 7 (ii) and Point 8 (ii) of the Central Police University General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs, whether a person is color-blind will determine if he or she is eligible to enroll in said school. The purposes of said provisions are to train professional police talents who are equipped with both

解釋文：憲法第七條規定，人民在法律上一律平等；第一百五十九條復規定：「國民受教育之機會，一律平等。」旨在確保人民享有接受各階段教育之公平機會。中央警察大學九十一學年度研究所碩士班入學考試招生簡章第七點第二款及第八點第二款，以有無色盲決定能否取得入學資格之規定，係為培養理論與實務兼備之警察專門人才，並求教育資源之有效運用，藉以提升警政之素質，促進法治國家之發展，其欲達成之目的洵屬重要公共利益；因警察工作之範圍廣泛、內容繁雜，職務常須輪調，隨時可能發生判斷顏色之需要，色盲者因此確有不適合擔任警察之正當理由，是上開招生簡章之規定與其目的間尚非無實質關聯，與憲法第七條及第一百五十九條規定並無牴觸。

theoretical knowledge and real-world techniques, and to attain effective use of educational resources, thus improving the quality of police administration and fostering the development of a rule-of-law nation. As such, the purposes are no doubt important public interests. In light of the wide range of police tasks, complexity of police work, and frequent transfer of posts, a police officer may be required to distinguish colors at any given moment. Therefore, a legitimate reason indeed exists when a color-blind person is considered to be unsuitable for the police profession. Given the above, the provisions of said General Regulation for student admission and the purposes thereof are substantially related and thus are not in conflict with Articles 7 and 159 of the Constitution.

REASONING: When a citizen, whose constitutional right was infringed upon and for whom remedies provided by law for such infringement had been exhausted, has questions on the constitutionality of the statute or regulation relied thereupon by the court of last resort in its

解釋理由書：按人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法，司法院大法官審理案件法第五條第一項第二款定有明文。系爭「中央警察大學（以下簡稱

final judgment, he or she may petition for interpretation of the Constitution. The foregoing is expressly provided under Article 5-I (ii) of the Constitutional Interpretation Procedure Act. It should be noted that the Central Police University (hereinafter "CPU") General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs at issue is a general legal norm prescribed and announced by the CPU regarding its 2002 graduate school admission for master's programs. As such, it falls within the term "regulation" as defined in the aforesaid Article 5-I (ii) of the Constitutional Interpretation Procedure Act.

警大）九十一學年度研究所碩士班入學考試招生簡章」為警大就有關九十一學年度研究所碩士班招生事項，所訂定並對外發布之一般性法規範，該當於前開審理案件法第五條第一項第二款所稱之命令，得為本院違憲審查之客體，合先說明。

University self-government is within the scope protected by the freedom of teaching under Article 11 of the Constitution. Universities are entitled to the right of self-government in teaching, research and learning. The scope of self-government covers not only such matters as internal organization, curriculum models, research topics, scholastic aptitude evaluations, examination rules, and

大學自治為憲法第十一條講學自由之保障範圍，大學對於教學、研究與學習之事項，享有自治權，其自治事項範圍除內部組織、課程設計、研究內容、學力評鑑、考試規則及畢業條件等外（本院釋字第三八０號、第四五０號及第五六三號解釋參照），亦包括入學資格在內，俾大學得藉以篩選學生，維繫學校品質，提升競爭力，並發展特色，實現教育理念。大學對於入學資格

graduation requirements (*See* J.Y. Interpretations Nos. 380, 450 and 563), but also qualifications for admission so that a university may thereby select its students, maintain its quality, improve its competitiveness, develop its characteristics, and realize its educational ideals. Since a university has the right of self-government in regards to qualifications for admission, it may hence set forth relevant qualifications and requirements for admission by means of self-governing regulations to the extent that they are reasonable and necessary. No violation of the principle of legal reservation as provided for under Article 23 of the Constitution should arise as a result. The CPU is a university established by the Ministry of the Interior to achieve the dual purposes of studying advanced police academics and of training professional police recruits (*See* Article 8 the Organic Act of the Ministry of the Interior and Article 2 of the Organic Act of the Central Police University). The said university is subordinate to the Ministry of the Interior and is in charge of the training and education of the police and thus is involved in the improvement of the nation's

既享有自治權，自得以其自治規章，於合理及必要之範圍內，訂定相關入學資格條件，不生違反憲法第二十三條法律保留原則之問題。警大係內政部為達成研究高深警察學術、培養警察專門人才之雙重任務而設立之大學（內政部組織法第八條及中央警察大學組織條例第二條參照），隸屬內政部，負責警察之養成教育，並與國家警政水準之提升與社會治安之維持，息息相關。其雖因組織及任務上之特殊性，而與一般大學未盡相同，然「研究高深警察學術」既屬其設校宗旨，就涉及警察學術之教學、研究與學習之事項，包括入學資格條件，警大即仍得享有一定程度之自治權。是警大就入學資格條件事項，訂定系爭具大學自治規章性質之「中央警察大學九十一學年度研究所碩士班入學考試招生簡章」，明定以體格檢查及格為錄取條件，既未逾越自治範圍，即難指摘與法律保留原則有違。惟警大自治權之行使，應受其功能本質之限制，例如不得設立與警政無關之系別，且為確保其達成國家賦予之政策功能，而應接受比一般大學更多之國家監督，自不待言。是以入學資格為例，即使法律授權內政部得依其警察政策之特殊需求，為警大研究所碩士班之招生訂定一定資格標準，

a police administration and the maintenance of social order and safety. Although it may be different from ordinary universities due to the specialty of its organization and missions, the CPU may nonetheless have the right of self-government to a certain extent when it comes to such matters as the teaching, research and learning regarding the police academics, including the qualifications and requirements for admission, since its mission statement includes the "research and study of advanced police academics." Therefore, in respect of the qualifications and requirements for admission, the CPU set forth the Central Police University General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs at issue, which, in nature, is a university's self-governing regulation. Where it specifically provides that passing the physical examination is a condition for admission, no violation of the principle of legal reservation can be found since it does not go beyond the scope of self-government. However, the CPU's exercise of its right of self-government should be subject to the

警大因而僅能循此資格標準訂定招生簡章，選取學生，或進一步要求警大擬定之招生簡章應事先層報內政部核定，雖均使警大之招生自主權大幅限縮，亦非為憲法所不許。

nature of its function. For instance, it should not establish a department that has nothing to do with police administration. Besides, it goes without saying that it should be subject to more state supervision than ordinary universities so as to make sure that it achieves functions mandated under the state's policy. Taking qualifications for admission as an example, if the law authorizes the Ministry of the Interior to formulate certain qualifications and criteria for the CPU's graduate school admission for master's programs based on the specific requirements of its police policies and hence the CPU can only set forth its general regulation for student admission and select its students based on such qualifications and criteria, or if it further requires that the general regulation for student admission prepared by the CPU be submitted to the Ministry of the Interior in advance, it is not unconstitutional despite the significant restriction of the CPU's right of self-government with respect to student admission.

The Central Police University General Regulation in Respect of the 2002 Graduate

系爭「中央警察大學九十一學年度研究所碩士班入學考試招生簡章」乃

School Admission Examinations for Master's Programs at issue is a self-governing regulation set forth by the CPU for the purpose of formulating its qualifications and requirements for admission. Where it does not go beyond the scope of self-government, there is no violation of the principle of legal reservation. Nonetheless, it is still subject to the fundamental rights provided for by the Constitution. Point 7 (ii) of the General Regulation at issue provides, "2. Items for Second Examination: oral examination and physical examination……" Point 8 (ii) thereof provides, "Others: The following tests must be passed; those who fail these tests will not be admitted……3. An examinee who has any of the following conditions shall be deemed to have failed the physical examination: ……ability to distinguish colors – color blindness (provided that a person suffering from dyschromatopsia will not be admitted to the Graduate School for Criminology and the Graduate School for Forensic Science) ……" Under the aforesaid provisions, whether a person is color-blind will determine if he or she is eligible to

警大為訂定入學資格條件所訂定之自治規章，在不違背自治權範圍內，固不生違反法律保留原則之問題，但仍受憲法所規定基本權之拘束。系爭招生簡章第七點第二款：「2.複試項目：含口試與體格檢查二項……」及第八點第二款：「其他人員：須通過下列檢查，不合格者，不予錄取。……3.考生有左項情形之一者，為體檢不合格：……辨色力—色盲（但刑事警察研究所及鑑識科學研究所，色弱者亦不錄取）……」之規定，因以色盲之有無決定能否取得入學資格，使色盲之考生因此不得進入警大接受教育，而涉有違反受教育權與平等權保障之虞，是否違憲，須受進一步之檢驗。

enroll in said school, thus preventing a color-blind examinee from being able to attend the CPU for education. Further review should be conducted to decide on its constitutionality since it is likely to infringe upon the individual's right to education and right of equality.

In respect of the people's right to education, it may be further divided into the "right to receive a civil education" and the "right to receive education other than a civil education." The former right is expressly provided for under Article 21 of the Constitution, which is intended to enable the people to demand that the State provide civil education benefits and to obligate the State to so perform. As for the people's right to receive education other than a civil education, Article 22 of the Constitution also guarantees it (*See* J.Y. Interpretation No. 382). Nevertheless, in light of the limited educational resources, it is the student's right to ensure that the State does not arbitrarily restrict or deprive him or her of the right to receive education at school that is guaranteed, but not the right to demand the grant of admission

按人民受教育之權利，依其憲法規範基礎之不同，可區分為「受國民教育之權利」及「受國民教育以外教育之權利」。前者明定於憲法第二十一條，旨在使人民得請求國家提供以國民教育為內容之給付，國家亦有履行該項給付之義務。至於人民受國民教育以外教育之權利，固為憲法第二十二條所保障（本院釋字第三八二號解釋參照），惟鑑於教育資源有限，所保障者係以學生在校接受教育之權利不受國家恣意限制或剝奪為主要內容，並不包括賦予人民請求給予入學許可、提供特定教育給付之權利。是國民教育學校以外之各級各類學校訂定特定之入學資格，排除資格不符之考生入學就讀，例如系爭招生簡章排除色盲之考生進入警大就讀，尚不得謂已侵害該考生受憲法保障之受教育權。除非相關入學資格條件違反憲法第七條人民在法律上一律平等暨第一百五

to school or provision of any particular education benefits. Therefore, if a school other than a civil-education school sets forth specific admission qualifications to preclude unqualified examinees from admission (e.g., the CPU's general regulation for admission's preclusion of a color-blind examinee from being admitted to said university), it does not necessarily infringe upon such examinees' constitutionally guaranteed right to education. Except where any relevant qualification or requirement for admission violates Article 7 of the Constitution, which provides that all citizens of the Republic of China shall be equal before the law, and Article 159 thereof, which provides that all citizens shall have an equal opportunity to receive education, thus unjustifiably restricting or depriving the people of a fair opportunity to receive education, there is no conflict with the Constitution.

十九條國民受教育之機會一律平等之規定，而不當限制或剝奪人民受教育之公平機會，否則即不生牴觸憲法之問題。

As for the issue of whether the discriminatory standards for classification based on color blindness as provided for in the General Regulation in question infringes upon the fair opportunity of all

至於系爭招生簡章規定以色盲為差別待遇之分類標準，使色盲之考生無從取得入學資格，是否侵害人民接受教育之公平機會，而違反平等權保障之問題，鑑於色盲非屬人力所得控制之生理

people to receive education and hence violates the principle of equal protection by precluding color-blind examinees from being admitted to the school, said General Regulation should be subject to strict scrutiny because color blindness is a biological defect beyond human control, the discrimination concerns the constitutionally guaranteed equal opportunity to receive education, and education plays a profound role in an individual's choice of jobs, career planning and sound development of personality, and is even closely related to a person's social status and the distribution of the State's resources. Therefore, in order to judge whether the General Regulation at issue is contrary to the principle of equal protection, one should determine whether the purposes to be achieved are important public interests, and whether the standards for classification and discriminatory treatment are substantially related to such purposes.

缺陷，且此一差別對待涉及平等接受教育之機會，為憲法明文保障之事項，而教育對於個人日後工作之選擇、生涯之規劃及人格之健全發展影響深遠，甚至與社會地位及國家資源之分配息息相關，系爭規定自應受較為嚴格之審查。故系爭招生簡章之規定是否違反平等權之保障，應視其所欲達成之目的是否屬重要公共利益，且所採取分類標準及差別待遇之手段與目的之達成是否具有實質關聯而定。

Since the CPU is charged with the dual missions of studying advanced police academics and training professional police recruits, all of its students are expected to

警大因兼負培養警察專門人才與研究高深警察學術之雙重任務，期其學生畢業後均能投入警界，為國家社會治安投注心力，並在警察工作中運用所

join the police force after graduation to devote themselves to the maintenance of the social order and peace of the State, and to combine theoretical knowledge and real-world techniques in carrying out police tasks. If a student is enrolled in a police education program but is not able to perform the real-life job of a police officer and the maintenance of social order and peace, the purposes of the CPU's establishment will simply be defeated. In order to achieve said purposes and effectively use the educational resources, freedom from color blindness is a condition for admission, thus precluding those who are not suitable for the position of police officer. Since the said purposes, if achieved, would be conducive to the improvement of the quality of police administration, and would help maintain or improve social order and peace, human rights protection, the police image and the prestige of law enforcement, thus furthering the development of a rule-of-law nation, they are certainly important public interests. In light of the wide range of police tasks, complexity of police work, and frequent transfer of posts, a police

學，將理論與實務結合；若學生入學接受警察教育，卻未能勝任警察、治安等實務工作，將與警大設校宗旨不符。為求上開設校宗旨之達成及教育資源之有效運用，乃以無色盲為入學條件之一，預先排除不適合擔任警察之人。是項目的之達成，有助於警政素質之提升，並使社會治安、人權保障、警察形象及執法威信得以維持或改善，進而促進法治國家之發展，自屬重要公共利益。因警察工作之範圍廣泛、內容繁雜，職務常須輪調，隨時可能發生判斷顏色之需要，色盲者因此確有不適合擔任警察之正當理由。是系爭招生簡章規定排除色盲者之入學資格，集中有限教育資源於培育適合擔任警察之學生，自難謂與其所欲達成之目的間欠缺實質關聯。雖在現行制度下，警大畢業之一般生仍須另行參加警察特考，經考試及格後始取得警察任用資格而得擔任警察；且其於在校期間不享公費，亦不負有畢業後從事警察工作之義務，以致警大並不保障亦不強制所有一般生畢業後均從事警察工作。然此仍不妨礙警大在其所得決策之範圍內，儘可能追求符合設校宗旨及有效運用教育資源之目的，況所採排除色盲者入學之手段，亦確有助於前開目的之有效達成。是系爭招生簡章之規定與

officer may be required to distinguish colors at any given moment. Therefore, a legitimate reason indeed exists when a color-blind person is considered to be unsuitable for the police profession. Given the above, the provisions of said General Regulation for student admission, in precluding color-blind people from admission and concentrating limited educational resources on training and cultivating those students who are suitable for the police profession, are substantially related to the purposes to be achieved. Under the current system, the CPU's graduates still have to take the specific examination for the police profession and will qualify as police officers only after passing said examination. Besides, the CPU's students do not have any public fund appropriated for their tuition, nor are they required to perform the police functions upon their graduation. As such, the CPU neither guarantees any graduate a police job nor compels any graduate to perform such job after their graduation. Despite the above, the CPU may still pursue the purposes of fulfilling its missions and effectively using the educational resources as

該目的間之實質關聯性，並不因此而受影響，與憲法第七條及第一百五十九條規定並無牴觸。

long as it falls within its decision-making power. In addition, the means of precluding color-blind people from admission indeed is conducive to the achievement of the aforesaid purposes. Given the above, the provisions of said General Regulation for student admission and the purposes thereof are substantially related and thus are not in conflict with Articles 7 and 159 of the Constitution.

EDITOR'S NOTE:

Summary of facts: The Petitioner took the entrance exam for the Master of Law Program at the Central Police University. The first round was the written examination, and the second round entailed an interview and a physical examination. Having passed the first round, the Petitioner was diagnosed to have deuteranopia on both eyes by the Central Police University, which then disqualified the Petitioner on the ground that the requirements for physical fitness under Points 7 (ii) and 8 (ii) of the Admissions Rules was not met due to ,color-blindness.

Having exhausted all administrative

編者註：

事實摘要：聲請人參加中央警察大學（以下簡稱警大）研究所碩士班入學考試，報考法律學研究所；初試採筆試，複試則含口試與體格檢查二項。聲請人經初試錄取後，於複試時，經警大醫務室檢驗判定為兩眼綠色盲，警大乃依招生簡章第七點第二款及第八點第二款以有無色盲決定能否取得入學資格規定，認定聲請人體格檢查不合格，不予錄取。

聲請人於窮盡行政救濟途徑後，

remedies, the Petitioner deemed the abovementioned rules applied by the Supreme Administrative Court in making its decision violate the principle of legal reservation and infringed upon the Petitioner's right to receive education and right of equality, and filed the petition for interpretation.

認最高行政法院判決所適用之上開規定，違反法律保留原則，並侵害其受憲法保障之受教育權及平等權，爰聲請解釋。

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

ISSUE: What is the scope of presidential immunity? Can the president ever claim the state secrets privilege? If so, what is the scope of such privilege ?

RELEVANT LAWS:

Articles 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 52, 53, 56 and 104 of the Constitution; Articles 2-II, -III, -IV, -V and -VII, 3-I, 5-I, 6-II, 7-II, 9-I (i) and (ii) of the Amendments to the Constitution（憲法第三十五條、第三十六條、第三十七條、第三十八條、第三十九條、第四十條、第四十一條、第四十二條、第四十三條、第四十四條、第五十二條、第五十三條、第五十六條、第一百零四條；憲法增修條文第二條第二項、第三項、第四項、第五項、第七項、第三條第一項、第五條第一項、第六條第二項、第七條第二項、第九條第一項第一款、第二款）; J.Y. Interpretations Nos. 388 and 585（司法院釋字第三八八號、第五八五號解釋）; Article 304 of the Code of Civil Procedure（民事訴訟法第三百零四條）；Articles 134-II, 176-1, 179-II, 183-II, 230-III and 231-III of the Code of Criminal Procedure（刑事訴訟法第一百三十四條第二項、第一百七十六條之一、第一百七十九條第二項、第一百八十三條第二項、第二百三十條第三項、第二百三十一條第三項）; Articles 2, 4, 7-I (i), 11 and

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

12 of the State Secrets Protection Act（國家機密保護法第二條、第四條、第七條第一項第一款、第十一條、第十二條）; Regulation Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets（法院辦理涉及國家機密案件保密作業辦法）；Articles 63-1-I (i) and (ii) of the Court Organic Act（法院組織法第六十三條之一第一項第一款、第二款）；Article 5-I (ii) of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

Presidential criminal immunity（總統刑事豁免權）, criminal prosecution（刑事上之訴究）, state secrets privilege（國家機密特權）, presidential state secrets privilege（總統國家機密特權）, *ad hoc* collegiate bench（特別合議庭）. **

HOLDING:

I. 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 subject to criminal prosecution unless he is charged with having committed an act of rebellion or treason. The said provision is so formulated as to pay respect to and provide protection

解釋文：

一、總統之刑事豁免權

憲法第五十二條規定，總統除犯內亂或外患罪外，非經罷免或解職，不受刑事上之訴究。此係憲法基於總統為國家元首，對內肩負統率全國陸海空軍等重要職責，對外代表中華民國之特殊身分所為之尊崇與保障，業經本院釋字第三八八號解釋在案。

for the President, being the head of the State, for his special status as Commander of the Army, Navy and Air Force and assuming other important duties internally, and representing the Republic of China externally. This Court has so opined in J.Y. Interpretation No. 388.

It has been made clear in J. Y. Interpretation No. 388 that where the President commits a crime other than rebellion or treason, the prosecution for such crime is to be only temporarily withheld, and the application of the Criminal Code or relevant laws which provide for criminal punishment is not permanently excluded. As such, it is merely a temporary procedural barrier, rather than a substantive immunity from any criminal liability on the part of the President. Therefore, the phrase "not …… subject to criminal prosecution" as provided for under 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

依本院釋字第三八八號解釋意旨，總統不受刑事上之訴究，乃在使總統涉犯內亂或外患罪以外之罪者，暫時不能為刑事上訴究，並非完全不適用刑法或相關法律之刑罰規定，故為一種暫時性之程序障礙，而非總統就其犯罪行為享有實體之免責權。是憲法第五十二條規定「不受刑事上之訴究」，係指刑事偵查及審判機關，於總統任職期間，就總統涉犯內亂或外患罪以外之罪者，暫時不得以總統為犯罪嫌疑人或被告而進行偵查、起訴與審判程序而言。但對總統身分之尊崇與職權之行使無直接關涉之措施，或對犯罪現場之即時勘察，不在此限。

during his presidency for any criminal offense committed by him other than rebellion or treason, provided that any measure not directly concerning the esteemed status of the presidency and exercise of the presidential authorities, or prompt inspection and investigation of the crime scene may still be conducted.

Presidential criminal immunity does not extend to the evidentiary investigation and preservation directed at the President for a criminal case involving another person. However, if, as a result, the President is suspected of having committed a crime, necessary evidentiary preservation may still be conducted pursuant to the intent of this Interpretation although no investigation may be commenced against the President, regarding him as a suspect or defendant. In other words, in light of the esteemed status of the presidency and the protection of the exercise of the presidential authorities provided for under Article 52 of the Constitution, the President's person may not be restrained when any measure and evidentiary preservation is conducted that is not subject to

總統之刑事豁免權，不及於因他人刑事案件而對總統所為之證據調查與證據保全。惟如因而發現總統有犯罪嫌疑者，雖不得開始以總統為犯罪嫌疑人或被告之偵查程序，但得依本解釋意旨，為必要之證據保全，即基於憲法第五十二條對總統特殊身分尊崇及對其行使職權保障之意旨，上開因不屬於總統刑事豁免權範圍所得進行之措施及保全證據之處分，均不得限制總統之人身自由，例如拘提或對其身體之搜索、勘驗與鑑定等，亦不得妨礙總統職權之正常行使。其有搜索與總統有關之特定處所以逮捕特定人、扣押特定物件或電磁紀錄之必要者，立法機關應就搜索處所之限制、總統得拒絕搜索或扣押之事由，及特別之司法審查與聲明不服等程序，增訂適用於總統之特別規定。於該法律公布施行前，除經總統同意者外，無論

presidential criminal immunity. For instance, no detention or search, inspection or examination of his person may be conducted, nor should the ordinary exercise of the presidential authorities be impeded. Where it is necessary to search any particular place concerning the President so as to arrest any particular individual, or seize any specific object or electronic record, the legislative branch should formulate additional provisions regarding the President in respect of the restrictions on the places to be searched, the grounds on which the President may reject the search or seizure, as well as the specific procedures for judicial review and objections. Except with the President's consent, prior to the implementation of such law, the competent prosecutor shall file a motion with a five-judge special tribunal at the High Court or its appropriate branch, which shall be presided over by a senior division chief judge and shall review the adequacy and necessity of the relevant searches and seizures, irrespective of whether the aforesaid particular place, object or electronic record concerns any state secrets. Without an affirmative

上開特定處所、物件或電磁紀錄是否涉及國家機密，均應由該管檢察官聲請高等法院或其分院以資深庭長為審判長之法官五人組成特別合議庭審查相關搜索、扣押之適當性與必要性，非經該特別合議庭裁定准許，不得為之，但搜索之處所應避免總統執行職務及居住之處所。其抗告程序，適用刑事訴訟法相關規定。

ruling given by the special tribunal, no such search or seizure may be conducted, provided that the places to be searched shall exclude the places where the President carries out his functions and resides. The relevant provisions of the Code of Criminal Procedure shall apply *mutatis mutandis* to the procedure for filing an interim appeal.

Furthermore, presidential criminal immunity does not extend to his duty to testify as a witness in a criminal case involving another person. Nevertheless, when the criminal investigation authorities or the trial courts consider the President as a witness in a criminal procedure involving someone else 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 the State, the examination shall be conducted at the place of his/her choosing."

The presidential privilege or immunity from criminal prosecution is designed for the office of the President. Therefore,

總統之刑事豁免權，亦不及於總統於他人刑事案件為證人之義務。惟以他人為被告之刑事程序，刑事偵查或審判機關以總統為證人時，應準用民事訴訟法第三百零四條：「元首為證人者，應就其所在詢問之」之規定，以示對總統之尊崇。

總統不受刑事訴究之特權或豁免權，乃針對總統之職位而設，故僅擔任總統一職者，享有此一特權；擔任總統

the President is the only person that enjoys such privilege. In principle, the individual who serves as the President may not waive said privilege.

職位之個人，原則上不得拋棄此一特權。

II. Presidential State Secrets Privilege

Subject to the scope of his executive powers granted by the Constitution and the Amendments to the Constitution, the President has the power to decide not to disclose any information relating to national security, defense and diplomacy if he believes that the disclosure of such information may affect 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.

二、總統之國家機密特權

總統依憲法及憲法增修條文所賦予之行政權範圍內，就有關國家安全、國防及外交之資訊，認為其公開可能影響國家安全與國家利益而應屬國家機密者，有決定不予公開之權力，此為總統之國家機密特權。其他國家機關行使職權如涉及此類資訊，應予以適當之尊重。

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 procedure, and, to the extent that he may refuse to so testify, he may also refuse

總統依其國家機密特權，就國家機密事項於刑事訴訟程序應享有拒絕證言權，並於拒絕證言權範圍內，有拒絕提交相關證物之權。立法機關應就其得拒絕證言、拒絕提交相關證物之要件及相關程序，增訂適用於總統之特別規

to produce the relevant evidence. The legislative branch should formulate additional provisions regarding the President in respect of the requisite elements and applicable procedure for the refusal to testify and refusal to produce relevant evidence. Prior to the implementation of such law, the President should elaborate on whether the questioning and statements relating to state secrets that fall within the scope of the presidential state secrets privilege, or the production and submission of the relevant evidence, will jeopardize national interests. Failing any justification, the competent prosecutor or trial court should consider the circumstances on a case-by-case basis and make a disposition or ruling in accordance with Articles 134-II, 179-II and 183-II of the Code of Criminal Procedure. If the President is not satisfied with the prosecutor's or the trial court's disposition or ruling to overrule his refusal to testify or refusal to produce relevant evidence, he may raise an objection or interim appeal based on the intent of this Interpretation, and such objection or appeal should be heard by the aforesaid five-judge special tribunal at the High

定。於該法律公布施行前，就涉及總統國家機密特權範圍內國家機密事項之訊問、陳述，或該等證物之提出、交付，是否妨害國家之利益，由總統釋明之。其未能合理釋明者，該管檢察官或受訴法院應審酌具體個案情形，依刑事訴訟法第一百三十四條第二項、第一百七十九條第二項及第一百八十三條第二項規定為處分或裁定。總統對檢察官或受訴法院駁回其上開拒絕證言或拒絕提交相關證物之處分或裁定如有不服，得依本解釋意旨聲明異議或抗告，並由前述高等法院或其分院以資深庭長為審判長之法官五人組成之特別合議庭審理之。特別合議庭裁定前，原處分或裁定應停止執行。其餘異議或抗告程序，適用刑事訴訟法相關規定。總統如以書面合理釋明，相關證言之陳述或證物之提交，有妨害國家利益之虞者，檢察官及法院應予以尊重。總統陳述相關證言或提交相關證物是否有妨害國家利益之虞，應僅由承辦檢察官或審判庭法官依保密程序為之。總統所陳述相關證言或提交相關證物，縱經保密程序進行，惟檢察官或法院若以之作為終結偵查之處分或裁判之基礎，仍有造成國家安全危險之合理顧慮者，應認為有妨害國家利益之虞。

Court or its appropriate branch, which shall be 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 stay. The applicable provisions of the Code of Criminal Procedure should apply to the rest of the objection or interim appeal proceedings. If the President has justified in writing that the relevant testimony or production of evidence is likely to jeopardize national interests, the prosecutor and the court should give such justification due respect. Only the prosecutor or trial judge can preside over the President's testimony and production of relevant evidence under confidential proceedings to determine if it is likely to jeopardize national interests. Even where the President's testimony is given or the relevant evidence is produced under confidential proceedings, it should be deemed to be likely to jeopardize national interests if the prosecutor or the court, in using it as the basis on which the investigation or judgment is concluded, nonetheless reasonably raises national security concerns.

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 aforesaid proceedings will not be applicable. However, if, during the trial, the President for some reason changes his mind and reclassifies the information in question as state secrets, or otherwise produces any other duly classified state secrets, the court should then continue the trial in accordance with the relevant proceedings mentioned above. As for the proceedings already conducted, there should be no violation of the relevant provisions of the State Secrets Protection Act and the Regulation

法院審理個案，涉及總統已提出之資訊者，是否應適用國家機密保護法及「法院辦理涉及國家機密案件保密作業辦法」相關規定進行其審理程序，應視總統是否已依國家機密保護法第二條、第四條、第十一條及第十二條規定核定相關資訊之機密等級及保密期限而定；如尚未依法核定為國家機密者，無從適用上開規定之相關程序審理。惟訴訟程序進行中，總統如將系爭資訊依法改核定為國家機密，或另行提出其他已核定之國家機密者，法院即應改依上開規定之相關程序續行其審理程序。其已進行之程序，並不因而違反國家機密保護法及「法院辦理涉及國家機密案件保密作業辦法」相關之程序規定。至於審理總統核定之國家機密資訊作為證言或證物，是否妨害國家之利益，應依前述原則辦理。又檢察官之偵查程序，亦應本此意旨為之。

Governing the Court's Safeguarding of Secrets in Handling Cases Involving State Secrets. In determining whether the hearing of the testimony or evidence classified as state secrets by the President may jeopardize national interests, the aforesaid principles should be followed. Furthermore, the prosecution's investigation proceedings should also be conducted under the foregoing principles.

III. Preliminary Injunction

It should be noted that it is no longer necessary to deliberate on the petition for preliminary injunction in question now that an interpretation has been given for the case at issue.

三、暫時處分部分

本件暫時處分之聲請，因本案業經作成解釋，已無須予以審酌，併予指明。

REASONING:

解釋理由書：

I. Presidential Criminal Immunity

The exercise of the criminal judicial power is intended to enforce criminal justice. The immunity or privilege from criminal prosecution for heads of states originated from the concept of a divine and inviolable kingship during the autocratic era. Modern democracies differ on the provisions regarding presidential

一、總統之刑事豁免權

刑事司法權之行使，係以刑事正義之實踐為目的。國家元首不受刑事訴究之特權或豁免權，濫觴於專制時期王權神聖不受侵犯之觀念。現代民主法治國家，有關總統刑事豁免權之規定不盡相同。總統刑事豁免權之有無、內容與範圍，與中央政府體制並無直接關聯，尚非憲法法理上之必然，而屬各國憲法

criminal immunity. The existence, contents and scope of presidential criminal immunity do not have any direct connection with the institution of the central government. Furthermore, it is not an essential idea of constitutional law, but rather a decision of constitutional policy made by the respective states.

政策之決定。

Article 52 of the Constitution provides, "The President shall not, without having been recalled, or having been relieved of his functions, be subject to criminal prosecution unless he is charged with having committed an act of rebellion or treason." This is known as presidential criminal immunity. In nature, it restricts the state's judicial power to administer criminal justice and grants the President the privilege not to be subject to criminal prosecution without having been recalled or having been relieved of his functions, unless he is charged with having committed an act of rebellion or treason. As such, it is an exception to the principle of equal justice for all under the law as embraced by rule-of-law nations. The exception is a constitutional policy decision that is so

憲法第五十二條規定：「總統除犯內亂或外患罪外，非經罷免或解職，不受刑事上之訴究」，是為總統之刑事豁免權。其本質為抑制國家刑事司法權，而賦予總統除涉犯內亂或外患罪外，非經罷免或解職，不受刑事上訴究之特權，乃法治國家法律之前人人平等原則之例外。此一例外規定，係憲法基於總統為國家元首，對內肩負統率全國陸海空軍等重要職責，對外代表中華民國之特殊身分，為對總統特別尊崇與保障所為之政策決定。

formulated as to pay respect to and provide protection for the President, being the head of the State, for his special status as Commander of the Army, Navy and Air Force and assuming other important duties internally, and representing the Republic of China externally.

The first part of the Holding of J. Y. Interpretation No. 388 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 subject to criminal prosecution unless he is charged with having committed an act of rebellion or treason. The said provision is so formulated as to pay respect to and provide protection for the President, being the head of the State, for his special status as Commander of the Army, Navy and Air Force and assuming other important duties internally, and representing 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

中華民國八十四年十月二十七日公布之本院釋字第三八八號解釋文前段釋示：「憲法第五十二條規定，總統除犯內亂或外患罪外，非經罷免或解職，不受刑事上之訴究。此係憲法基於總統為國家元首，對內肩負統率全國陸海空軍等重要職責，對外代表中華民國之特殊身分所為之尊崇與保障。」該解釋理由書第一段載明：「憲法第五十二條規定，總統除犯內亂或外患罪外，非經罷免或解職，不受刑事上之訴究。此係憲法基於總統為國家元首，對內肩負統率全國陸海空軍、依法公布法律、任免文武官員等重要職責，對外代表中華民國之特殊身分所為之尊崇與保障。藉以確保其職權之行使，並維護政局之安定，以及對外關係之正常發展。惟此所謂總統不受刑事訴究之特權或豁免權，乃針對其職位而設，並非對其個人之保障，且亦非全無限制，如總統所犯為內亂或

subject to any criminal prosecution except being charged with crimes in relation to rebellion or treason. This provision is so formulated as to pay respect to and provide protection for the President, being the head of the State, for his special status as Commander of the Army, Navy and Air Force, promulgating laws, appointing and discharging civil and military officers internally, and representing the Republic of China externally. By this provision, the President's exercise of his powers can be ensured and political stability and the development of foreign relations can be maintained. However, the privilege or immunity which excludes the President from criminal prosecution is designed for the post of the President. It is neither given for personal protection, nor is it granted without limitation. If the President commits crimes in relation to rebellion or treason, he shall be subject to criminal prosecution. As to situations under which 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

外患罪，仍須受刑事上之訴究；如所犯為內亂或外患罪以外之罪，僅發生暫時不能為刑事上訴追之問題，並非完全不適用刑法或相關法律之刑罰規定」，就憲法第五十二條之規範目的，與總統刑事豁免權之性質、保護對象及效力等，已作成有拘束力之解釋。依該解釋意旨，總統不受刑事上之訴究，為一種暫時性之程序障礙，而非總統就其犯罪行為享有實體之免責權。

which provide for criminal punishment is not permanently excluded." The said interpretation has already given 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 merely a temporary procedural barrier, rather than a substantive immunity from any criminal liability on the part of the President.

The Constitution has been amended several times since October 27, 1995. The institution of the central government has undergone numerous changes, e.g., direct presidential election, presidential appointment of the premier, abolition of the National Assembly, the Legislative Yuan's vote of no confidence against the premier, and the presidential power to dissolve the Legislative Yuan upon the latter's vote of no confidence against the premier. However, in view of the current Constitution, the President still has the powers and authorities enumerated in the

自八十四年十月二十七日以來，歷經多次修憲，我國中央政府體制雖有所更動，如總統直選、行政院院長改由總統任命、廢除國民大會、立法院得對行政院院長提出不信任案、總統於立法院對行政院院長提出不信任案後得解散立法院、立法院對總統得提出彈劾案並聲請司法院大法官審理等。然就現行憲法觀之，總統仍僅享有憲法及憲法增修條文所列舉之權限，而行政權仍依憲法第五十三條規定概括授予行政院，憲法第三十七條關於副署之規定，僅作小幅修改。況總統刑事豁免權之有無與範圍，與中央政府體制並無必然之關聯，

Constitution and the Amendments to the Constitution whereas the executive power is, in general, vested in the Executive Yuan in accordance with Article 53 of the Constitution. The provision regarding the countersign provided for under Article 37 of the Constitution has only been minimally modified. Moreover, as mentioned above, the existence and scope of presidential criminal immunity do not necessarily have anything to do with the institution of the central government. And, the nature of presidential criminal immunity remains unchanged, which is intended to restrict the state's judicial power to administer criminal justice and also to pay respect to and provide protection for the special status of the President. Therefore, Article 52 of the Constitution does not have to be otherwise construed due to the multiple amendments to the Constitution. Hence, it is unnecessary to modify J.Y. Interpretation No. 388.

已如前述，而總統之刑事豁免權，乃抑制國家之刑事司法權而對總統特殊身分予以尊崇與保障其職權行使之本質未變，因此憲法第五十二條規定，尚不因憲法歷經多次修正而須另作他解，本院釋字第三八八號解釋並無變更解釋之必要。

In light of the intent of J. Y. Interpretation No. 388, presidential immunity from criminal prosecution is merely a temporary procedural barrier, rather than a

依本院釋字第三八八號解釋意旨，總統不受刑事上之訴究，既為一種暫時性之程序障礙，而非總統就其犯罪行為享有實體之免責權，是憲法第五十

substantive immunity from any criminal liability on the part of the President. As such, the phrase "not …… subject to criminal prosecution" provided for under Article 52 of the Constitution should be so interpreted 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 his presidency for any criminal offense committed by him other than rebellion or treason. Therefore, no criminal investigation or trial shall begin after a President takes office if such investigation or trial has treated him as a suspect or defendant but has not begun prior to his inauguration. And, if such criminal investigation or trial has begun prior to the inauguration of the President and has treated him as a suspect or defendant, it shall be suspended as of the day when he takes the office. However, in order to also maintain the essence of presidential criminal immunity, which would still subject the President to criminal prosecution upon his recall, dismissal or expiry of term, any measure not directly concerning

二條規定「不受刑事上之訴究」，應指刑事偵查及審判機關，於總統任職期間，就總統涉犯內亂或外患罪以外之罪者，暫時不得以總統為犯罪嫌疑人或被告而進行偵查、起訴與審判程序而言。因此總統就任前尚未開始以其為犯罪嫌疑人或被告之刑事偵查、審判程序，自其就職日起，不得開始；總統就任前已開始以其為犯罪嫌疑人或被告之刑事偵查、審判程序，自其就職日起，應即停止。但為兼顧總統經罷免、解職或卸任後仍受刑事上訴究之總統刑事豁免權之本旨，故刑事偵查、審判機關，對以總統為犯罪嫌疑人或被告之刑事案件，得為對總統之尊崇與職權之行使無直接關涉之措施，如檢察官對告訴、告發、移送等刑事案件，及法院對自訴案件，得為案件之收受、登記等；總統就任前已開始以其為犯罪嫌疑人或被告之偵查程序，於其就職之日，應即停止；總統就任前以其為被告之刑事審判程序，於其就職之日，應為停止審判之裁定等，俟總統經罷免、解職或卸任之日起，始續行偵查、審判程序。

the esteemed status of the presidency and exercise of the presidential authorities, or prompt 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. For instance, the prosecutor may accept and register a case filed under criminal complaint, information, or transfer, and the court may do the same for a case filed under private prosecution. In respect of the criminal investigation procedure already initiated against the President as a suspect or defendant prior to his inauguration, it should be suspended as of the day when he takes office; and with respect to the criminal trial procedure already initiated against the President as a defendant prior to his inauguration, a ruling to stay the trial should be made. Such investigation or trial procedure may resume only upon the President's recall, dismissal or expiry of term.

Presidential criminal immunity is merely a procedural barrier that temporarily prevents criminal prosecution. If the

總統之刑事豁免權僅係暫時不能為刑事上訴究之程序障礙，總統如涉有犯罪嫌疑者，於經罷免、解職或卸任後

President is suspected of having committed a crime, prosecution may still be conducted against him according to law upon his recall, dismissal or expiry of term. Therefore, although 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 him during his presidency for any criminal offense committed by him other than rebellion or treason, prompt inspection and investigation of a crime scene may still be conducted. (*See* Article 230-III and 231-III of the Code of Criminal Procedure) Presidential criminal immunity merely refers to a temporary stay of prosecution for a President who has acted alone in the commission of a crime, but does not extend to the evidentiary investigation and preservation directed at him during the investigation or trial for a criminal case involving another person. However, if, as a result, the President is suspected of having committed a crime, necessary evidentiary preservation may still be conducted pursuant to the intent of this Interpretation so as to avoid any cover-up of

仍得依法訴究，故刑事偵查及審判機關，於總統任職期間，就總統涉犯內亂或外患罪以外之罪者，固然暫時不得以總統為犯罪嫌疑人或被告而進行偵查、起訴與審判程序，但就犯罪現場為即時勘察（刑事訴訟法第二百三十條第三項、第二百三十一條第三項參照），不在此限。總統之刑事豁免權，僅及於其個人犯罪之暫緩訴究，不及於因他人刑事案件而於偵查或審判程序對總統所為之證據調查與證據保全。惟如因而發現總統有犯罪嫌疑者，雖不得開始以總統為犯罪嫌疑人或被告之偵查程序，為避免證據湮滅，致總統經罷免、解職或卸任後已無起訴、審判之可能，仍得依本解釋意旨，為必要之證據保全程序，例如勘驗物件或電磁紀錄、勘驗現場、調閱文書及物件，以及自總統以外之人採集所需保全之檢體等。但基於憲法第五十二條對總統特殊身分尊崇及對其行使職權保障之意旨，上開證據調查與證據保全措施，均不得限制總統之人身自由，例如拘提或對其身體之搜索、勘驗與鑑定等，亦不得妨礙總統職權之正常行使。其有搜索與總統有關之特定處所以逮捕特定人、扣押特定物件或電磁紀錄之必要者，立法機關應就搜索處所之限制、總統得拒絕搜索或扣押之事由，

evidence that may render the prosecution and trial against the President upon his recall, dismissal or expiry of term unlikely, although no investigation may be commenced against the President regarding him as a suspect or defendant. For instance, such evidentiary preservation may include the inspection of objects or electronic records, investigation of crime scenes, review of documents and objects, and collection of samples to be examined from persons other than the President. However, in light of the esteemed status of the presidency and the protection of the exercise of the presidential authorities provided for under Article 52 of the Constitution, the President's person may not be restrained when any measure and evidentiary preservation is conducted that is not subject to presidential criminal immunity. For instance, no detention or search, inspection or examination of his person may be conducted, nor should the ordinary exercise of the presidential authorities be impeded. Where it is necessary to search any particular place concerning the President so as to arrest any particular individual, or seize any specific

及特別之司法審查與聲明不服等程序，增訂適用於總統之特別規定。於該法律公布施行前，除經總統同意者外，無論上開特定處所、物件或電磁紀錄是否涉及國家機密，均應由該管檢察官聲請高等法院或其分院以資深庭長為審判長之法官五人組成特別合議庭審查相關搜索、扣押之適當性與必要性，非經該特別合議庭裁定准許，不得為之，但搜索之處所應避免總統執行職務及居住之處所。其抗告程序，適用刑事訴訟法相關規定。

object or electronic record, the legislative branch should formulate additional provisions regarding the President in respect of the restrictions on the places to be searched, the grounds on which the President may reject the search or seizure, as well as the specific procedures for judicial review and objections. Except with the President's consent, prior to the implementation of such law, the competent prosecutor shall file a motion with a five-judge special tribunal at the High Court or its appropriate branch, which shall be presided over by a senior division chief judge and shall review the adequacy and necessity of the relevant searches and seizures, irrespective of whether the aforesaid particular place, object or electronic record concerns any state secrets. Without an affirmative ruling given by the special tribunal, no such search or seizure may be conducted, provided that the places to be searched shall exclude the places where the President carries out his functions and resides. The relevant provisions of the Code of Criminal Procedure shall apply *mutatis mutandis* to the procedure for filing an interim appeal.

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 procedure involving someone else 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 the State, the examination shall be conducted at the place of his/her choosing." However, the President may waive such privilege by appearing and testifying before the court as a witness.

總統於他人刑事案件為證人之義務，並非憲法第五十二條所謂之「刑事上之訴究」，因此不在總統刑事豁免權之範圍內。惟以他人為被告之刑事程序，刑事偵查及審判機關如以總統為證人時，應準用民事訴訟法第三百零四條：「元首為證人者，應就其所在詢問之」之規定，以示對總統之尊崇，但總統得捨棄此項優遇而到場作證。

In light of the intent of J. Y. Interpretation No. 388, 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

依本院釋字第三八八號解釋意旨，所謂總統不受刑事訴究之特權或豁免權之規範目的，乃針對其職位而設，因此擔任總統職位之個人，就總統刑事豁免權保障範圍內之各項特權，原則上不得拋棄。所謂原則上不得拋棄，係指

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 by the criminal investigation and trial procedure. Nevertheless, the presidential criminal immunity is, in essence, a constitutional privilege of the President. A person who exercises the presidential functions and authorities should have the discretion to decide 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 authorities and functions. As such, in respect of any particular evidentiary investigation that is subject to presidential criminal immunity other than the criminal prosecution and trial procedure which regard the President as a defendant and any other action that objectively will result in damage to the esteemed status of

總統原則上不得事前、概括拋棄其豁免權而言，以免刑事偵查、審判程序對總統之尊崇與職權之有效行使，造成無可預見之干擾。但總統之刑事豁免權，本質上為總統之憲法上特權，行使總統職權者，就個別證據調查行為，事實上是否造成總統尊崇與職權行使之損傷或妨礙，應有其判斷餘地。故除以總統為被告之刑事起訴與審判程序，或其他客觀上足認必然造成總統尊崇之損傷與職權行使之妨礙者外，其餘個別證據調查行為，縱為總統刑事豁免權所及，惟經總統自願配合其程序之進行者，應認為總統以個別證據調查行為，事實上並未造成總統尊崇與職權行使之損傷或妨礙而拋棄其個案豁免權，與憲法第五十二條之規範目的，尚無違背。總統得隨時終止其拋棄之效力而回復其豁免權，自不待言。至總統於上開得拋棄之範圍內，其刑事豁免權之拋棄是否違反本解釋意旨，若該案件起訴者，由法院審酌之。又總統刑事豁免權既係針對其職位而設，故僅擔任總統一職者，享有此一特權，其保障不及於非擔任總統職位之第三人。共同正犯、教唆犯、幫助犯以及其他參與總統所涉犯罪之人，不在總統刑事豁免權保障之範圍內；刑事偵查、審判機關對各該第三人所進行之刑事偵

the presidency and interference with the exercise of his authorities and functions, if the President voluntarily cooperates with the proceedings, he should be deemed to have waived his immunity for the particular case as he does not think that the particular evidentiary investigation has in fact resulted in any damage to the esteemed status of the presidency or any interference with the exercise of his authorities and functions. Such waiver is not contrary to the purpose of Article 52 of the Constitution. It goes without saying, though, that the President may at anytime terminate such waiver and restore his immunity. As to the issue of whether the President's waiver of criminal immunity is contrary to the intent of this Interpretation, it should fall within the court's discretion once the case is already prosecuted. In addition, since presidential criminal immunity is designed for the presidency, the President is the only person that enjoys such privilege, which does not extend to any third person. A principal co-offender, or a person who abets or assists or otherwise participates in the commission of a crime in which the President is involved

查、審判程序，自不因總統之刑事豁免權而受影響。

is 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.

II. Presidential State Secrets Privilege

The Constitution does not specifically provide for the presidential "state secrets privilege". However, under the principles of separation of powers and checks and balances, the chief executive should have the power to decide not to disclose any classified information regarding national security, defense and diplomacy based on the functions and authorities intrinsic to his office. Such power is part of the executive privileges of the chief executive, as was made clear in J.Y. Interpretation No. 585. Hence, the chief executive's state secrets privilege is recognized under our constitutional law.

The following is a summary of the powers granted to the President by the Constitution and the Amendments to the

二、總統之國家機密特權

憲法並未明文規定總統之「國家機密特權」，惟依權力分立與制衡原則，行政首長依其固有之權能，就有關國家安全、國防及外交之國家機密事項，有決定不予公開之權力，屬行政首長行政特權之一部分，本院釋字第五八五號解釋足資參照，此即我國憲法上所承認行政首長之國家機密特權。

總統依憲法及憲法增修條文所賦予之職權略為：元首權（憲法第三十五條）、軍事統帥權（憲法第三十六

Constitution: head of the State (Article 35 of the Constitution), supreme commander (Article 36 of the Constitution), promulgating laws and orders (Article 37 of the Constitution, Article 2-II of the Amendments to 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-III of the Amendments to 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-IV of the Amendments to the Constitution), declaring the dissolution of the Legislative Yuan (Article 2-V of the Amendments to the Constitution), nomination (Article 104 of the Constitution, Articles 2-VII, 5-I, 6-II, and 7-II of the Amendments to the Constitution) and appointment (Article 56 of the Constitution, 條）、公布法令權（憲法第三十七條、憲法增修條文第二條第二項）、締結條約、宣戰及媾和權（憲法第三十八條）、宣布戒嚴權（憲法第三十九條）、赦免權（憲法第四十條）、任免官員權（憲法第四十一條）、授與榮典權（憲法第四十二條）、發布緊急命令權（憲法第四十三條、憲法增修條文第二條第三項）、權限爭議處理權（憲法第四十四條）、國家安全大政方針決定權、國家安全機關設置權（憲法增修條文第二條第四項）、立法院解散權（憲法增修條文第二條第五項）、提名權（憲法第一百零四條、憲法增修條文第二條第七項、第五條第一項、第六條第二項、第七條第二項）、任命權（憲法第五十六條、憲法增修條文第三條第一項、第九條第一項第一款及第二款）等，為憲法上之行政機關。總統於憲法及憲法增修條文所賦予之行政權範圍內，為最高行政首長，負有維護國家安全與國家利益之責任。是總統就其職權範圍內有關國家安全、國防及外交資訊之公開，認為有妨礙國家安全與國家利益之虞者，應負保守秘密之義務，亦有決定不予公開之權力，此為總統之國家機密特權。立法者並賦予總統單獨核定國家機密且永久保密之權限，此觀國家

Articles 3-I and 9-I (i) and (ii) of the Amendments to the Constitution). As such, the presidency is part of the executive branch under the Constitution. Subject to the scope of his executive powers granted by the Constitution and the Amendments to the Constitution, the President is the highest executive officer and has a duty to preserve national security and national interests. Therefore, within the scope of his authorities, the President has the duty to maintain the confidentiality of, and the power to decide not to disclose, any information relating to national security, defense and diplomacy if he believes that the disclosure of such information may affect national security and national interests and hence should be classified as state secrets. Such power is known as the presidential state secrets privilege. The legislators have given the President the power to unilaterally classify state secrets and keep them secret permanently, as is clearly shown in Articles 7-I (i) and 12-I of the State Secrets Protection Act. Said power should be given due respect by the other state organs if the exercise of their official authorities

機密保護法第七條第一項第一款、第十二條第一項自明。其他國家機關行使職權如涉及此類資訊，應予以適當之尊重。惟源自於行政權固有權能之「國家機密特權」，其行使仍應符合權力分立與制衡之憲法基本原則，而非憲法上之絕對權力。

involves any such information. However, the exercise of the "state secrets privilege," which derives from the powers intrinsic to the executive branch, should still follow the fundamental constitutional principles of separation of powers and checks and balances as it is not an absolute power under the Constitution.

Based on the presidential state secrets privilege, the President should have the right to refuse to testify as to matters concerning state secrets during the criminal procedure, and, to the extent that he may refuse to so testify, he may also refuse to produce the relevant evidence. The legislative branch 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 implementation of such law, the President should elaborate on whether the questioning and statements relating to state secrets that fall within the scope of the presidential state secrets privilege, or the production and submission of the relevant evidence, will jeopardize national

總統依其國家機密特權，就國家機密事項於刑事訴訟程序應享有拒絕證言權，並於拒絕證言權範圍內，有拒絕提交相關證物之權。立法機關應就其得拒絕證言、拒絕提交相關證物之要件及相關程序，增訂適用於總統之特別規定。於該法律公布施行前，就涉及總統國家機密特權範圍內國家機密事項之訊問、陳述，或該等證物之提出、交付，是否妨害國家之利益，由總統釋明之。其未能合理釋明者，該管檢察官或受訴法院應審酌具體個案情形，依刑事訴訟法第一百三十四條第二項、第一百七十九條第二項及第一百八十三條第二項規定為處分或裁定。總統對檢察官或受訴法院駁回其上開拒絕證言或拒絕提交相關證物之處分或裁定如有不服，得依本解釋意旨聲明異議或抗告，並由前述高等法院或其分院以資深庭長為審判長之

interests. Failing any justification, the competent prosecutor or trial court should consider the circumstances on a case-by-case basis and make a disposition or ruling in accordance with Articles 134-II, 179-II and 183-II of the Code of Criminal Procedure. If the President is not satisfied with the prosecutor's or the trial court's disposition or ruling to overrule his refusal to testify or refusal to produce relevant evidence, he may raise an objection or interim appeal based on the intent of this Interpretation, and such objection or appeal should be heard by the aforesaid five-judge special tribunal at the High Court or its appropriate branch, which shall be 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 stay. The applicable provisions of the Code of Criminal Procedure should apply to the rest of the objection or interim appeal proceedings. If the President has justified in writing that the relevant testimony or production of evidence is likely to jeopardize national interests, the prosecutor and the court should give

法官五人組成之特別合議庭審理之。特別合議庭裁定前，原處分或裁定應停止執行。其餘異議或抗告程序，適用刑事訴訟法相關規定。總統如以書面合理釋明，相關證言之陳述或證物之提交，有妨害國家利益之虞者，檢察官及法院應予以尊重。總統陳述相關證言或提交相關證物是否有妨害國家利益之虞，應僅由承辦檢察官或審判庭法官依保密程序為之。總統所陳述相關證言或提交相關證物，縱經保密程序進行，惟檢察官或法院若以之作為終結偵查之處分或裁判之基礎，仍有造成國家安全危險之合理顧慮者，應認為有妨害國家利益之虞。

such justification due respect. Only the prosecutor or trial judge can preside over the President's testimony and production of relevant evidence under confidential proceedings to determine if they are likely to jeopardize national interests. Even where the President's testimony is given or the relevant evidence is produced under confidential proceedings, it should be deemed to be likely to jeopardize national interests if the prosecutor or the court, in using it as the basis on which the investigation or judgment is concluded, may nonetheless reasonably raise national security concerns.

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 it involves information already submitted by the President, the trial court should consider whether the President has duly classified the relevant information and determined the classification period in accordance

法院審理個案，涉及總統已提出之資訊者，是否應適用國家機密保護法及「法院辦理涉及國家機密案件保密作業辦法」相關規定進行其審理程序，應視總統是否已依國家機密保護法第二條、第四條、第十一條及第十二條規定核定相關資訊之機密等級及保密期限而定；如尚未依法核定為國家機密者，無從適用上開規定之相關程序審理。惟訴訟程序進行中，總統如將系爭資訊依法改核定為國家機密，或另行提出其他已核定之國家機密者，法院即應改依上開

with Articles 2, 4, 11 and 12 of the State Secrets Protection Act. If the information is not classified as state secrets, the aforesaid proceedings will not be applicable. However, if, during the trial, the President for some reason changes his mind and reclassifies the information in question as state secrets, or otherwise produces any other duly classified state secrets, the court should then continue the trial in accordance with the relevant proceedings mentioned above. As for the 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. In determining whether the hearing of the testimony or evidence classified as state secrets by the President may jeopardize national interests, the aforesaid principles should be followed. Furthermore, the prosecution's investigation proceedings should also be conducted under the foregoing principles.

規定之相關程序續行其審理程序。其已進行之程序，並不因而違反國家機密保護法及「法院辦理涉及國家機密案件保密作業辦法」相關之程序規定。至於審理總統核定之國家機密資訊作為證言或證物，是否妨害國家之利益，應依前述原則辦理。又檢察官之偵查程序，亦應本此意旨為之。

III. Preliminary Injunction and Dismissal

It should be noted that it is no longer

三、暫時處分及不受理部分

本件暫時處分之聲請，因本案業

necessary to deliberate on the petition for preliminary injunction in question now that an interpretation has been given for the case at issue. In addition, it is maintained by the petition at issue that a dispute has arisen regarding Article 52 of the Constitution in respect of the exercise of the presidential authorities and the trial of the Taipei District Court Criminal Case 95-JCS No. 4; and that the application of Article 63-1-I (i) and (ii) of the Court Organic Act and Article 176-1 of the Code of Criminal Procedure may have contradicted Article 52 of the Constitution. The foregoing should be dismissed as it is inconsistent with Article 5-I (ii) of the Constitutional Interpretation Procedure Act.

經作成解釋，已無須予以審酌，併予指明。又本件聲請意旨主張總統行使職權，與臺灣臺北地方法院九十五年度矚重訴字第四號刑事案件審理之職權，發生適用憲法第五十二條之爭議；適用法院組織法第六十三條之一第一項第一款、第二款及刑事訴訟法第一百七十六條之一規定，發生有牴觸憲法第五十二條之疑義部分，核與司法院大法官審理案件法第五條第一項第一款規定不符，應不受理。

EDITOR'S NOTE:

Summary of facts: The prosecutor at the Investigation Task Force for Criminal Profiteering Crimes of the Taiwan High Prosecutors Office interrogated the Petitioner regarding the use of the "state affairs discretionary fund" and requested the Petitioner to provide relevant information and documents. Subsequently the Petitioner's wife and several others were

編者註：

事實摘要：臺灣高等法院檢察署查緝黑金中心檢察官就聲請人「國務機要費」使用問題，訊問聲請人，向聲請人要求取得有關資料、文件，嗣起訴書將其夫人等人以共同貪污及偽造文書罪嫌提起公訴。

indicted on the ground of joint corruption and forgery of documents.

The case was reviewed by the Taiwan Taipei District Court. The Petitioner argued that although the prosecutor did not prosecute the Petitioner in formality, the indictment was premised on the Petitioner being an accomplice with the Petitioner's wife being charged with jointly committing criminal corruption and forgery of documents. Such investigation and indictment along with the handling by the Court have violated the criminal immunity for the President under Article 52 of the Constitution.

本案由臺灣臺北地方法院審理，聲請人認本案檢察官形式上雖未起訴聲請人，其起訴書卻以認定聲請人係犯罪共同正犯為前提，並將其夫人以共同貪污及偽造文書罪嫌提起公訴，此一偵查聲請人與起訴行為以及台灣台北地方法院審理本案之行為，應已違反憲法第五十二條總統刑事豁免權之規定。

In addition, the Court issued a written request to the Petitioner for an explanation of related matters. However, the Petitioner deemed such related matters within the scope of presidential privilege of state secrets. As a result, the Petitioner claimed that the exercise of presidential authority [in this case] runs affront with the exercise of the Court's authority to review criminal cases concerning Article 52 of the Constitution on the criminal

又臺灣臺北地方法院為審理本案，發函聲請人，要求聲請人說明相關事項，聲請人認相關事項係屬總統之國家機密特權。爰此，聲請人主張總統行使職權，與臺灣臺北地方法院刑事案件審理之職權，發生適用憲法第五十二條總統刑事豁免權之爭議，聲請解釋。

immunity for the President, and petitioned
for interpretation.

J. Y. Interpretation No.628（June 22, 2007）*

ISSUE: Do the Taiwan Province Irrigation Associations have the authority under law to levy and collect surplus water tolls ?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; J.Y. Interpretations Nos. 518 and 563（司法院釋字第五一八號、第五六三號解釋）; Article 3-II and –III of the Water Resource Act (amended and promulgated on January 19, 1955)（水利法第三條第二項、第三項（中華民國四十四年一月十九日修正公布））；Articles 10 (i), 28 and 29 of the Organic Act of the Irrigation Associations (enacted and promulgated on July 2, 1965) (農田水利會組織通則第十條第一款、第二十八條、第二十九條（五十四年七月二日制定公布）); Article 41(i) of the Organic Regulation of the Irrigation Associations of the Taiwan Province (amended and issued on May 27, 1995)（臺灣省農田水利會組織規程第四十一條第一款（八十四年五月二十七日修正發布））；Guidelines for the Collection of Fees Imposed by the Taiwan Province Irrigation Associations (amended and issued on March 24, 1989)（臺灣省農田水利會各項費用徵收要點（七十八年三月二十四日修正發布））；Clause 4 of the Guidelines for the Use of Irrigation Reservoirs in Respect of the Taiwan Province

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

Shimen Irrigation Association (for the approval and record of the Water Conservancy Administration of the Department of Reconstruction, Taiwan Provincial Government on May 7, 1998)（臺灣省石門農田水利會灌溉蓄水池使用要點第四點（臺灣省政府建設廳水利處八十七年五月七日核備））.

KEYWORDS:

Irrigation association（農田水利會）, public legal person（公法人）, self-governing body（自治團體）, right of self-government（自治權）, self-governing regulations（自治規章）, surplus water toll（餘水使用費）, property right（財產權）, principle of legal reservation（法律保留原則）, principle of proportionality（比例原則）.**

HOLDING: An irrigation association, which is a local self-governing body in charge of water conservancy, is a public legal person established by law. To the extent authorized by law, it has self-governing powers and authorities. An irrigation association may, by law, levy a surplus water toll (*See* Articles 10 (i) and 28 of the Organic Act of the Irrigation Associations). Therefore, as far as the management of surplus water is concerned, the Organic Act of the Irrigation Associations has empowered irrigation

解釋文：農田水利會係由法律設立之公法人，為地方水利自治團體，在法律授權範圍內享有自治之權限。農田水利事業之餘水管理乃農田水利會自治事項之一，農田水利會並得依法徵收餘水使用費（農田水利會組織通則第十條第一款、第二十八條規定參照）。是關於餘水管理，農田水利會組織通則已授予農田水利會得訂定自治規章以限制人民自由權利之自治權限。依該通則第二十九條（中華民國五十四年七月二日制定公布）規定，徵收餘水使用費之標準及辦法固係授權省（市）主管機關訂

associations to formulate self-governing regulations to impose restrictions on the people's freedoms and rights. According to Article 29 of said Act (enacted and promulgated on July 2, 1965), the provincial (city) government is empowered to formulate the criteria and rules for the levy of a surplus water toll. In fact, the Taiwan Provincial Government has prescribed certain criteria and procedures for the levy of a surplus water toll. Nevertheless, if an irrigation association formulates self-governing regulations to supplement any relevant matter that is not covered by such criteria or procedures and submits them to the competent authority for approval and record, it is still in line with the intent of Article 29 of said Act. Clause 4 of the Guidelines for the Use of Irrigation Reservoirs in Respect of the Taiwan Province Shimen Irrigation Association (submitted for the approval and record of the Water Conservancy Administration of the Department of Reconstruction, Taiwan Provincial Government on May 7, 1998 as per Letter No. 87-S.N.-A875017476) is a part of the self-governing regulations formulated by the

定，臺灣省政府據此並已就餘水使用費訂定一定之徵收標準及程序，然若有規範未盡部分，農田水利會訂定自治規章予以補充，並報請主管機關核備者，尚符合上開通則第二十九條規定之意旨。臺灣省石門農田水利會灌溉蓄水池使用要點（臺灣省政府建設廳水利處八十七年五月七日八七水農字第Ａ八七五０一七四七六號函核備）第四點之規定，乃該會依正當程序本於其徵收餘水使用費之自治權限，在法律授權得徵收餘水使用費範圍內，分別依餘水使用之不同情形，確定餘水使用費之徵收對象所為具體規定之自治規章，符合水資源有效利用及使用者付費之立法意旨，手段亦屬合理及必要，未逾越臺灣省政府就農田水利會徵收餘水使用費訂定命令之範圍，亦未牴觸上開法律及其授權規定，於憲法第十五條保障之財產權、第二十三條規定之法律保留原則與比例原則，尚無違背。

said Irrigation Association through due process based on its self-governing authority to levy a surplus water toll to the extent authorized by law. Said clause has set forth specific rules in respect of persons upon whom the surplus water toll should be levied based on the differing situations under which the surplus water is used. As such, it is not only consistent with the legislative purposes of effective use of water resources and "user pays," but is also rational and necessary. Therefore, it does not go beyond the authority granted by the Taiwan Provincial Government to the irrigation associations in respect of the formulation of regulations regarding the levy of a surplus water toll, nor is it contrary to the aforesaid law and its enabling provisions. There is no violation of the property right guaranteed under Article 15 of the Constitution, nor is there any violation of the principle of legal reservation or proportionality embodied in Article 23 thereof.

REASONING: An irrigation association is a public legal person established by the state according to law for the

解釋理由書：農田水利會係秉承國家推行農田水利事業之宗旨，依法律設立之公法人，為地方水利自治團體

purpose of promoting farmland irrigation operations. The irrigation association is a local self-governing body in charge of water conservancy (*See* Article 3-II and –III of the Water Resource Act as amended and promulgated on January 19, 1955). To the extent authorized by law, it has self-governing powers and authorities (*See* J.Y. Interpretation No. 518). According to Article 10 of the Organic Act of the Irrigation Associations, the missions of the irrigation associations include the initiation, improvement, maintenance, and management of farmland irrigation operations, precautionary and rescue measures in the event of disasters and threats, raising of expenditure and institution of funds for farmland irrigation operations, and research and development projects for the interests of farmland irrigation operations. The foregoing are self-governing matters entrusted to the irrigation associations by law. To the extent consistent with and authorized by law, an irrigation association certainly may formulate self-governing regulations to achieve its missions. However, where the self-governing regulations formulated by the irrigation

（四十四年一月十九日修正公布之水利法第三條第二、三項參照），在法律授權範圍內享有自治之權限（本院釋字第五一八號解釋參照）。依農田水利會組織通則第十條規定，農田水利會之任務包括農田水利事業之興辦、改善、保養及管理、災害之預防及搶救、經費之籌措及基金設立、效益之研究及發展等事項，此即為法律授予農田水利會之自治事項。農田水利會為執行上開自治事項，於不牴觸法律與其授權之範圍內，自得訂定自治規章，以達成其任務。惟農田水利會訂定之自治規章，如有限制人民自由權利者，為符合憲法第二十三條所定法律保留原則之要求，仍應有法律規定或法律之授權，始得為之。又團體內部意見之形成，依憲法之民主原則，不僅應遵守多數決之原則（本院釋字第五一八號解釋理由書參照），且如事關人民權利之限制者，所形成之規定內容應符合比例原則，其訂定及執行並應遵守正當程序（本院釋字第五六三號解釋參照），農田水利會於訂定限制人民自由權利之自治規章時，亦應本此原則，乃屬當然。

association may impose restrictions on the people's rights, it cannot do so except as prescribed or authorized by law so as to comply with the principle of legal reservation embodied in Article 23 of the Constitution. Furthermore, under the democratic principle of the Constitution, not only should the formation of the internal opinion of a group follow the majority rule (*See* J.Y. Interpretation No. 518), but the contents thereof should also be consistent with the principle of proportionality and the formulation and implementation thereof should adhere to the due process if it involves any restriction on the people's rights (*See* J.Y. Interpretation No. 563). In formulating its self-governing regulations that may restrict the people's freedoms and rights, an irrigation association should, of course, abide by said principles.

According to Article 10 (i) of the Organic Act of the Irrigation Associations, the missions of the irrigation associations include, among other things, the initiation, improvement, maintenance, and management of farmland irrigation operations.

依農田水利會組織通則第十條第一款規定，農田水利會具有興辦、改善、保養及管理農田水利事業之任務。而農田水利會於改善現有灌溉輸配水設施、減少輸水損失及提高用水效率後所節餘之餘水，不僅得再分配予會員供農

In respect of the surplus water conserved by the irrigation association's improvement of the existing irrigation and water distribution facilities, reduction of the loss in water transportation, and enhancement of water usage efficiency, the irrigation association may not only re-distribute it to its members for the purpose of irrigating farmland, but also for other purposes so as to effectively utilize the water resources to the fullest extent as long as the operation of farmland irrigation is not affected. As such, the management of the surplus water relating to farmland irrigation operations should fall within the scope of self-governing matters of the irrigation association, which may adjust the priority of water supply based on the actual volume of on-site surplus water and the level of difficulty of the operation. Furthermore, according to Article 25 (as amended and promulgated on December 17, 1980), Article 26 (as amended and promulgated on February 9, 1970), Article 27 (as amended and promulgated on July 2, 1965) and Article 28 of the Organic Act of the Irrigation Associations, an irrigation association has the authority to collect

田灌溉之用，且在不影響農田灌溉之運作下，亦得作農田灌溉以外目的之使用，以充分有效利用水資源，是農田水利事業之餘水管理自屬農田水利會之自治事項範圍，農田水利會可依調配用水現場實際節餘水量及其操作難度，調整供水優先次序。又農田水利會組織通則第二十五條（六十九年十二月十七日修正公布）、第二十六條（五十九年二月九日修正公布）、第二十七條（五十四年七月二日制定公布）及第二十八條明文規定，農田水利會有徵收會費、餘水使用費及其他費用之權限。準此以觀，足見法律已授予農田水利會就餘水使用費之徵收，得訂定自治規章限制人民自由權利之自治權限。而餘水使用者則負有繳納之公法上金錢給付義務，為餘水使用者之公法上負擔（本院釋字第五一八號解釋理由書參照）；且餘水使用費既係向使用者徵收，自不因使用者是否為會員而有異。農田水利會據上述法律授權，於徵收餘水使用費時，應得依正當程序訂定合理、必要之自治規章。

membership dues, surplus water tolls and other fees. In light of the above, the law has empowered the irrigation association to formulate self-governing regulations in respect of the collection of a surplus water toll to impose restrictions on the people's rights and freedoms. A user of the surplus water has an obligation under the public law to pay a toll, and hence such user has a burden under the public law (S*ee* Reasoning of J.Y. Interpretation No. 518). Furthermore, since the surplus water toll is collected from a user, it will not make any difference whether he or she is a member. Based on the authorization of the aforesaid law, an irrigation association, in collecting a surplus water toll, may set forth reasonable and necessary self-governing regulations under the due process.

However, since the irrigation association is a public legal person established by law, its power to formulate self-governing regulations should be subject to the legislators' discretion. Article 29 of the Organic Act of the Irrigation Associations, which remains unchanged despite

惟農田水利會係以法律設立之公法人，其訂定自治規章之權限，立法者有自由形成之空間。自五十四年七月二日制定公布起至八十四年十一月八日止，歷次修正均未更動之農田水利會組織通則第二十九條規定：「農田水利會依前四條規定，徵收各費之標準及辦

the numerous amendments made to the law between July 2, 1965--when it was first enacted--and November 8, 1995, provides, “In respect of the criteria and measures for the collection of various fees by the irrigation associations according to the four preceding articles, the competent provincial (or municipal) authorities shall establish such criteria and measures, and notify the central competent authorities for the record.” Hence the competent authorities are authorized to formulate the criteria and measures for the collection of membership dues, construction fees, user fees for buildings and surplus water tolls (*See* Articles 25 to 28 of said Act). Pursuant to the authorization of Article 29 of said Act, the Taiwan Provincial Government amended and issued the Organic Regulation of the Irrigation Associations of the Taiwan Province on May 27, 1995. Article 41 (i) thereof provides, “The criteria for the collection of surplus water tolls or construction fees shall be as follows: (i) the surplus water toll shall be no less than the maximum membership rate for the area concerned.” The said provision is meant to impose the minimum for the

法，由省（市）主管機關訂定，並報中央主管機關核備。」對農田水利會徵收會費、工程費、建造物使用費及餘水使用費之徵收標準及辦法（同通則第二十五至二十八條參照），係授權主管機關訂定。臺灣省政府依上開通則第二十九條規定之授權，於八十四年五月二十七日修正發布臺灣省農田水利會組織規程，其第四十一條第一款規定：「餘水使用費或建造物使用費，徵收標準如左：一、餘水使用費，最低不得低於該地區最高之會費收費率。」是就餘水使用費之徵收標準設最低費率限制；另臺灣省政府於七十八年三月二十四日修正發布臺灣省農田水利會各項費用徵收要點，就農田水利會徵收各項費用之作業程序、欠費處理、帳簿設置與稽核等予以規定。除此以外，上述主管機關就如何確定餘水使用費之徵收對象、徵收之具體數額等事項均未及之。對於此種未盡部分事項，農田水利會為執行其徵收餘水使用費之自治權限，訂定自治規章予以補充，並報請主管機關核備者，尚符合上開通則第二十九條規定之意旨。

collection of surplus water tolls. Furthermore, the Taiwan Provincial Government amended and issued the Guidelines for the Collection of Fees Imposed by the Taiwan Province Irrigation Associations on March 24, 1989, setting forth the operation procedure, settlement of unpaid fees, bookkeeping and audit and control for the collection of various fees by the irrigation associations. Other than the foregoing, the competent authorities were silent as to the persons from whom the surplus water toll should be collected and the specific amounts thereof. Where an irrigation association formulated self-governing regulations to supplement such matters that were not addressed based on its self-governing authority to levy a surplus water toll and submitted them to the competent authority for approval and record, it is still in line with the intent of Article 29 of said Act.

Clause 4-I of the Guidelines for the Use of Irrigation Reservoirs in Respect of the Taiwan Province Shimen Irrigation Association (submitted for the approval and record of the Water Conservancy

臺灣省石門農田水利會灌溉蓄水池使用要點（臺灣省政府建設廳水利處八十七年五月七日八七水農字第Ａ八七五０一七四七六號函核備）第四點第一項規定：「用水使用費應向訂立之使用

Administration of the Department of Reconstruction, Taiwan Provincial Government on May 7, 1998 as per Letter No. 87-S.N.-A875017476) provides, "A water toll shall be collected from the person who enters into the letter of consent. Where there is any use of water in the absence of a letter of consent entered into pursuant to the foregoing clause, the water toll shall be collected in accordance with the following: (i) where the landowner of the reservoir or all of the co-owners jointly use the water, it shall be collected from the landowner; (ii) where the reservoir is leased to or used by another person who refused or failed to enter into a letter of consent with this Association, the landowner or all of the co-owners may produce the lease or letter of consent or other papers, whereupon this Association will forthwith collect it from the lessee or user; and (iii) where the reservoir is occupied by another person or other co-owners (i.e., no letter of consent is available), it shall be collected from the occupant." The foregoing provision is a part of the self-governing regulations formulated by the said Irrigation Association through due

同意書人徵收之。未依前條規定訂立使用同意書而有使用情形者，應向下列規定徵收用水使用費。（一）蓄水池土地所有人或全體共有人共同使用者，應向土地所有人徵收之。（二）蓄水池出租或同意他人使用，而該承租人或使用人拒或未與本會訂立使用同意書者，得由土地所有人或全體共有人提出租賃契約書或同意書或其他具體文件由本會逕向土地承租人或使用人徵收之。（三）蓄水池為他人或他共有人占用者（即不能取得使用同意書者）應向占用人徵收。」乃該會本於其徵收餘水使用費之自治權限，在法律授權得對人民徵收餘水使用費範圍內，分別依餘水使用之不同情形，確定餘水使用費之徵收對象所為具體規定之自治規章，符合水資源有效利用及使用者付費之立法意旨，手段亦屬合理及必要。上開要點並由臺灣省石門農田水利會會務委員會審議通過（該要點第二十四點參照），復經臺灣省政府建設廳水利處准予核備，已具備正當程序之要求。是上開規定即未逾越主管機關所訂定之臺灣省農田水利會組織規程與臺灣省農田水利會各項費用徵收要點規定之範圍，亦未牴觸上開法律及其授權之規定，於憲法第十五條保障之財產權、第二十三條規定之法律保留

process based on its self-governing authority to levy a surplus water toll to the extent authorized by law. Said clause has set forth specific rules in respect of persons upon whom the surplus water toll should be levied based on the differing situations under which the surplus water is used. As such, it is not only consistent with the legislative purposes of effective use of water resources and "user pays," but is also rational and necessary. The aforesaid Guidelines were not only passed by the Governing Board of the Taiwan Province Shimen Irrigation Association (*See* Clause 24 of said Guidelines), but also approved by the Water Conservancy Administration of the Department of Reconstruction, Taiwan Provincial Government for the record, hence satisfying the due process requirement. Therefore, they do not go beyond the authority granted by the Organic Regulation of the Irrigation Associations of the Taiwan Province and the Guidelines for the Collection of Fees Imposed by the Taiwan Province Irrigation Associations, nor are they contrary to the aforesaid law and its enabling provisions. There is no

原則與比例原則，尚無違背。至人民與農田水利會間因徵收餘水使用費事件所生之爭議，為公法上爭議。八十九年七月一日修正行政訴訟法施行前，相關爭議已依法提起訴訟並經裁判確定者，其效力固不受影響，惟自修正行政訴訟法施行後，就此類爭議事件應循行政爭訟程序請求救濟，併予指明。

violation of the property right guaranteed under Article 15 of the Constitution, nor is there any violation of the principle of legal reservation or proportionality embodied in Article 23 thereof. As for the dispute between the people and an irrigation association arising out of the imposition of a surplus water toll, it should be a dispute under public law. With regard to a dispute for which an action has been legally brought and a final and conclusive judgment rendered prior to the amendments made to the Administrative Litigation Act on July 1, 2000, the validity thereof should remain unaffected. It should be noted, however, that remedies for such disputes should be sought through the administrative litigation procedures after the enforcement of the Administrative Litigation Act as amended.

EDITOR'S NOTE:

Summary of facts:The Petitioner breed fish in a jointly owned pond. The Shimen Irrigation Association of Taiwan Province billed the Petitioner twice for the utility of excessive water but to no avail. The Association then brought an action in

編者註：

事實摘要：臺灣省石門農田水利會以聲請人使用其與他人共有之溜池池水放養魚類，經二次通知聲請人繳納餘水使用費，聲請人均未繳納，乃依農田水利會組織通則第二十八條徵收水費之標準及辦法與臺灣省石門農田水利會灌

court demanding payment in accordance with the standards and measures for water levy under Article 28 of the General Organic Rules of the Irrigation Associations and Point 4, Paragraph 1 of the Irrigation Reservoirs Usage Guidelines of the Shimen Irrigation Association of Taiwan Province. The Petitioner countered with the argument that the usage guidelines were self-implemented by the Association and in violation of the standards and measures for water levy in accordance with Article 29 of the General Organic Rules of the Irrigation Associations, among other things.

溉蓄水池使用要點第四點第一項用水使用費徵收規定，向法院起訴請求給付餘水使用費。聲請人則以前開使用要點係水利會自行訂定，違反農田水利會組織通則第二十九條徵收水費之標準及辦法之規定等為由抗辯。

With the judgment being finalized, the Petitioner nevertheless appealed forreharing but was denied. The Petitioner then petitioned for interpretation.

案經法院判決確定。聲請人雖提起再審，仍遭駁回，爰聲請解釋。

J. Y. Interpretation No.629（July 6, 2007）*

ISSUE: Is the Resolution of the Joint Meeting of the Supreme Administrative Court issued in November 2007 in violation of the Constitution ?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; J.Y. Interpretation No.574（司法院釋字第五七四號解釋）; Article 229 of the Administrative Litigation Act（行政訴訟法第二百二十九條）; Article 427-I of the Code of Civil Procedure (as amended on February 3, 1999)（民事訴訟法第四百二十七條第一項（中華民國八十八年二月三日修正））; Article 436-8-I of the Code of Civil Procedure（民事訴訟法第四百三十六條之八第一項）; J.Y. Order No. Y.T.T.H.Y.-25746 issued on October 22, 2001（司法院九十年十月二十二日（九十）院臺廳行一字第二五七四六號令）；Resolution of the Joint Meeting of the Supreme Administrative Court Division-Chief Judges and Judges Meeting, November 2007（最高行政法院九十年十一月份庭長法官聯席會議暨法官會議決議）.

KEYWORDS:

Administrative litigation（行政訴訟）, summary procedure（簡易程序）, principle of a constitutional state（法治國原

* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

則）, principle of non-retroactivity（法律不溯既往原則）, principle of reliance protection（信賴保護原則）, principle of legal reservation（法律保留原則）, principle of clarity of authorization of law（授權明確性原則）, principle of stability of law（法安定性原則）, principle of clarity and definiteness of law（法明確性原則）, right of instituting legal proceedings（訴訟權）.**

HOLDING: It was resolved in the Joint Meeting of the Supreme Administrative Court Division-Chief Judges and Judges Meeting in November 2007 that an administrative litigation that is filed for any case whose amount at issue (value at issue) falls between NT$30,000 and NT$100,000 after the amount (value) for the summary procedure under the Administrative Litigation Act is increased to NT$100,000 as of January 1, 2002, should be tried in accordance with the summary procedure; that those cases pending at the various High Administrative Courts before said amount increase but not concluded after such increase should be reassigned as summary cases and the parties concerned be notified that their cases

解釋文：最高行政法院中華民國九十年十一月份庭長法官聯席會議暨法官會議決議：「行政訟訴法簡易程序之金額（價額）於九十一年一月一日提高為十萬元後，訴訟標的金額（價額）逾三萬元至十萬元間之事件，於提高後始提起行政訴訟者，依簡易程序審理。提高前已繫屬各高等行政法院而於提高後尚未終結者，改分為簡字案件，並通知當事人，仍由原股依簡易程序繼續審理；於提高前已終結者以及於提高前已提起上訴或抗告者，均仍依通常程序辦理。」符合行政訴訟法第二百二十九條第二項規定及司法院九十年十月二十二日（九十）院臺廳行一字第二五七四六號令之意旨，與法律保留原則、法安定性原則與法明確性原則均無違背，於憲法第十六條、第二十三條規定尚無牴

would still be tried by the original sections of the courts pursuant to the summary procedure; and that those cases already concluded before such increase, as well as cases for which an appeal or a motion to set aside had already been filed before such increase, should be handled under ordinary procedure. Said resolution is consistent with Article 229-II of the Administrative Litigation Act and J.Y. Order No. Y.T.T.H.Y.-25746 issued on October 22, 2001, and is not contrary to the principles of legal reservation, of stability of law and of clarity and definiteness of law. As such, it does not violate Articles 16 and 23 of the Constitution.

觸。

REASONING: The right of instituting legal proceedings referred to in Article 16 of the Constitution is available when the people's rights are infringed and fair legal proceedings may be resorted to in seeking certain remedy from the courts. The trial instances, procedures and relevant requisites to be followed by the legal actions shall be justified by the legislative authority under laws by taking into consideration the type, nature and purpose of

解釋理由書：憲法第十六條所規定之訴訟權，係以人民於其權利遭受侵害時，得依法請求法院救濟為其核心內容。而訴訟救濟應循之審級、程序及相關要件，則由立法機關衡量訴訟案件之種類、性質、訴訟政策目的，以及訴訟制度之功能等因素，以法律為正當合理之規定，本院釋字第五七四號解釋足資參照。

the legal actions, as well as the function of litigious systems. The foregoing has been made clear in J.Y. Interpretation No. 574.

According to Article 229-I (i) to (iii) of the Administrative Litigation Act as amended on October 28, 1998, summary procedure shall be applicable to administrative litigation matters arising out of "an action involving tax collection where the assessed taxable amount falls below NT$30,000," or "an action where the party concerned objects to the imposition of a fine by an administrative agency, which falls below NT$30,000," or "such other action as involves property under public law, the amount or value of the subject matter of which falls below NT$30,000." The criteria for determining whether the ordinary procedure or summary procedure should be applied when an administrative litigation is filed are whether the potential benefits receivable by the party bringing the action will exceed a specified amount or value. Such criteria are justifiable and rational restrictions imposed by the lawmakers for the purposes of preventing needless waste

八十七年十月二十八日修正之行政訴訟法第二百二十九條第一項第一款至第三款規定，行政訴訟事件「關於稅捐課徵事件涉訟，所核課之稅額在新臺幣三萬元以下者」、「因不服行政機關所為新臺幣三萬元以下罰鍰處分而涉訟者」、「其他關於公法上財產關係之訴訟，其標的之金額或價額在新臺幣三萬元以下者」，適用簡易訴訟程序，係以當事人起訴所得受之利益是否逾一定之金額或價額，而決定其提起行政訴訟時應適用通常訴訟程序或簡易訴訟程序之標準，乃立法者衡酌行政訴訟救濟制度之功能及訴訟事件之屬性，避免虛耗國家有限之司法資源，促使公法上爭議早日確定，以維持社會秩序所為之正當合理之限制，與憲法第十六條、第二十三條規定尚無違背。但法律之內容難以鉅細靡遺，如有須隨社會變遷而與時俱進者，立法機關自得授權主管機關發布命令為之。其授權之範圍及內容具體明確者，並非憲法所不許。

of the State's limited judicial resources and expediting the finalization of disputes arising under public law so as to maintain social order after they take into account the functions of the administrative litigation relief system and the attributes of litigation matters. As such, they are not contrary to Articles 16 and 23 of the Constitution. Since, however, no laws can be so exhaustive as to cover all things, big or small, the legislative body may, as a matter of course, authorize the competent authorities to issue relevant orders where there is any need to make adjustments as the social conditions change over time. As long as the scope and contents of the authorization are clear and definite, it will not be prohibited by the Constitution.

Since the criteria for determining whether the ordinary procedure or summary procedure should be applied in an administrative litigation rest upon whether the potential benefits receivable by the party bringing the action will exceed a specified amount or value, whether such criteria may effectively perform the functions of preventing the needless waste of

行政訴訟既以當事人起訴所得受之利益是否逾一定之金額或價額，作為劃分通常訴訟程序與簡易訴訟程序之標準，則此一劃分標準是否有效而可發揮避免虛耗國家有限之司法資源，促使公法上爭議早日確定之功能，應視社會情勢而定。衡諸法律之修正費時，是行政訴訟法第二百二十九條第二項規定，該條第一項所定數額，授權司法院得因情

the State's limited judicial resources and expediting the finalization of disputes arising under public law should depend upon the social circumstances. In light of the fact that the amendment to any law may require a substantial amount of time, Article 229-II of the Administrative Litigation Act provides that the Judicial Yuan is authorized to reduce the amount specified in Paragraph I of said article to no less than NT$20,000 and to increase it to no more than NT$200,000 by issuing an order to that effect as dictated by the circumstances. The purpose of such authorization is indeed justifiable and the scope and contents thereof are clear and definite. As such, there is no violation of either the principle of legal reservation, or the principle of clarity of authorization of law.

勢需要，以命令減為新臺幣（下同）二萬元或增至二十萬元，以資因應。其授權之目的洵屬正當，且其範圍及內容具體明確，自無違於法律保留原則與授權明確性原則。

It is noted that, according to Article 229-I (i) to (iii) of the Administrative Litigation Act as amended on October 28, 1998, the summary procedure will not be applicable to administrative litigation matters unless the amount or value at issue falls below NT$30,000. Due to the fact

查八十七年十月二十八日修正之行政訴訟法第二百二十九條第一項第一款至第三款所規定之行政訴訟事件，須其金額或價額在三萬元以下，始有簡易訴訟程序之適用。由於該次行政訴訟法修正案之研議過程長達十七年之久，其間我國之經濟及社會結構已有重大變

that the studies and discussions regarding these particular amendments to the Administrative Litigation Act extended over a period of 17 years and that the economic and social structures of our nation experienced substantial changes during that time, NT$30,000 as the benchmark for determining whether the summary procedure should apply is obviously too low a figure. Furthermore, the threshold amount or value of a claim to which the summary procedure should be applicable has been raised to NT$500,000 under Article 427-I of the Code of Civil Procedure as amended on February 3, 1999. Under Article 436-8-I of said Act, the small-claim procedure will also apply to an action whose amount or value in controversy falls below NT$100,000. In view of the expediency and facility of the summary procedure, the Judicial Yuan deemed it necessary to increase the aforesaid amount to which the summary procedure should apply and hence raised such amount under Article 229-I of the Administrative Litigation Act to NT$100,000, which should come into force as of January 1, 2002, in accordance with Article

遷，以三萬元以下數額作為適用簡易訴訟程序之基準，顯然偏低，且八十八年二月三日修正之民事訴訟法第四百二十七條第一項關於適用簡易訴訟程序之事件，其金額或價額已提高為五十萬元以下，同法第四百三十六條之八第一項關於適用小額訴訟程序之事件，其金額或價額亦規定為十萬元以下。司法院鑒於簡易訴訟程序有簡便易行，迅速審理之效，為減輕人民訟累、節省司法資源，並配合經濟發展，上開適用簡易訴訟程序之金額或價額有予提高之必要，爰依行政訴訟法第二百二十九條第二項規定，以九十年十月二十二日（九十）院臺廳行一字第二五七四六號令訂定「依行政訴訟法第二百二十九條第二項之規定，將行政訴訟法第二百二十九條第一項所定適用簡易程序之數額增至新臺幣十萬元，並自中華民國九十一年一月一日起實施」（參閱九十年十一月司法院公報第四十三卷第十一期第七十四頁），以因應情勢之需要，與行政訴訟法第二百二十九條第二項規定之授權意旨，並無不符。

229-II of said Act by issuance of J.Y. Order No. Y.T.T.H.Y.-25746 on October 22, 2001, so as to reduce the people's burden to cope with court actions and save judicial resources while also taking into account the economic development (*See* J.Y. Gazette, Vol. 43, Issue 11, p. 74 (November 2001)). Therefore, it is not inconsistent with the intent of the authorization contemplated by Article 229-II of the Administrative Litigation Act.

The principle of rule of law is a basic principle of the Constitution and its primary purposes are to ensure the protection of the rights of people, the stability of the legal order and the compliance with the principle of reliance protection. Therefore, once laws are amended, unless the laws specifically provide for retroactive application, they shall be effective as of the date when they are promulgated. This Court has made the foregoing clear through its various interpretations. The foregoing enabling order issued by the Judicial Yuan does not contain any special provision for retroactivity. As such, the Resolution of the Joint Meeting of the

按法治國原則為憲法之基本原則，首重人民權利之維護、法秩序之安定及信賴保護原則之遵守。因此，法律一旦發生變動，除法律有溯及適用之特別規定者外，原則上係自法律公布生效日起，向將來發生效力，迭經本院解釋有案。司法院上開授權命令，並無溯及適用之特別規定，是最高行政法院九十年十一月份庭長法官聯席會議暨法官會議決議，乃就該命令應如何自公布生效日起向將來發生效力，所為之過渡規定，與法律不溯既往原則，自無違背。另查上開命令雖無溯及效力，而係適用於該命令生效後所進行之程序，然對人民依舊法所建立之生活秩序，仍難免發生若干影響。此時於不違反法律平等適

Supreme Administrative Court Division-Chief Judges and Judges Meeting in November 2007 has merely established a set of interim provisions with respect to the application of said order as of the date of its promulgation and hence it does not violate the principle of non-retroactivity. Furthermore, although the aforesaid order does not have any retroactivity and hence is merely applicable to the procedure after said order comes into effect, it nonetheless will inevitably have some impact on the lives of the people and the social order established under the prior laws. Under such circumstances, so long as it is not contrary to the principle of equality of law, there will be no violation of the principle of stability of law and the principle of reliance protection if the application of said order is adequately excluded after its entry into force. Accordingly, it was resolved by the Supreme Administrative Court that "an administrative litigation that is filed for any case whose amount at issue (value at issue) falls between NT$30,000 and NT$100,000 after the amount (value) for the summary procedure under the Administrative Litigation

用之原則下，如適度排除該命令於生效後之適用，即無違法治國之法安定性原則及信賴保護原則。準此，上開最高行政法院決議：「行政訴訟法簡易程序之金額（價額）於九十一年一月一日提高為十萬元後，訴訟標的金額（價額）逾三萬元至十萬元間之事件，於提高後始提起行政訴訟者，依簡易程序審理。提高前已繫屬各高等行政法院而於提高後尚未終結者，改分為簡字案件，並通知當事人，仍由原股依簡易程序繼續審理；於提高前已終結者以及於提高前已提起上訴或抗告者，均仍依通常程序辦理。」對於簡易程序之金額（價額）提高前已提起行政訴訟者，除於提高前高等行政法院訴訟程序已終結者以及於提高前已提起上訴或抗告者，仍適用提高前規定之程序繼續審理外，其已繫屬各高等行政法院而於提高後尚未終結者，改分為簡字案件，依簡易訴訟程序繼續審理。對當事人就訴訟程序之期待，縱不能盡如其意，惟行政訴訟簡易程序與通常程序，僅事件由獨任法官審理、裁判得不經言詞辯論為之、對裁判提起上訴或抗告須經最高行政法院許可且以訴訟事件所涉及之法律見解具有原則性者為限等訴訟程序之繁簡不同，就人民於其權利遭受侵害時，得依法請求法院救

Act is increased to NT$100,000 as of January 1, 2002, should be tried in accordance with the summary procedure; that those cases pending at the various High Administrative Courts before said amount increase but not concluded after such increase should be re-assigned as summary cases and the parties concerned be notified that their cases would still be tried by the original sections of the courts pursuant to the summary procedure; and that those cases already concluded before such increase, as well as cases for which an appeal or a motion to set aside had already been filed before such increase, should be handled under ordinary procedure." With respect to the cases for which an administrative litigation is already filed before the amount (value) for the summary procedure is increased, those cases pending at the various High Administrative Courts before said amount increase but not concluded after such increase should be re-assigned as summary cases and would still be tried pursuant to the summary procedure except that those cases already concluded by the High Administrative Courts before such increase,

濟之功能而言並無二致，而相對於紓解人民訟累及節省司法資源此一重大公益之重要性與必要性，則簡易訴訟程序之金額（價額）提高前已繫屬各高等行政法院而於提高後尚未終結者，改分為簡字案件，依簡易訴訟程序繼續審理所受之不利影響，尚屬合理，與法治國家法安定性之要求，仍屬相符。是最高行政法院上開決議符合行政訴訟法第二百二十九條第二項規定及司法院九十年十月二十二日（九十）院臺廳行一字第二五七四六號令之意旨，與法律保留原則、法安定性原則與法明確性原則均無違背，於憲法第十六條、第二十三條規定尚無牴觸。

as well as cases for which an appeal or a motion to set aside had already been filed before such increase, should be handled under ordinary procedure in effect before such increase. Even though the litigation procedure may not be utterly satisfactory for a party, when it comes to the summary procedure and ordinary procedure under the administrative litigation, the only procedural differences lie where a single judge may hear and decide on a matter without resorting to oral arguments, where the appeal or motion to set aside should be granted by the Supreme Administrative Court and where the question of law for the case at issue is a fundamental one, etc. It does not make any difference when it comes to the people's right to seek judicial remedy pursuant to law when their rights are infringed upon. In contrast to the importance and necessity of such significant public interests as the alleviation of the people's trial burdens and the judicial economy, it should be reasonable-though somewhat unfavorable to re-assign those cases pending at the various High Administrative Courts before the amount (value) for the summary procedure is

increased but not concluded after such increase as summary cases and to continue their trials pursuant to the summary procedure, which is still in line with the principle of stability of law for a rule-of-law nation. Therefore, the aforesaid resolution of the Supreme Administrative Court is consistent with Article 229-II of the Administrative Litigation Act and J.Y. Order No. Y.T.T.H.Y.-25746 issued on October 22, 2001, and is not contrary to the principles of legal reservation, of stability of law and of clarity and definiteness of law. As such, it does not violate Articles 16 and 23 of the Constitution.

Justice Yu-Hsiu Hsu filed dissenting opinion.

本號解釋許大法官玉秀提出不同意見書。

EDITOR'S NOTE:

Summary of facts:The Petitioner was fined NT$70,000 for public servant property declaration matter and brought an administrative litigation. The Taipei High Administrative Court reviewed the case by following the normal procedures. The Judicial Yuan, in accordance with Article 229, Paragraph 2 of the Administrative

編者註：

事實摘要：聲請人因申報公職人員財產事件遭處罰鍰七萬元，聲請人不服，提起行政訴訟。臺北高等行政法院本依通常程序進行審理，嗣司法院依行政訴訟法第二百二十九條第二項規定，以函令將適用簡易程序之數額，增至新臺幣十萬元，並自九十一年一月一日起實施。臺北高等行政法院遂函知聲請

Litigation Act, subsequently issued an order increasing the amount subject to summary procedures to NT$100,000, effective as of January 1, 2002. As a result, the Taipei High Administrative Court notified the Petitioner that the proceeding for the case shall beswitched to summary procedures and denied the Petitioner's case.

人，改依簡易程序審理，嗣並判決駁回聲請人之訴。

The Petitioner appealed. The Joint Meeting of Presiding Judges and Judges as well as the Judicial Conference of the Supreme Administrative Court has resolved: "Any case pending at the various high administrative courts brought before the increase of amount but not yet concluded after the increase shall be redesignated as summary proceeding and the parties shall be notified, with the case continues to be reviewed by the original court accordingly." Accordingly, the Supreme Administrative Court does not consider the ruling to re-designate the case contrary to the law and denied the appeal.

聲請人提起上訴，經最高行政法院依據同院庭長法官聯席會議暨法官會議決議：「提高前已繫屬各高等行政法院而於提高後尚未終結者，改分為簡字案件，並通知當事人，仍由原股依簡易程序繼續審理」，認原判決改依簡易程序審理，於法並無不合，而駁回其上訴。

The Petitioner believed this resolution

聲請人認該前開決議，有牴觸憲

contradicts Articles 16 and 23 of the Constitution, and petitioned for interpretation.

法第十六條訴訟權及第二十三條基本權之限制規定疑義，聲請解釋。

J. Y. Interpretation No.630（July 13, 2007）*

ISSUE: Is Article 329 of the Criminal Code unconstitutional in providing for the crime of constructive robbery ?

RELEVANT LAWS:

Articles 8, 15, 22 and 23 of the Constitution（憲法第八條、第十五條、第二十二條、第二十三條）; Articles 328 and 329 of the Criminal Code（刑法第三百二十八條、第三百二十九條）.

KEYWORDS:

Larceny（竊盜）, forcible taking（搶奪）, escape arrest（脫免逮捕）, destroy evidence（湮滅證據）, constructive robbery（準強盜罪）, violence and threat（強暴脅迫）, causal relation（因果關係）, subjective unlawfulness（主觀不法）, objective unlawfulness（客觀不法）, compound single intent（複合之單一故意）, statutory punishment（法定刑）, doctrine of punishment commensurate with a crime （罪刑相當原則）.**

HOLDING: Article 329 of the Criminal Code is intended to protect by means of criminal punishment the physical freedom, personal safety and property

解釋文：刑法第三百二十九條之規定旨在以刑罰之手段，保障人民之身體自由、人身安全及財產權，免受他人非法之侵害，以實現憲法第八條、第二

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposes only.

rights of the people against illegal infringement by others, so as to fulfill the purpose embodied in Articles 8, 15 and 22 of the Constitution. The reason that the lawmakers have only enumerated, with respect to the instantaneous use of violence and threat in the commission of larceny and forcible taking, the three specific incidents of defending the property taken, escaping arrest and destroying criminal evidence, which always lead to violence and threat, is to choose the situations of relatively higher degree of danger to the physical freedom and personal safety of the people to be deemed as an act of robbery and made liable to severe punishment. And the reason for larceny and forcible seizure committed under the forgoing circumstances being fictionalized as constructive robbery is because, in other property crimes, there is rarely any close relation between the act of property seizure and the act of violence or the threat in terms of time and place. Thus, the provision cited above does not go beyond the scope of the power of reasonable discretion of lawmakers and can hardly be considered to constitute any unreasonable

十二條及第十五條規定之意旨。立法者就竊盜或搶奪而當場施以強暴、脅迫者，僅列舉防護贓物、脫免逮捕或湮滅罪證三種經常導致強暴、脅迫行為之具體事由，係選擇對身體自由與人身安全較為危險之情形，視為與強盜行為相同，而予以重罰。至於僅將上開情形之竊盜罪與搶奪罪擬制為強盜罪，乃因其他財產犯罪，其取財行為與強暴、脅迫行為間鮮有時空之緊密連接關係，故上開規定尚未逾越立法者合理之自由形成範圍，難謂係就相同事物為不合理之差別對待。經該規定擬制為強盜罪之強暴、脅迫構成要件行為，乃指達於使人難以抗拒之程度者而言，是與強盜罪同其法定刑，尚未違背罪刑相當原則，與憲法第二十三條比例原則之意旨並無不符。

discrimination for the same matter. To constitute the crime of constructive robbery under the provision, the acts of violence and the threats must have reached the degree of rendering resistance impossible. The statutory punishment is therefore the same as for the crime of robbery, and is not contrary to the doctrine of punishment commensurate with the crime; nor is it inconsistent with the essence of the principle of proportionality under Article 23 of the Constitution.

REASONING: The physical freedom, personal safety and property rights of the people are protected under Articles 8, 15 and 22 of the Constitution. The Criminal Code provides in Article 329 that "a person who commits larceny or forcible seizure of property of another and thereupon uses violence or threat to defend the property, evade arrest or destroy criminal evidence shall be punishable in the same manner as for the crime of robbery." The statute is intended to protect by means of criminal punishment the physical freedom as well as personal and property safety of the people against

解釋理由書：人民之身體自由、人身安全及財產權，受憲法第八條、第二十二條及第十五條規定之保障，刑法第三百二十九條規定「竊盜或搶奪，因防護贓物、脫免逮捕或湮滅罪證，而當場施以強暴、脅迫者，以強盜論。」旨在以刑罰之手段，保障人民之身體自由、人身及財產安全，免受他人非法之侵害，以實現上開憲法意旨。上開刑法規定所列舉之防護贓物、脫免逮捕或湮滅罪證三種客觀具體事由，屬於竊盜及搶奪行為事發之際，經常促使行為人對被害人或第三人施強暴、脅迫之原因，故立法者選擇該等事由所造成實施強暴、脅迫之情形，論以強盜罪，俾

illegal infringement by other persons, so as to fulfill the purpose embodied in the above Constitutional articles. The three objective and specific incidents of defending the property taken, evading arrest and destroying criminal evidence enumerated in the statute cited above are causes for which the actor often uses violence upon and threat against the victim or a third person at the time when larceny or forcible seizure of property is being committed. Therefore, the lawmakers have chosen to make the situations where violence and threat are used in such incidents punishable in the same manner as robbery for the purpose of protecting effectively the physical freedom as well as personal and property safety of the victim and third persons against illegal infringement. While persons who commit other property crimes may also use violence or threat to defend the property, evade arrest or destroy criminal evidence, there is rarely any close relation between the act of property seizure and the act of violence or threat in terms of time and place. Thus, the provision cited above does not go beyond the scope of the power of reasonable

能有效保護被害人或第三人之身體自由、人身及財產安全不受非法侵害；其他財產犯罪行為人，雖亦可能為防護贓物、脫免逮捕或湮滅罪證而施強暴、脅迫之行為，然其取財行為與強暴、脅迫行為間鮮有時空之緊密連接關係，故上開規定尚未逾越立法者合理之自由形成範圍，難謂係就相同事物為不合理之差別對待。

discretion of lawmakers and can hardly be considered to constitute any unreasonable discrimination for the same matter.

In the case of constructive robbery under Article 329 of the Criminal Code, the act of the person who commits larceny or forcible seizure of property of another and thereupon uses violence or threat to defend the property, evade arrest or destroy criminal evidence is deemed to be an act of robbery of seizing the property of another by the use of violence or threat that renders resistance impossible because the cause and effect between the act of forcible seizure and the act of using violence and threat in the crime of constructive robbery, albeit in an order opposite to the causal relation in the crime of robbery, are so closely related in terms of time and space that it is impossible to draw a clear-cut line of demarcation between the intent of larceny and forcible seizure and the intent to employ force and threat, which may thus be considered a compound single intent. In other words, the subjective unlawfulness of such an offender is hardly distinguishable from the subjective

查刑法第三百二十九條準強盜罪之規定，將竊盜或搶奪之行為人為防護贓物、脫免逮捕或湮滅罪證而當場施強暴、脅迫之行為，視為施強暴、脅迫使人不能抗拒而取走財物之強盜行為，乃因準強盜罪之取財行為與施強暴、脅迫行為之因果順序，雖與強盜罪相反，卻有時空之緊密連接關係，以致竊盜或搶奪故意與施強暴、脅迫之故意，並非截然可分，而得以視為一複合之單一故意，亦即可認為此等行為人之主觀不法與強盜行為人之主觀不法幾無差異；復因取財行為與強暴、脅迫行為之因果順序縱使倒置，客觀上對於被害人或第三人所造成財產法益與人身法益之損害卻無二致，而具有得予以相同評價之客觀不法。故擬制為強盜行為之準強盜罪構成要件行為，雖未如刑法第三百二十八條強盜罪之規定，將實施強暴、脅迫所導致被害人或第三人不能抗拒之要件予以明文規定，惟必於竊盜或搶奪之際，當場實施之強暴、脅迫行為，已達使人難以抗拒之程度，其行為之客觀不法，方與強盜行為之客觀不法相當，而得與

unlawfulness of the offender who commits robbery. Furthermore, despite that the act of forcible seizure is in an inverted order of the causal relation with the act of violence and threat, the damage it causes to the legal right to the property or body of the victim or the third person is no different from robbery in the objective view, and the act constitutes an objective unlawfulness susceptible to the same judgment. Therefore, the constituent elements for constructive robbery that are assumed by law to constitute the crime of robbery, although not explicitly requiring that the force and threat used immediately upon commission of larceny or forcible seizure must reach the degree of rendering it impossible for the victim or third person to resist as is so provided by Article 328 of the Criminal Code with respect to the crime of robbery, the objective unlawfulness of such an act is similar to the objective unlawfulness of the act of robbery and may be made liable to the same statutory punishment as robbery if force and threat are used immediately upon commission of larceny or forcible seizure to the extent of rendering it impossible for

強盜罪同其法定刑。據此以觀，刑法第三百二十九條之規定，並未有擴大適用於竊盜或搶奪之際，僅屬當場虛張聲勢或與被害人或第三人有短暫輕微肢體衝突之情形，因此並未以強盜罪之重罰，適用於侵害人身法益之程度甚為懸殊之竊盜或搶奪犯行，尚無犯行輕微而論以重罰之情形，與罪刑相當原則即無不符，並未違背憲法第二十三條比例原則之意旨。

the victim or third person to resist. It follows that, where the application of Article 329 of the Criminal Code is not expanded to the situation of deceptive showing of force or momentary and minor body contact with the victim or the third person when committing larceny or forcible seizure, and consequently, instead of the crime of robbery which calls for severe punishment, the offense of larceny or forcible seizure which causes much less infringement upon the personal right is charged, it does not authorize severe penalty for such minor offenses and is not contrary to the doctrine of punishment commensurate with the crime; nor is it inconsistent with the essence of the principle of proportionality under Article 23 of the Constitution.

Justice Yu-hsiu Hsu filed concurring opinion.

本號解釋許大法官玉秀提出協同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner is the judgeof a larceny case. The defendant in that case was suspected in damaging the door lock of a shanty where the victim

編者註：

事實摘要：聲請人刑事庭法官審理竊盜案件，被告涉嫌攜帶油壓剪，破壞被害人放置農具之工寮門鎖，而侵入竊取馬達等財物，旋因當場為被害人發

places farm tools, burglarizing to steal motors, among other items. The defendant was spotted at the scene by the victim, who blocked the exit and demanded that the defendant went to the police station with him. While trying to flee the scene, the defendant engaged in physical pulling and dragging with the victim and inadvertently cut the victim's finger. The prosecutor eventually indicted the defendant with the offences of aggravated larceny and ordinary battery.

現、擋住出口並要求隨同前往警局，為逃離現場而與之發生拉扯、衝撞，不慎割傷被害人手指。經檢察官以被告所犯為加重竊盜罪及普通傷害罪提起公訴。

The Petitioner believes the exercise of violence to evade arrest that causes injures to the victim should constitute and apply the offence of constructive robbery under Article 329 and aggravated robbery under Article 330 of the Criminal Code. In addition, the Petitioner deemed the provision cited above contradict the principle of equality, the principle of proportionality, and the principle of clarity and definiteness of law under the Constitution and J. Y. Interpretation Nos. 594 and 602, andruled to stay the litigation while petitioned for an interpretation.

聲請人認構成脫免逮捕而實施強暴並傷及被害人，而應適用刑法第三百二十九條準強盜罪與第三百三十條加重強盜罪之規定；並認上開規定牴觸憲法上平等原則、比例原則，以及司法院釋字第五九四號與六０二號解釋之明確性原則與罪刑相當原則，爰裁定停止訴訟程序而聲請解釋。

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

ISSUE: Is Article 5-II of the Communication Protection and Monitoring Law, promulgated and implemented on July 14, 1999, unconstitutional ?

RELEVANT LAWS:

Article 12 the Constitution（憲法第十二條）; Interpretation No 603（司法院釋字第六０三號解釋）; Articles 1, 2, 5, and 7 of the Communication Protection and Monitoring Law (promulgated and implemented on July 14, 1999)（通訊保障及監察法第一條、第二條、第五條、第七條（八十八年七月十四日制定公布））; Article 5-II (I) of the Constitutional Interpretation Procedure Act(司法院大法官審理案件法第五條第一項第二款).

KEYWORDS:

freedom of privacy of correspondence（秘密通訊自由）, Communication Protection and Monitoring Law（通訊保障及監察法）, correspondence monitoring（通訊監察）, principle of minimum infringement（最小侵害原則）, reasonable and legitimate procedure（合理正當程序）, check and balance of powers（權力制衡）.**

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* Translated by Fort Fu-Te Liao.

** Contents within frame, not part of the original text, are added for reference purposes only.

HOLDING: Article 12 of the Constitution provides: "The people shall have freedom of privacy of correspondence." Its purpose is to protect the people's right to choose whether or not, with whom, when and how to communicate and the contents of their communication without arbitral invasion by the State and others. Any measure of restraint adopted by the State shall have legal bases. In addition, requirements for taking such measures of restraint must be specific and explicit without exceeding what is necessary, and their procedures should be reasonable and legitimate to fulfill the purpose of protecting the freedom of privacy of correspondence guaranteed by the Constitution. Article 5-II of the Communication Protection and Monitoring Law, promulgated on and implemented as of July 14, 1999, provided: "During criminal investigations, the writs of communication monitoring mentioned in the preceding paragraph are issued by prosecutors upon applications from judicial police authorities or by virtue of the prosecutors' own authority." It did not require that the writ of communication monitoring be

解釋文：憲法第十二條規定：「人民有秘密通訊之自由。」旨在確保人民就通訊之有無、對象、時間、方式及內容等事項，有不受國家及他人任意侵擾之權利。國家採取限制手段時，除應有法律依據外，限制之要件應具體、明確，不得逾越必要之範圍，所踐行之程序並應合理、正當，方符憲法保護人民秘密通訊自由之意旨。中華民國八十八年七月十四日制定公布之通訊保障及監察法第五條第二項規定：「前項通訊監察書，偵查中由檢察官依司法警察機關聲請或依職權核發」，未要求通訊監察書原則上應由客觀、獨立行使職權之法官核發，而使職司犯罪偵查之檢察官與司法警察機關，同時負責通訊監察書之聲請與核發，難謂為合理、正當之程序規範，而與憲法第十二條保障人民秘密通訊自由之意旨不符，應自本解釋公布之日起，至遲於九十六年七月十一日修正公布之通訊保障及監察法第五條施行之日失其效力。

in principle issued by an impartial and independent judge. It charged the prosecutor and judicial police officers, who are responsible for criminal investigations, with the concurrent duties of applying for and issuing the writ of communication monitoring. Such provision can not be regarded as reasonable and legitimate and is in violation of Article 12 of the Constitution that guarantees the freedom of privacy of correspondence. The provision shall be annulled when this interpretation is promulgated or at the latest on July 11, 2007 when the amended Article 5 of the Communication Protection and Monitoring Law becomes effective.

REASONING: Article 5-I(II) of the Constitutional Interpretation Procedure Act provides that, a person who has suffered unlawful infringement of his rights guaranteed by the Constitution and, after having brought a legal action through legal procedures, considers the laws or ordinances applied by the court in rendering its irrevocable final judgment to be conflicting with the Constitution, may apply for constitutional interpretations.

解釋理由書：按人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法，司法院大法官審理案件法第五條第一項第二款定有明文。查本件據以聲請之確定終局判決係以監聽取得之證據作為不利於聲請人判決證據之一，而監聽合法與否，係依八十八年七月十四日制定公布之通訊保障及監察法（以下簡稱通保法）第五條

Because one of the evidences based on which the irrevocable final judgment rendered against the applicant has been obtained through communication monitoring, and whether the monitoring was legal or not is determined according to Article 5 of the Communication Protection and Monitoring Law promulgated on and implemented as of July 14, 1999. said Article is one of the laws applied by the court in making the aforesaid irrevocable final judgment, and the Judicial Yuan is certainly empowered to take cognizance of this case and deliver interpretation in accordance with the above mentioned Article 5-II (I) of the Constitutional Interpretation Procedure Act.

之規定定之，故該規定亦屬上述判決所適用之法律，本院自得依首開規定受理解釋。

Article 12 of the Constitution provides: “The people shall have freedom of privacy of correspondence.” Its purpose is to protect the people’s right to choose whether or not, with whom, when and how to communicate and the contents of their communication without arbitral invasion by the State and others. The freedom of privacy of correspondence is one of concrete modes of right to privacy that

憲法第十二條規定：「人民有秘密通訊之自由。」旨在確保人民就通訊之有無、對象、時間、方式及內容等事項，有不受國家及他人任意侵擾之權利。此項秘密通訊自由乃憲法保障隱私權之具體態樣之一，為維護人性尊嚴、個人主體性及人格發展之完整，並為保障個人生活私密領域免於國家、他人侵擾及維護個人資料之自主控制，所不可或缺之基本權利（本院釋字第六０三號

the Constitution guarantees. It is an essential fundamental right necessary for maintaining human dignity, individual autonomy, complete development of personal quality; and is safeguarded against interference by the State and others in the self-control of personal information so that the privacy of individual life will be protected. (*See* J. Y. Interpretation No. 603) Such freedom is explicitly guaranteed by Article 22 of the Constitution. Any measure of restraint adopted by the State shall have legal bases. In addition, requirements for taking such measures of restrain must be specific and explicit without exceeding what is necessary, and their procedures should be reasonable and legitimate to fulfill the purpose of protecting the freedom of privacy of correspondence guaranteed by the Constitution.

解釋參照），憲法第十二條特予明定。國家若採取限制手段，除應有法律依據外，限制之要件應具體、明確，不得逾越必要之範圍，所踐行之程序並應合理、正當，方符憲法保障人民基本權利之意旨。

The Communication Protection and Monitoring Law is a statute enacted by the State for the purpose of balancing the conflict of interests between "protection of the people's freedom of privacy of correspondence from illegal invasion" and "guarantee of national security and

通保法係國家為衡酌「保障人民秘密通訊自由不受非法侵害」及「確保國家安全、維護社會秩序」之利益衝突，所制定之法律（通保法第一條參照）。依其規定，國家僅在為確保國家安全及維護社會秩序所必要，於符合法定之實體及程序要件之情形下，始得核

maintenance of social order." (*See* Article 1 of the Communication Protection and Monitoring Law) According to its provisions, only where it is necessary to safeguard national security and maintain social order the State may issue the writs of communication monitoring to examine the people's private correspondence, provided that both substantive and procedural legal requirements are met. (*See* Articles 2, 5 and 7 of the Communication Protection and Monitoring Law) Article 5, Paragraph 1, of the Communication Protection and Monitoring Law provides: "writs of communication motoring may be issued when there are sufficient facts to support the belief that a defendant or suspect has committed one of the following crimes with serious endanger to the national security or social order to the extent of giving reasonable belief that details of the correspondence are relevant to the case and that it is not possible or very difficult to collect or investigate evidence by other means." This is the legal basis for the State to limit the people's freedom of privacy of correspondence. Its requirements can be regarded somewhat concrete

發通訊監察書，對人民之秘密通訊為監察（通保法第二條、第五條及第七條參照）。通保法第五條第一項規定：「有事實足認被告或犯罪嫌疑人有下列各款罪嫌之一，並危害國家安全或社會秩序情節重大，而有相當理由可信其通訊內容與本案有關，且不能或難以其他方法蒐集或調查證據者，得發通訊監察書」，此為國家限制人民秘密通訊自由之法律依據，其要件尚稱具體、明確。國家基於犯罪偵查之目的，對被告或犯罪嫌疑人進行通訊監察，乃是以監控與過濾受監察人通訊內容之方式，蒐集對其有關之紀錄，並將該紀錄予以查扣，作為犯罪與否認定之證據，屬於刑事訴訟上強制處分之一種。惟通訊監察係以未告知受監察人、未取得其同意且未給予防禦機會之方式，限制受監察人之秘密通訊自由，具有在特定期間內持續實施之特性，故侵害人民基本權之時間較長，亦不受有形空間之限制；受監察人在通訊監察執行時，通常無從得知其基本權已遭侵害，致其無從行使刑事訴訟法所賦予之各種防禦權（如保持緘默、委任律師、不為不利於己之陳述等）；且通訊監察之執行，除通訊監察書上所載受監察人外，可能同時侵害無辜第三人之秘密通訊自由，與刑事訴訟上之搜

and explicit. Where the State carries on monitoring of the correspondence of a defendants or suspect for the purpose of criminal investigation, it means that the State is taking a measure of collecting relevant records of the person under monitoring by scrutinizing and screening his details of communication and may seize such records. Such measure, being one type of coercive measures in criminal procedure, and the records seized may be admitted as evidence for determining whether the person is guilty. However, in the measure of correspondence monitoring, the freedom of privacy of correspondence is restrained in such a way that the person under surveillance is not notified, nor has he given his consent thereto or been offered any opportunity to defend, with the characteristics of continuity within a specific period of time, thereby causing a jeopardy upon the people's fundamental rights for a relatively longer time without tangible space barriers. Those who are monitored usually do not know that their fundamental rights are being invaded, so that they have no way to exercise defensive rights (such as the

索、扣押相較，對人民基本權利之侵害尤有過之。

right to keep silence, appoint lawyer or not to make statements disadvantageous to themselves) under the Criminal Procedure Law. Furthermore, enforcement of correspondence monitoring may simultaneously cause encroachment upon the freedom of privacy of correspondence of innocent third parties other than those named in the writ of communication monitoring, resulting in worse damage to the people's fundamental rights than search and seizure in criminal procedure.

Correspondence monitoring is a measure violating the people's fundamental rights intensely and broadly. When enforcing correspondence monitoring, the State, in order to fulfill its purpose of coercive measure, usually deprives those who are monitored of their pre-defensive rights to prevent such coercive measure. In order to check and balance coercive measures taken by investigation authorities to prevent unnecessary infringement, and at the same time to fulfill the purpose of coercive measure, pre-review by an independent and impartial judicial institution is an essential means to protect the

鑒於通訊監察侵害人民基本權之程度強烈、範圍廣泛，並考量國家執行通訊監察等各種強制處分時，為達成其強制處分之目的，被處分人事前防禦以避免遭強制處分之權利常遭剝奪。為制衡偵查機關之強制處分措施，以防免不必要之侵害，並兼顧強制處分目的之達成，則經由獨立、客觀行使職權之審判機關之事前審查，乃為保護人民秘密通訊自由之必要方法。是檢察官或司法警察機關為犯罪偵查目的，而有監察人民秘密通訊之需要時，原則上應向該管法院聲請核發通訊監察書，方符憲法上正當程序之要求。系爭通保法第五條第二項未設此項規定，使職司犯罪偵查之檢

people's freedom of privacy of correspondence. Therefore, when the prosecutor or judicial police authority believes it is necessary to monitor private correspondence for the purpose of criminal investigation, they shall in principle apply to the court for issuing a writ of communication motoring to comply with the due process requirement of the Constitution. Article 5-II of the Communication Protection and Monitoring Law in dispute did not specify such requirement, with the result that the prosecutor and judicial police authority, who are responsible for criminal investigations, were charged with the concurrent duty of applying for and issuing the writ of communication monitoring, with no proper inter-agencies check and balance mechanism to prevent unnecessary infringement of the people's freedom of privacy of correspondence that is guaranteed by the Constitution. The provision can hardly be regarded as a reasonable and legitimate procedural rule, and did not comply with Article 12 of the Constitution that protects the people's freedom of privacy of correspondence. This provision shall be annulled when this

察官與司法警察機關，同時負責通訊監察書之聲請與核發，未設適當之機關間權力制衡機制，以防免憲法保障人民秘密通訊自由遭受不必要侵害，自難謂為合理、正當之程序規範，而與憲法第十二條保障人民秘密通訊自由之意旨不符，應自本解釋公布之日起，至遲於九十六年七月十一日修正公布之通保法第五條施行之日失其效力。另因通訊監察對人民之秘密通訊自由影響甚鉅，核發權人於核發通訊監察書時，應嚴格審查通保法第五條第一項所定要件；倘確有核發通訊監察書之必要時，亦應謹守最小侵害原則，明確指示得為通訊監察之期間、對象、方式等事項，且隨時監督通訊監察之執行情形，自不待言。

interpretation is promulgated or at the latest on July 11, 2007 when the amended Article 5 of the Communication Protection and Monitoring Law becomes effective. Moreover, as communication monitoring is a severe intrusion to the people's freedom of privacy of correspondence, those who have the right to issue the writ of communication monitoring should make strict review to ensure that the application meets the requirements set forth in Article 5 of the Communication Protection and Monitoring Law. When there is evidently need to issue a writ of communication monitoring, they should adhere to the principle of minimum infringement, and specify clearly the period, person and method of monitoring. It is also obvious that they should supervise over its implementation at all times.

EDITOR'S NOTE:

Summary of facts: The Petitioner, a police officer at the information division of a police station, received a call on his mobile phone from the mobile phone of an anonymous Female A requesting assistance to search the personal information

編者註：

事實摘要：聲請人為警局資訊室警員，接獲不明女子Ａ以行動電話撥接至其使用之行動電話，要求協助查詢一高姓女子之個人資料。嗣聲請人經由其使用之電腦，向內政部警政署連線查獲相關資料，並告知Ａ女子。

of a Ms. Kao. The Petitioner then used his computer to access the National Police Agency of the Ministry of the Interior, retrieved the relevant information and relayed to Female A.

The aforementioned leak of secrets was uncovered after the prosecutor's approval of a communications surveillance warrant on the Petitioner's mobile phone activities and the inspection of Petitioner's inquiry records summoned from the National Police Agency. The Taiwan High Court, based on the surveillance transcript as evidence, held the Petitioner guilty of leaking confidential information under Article 132, Paragraph 1 of the Criminal Code.

The Petitioner argued that: (1) the communications surveillance warrant should have been approved and issued by the judge. Article 5, Paragraph 2 of the Communication Protection and Monitoring Act(the "Act") is unconstitutional; (2) the communications surveillance warrant was approved and issued on the ground of felonies in connection with firearms. The

上述行為因檢察官核准通訊監察書後，對聲請人使用之行動電話為通信監察，而得知洩密等情，並函請內政部警政署調取聲請人查詢之紀錄而查獲。台灣高等法院判決乃以監聽譯文為證據，認定聲請人構成刑法第一百三十二條第一項之洩密罪。

聲請人主張：(1)通訊監察書應一律由法官核發，通訊保障及監察法（以下簡稱本法）第五條第二項有關通訊監察書於偵查中由檢察官核發之規定違憲；(2)本件通訊監察書係以槍砲等重罪名義核發，系爭判決卻將監聽不屬本法第五條第一項各款發通訊監察書之情形而取得之譯文，作為認定聲請人有罪之證據，有牴觸憲法之疑義，聲請解釋

disputed judgment, however, convicted the petitioner by relying on transcripts of materials obtained not related to the warrant under Article 5, Paragraph 1 of the Act as evidence and is questionable for contradicting the Constitution.

憲法。

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

ISSUE: Is it constitutional for the Legislative Yuan not to exercise its consent power over the appointment of Control Yuan commissioners ?

RELEVANT LAWS:

Article 28, Paragraph 2, of the Constitution of the Republic of China (application suspended in accordance with Article 1, Paragraph 2, of the Amendment of the Constitution of the Republic of China; （中華民國憲法第二十八條第二項(已停止適用)）; Article 7, Paragraphs 1 and 2, of the Amendment of the Constitution of the Republic of China (amended as of April 25, 2000; （中華民國憲法增修條文第七條第一項、第二項；民國八十九年四月二十五日修正公布); Articles 8 and 29 of the Legislative Functioning Act [or Act Governing the Discharging of Duties of the Legislative Yuan]（立法院職權行使法第八條、第二十九條）; Article 5, Paragraph 1, Sections 1 and 3, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第一款、第三款）.

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** Contents within frame, not part of the original text, are added for reference purposes only.

KEYWORDS:

checks and balances（權力制衡）, consent power approval（同意權）, Control Yuan（監察院）, Legislative Yuan（立法院）, nomination（提名）, President（總統）, separation of powers（權力分立）.**

HOLDING: Article 7, Paragraphs 1 and 2 of the Amendment of the Constitution of the republic of China [hereinafter Constitutional Amendments] stipulate that "[t]here shall be a Control Yuan as the highest authority for the exercise of impeachment, censure and audit power," and that "[t]he Control Yuan shall consist of 29 Commissioners, among whom one shall be appointed as Chief Commissioner and one as Deputy-Chief Commissioner for a term of six years by the President and with the consent of the Legislative Yuan."[1] As such, the Control Yuan is an

解釋文：「監察院為國家最高監察機關，行使彈劾、糾舉及審計權」，「監察院設監察委員二十九人，並以其中一人為院長、一人為副院長，任期六年，由總統提名，經立法院同意任命之」，為憲法增修條文第七條第一項、第二項所明定。是監察院係憲法所設置並賦予特定職權之國家憲法機關，為維繫國家整體憲政體制正常運行不可或缺之一環，其院長、副院長與監察委員皆係憲法保留之法定職位，故確保監察院實質存續與正常運行，應屬所有憲法機關無可旁貸之職責。為使監察院之職權得以不間斷行使，總統於當屆監察院院

[1] "Yuan (院)" literally means the "grand house," and is the equivalent of "branch" as in constitutional governance. The Control Yuan is a unique creation of the Constitution of the Republic of China, which reflects, in part, the traditional censorial system in ancient China and is in deference to the idea of Dr. Sun Yat-sen, the founding father of the modern Chinese republic, of having a separate and independent government branch charged specifically with the authority to investigate, censure, impeach and audit officials and/or their acts at other government branches. The idea is that such an arrangement can more or less avoid

integral and indispensible national agency for the normal operations of the constitutional system with its specific power bestowed by the Constitution. Given that the Chief Commissioner, Deputy-Chief Commissioner and Commissioners are all legal positions preserved by the Constitution, it behooves all constitutional agencies, as regards their respective duties, to maintain the functional existence and normal operations of the Control Yuan. To ensure the continuous exercise of power by the Control Yuan, prior to the expiration of the term of the incumbent Chief Commissioner, Deputy-Chief Commissioner and Commissioners, the President should nominate candidates to fill these positions in a timely manner and seek the Legislative Yuan's consent. The Legislative Yuan, in turn, should

長、副院長及監察委員任期屆滿前，應適時提名繼任人選咨請立法院同意，立法院亦應適時行使同意權，以維繫監察院之正常運行。總統如消極不為提名，或立法院消極不行使同意權，致監察院無從行使職權、發揮功能，國家憲政制度之完整因而遭受破壞，自為憲法所不許。引發本件解釋之疑義，應依上開解釋意旨為適當之處理。

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unnecessary political interference or ramification surrounding the disposition of a public official, especially when that official happens to occupy a senior position in the government. For a detailed illustration, *See* Hung-Dah Chiu and Jyh-Pin Fa, *The Legal System of the Republic of China in Taiwan*, contained in Kenneth R. Redden, ed., MODERN LEGAL SYSTEMS CYCLOPEDIA, vol. 2, Buffalo, New York: William S. Hein & Co., Inc., 1984, pp. 602, 622-23; *see also* Hung-dah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan (with documents)*, OCCASIONAL PAPERS/REPRINT SERIES IN CONTEMPORARY ASIAN STUDIES, No. 2 – 1993 (115), University of Maryland School of Law, p. 12.

exercise such consent power in a timely manner to maintain the normal operations of the Control Yuan. The Constitution does not allow for the event in which either the President or the Legislative Yuan fails to nominate or consent to the nomination of candidates so that the Control Yuan cannot exercise its power or function, thereby jeopardizing the integrity of the constitutional system. All issues [in the petition] should be disposed of appropriately in accordance with this Interpretation.

REASONING: The term of the third Chief Commissioner, Deputy-Chief Commissioner and Commissioners expired as of January 31, 2005. In accordance with Article 7, Paragraph 2, of the Constitutional Amendments promulgated on April 25, 2000, the President submitted an official bill (*Hua Zong Yi Zhi* No. 09310052491) to the Legislative Yuan on December 20, 2004, nominating Chen-Bong Chang and 28 other individuals to serve as the fourth Commissioners. Without complying with Article 29 of the Legislative Functioning Act [or Act Governing

解釋理由書：緣第三屆監察院院長、副院長及監察委員任期於中華民國九十四年一月三十一日屆滿，總統依八十九年四月二十五日公布之中華民國憲法增修條文第七條第二項規定，於九十三年十二月二十日以華總一智字第０九三一００五二四九一號咨文，向立法院提名張建邦等二十九人為第四屆監察委員。立法院以其議案類別為總統提案之行使同意權案，未依立法院職權行使法第二十九條規定，不經討論交付全院委員會審查，提出院會表決，而依同法第八條第二項之規定，先送程序委員會編列議事日程。該委員會於同年十二月

the Discharging of Duties of the Legislative Yuan], which requires that the Legislative Yuan shall refer all [presidential] nomination bills to the *En Banc* Committee for review without discussion before such bills are voted on by its full assembly, the Legislative Yuan, based on Article 8, Section 2, of the same Act instead first referred this bill to the Rules [or Procedure] Committee for the assignment to the legislative calendar.[2] When that committee determined the legislative agenda for the 6th Session, 12th Meeting of the 5th Legislative Yuan, on December 21 of that year, the majority voted to table the review of this presidential bill concerning the nomination of Chief Commissioner, Deputy-Chief Commissioner and Commissioners of the Control Yuan. 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.

二十一日審定立法院第五屆第六會期第十二次會議議事日程時，經表決結果，多數通過總統咨請立法院同意監察院院長、副院長及監察委員被提名人案，暫緩編列議程報告事項。該委員會並於同年十二月二十八日、九十四年一月四日、十一日及十八日為相同決議。是迄第五屆立法委員最後一次會議，並未就該案進行審查。嗣第六屆立法委員於九十四年二月一日就職後，總統復於九十四年四月四日以華總一智字第０九四００四六０六一號咨文，請立法院依第一次咨文提名名單行使第四屆監察院人事同意權。該案仍送立法院程序委員會。該委員會於九十四年四月六日及五月十日協商通過該案「暫緩編列議程報告事項」，另於九十四年四月十二日、十九日、二十六日、同年五月三日、十七日、二十四日等，表決通過該案「暫緩編列議程報告事項」。迄至本解釋公布之日為止，立法院仍未行使該人事同意權。

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2 Article 29 of the Act Governing the Discharging of Duties of the Legislative Yuan provides: "In exercising its power to consent in accordance with Article 104 of the Constitution or Article 5, Paragraph 1, Article 6, Paragraph 2 or Article 7, Paragraph 2, of the Constitutional Amendments, the Legislative Yuan shall, without discussions, submit [the nomination bill] to the *En Banc* Committee for review and cast a floor vote anonymously in the full assembly. Such bill shall be deemed to have passed if more than half of the total number of members should vote in the affirmative."

Thus, at the very last meeting of the session, the bill still had not been reviewed by the 5th Legislative Yuan. Since members of the 6th Legislative Yuan were inaugurated on February 1, 2005, the President once again submitted a nomination bill (*Hua Zong Yi Zhi* No. 09400046061) requesting that the Legislative Yuan exercise its consent power over the same slate of nominees. That bill was once again referred to the Rules Committee. That committee, through [internal] consultation, agreed that the bill should be "suspended from being listed as an item to be reported" and voted to resolve the same on April 12, 19, 26 and May 3, 17, and 24, 2005, respectively. As of the date this Interpretation is being issued, the Legislative Yuan has yet to act on this nomination bill.

The petitioners are Mr. Ching-Te Lai and 88 other members of the Legislative Yuan.[3] They claimed that members of

聲請人立法委員賴清德等八十九人認立法院程序委員會濫用議事程序，不當阻撓監察委員人事同意權進入院會

[3] By the time the petition was filed and this interpretation was issued, the Legislative Yuan consisted of a total of 225 members, of which 89 seats were occupied by members of the Democratic Progressive Party (DPP), the largest political party at the time. Together with

the Rules Committee of the Legislative Yuan have abused the parliamentary procedure by inappropriately preventing the nomination bill from being voted on by the full assembly, which resulted in the operation of the national control or supervisory power being paralyzed, created a dispute between the Legislative Yuan and Control Yuan over the exercise of their respective constitutional powers, and caused 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, Section 3, of the Constitutional Interpretation Procedure Act[4]

表決，導致癱瘓國家監察權運作，牽涉立法院與監察院彼此間憲法上職權行使爭議，並有動搖憲法之權力分立制度及危害民主憲政秩序之虞，質疑立法院程序委員會阻撓院會行使監察委員人事同意權，是否僭越院會職權，行使人事同意權是否屬立法院之憲法上義務，以及不行使人事同意權是否逾越立法院自律權範圍等情，爰依司法院大法官審理案件法第五條第一項第三款規定，向本院聲請解釋憲法。按立法委員現有總額三分之一以上得就其行使職權，適用憲法發生之疑義，聲請解釋憲法，前開司法院大法官審理案件法第五條第一項第三款定有明文。本件聲請書之意旨，乃聲請人等就適用憲法增修條文第七條第二項，行使監察院人事同意權，立法院擱

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the 12 votes controlled by the Taiwan Solidarity Union, this so-called "Pan Green" coalition (based on the color of the DPP logo and symbolism) was nevertheless the minority in the parliament. The razor-thin majority was controlled by a coalition that consisted of 80 members of the Kuomintang (KMT or Nationalist Party) and 34 members of the People First Party, or so-called "Pan Blue" coalition (based on the background color of the KMT logo). As a result of a major partisan dispute, this petition was filed jointly by all DPP members, with Mr. Ching-Te Lai, then one of the ranking members of the Judicial Committee, taking the lead. When the 7th Legislative Yuan came into being on February 1, 2008, the total number of seats was reduced to 113 in accordance with Article 4 of the Constitutional Amendments (amended and promulgated as of June 10, 2005).

4 Article 5 (Grounds to Petition for Interpretation) of the Constitutional Interpretation Procedure Act states: "The grounds on which the petitions for interpretation of the Constitution may be made are as follows: 1.When a government agency, in carrying out its function and duty, has doubt about the meanings of a constitutional provision; or, when a government

questioning whether the Rules Committee actions have usurped the power of the full assembly, whether it is the Legislative Yuan's constitutional obligation to exercise its consent over personnel nominations, and whether by not acting on the [presidential] nomination bill the Committee exceeded the self-regulatory power of the Legislative Yuan. Article 5, Paragraph 1, Section 3 of the Constitutional Interpretation Procedure Act expressly stipulates that one-third or more of all the members of the Legislative Yuan may bring forth a petition [to the Grand Justices] to interpret questions derived from the exercise of its power in accordance with the Constitution. Since this petition concerns Article 7, Paragraph 2, of the Constitutional Amendments regarding the exercise of consent power over the nomination of Control Yuan personnel and the constitutionality of the Legislative Yuan's resolution to table the exercise of such

置該同意權之行使，發生有無違憲之疑義，聲請本院解釋，符合上開規定之要件，應予受理。

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agency disputes with other agencies in the application of a constitutional provision; or, when a government agency has questions on the constitutionality of a statute or regulation at issue; …… or 3.When one-third of the Legislators or more have doubt about the meanings of a constitutional provision governing their functions and duties, or have questions about the constitutionality of a statute at issue, and have therefore initiated a petition."

power, the petition meets the above-stated requirements and should, therefore, be accepted.

The purpose of the Constitution in installing various national agencies is to uphold their respective and necessary functions within the constitutional governance, which is not to be interrupted for even a day due to change of personnel. Various examples can be found around the world where either the Constitution or the law [of a nation] clearly provides an adequate mechanism to maintain the continuation and normal operations of the government even when a successor [to govern an agency] may not be inaugurated for a period of time. For instance, the United States Constitution grants the President a temporary, recess appointment power when the Senate is not in session (Article II, Section 2);[5] in states that adopt the Cabinet system, members of the incumbent cabinet shall carry on their duties

憲法設置國家機關之本旨，在使各憲法機關發揮其應有之憲政功能，不致因人事更迭而有一日中斷。為避免因繼任人選一時無法產生致影響憲政機關之實質存續與正常運行，世界各國不乏於憲法或法律中明文規定適當機制，以維憲法機關於不墜之例。如美國聯邦憲法賦予總統於參議院休會期間有臨時任命權（美國聯邦憲法第二條第二項參照）；又如採取內閣制國家，於新任內閣閣員尚未任命或就任之前，原內閣閣員應繼續執行其職務至繼任人任命就職時為止（德國基本法第六十九條第三項、日本國憲法第七十一條參照）。我國憲法雖亦有類似規定，如「每屆國民大會代表之任期，至次屆國民大會開會之日為止」（憲法第二十八條第二項，依憲法增修條文第一條第二項規定，已停止適用），使前後屆國民大會代表得以連續行使職權；又如「總統缺位時，

[5] Article II, Section 2, Paragraph 3, of the U.S. Constitution states: "The President shall have power to fill all vacancies that may occur during the recess of the Senate, by granting commissions which shall expire at the end of the next session."

until the new cabinet assumes its power (*See* Article 69, Paragraph 3, of the *Grundgesetz für die Bundesrepublik Deutschland* (GG, Basic Law of the Federal Republic of Germany);[6] and Article 71 of the Japan Constitution[7]). While this nation's Constitution has similar provisions, for example, "[t]he term of the delegates to each National Assembly shall terminate upon the date the next National Assembly convenes" (Article 28, Paragraph 2, of the Constitution, application suspended in accordance with Article 1, Paragraph 2, of the Constitutional Amendments), so that the duties of National Assembly delegates can be carried on from one session to another; also for example, "[i]n the event the office of the President should become vacant, it shall be assummed by the Vice President until the expiration of the original presidential term" (Article 49, 由副總統繼任，至總統任期屆滿為止」（憲法第四十九條前段），及「總統、副總統均缺位時，由行政院院長代行其職權，並依本條第一項規定補選總統、副總統，繼任至原任期屆滿為止」（憲法增修條文第二條第八項）；惟就監察院因監察院院長、副院長及監察委員任期屆滿而繼任人選未能適時產生時，如何維繫監察院之正常運作，我國憲法及法律未設適當之處理機制，則尚未以修憲或立法方式明定上開情形之解決途徑以前，更須依賴享有人事決定權之憲法機關忠誠履行憲法賦予之權責，及時產生繼任人選，以免影響國家整體憲政體制之正常運行。

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6 That provision states: "At the request of the Federal Chancellor or of the Federal President, a Federal Minister shall be obliged to continue to manage the affairs of his office until a successor is appointed."

7 It provides: "In the cases mentioned in the two preceding Articles [*i.e.*, passage of a non-confidence resolution in the *Diet* (House of Representatives) or vacancy of the Prime Minister due to Cabinet resignation *en masse* or other causes], the Cabinet shall continue its functions until the time when a new Prime Minister is appointed."

front Paragraph, of the Constitution), and "[i]n the event the offices of both the President and the Vice President shall become vacant, the Premier [of the Executive Yuan] shall carry out their respective duties and make-up elections shall be held in accordance with Paragraph 1 of this Article for the successors to serve out the remaining term of the President and Vice President" (Article 2, Paragraph 8, of the Constitutional Amendments); yet neither the Constitution nor any law provides an adequate mechanism to resolve the present issue and maintain the normal operations of the Control Yuan when the term of its Chief Commissioner, Deputy-Chief Commissioner and Commissioners has expired before succeeding candidates can be inaugurated. Until the Constitution or law can be amended to address this issue, the normal operations of constitutional governance will continue to depend more on a constitutional agency having decision-making power over personnel issues to faithfully carry out its duties to fill the vacancies and to prevent such governance from being impacted.

Article 7, Paragraphs 1 and 2 of the Constitutional Amendments stipulate that "[t]here shall be a Control Yuan as the highest authority for the exercise of impeachment, censure and audit power," and that "[t]he Control Yuan shall consist of 29 Commissioners, among whom one shall be appointed as Chief Commissioner and one as Deputy-Chief Commissioner for a term of six years by the President and with the consent of the Legislative Yuan." As such, the Control Yuan is an integral and indispensible national agency for the normal operations of the constitutional system with its specific power bestowed by the Constitution. Given that the Chief Commissioner, Deputy-Chief Commissioner and Commissioners are all legal positions preserved by the Constitution, it behooves all constitutional agencies, as regards their respective duties, to maintain the functional existence and normal operations of the Control Yuan. In accordance with Article 7, Paragraph 2, of the Constitutional Amendments, the Chief Commissioner, Deputy-Chief Commissioner and Commissioners shall be nominated by the President and consented to or

「監察院為國家最高監察機關，行使彈劾、糾舉及審計權」，「監察院設監察委員二十九人，並以其中一人為院長、一人為副院長，任期六年，由總統提名，經立法院同意任命之」，為憲法增修條文第七條第一項、第二項所明定。是監察院係憲法所設置並賦予特定職權之國家憲法機關，為維繫國家整體憲政體制正常運行不可或缺之一環，其院長、副院長與監察委員皆係憲法保留之法定職位，故確保監察院實質存續與正常運行，應屬所有憲法機關無可旁貸之職責。依據憲法增修條文第七條第二項之規定，監察院院長、副院長及監察委員係由總統提名，經立法院同意任命。此乃制憲者基於權力分立與制衡之考量所為之設計，使總統享有監察院人事之主動形成權，再由立法院就總統提名人選予以審查，以為制衡。為使監察院之職權得以不間斷行使，總統於當屆監察院院長、副院長及監察委員任期屆滿前，應適時提名繼任人選咨請立法院同意，立法院亦應適時行使同意權，以維繫監察院之正常運行。立法院就總統所提監察院人事議案積極行使同意權，不論為同意或不同意之決定，即已履行憲法所定行使同意權之義務；若因立法院為不同意之決定，致監察院暫時無從

approved by the Legislative Yuan before they can be appointed. This design is based upon the consideration of separation of powers as well as checks and balances. While the President is empowered to initiate decisions regarding the Control Yuan's personnel, such decisions are subject to the checks and balances of review by the Legislative Yuan. In order that the Control Yuan may exercise its power without interruption, the President should nominate successors [to fill the positions] of Chief Commissioner, Deputy-Chief Commissioner and Commissioners in a timely manner before the term of these incumbents expires and seek approval from the Legislative Yuan. The Legislative Yuan, in turn, should also exercise its consent power in a timely manner to ensure the normal operations of the Control Yuan. Regardless of its decision to approve or disapprove, the Legislative Yuan shall have fulfilled its constitutional duty once such a decision is actively made. As their respective constitutional obligation, if the Legislative Yuan should disapprove of the nominees so that the Control Yuan temporarily cannot carry

行使職權者，總統仍應繼續提名適當人選，咨請立法院同意，立法院亦應積極行使同意權，此係總統與立法院之憲法上義務。是總統如消極不為提名，或立法院消極不行使同意權，致監察院不能行使職權、發揮功能，國家憲政制度之完整因而遭受破壞，自為憲法所不許。引發本件解釋之疑義，應依上開解釋意旨為適當之處理。又監察院院長、副院長及監察委員因任期屆滿，而繼任人選尚未產生前，立法者亦得以法律明定適當之機制，以維繫監察院之正常運行，要不待言。

out its normal functions, the President should nevertheless nominate [other] suitable candidates and submit the list [in a new bill] to the Legislative Yuan for approval, and the Legislative Yuan should also actively engage in the exercise of its consent power. The Constitution does not allow for the event in which either the President or the Legislative Yuan fails to nominate or consent to the nomination of candidates so that the Control Yuan cannot exercise its power or function, thereby jeopardizing the integrity of the constitutional system. All issues [in the petition] should be disposed of appropriately in accordance with this Interpretation. Needless to say, when the term of the incumbent Chief Commissioner, Deputy-Chief Commissioner and Commissioners has expired before their successors can be inaugurated, the legislators also may enact a law to expressly provide an adequate mechanism to address the issue and to maintain the normal operations of the Control Yuan.

With regard to the petitioners' claim that this petition involves a dispute over

至於聲請人指稱本件牽涉立法院與監察院彼此間憲法上職權行使爭議部

the exercise of the respective constitutional power between the Legislative Yuan and Control Yuan, it is necessary to point out that this part of the petition is not accepted because the dispute does not involve one-third or more of the Legislative Yuan members concerning questions derived from the exercise of its constitutional power or within the scope upon which a petition can be filed concerning violation of the Constitution in the application of a law (*See* Article 5, Paragraph 1, Section 1, central paragraph, of the Constitutional Interpretation Procedure Act). Hence, this part of the petition does not meet the standards set forth in Article 5, Paragraph 1, Section 3, of the Constitutional Interpretation Procedure Act.

分，因該職權行使爭議尚非三分之一以上立法委員就其行使職權，適用憲法所發生之疑義，或適用法律發生有牴觸憲法之疑義時，所得聲請解釋之範圍（司法院大法官審理案件法第五條第一項第一款中段參照），是該部分聲請核與司法院大法官審理案件法第五條第一項第三款規定不符，應不受理，併此指明。

Justice Yih-Nan Liaw filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion, in which Justice Yih-Nan Liaw joined.

Justice Yu-Hsiu Hsu filed concurring opinion.

Justice Syue-Ming Yu filed dissenting opinion in part.

本號解釋廖大法官義男提出協同意見書；許大法官宗力、廖大法官義男共同提出協同意見書；許大法官玉秀提出協同意見書；余大法官雪明提出部分不同意見書；彭大法官鳳至、余大法官雪明共同提出不同意見書。

Justice Feng-Zhi Peng filed dissenting opinion, in which Justice Syue-Ming Yu joined.

EDITOR'S NOTE 1:

Summary of facts: The term of the third Chief Commissioner, Deputy-Chief Commissioner and Commissioners expired on January 31, 2005. The President submitted an official bill to the Legislative Yuan on December 20, 2004, nominating individuals to serve as the fourth Commissioners. Based on the committee's voting, the Legislative Yuan tabled the nominations to be placed on the legislative calendar. No review was conducted as of the last meeting of the fifth Legislative Yuan.

Upon the inauguration of the 6th Legislative Yuan on February 1, 2005, the President again submitted a nomination bill on April 4 of the same year, requesting the Legislative Yuan to exercise its consent power over the same slate of nominees. It was once again transmitted to the Rules Committee, whch tabled the bill to be placed on the legislative calendar.

編者註 1：

事實摘要：第三屆監察院院長、副院長及監察委員任期於九十四年一月三十一日屆滿，總統於九十三年十二月二十日以咨文向立法院提名第四屆監察委員。立法院經委員會經表決結果，前開提名人案暫緩編列議程報告事項。迄第五屆立法委員最後一次會議，並未就該案進行審查。

嗣第六屆立法委員於九十四年二月一日就職後，總統復於同年四月四日再以咨文請立法院依第一次咨文提名名單行使第四屆監察院人事同意權。該案仍送立法院程序委員會。該委員會表決通過該案暫緩編列議程報告事項。

The Petitioners, members of the Legislative Yuan, argued that the Rules Committee of the Legislative Yuan abused the parliamentary procedure to paralyze the operations of the national control power, caused a dispute between the Legislative Yuan and the Control Yuan over the exercise of their respective constitutional powers likely to disrupt the system of separation of powers under the Constitution and the order of constitutional democracy. The petition is filed in accordance with Article 5, Paragraph 1, Subparagraph 3 of the Constitutional Interpretation Procedure Act to resolve questions derived from the application of the Constitution.

聲請人立法委員等人認立法院程序委員會濫用議事程序，導致癱瘓國家監察權運作，牽涉立法院與監察院彼此間憲法上職權行使爭議，並有動搖憲法之權力分立制度及危害民主憲政秩序之虞等情，依司法院大法官審理案件法第五條第一項第三款行使職權，適用憲法發生疑義，聲請解釋。

EDITOR'S NOTE 2:

The re-election of President Chen Shui-Bian of the DPP on March 20, 2004, for another four-year term was highly controversial due to a dramatic event that occurred less than 24 hours prior to the day the voting was to begin. Both Mr. Chen and his running mate, the then Vice President Annette S. Lu, each suffered a single bullet wound while riding together

編者註 2：

in an open jeep along the campaign trail. Proponents (mostly "Pan Green" supporters) believe that it was a blatant assassination attempt, while opponents (mostly "Pan Blue" supporters) called the incident questionable and believed it was self-orchestrated to swing the voting outcome. The Chen-Lu ticket eventually won the election by a razor-thin margin (50.11%

to 49.89%, or by 29,518 votes out of a total of 12,914,422 valid votes) and their legitimacy was quickly called into question. Since the "Pan Blue" coalition still retained a slim majority in the Legislative Yuan, the stage was set for a bitter power struggle between these two political camps over the next four years.

Against this backdrop, when President Chen submitted his slate of nominees for the Control Yuan just six months after his second inauguration, it amounted to adding fuel to the fire. Exercising its parliamentary maneuvering skill, the KMT-led "Pan Blue" coalition in the Legislative Yuan managed to remove the nomination bill from the floor and voted to table it indefinitely at various meetings of the Rules Committee. They raised at least four grounds for their objections to the nomination:

(1) The Review and Recommendation Committee set up by President Chen was itself composed of questionable figures, some of whom had strong partisan inclination, and the nomination slate was deemed highly partisan and thus not reflective of the actual fabric of the society.

(2) To make matters worse, two controversial members of that Committee were themselves included in the final slate of nominees, with the President's endorsement, to serve as Chief Commissioner and Deputy-Chief Commissioner, respectively. While Mr. Chen-Bong Chang, the nominee for the Chief Commissioner position, was a member of the KMT, he had been implicated in prior criminal investigations while serving as Minister of Transportation and had other political baggage. So he was regarded as unfit for the position and his nomination did not appease the "Pan Blue" Coalition; some even considered this nomination as a betrayal of his political party and an insult to the integrity required for the position.

(3) Another controversial nominee, Ms. Nita C. Ing (殷琪), Chairwoman of the Taiwan High Speed Rail Corporation (THSRC) and other high-profile construction firms, was perceived to have been too deeply involved in Chen's political and financial campaigns as well as the bailout lobbying of THSRC in light of several

major cost over-run incidents and criminal investigations. Her nomination was seen as an outright conflict of interest, *i.e.*, to allow her to obtain impeachment power over the very public officials who would be in a position to supervise the operations of her companies.

(4) Several other nominees did not possess significant qualifications other than being the protégés of the President or Vice President and were perceived as too political and partisan to render impartial, objective judgment.

As a result of this stalemate in the Legislative Yuan, all members of the "Pan Green" coalition jointly filed the petition to the Judicial Yuan to challenge the constitutionality of "Pan Blue" coalition's actions. Despite the ruling of this Interpretation, all these most senior decision-making positions at the Control Yuan remain vacant through the remainder of Chen's second term. In the meantime, allegedly more than 22,000 cases or petitions piled up and were backlogged. On March 22, 2008, Dr. Yin-Jeou Ma was elected with 58% of the vote to succeed Chen as the 12th President of the ROC. He, together with the "Pan Blue" coalition, will control nearly 75% of the 7th Legislative Yuan. Thus, it is widely believed that the Control Yuan may finally resume its full functions, and the nomination process this time should meet with much less resistance.

J. Y. Interpretation No.633（September 28, 2007）*

ISSUE: Are certain provisions of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, as amended on May 1, 2006, unconstitutional ?

RELEVANT LAWS:

J. Y. Interpretation No.585（司法院釋字第五八五號解釋）; Articles 1, 2, 4, 5, 6, 7, 8, 8-1, 8-2, 8-3, 11 and 15 of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting, as amended on May 1, 2006（中華民國九十五年五月一日修正公布之三一九槍擊事件真相調查特別委員會條例第一條、第二條、第四條、第五條、第六條、第七條、第八條、第八條之一、第八條之二、第八條之三、第十一條、第十五條）; Article 70 of the Budget Act（預算法第七十條）; Article 42 of the Administrative Procedure Act（行政程序法第四十二條）; Articles 26, 27, 28, 29 and 30 of the Control Act（監察法第二十六條、第二十七條、第二十八條、第二十九條、第三十條）; Articles 18, 22 and 36 of the Public Service Personnel Employment Act（公務人員任用法第十八條、第二十二條、第三十六條）.

KEYWORDS:

preliminary injunction（暫時處分）, principles of separation

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* Translated by Chun-Yih Cheng and Pei-Chen Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

of powers and checks and balances（權力分立與制衡原則）, representative politics（民意政治）, principle of accountability politics（責任政治原則）, principle of proportionality（比例原則）, due process of law （正當法律程序）, principle of clarity and definiteness of law（法律明確性原則）, Legislative Yuan's power to investigate （立法院調查權）, power to request production of files（文件調閱權）, budget（預算）, pecuniary fines（罰鍰）.**

HOLDING:

1. Article 4-II, Article 8, Article 8-1, Article 8-2-I, II and III regarding reports and public announcements; Article 8-2-V and VI, Article 8-3, and Article 11-II regarding secondment of officials from administrative organs; Article 11-IV and Article 15-I of the Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCITA"), as amended on May 1, 2006, are in line with the Constitution and J.Y. Interpretation No. 585.

2. Article 8-2-III regarding pecuniary fines and Article 8-2-IV are contrary to the intents of J.Y. Interpretation No. 585.

解釋文：

一、中華民國九十五年五月一日修正公布之三一九槍擊事件真相調查特別委員會條例（以下簡稱真調會條例）第四條第二項、第八條、第八條之一、第八條之二第一項、第二項、第三項關於報告並公布部分、第五項、第六項、第八條之三、第十一條第二項關於調用行政機關人員部分、第四項、第十五條第一項規定，與憲法及本院釋字第五八五號解釋意旨並無不符。

二、同條例第八條之二第三項關於罰鍰部分、第四項規定，與本院釋字第五八五號解釋意旨不符；第十一條第

Article 11-III is contrary to the principles of separation of powers and checks and balances, and shall become null and void as of the date of the promulgation hereof.

三項規定與憲法所要求之權力分立制衡原則不符，均應自本解釋公布之日起失其效力。

3. As to the petition for preliminary injunction regarding the aforesaid provisions of the SCITA, it is no longer necessary to examine the petition since an interpretation has been given for the case on merit. In addition, since the petition for the interpretation of the other provisions of the SCITA has been rejected, the petition for preliminary injunction regarding such provisions shall not be reviewed.

三、本件暫時處分之聲請，關於同條例上開規定部分因本案業經作成解釋，已無須予以審酌；同條例其他條文部分之釋憲聲請既應不受理，則該部分暫時處分之聲請亦失所附麗，併予指明。

REASONING: The Legislative Yuan's investigation power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authorities. The exercise of such power should be carried out by the Legislative Yuan through establishing an investigation commission pursuant to law. Only in extraordinary cases may the Legislative Yuan mandate non-members of the Legislative Yuan to assist in the investigation of any particular matters by enacting

解釋理由書：立法院調查權係協助立法院行使憲法職權所需之輔助性權力，其權力之行使，原則上固應由立法院依法設立調查委員會為之，然於特殊例外情形，就特定事項之調查有委任非立法委員之人士協助調查之必要時，尚非不得制定特別法，就委任之目的、委任調查之範圍、受委任人之資格、選任、任期等人事組織事項、特別調查權限、方法與程序等妥為詳細規定，並藉以為監督之基礎，業經本院釋字第五八五號解釋闡釋在案。立法院制定及修正

a special law, 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, the authorities, methods and procedures for the special investigation, which law would also serve as the basis of supervision. The aforesaid has been made clear in J.Y. Interpretation No. 585 by Judicial Yuan. The Legislative Yuan enacted and amended the SCITA and established the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting (hereinafter the "SCIT") thereunder. The SCIT was created in an attempt to ascertain the truth about the circumstances of the shooting candidates for President and Vice President on March 19, 2004 (hereinafter the "319 Shooting") for the purpose of appeasing contestation arising from the dispute over the results of the presidential election and settling political turmoil (*See* Article 1-I of the SCITA). The SCITA is a special statute that the Legislation Yuan mandated non-members to assist the investigation into the specific

真調會條例，並據以設置三一九槍擊事件真相調查特別委員會（以下簡稱真調會），旨在查明九十三年三月十九日槍擊總統、副總統候選人事件（以下簡稱三一九槍擊事件）真相，平息選舉爭議、安定政局（同條例第一條第一項參照），乃立法院於特殊例外情形，就特定事項委任非立法委員之人士協助調查所制定及修正之特別法。本件聲請指摘該條例第四條第二項、第八條、第八條之一、第八條之二、第八條之三、第十一條第二項關於調用行政機關人員部分、第三項、第四項、第十五條第一項規定（以下簡稱系爭規定）違憲部分，應就系爭規定所訂定真調會之組織、權限範圍、調查方法、程序與強制手段，是否違反本院釋字第五八五號解釋意旨，而有違憲法所要求之權力分立與制衡原則、比例原則、法律明確性原則及正當法律程序等以為斷，茲分述之。

circumstances of this extraordinary case. The petition of this Interpretation asserts the unconstitutionality of Articles 4-II, 8, 8-1, 8-2, 8-3, and 11-II regarding the secondment of officials from administrative organs, and Articles 11-III, 11-IV, and 15-I of the SCITA (hereinafter the "Disputed Provisions"). It is therefore the decision of the Judicial Yuan to review whether the organization, authorities, methods, procedures and compulsory measures for the SCITA described in the Disputed Provisions are contrary to the intents of J.Y. Interpretation No. 585, i.e., whether they are in violation of the principles of separation of powers and checks and balances, principle of proportionality, principle of clarity and definiteness of law and due process of law as set forth by the Constitution. The petition is hereby analyzed below.

1. The Organization of the SCIT

(1) Article 4-II of the SCITA is not beyond the scope of intents of J.Y. Interpretation No. 585

The SCIT is a temporary special commission, which was created by the

一、真調會之組織

1、真調會條例第四條第二項規定未逾越本院釋字第五八五號解釋之意旨

真調會乃立法院為查明三一九槍擊事件真相，平息選舉爭議、安定政局

Legislative Yuan because of extraordinary necessity, with an attempt to ascertain the truth regarding the 319 Shooting for the purpose of appeasing contestation arising from the dispute over the results of the presidential election and settling political turmoil; it consists of non-members of the Legislative Yuan who shall be fair and impartial in sharing their professional knowledge to assist the said Yuan in exercising its investigation power. Article 4-II of the SCITA provides that, "[a]ny action, conducted by this Commission pursuant to the SCITA, may be taken in the name of the Commission. The Commission has the power to sue and can also be sued." The said provision is an extraordinary legislation created out of special necessity for establishing the SCIT by the Legislative Yuan and is not beyond the scope of intents of J.Y. Interpretation No. 585.

之特殊例外需要，依特別法委任非立法委員之專業公正人士所組成，協助立法院行使調查權之暫時性特別委員會。真調會條例第四條第二項規定「本會處理有關本條例事務所為之處分，得以本會名義行之，本會並有起訴及應訴之當事人能力」，係立法院設置真調會之特殊需要所為之例外設計，尚未逾越本院釋字第五八五號解釋之意旨。

(2) Article 11-II of the SCITA regarding secondment of officials from administrative organs is not in conflict with the Constitution. Article 11-III of the SCITA is contrary to the principles of separation of powers and checks and balances.

2、真調會條例第十一條第二項關於調用行政機關人員部分規定，與憲法尚無牴觸；同條第三項規定，違反權力分立與制衡原則

Article 11-II of the SCITA provides that, "[t]he convening member of the Commission may retain 3 to 5 consultants and may designate, second or contract appropriate persons as assistant investigators." The said provision is consistent with Articles 18, 22 and 36 of the Public Service Personnel Employment Act regarding employment, and such provision regarding secondment of officials from administrative organs is not in conflict with the Constitution. However, Article 11-III of the SCITA provides that, "[a]n administrative organ has no right to refuse the secondment ordered pursuant to the preceding paragraph." The provision means that if a convening member of the SCIT requests the secondment of an appropriate person from an administrative organ as an assistant investigator, the said administrative organ has no right to refuse such secondment. The SCIT is a temporary extraordinary commission under the authority of the Legislative Yuan in exercising investigation power and it is appropriate to have secondment from administrative organs of persons who are to act as assistant investigators. However, pursuant to

真調會條例第十一條第二項規定「本會召集委員得聘請顧問三人至五人，並得指派、調用或以契約進用適當人員兼充協同調查人員」，符合公務人員任用法第十八條、第二十二條及第三十六條進用人員之規定，其中關於調用行政機關人員部分規定，不生牴觸憲法問題。惟真調會條例第十一條第三項規定：「前項調用人員，行政機關不得拒絕。」即真調會召集委員如調用行政機關之適當人員兼充協同調查人員者，行政機關不得拒絕。然查真調會為隸屬立法院下行使調查權之暫時性特別委員會，其調用行政機關之適當人員兼充協同調查人員固無不合。惟基於權力分立與制衡原則，並尊重行政機關及被調用人員，上開調用應經被調用人員及其所屬行政機關之同意，業經本院釋字第五八五號解釋在案。前述同條第三項有關調用行政機關之適當人員，行政機關不得拒絕之規定，與上開意旨不符。

the principles of separation of powers and checks and balances and in order to show respect to the administrative organs and the seconded persons, such secondment shall be consented to by the seconded persons and the administrative organs, which has been explained in J.Y. Interpretation No. 585. Hence, the aforesaid paragraph 3 of Article 11 regarding secondment of officials from administrative organs is contrary to the intents of J.Y. Interpretation No. 585.

(3) Article 15-I of the SCITA is in line with the Constitution.

Members of the SCIT are recommended and invited to be members by the Legislative Yuan pursuant to Article 2-I and II of the SCITA. The said members accept the appointments of the said Yuan to conduct an investigation of the 319 Shooting and its associated incidents, which occurred before and after the 319 Shooting, to ascertain the truth in connection with the mastermind and other related persons' motives, the purposes, facts, and effects of said Shooting (*See* Article 7 of the SCITA). Based upon representative

3、真調會條例第十五條第一項規定與憲法尚無不符

真調會委員係由立法院依據真調會條例第二條第一項、第二項規定推薦及聘任，受立法院之委任，就三一九槍擊事件發生前、後其事件本身或衍生之相關事項予以調查，以查明主導人及有關人員之動機、目的、事實經過及其影響等之真相（同條例第七條參照）。基於民意政治及責任政治原則，立法院就其行使調查權之成效，自應擔負政治責任，並就其有無濫用權限，受民意之監督，是立法院負有指揮監督真調會委員之職責，對於不適任之委員自得經院會決議後予以免職。同條例第十五條第一

politics and the principle of accountability politics, the Legislative Yuan shall take political responsibility for the outcome of exercising investigation power, and the people will determine whether it has abused its power. Hence, the Legislative Yuan has the duties of directing and supervising members of the SCIT. Any member of the SCIT who is deemed incompetent may be expelled from his or her office by a resolution of the Legislative Yuan. Furthermore, Article 15-I of the SCITA provides that, "[a]ny member of this Commission who has lost legal capacity or is in violation of laws and/or regulations may be expelled from his or her office by resolutions of the Legislative Yuan." The said provision enables the Legislative Yuan to perform its duties of directing and supervising members of the SCIT and is in line with the aforesaid intents. In addition, members of the SCIT shall be non-partisan and shall exercise their powers without any prejudice in accordance with laws (*See* Article 4-I of the SCITA). In the event that the eligibility or impartiality of members of the SCIT in exercising their powers is prejudiced

項規定：「本會委員喪失行為能力或違反法令者，得經立法院決議，予以除名。」俾立法院執行其指揮監督真調會委員職務之職責，合於上開意旨。又真調會委員須超出黨派以外，依法公正行使職權（同條例第四條第一項參照）。倘其違反法令之行為，影響執行職務之公正性或適任性，立法院本於指揮監督之職權，經院會決議該委員已不適任而予以除名，其涵義於個案中並非不能依據社會通念等加以認定及判斷，並可由司法審查予以確認，符合本院釋字第五八五號解釋意旨，與法律明確性原則尚無不合。

because of violation of laws, any member of this Commission who is incompetent may be expelled from his or her office by resolutions of the Legislative Yuan as a result of exercising the said Yuan's duties of directing and supervising. The contents of Article 15-I can be ascertained in accordance with social norms and be established by judicial review. Therefore, this provision is in line with the intents of J.Y. Interpretation No. 585 and does not conflict with the principle of clarity and definiteness of law.

(4) Article 11-IV of the SCITA is in line with the Constitution if applicable laws and regulations concerning budgets are complied with.

The SCIT is a temporary special commission subordinate to the Legislative Yuan for exercising investigation power and its operational expenses shall be met from the budget proposed by the said Yuan. However, if there is factual necessity and relevant laws and regulations concerning budgets are complied with, the said Yuan is entitled to use the second reserves pursuant to law without any violation of

4、真調會條例第十一條第四項於符合預算法令規定之情形下，不生違憲問題

真調會為隸屬於立法院下行使調查權之暫時性特別委員會，其所需經費自應由立法院編列預算支應。惟遇事實需要而合於預算法令規定之情形者，自得依法動支第二預備金，並未侵害行政權，業經本院釋字第五八五號解釋闡釋在案。本於上述相同意旨，真調會條例第十一條第四項規定：「本會所需經費由立法院預算支應。必要時由行政院第二預備金項下支應，行政院不得拒

executive powers of the Executive Yuan, which is explained in J.Y. Interpretation No. 585. Article 11-IV thereof provides that, "[t]he funds required by this Commission shall be met by the budget of the Legislative Yuan. Whenever necessary, the funds may be met by the second reserves of the Executive Yuan, and the Executive Yuan shall have no objection." Based upon the intents of J.Y. Interpretation No. 585, as long as all applicable laws and regulations concerning budgets are complied with, there is no violation of the Constitution.

絕。」於符合預算法令規定之情形下，亦不生違憲問題。

2. The Scope, Methods, Procedures and Compulsory Measures for the SCIT in Exercising the Investigation Power

As stated above, the purpose that Legislative Yuan enacted and amended the SCITA and creates the SCIT thereby is to ascertain the truth about the circumstances of the 319 Shooting in order to appease contestation arising from the results of the presidential election and settle political turmoil. To attain such purposes, the said Yuan is entitled to delegate its investigation power regarding the 319

二、真調會行使調查權之範圍、方法、程序與強制手段

立法院制定及修正真調會條例，並據以設置真調會之目的，在於查明三一九槍擊事件真相，平息選舉爭議、安定政局，已如前述。為達上開目的，立法院自得於該條例將三一九槍擊事件本身或衍生之相關事項之調查權，明定授權真調會或其委員為之。惟真調會既為隸屬於立法院下行使調查權之暫時性特別委員會，其所具有之權限，應限於立法院調查權所得行使之權限，並僅止於

Shooting and its associated incidents to the SCIT or members of the SCIT, which is prescribed in the SCITA. However, since the SCIT is a temporary special commission and is subordinate to the Legislative Yuan for exercising investigation power, the SCIT's authority shall be limited to the scope of investigation power exercised by the said Yuan and shall be restricted to the scope of the investigation of the truth about the circumstances of the 319 Shooting. If any procedure of any investigation method is implicated as limiting the fundamental rights of the people as protected by the Constitution, such procedure shall be in conformity with the principle of proportionality, the principle of clarity and definiteness of law and due process of law as set forth by the Constitution, which is explained in J.Y. Interpretation No. 585.

三一九槍擊事件真相之調查。如就各項調查方法所規定之程序，有涉及限制憲法所保障人民之自由權利者，必須符合憲法上比例原則、法律明確性原則及正當法律程序之要求，業經本院釋字第五八五號解釋在案。

(1) Article 8 of the SCITA is in line with the Constitution.

Article 8-1 of the SCITA provides that, "[t]his Commission or members of this Commission is/are entitled to do the following at the time of investigation in

1、真調會條例第八條規定與憲法尚無不符

真調會條例第八條第一項規定：「本會或本會委員依本條例為調查時，得為下列行為：一、通知有關機關、團體、事業或個人到場陳述事實經過或陳

accordance with this Act: 1. Give notice to related organs, groups, business entities or individuals to appear to testify or to make statements in person; 2. Give notice to related organs, groups, business entities or individuals to submit relevant files, documents and other necessary data or evidence. However, permission to borrow such relevant materials during the trial shall be obtained from such trial court; 3. Appoint personnel to the office premises, firms, business premises or other premises of related organs, groups, business entities or individuals to conduct necessary investigation or inspection; 4. Appoint investigators; 5. Appoint different organs to investigate the specified cases or items, if necessary; 6. Conduct other necessary investigation." In addition, Article 8-II of the SCITA provides that, "[e]very organ shall conduct investigations and reply in writing after such appointment in Item 5 of the preceding paragraph is accepted." These two Articles are two effective measures to obtain related information regarding the truth about the circumstances of the 319 Shooting for the purpose of appeasing contestation arising from the

述意見。二、通知有關機關、團體、事業或個人提出有關檔案冊籍、文件及其他必要之資料或證物。但審判中之案件資料之調閱，應經該繫屬法院之同意。三、派員前往有關機關、團體、事業或個人之辦公場所、事務所、營業所或其他場所為必要之調查或勘驗。四、委託鑑定。五、於必要時，得就指定案件或事項，委託其他機關調查。六、其他必要之調查行為。」同條第二項規定：「各機關接受前項第五款之委託後，應即進行調查，並以書面答復。」均為獲取三一九槍擊事件真相所需相關資訊之有效手段，俾平息選舉爭議、安定政局，以維持社會秩序，與強制搜索尚屬有間，並未逾越真調會之權限範圍，亦無違於憲法所要求之權力分立與制衡原則，與本院釋字第五八五號解釋意旨，並無不符。真調會原則上應以合議方法行使其職權，如真調會委員為調查時，須其提議調查之事項，業經其他委員四人審查同意者，方得為之。其調查結果，應由真調會依同條例第六條規定處理，不得自行對外公布或發表任何意見（同條例第五條參照），與集體行使職權之意旨尚無違背。又同條例第八條第一項第二款但書規定，審判中案件資料之調閱，應經該繫屬法院之同意，乃維

results of the presidential election and settling political turmoil, which are different from compulsory search and seizure, and are not beyond the scope of the SCIT, nor are they in violation of the principles of separation of powers and checks and balances set forth by the Constitution. These two Articles are in conformity with the intents of J.Y. Interpretation No. 585. The SCIT shall exercise its powers by joint decision of its members, which means a member of the SCIT may exercise his/her investigation power, provided that the objective of investigation he/she proposes is reviewed and agreed upon by the other four members of the SCIT. The outcome of such investigation shall be handled in conformity with Article 6 of the SCITA and a member shall not publish nor deliver any comment to the public in respect of such outcome (*See* Article 5 of the SCITA), which is not in violation of the intent of exercising powers collectively. Moreover, Item 2 of Article 8-I provides that permission to borrow relevant materials during a trial shall be obtained from such trial court, which is a necessary provision to protect trial power

護法院依法獨立行使審判權所必要。而國家機關獨立行使職權受憲法之保障者，即非立法院所得調查之事物範圍，業經本院釋字第五八五號解釋在案。是依同項第二款規定向前述機關調閱資料或證物，應經各該機關之同意，乃屬當然。同項第三款所規定之勘驗，乃藉之以獲得證據資料所行使之國會調查權而言，其程序準用行政程序法之相關規定，此與司法調查權尚屬有間。真調會條例第八條第一項第六款規定之其他必要調查行為，係為補充同項第一款至第五款規定不足所定之概括條款，解釋上以與同項第一款至第五款之行為具有類似性之調查行為為限，其意義非難以理解，且為受規範者所得預見，並可經由司法審查加以確認，無違於法律明確性原則，均併予指明。另同條第三項規定：「本會執行調查之人員依法執行公務時，應出示有關執行職務之證明文件；其未出示者，受調查者得拒絕之。」第四項規定：「本會或本會委員行使調查權時，有關受調查者之程序保障，除本條例另有規定外，準用監察法有關規定。」為保障受調查者之執行程序規定。而上開規定復未排除現有法律所得提供受調查者之程序保障，與憲法及本院釋字第五八五號解釋意旨，自無

independently exercised by a court pursuant to the law. Where a State organ exercises its power independently, it shall not fall under the scope of the Legislative Yuan's investigation power. The aforesaid is explained in J.Y. Interpretation No. 585. Therefore, it is clear that the request for documents or evidence by the abovementioned organs shall be granted by every such independent organ. The inspection set forth in Item 3 of Article 8-I is the Legislative Yuan's investigation power and such power is used to obtain evidence and documents. Such procedure is carried out in conformity *mutatis mutandis* with related provisions of the Administrative Procedure Act. The aforesaid power differs from judicial investigation power. Item 6 of Article 8-I regarding "other necessary investigation" is a general provision to supplement Items 1 to 5 thereof. The said Item shall be construed to the extent similar to the investigation conducts provided in Items 1 to 5 of the SCITA. The meaning of this item is not difficult to realize, is foreseen by the regulated people and can be established by judicial review. Hence, the aforesaid Item

不合。

is in line with the principle of clarity and definiteness of law. In addition, Article 8-III provides that, "[i]nvestigation personnel of the SCIT who exercise power and authority pursuant to law shall present related evidence of appropriate authority. The investigated person is entitled to reject such investigation, provided that no evidence is presented." Further, Article 8-IV provides that, "[a]t the time of exercising investigation power by the SCIT or members of the SCIT, unless otherwise provided for herein, related procedure protection shall be carried out in conformity *mutatis mutandis* with related provisions of the Control Act." The aforesaid two Articles are procedure provisions to protect investigated persons; further, such Articles do not exclude procedure protection for investigated persons under current laws; hence they are in line with the Constitution and the intents of J.Y. Interpretation No. 585.

(2) Article 8-1 of the SCITA is in line with the Constitution and the intents of J.Y. Interpretation No. 585

Article 8-1-I of the SCITA provides

2、真調會條例第八條之一規定與憲法及本院釋字第五八五號解釋意旨尚無不合

真調會條例第八條之一第一項規

that, "[i]nvestigation personnel of the Commission are entitled to seal up related certificates or documents for safekeeping, or take away, take possession of all or part of such certificates or documents, if necessary." Article 8-1-II thereof provides that, "[w]hen sealing up, taking away or taking possession of certificates or documents possessed by organs, the consent of their chief official is required. Unless it is proved that there is any interference with the State's material interest and an investigation is consented to by an administrative court with a provisional disposition order within seven days from the investigation day, the said chief official shall not reject such investigation." Article 8-1-III thereof provides that, "[t]he certificates that are taken away shall have stamps affixed to them by the said chief official and the investigation personnel shall provide receipts for such certificates." The aforesaid Articles are effective measures to obtain related information regarding the truth of the 319 Shooting. In addition, according to Article 8-1-II, if the investigated organ rejects the request by the investigation personnel to seal up the cer-

定：「本會調查人員必要時得臨時封存有關證件資料，或攜去、留置其全部或一部。」第二項規定：「封存、攜去或留置屬於政府機關持有之證件資料者，應經該主管長官之允許。除經舉證證明確有妨害重大國家利益，並於七日內取得行政法院假處分裁定同意者外，該主管長官不得拒絕。」第三項規定：「凡攜去之證件，該主管人員應加蓋圖章，由調查人員給予收據。」亦為獲取三一九槍擊事件真相所需相關資訊之有效手段，且依上開第二項規定，受調查政府機關以有妨害重大國家利益，而拒絕封存、攜去或留置屬於其特有之證件資料時，應於七日內向行政法院聲請假處分裁定，並得對該項除外情形有無之爭議，依同條例第八條之二第五項規定提起確認訴訟確認之，已明定政府機關之主管長官得拒絕封存、攜去或留置該證件資料之合理要件，與強制扣押不同，並未逾越立法院所得行使之調查權範圍及權力分立與制衡原則，與憲法及本院釋字第五八五號解釋意旨尚無不合。又上開得封存、攜去或留置之證件資料，以與調查事項有關且屬必要者為限，此並得由法院加以審查，乃屬當然。

tificates for safekeeping, take away or take possession of the certificates or documents with the reason of interference with the State's material interest, the said organ shall apply for a provisional disposition order with the administrative court within seven days from the investigation day. Moreover, whether an exception thereof exists can be confirmed by filing a confirmation suit in accordance with Article 8-2-V. The aforesaid Articles thereof expressly provide feasible requirements for the organ's chief official to reject the request that such certificates or documents be sealed up for safekeeping, taken away and taken into possession. The abovementioned conducts differ from compulsory search and seizure, are not beyond the scope of the Legislative Yuan's investigation power and principles of separation of powers and checks and balances, and are in line with the Constitution and the intents of J.Y. Interpretation No. 585. In addition, such certificates or documents so sealed up, taken away or taken into possession shall be limited to the scope of related and necessary investigation, which may be reviewed by a court.

(3) Article 8-2-I, II, and III regarding reports and promulgations, V, and VI are in line with the Constitution and the intents of J.Y. Interpretation No. 585. However, Article 8-2-III regarding pecuniary fines and IV are in conflict with the intents of J.Y. Interpretation No. 585.

Article 8-2-I provides that, "[t]he authority and power exercised by the SCIT and members of the SCIT shall comply with due process of law and conduct in conformity with the principle of proportionality." This Article intends to protect the procedural interest of the investigated persons, which is in line with the Constitution and the intents of J.Y. Interpretation No. 585. Article 8-2-II provides that, "[n]o related organs, organizations, enterprises or persons to be investigated shall avoid, delay or reject such investigation for any reason, unless it is proved that any interference with the State's material interest or any risk of criminal or administrative punishments may occur due to the investigated organ's cooperation." This Article empowers the SCIT as a compulsory authority at the time of the investigation and approves feasible reasons

3、真調會條例第八條之二第一項、第二項、第三項關於報告並公布部分、第五項、第六項規定，與憲法及本院釋字第五八五號解釋意旨尚無不合；同條第三項關於罰鍰部分、第四項規定，與本院釋字第五八五號解釋意旨不符

真調會條例第八條之二第一項規定：「本會及本會委員行使職權，應注意遵守正當法律程序，以符合比例原則之方式為之。」乃為保障受調查者之程序規定，與憲法及本院釋字第五八五號解釋意旨並無不符。第二項規定：「接受調查之有關機關、團體、事業或有關人員，不得以任何理由規避、拖延或拒絕。但經舉證證明確有妨害重大國家利益或因配合調查致本身有遭受刑事處罰或行政罰之虞者，不在此限。」賦予真調會進行調查所需之強制權限，並准許受調查者合理之拒絕調查事由，並未逾越立法院調查權所得行使之範圍，自無不合。立法院為有效行使調查權，得以法律規定由立法院院會決議，對違反協助調查義務者裁處適當之罰鍰，此乃立法院調查權之附屬權力，本院釋字第五八五號解釋闡釋明確。是同條第三項規定：「違反前項規定者，除向立法院報

offered by the investigated persons to refuse investigation, which is not beyond the scope of the Legislative Yuan's investigation power. In order to exercise its investigation 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 investigation power. This has been explained clearly in J.Y. Interpretation No. 585. Article 8-2-III thereof provides that, "[i]n case of violation of the preceding provision hereof, successive fines shall be imposed on such investigated persons, in addition to their being reported to the Legislative Yuan and being named in a public announcement." The part of this Article regarding the SCIT's power to impose pecuniary fines is not in line with the intents of J.Y. Interpretation No. 585. Hence, Article 8-2-IV which provides that, "[r]egarding the pecuniary fines mentioned in the preceding provision, they shall be in conformity with the Administrative Procedure Act and the Administrative Enforcement

告並公布外，得按次連續處新臺幣十萬元以下罰鍰。」其中賦予真調會逕行裁處罰鍰之權力部分，核與上開解釋意旨不符；同條第四項規定：「前項罰鍰案件之處理，準用行政程序法及行政執行法之規定。」亦失所附麗。惟受調查者違反真調會條例第八條之二第二項規定之行為，真調會應將該違法行為向立法院報告並公布，亦有助於查明真相之目的，尚無不合。又同條第五項、第六項分別規定：「第二項但書及前條第二項除外情形之有無，發生爭議時，受調查者得向本會所在地之行政法院提起確認訴訟確認之。各級行政法院於受理後，應於三個月內裁判之。」「前項確認訴訟，適用行政訴訟法之規定。」特別規定上開受調查政府機關證明確有妨害重大國家利益，拒絕封存、攜去或留置證件資料，及前述受調查者證明確有妨害重大國家利益或因配合調查致本身有遭受刑事處罰或行政罰之虞，規避、拖延或拒絕調查，而發生爭議時，受調查者均得提起確認訴訟，依行政訴訟法規定之程序解決之，自屬合理之解決途徑，尚不生違憲問題。至上開確認訴訟終結確定前，受調查者是否違反協助調查義務尚未明確，自不得對其裁處罰鍰，併予指明。

Act" shall likewise be considered null and void. However, in regard to the investigated persons' violative conducts mentioned in Article 8-2-II, the SCIT shall report such violative conducts to the Legislative Yuan and announce to the public, which provision will be helpful in ascertaining the truth and therefore is permissible. In addition, Article 8-2-V and VI separately provide that, "[w]hether exceptions to Article 8-2-II and Article 8-1-II exist or not, the investigated persons may file a confirmation suit with the administrative court located in the district of the SCIT if any controversy arises. Every instance of administrative court shall deliver its judgment within three months after accepting such filing." "The confirmation suit mentioned in the preceding Paragraph is carried out in conformity with the Administrative Litigation Act." These two Articles specifically stipulate that if the aforesaid investigated organs prove that any interference with the State's material interest exists and refuse to allow certificates or documents to be sealed up for safekeeping, taken away or taken into possession, or if the aforesaid investigated

persons prove that any interference with the State's material interest exists or is under risk of criminal or administrative punishments due to the investigated person's cooperation and thus attempt to avoid, delay or refuse to cooperate with the investigation, and if any controversy arises thereof, the investigated organ or person is entitled to file a confirmation suit and resolve such controversy in conformity with the Administrative Litigation Act, which is a reasonable solution and is in line with the Constitution. Moreover, it should be pointed out that before the confirmation suit is concluded, it can not be known whether the investigated person has violated his/her duty to assist with the investigation, and therefore, any punishment or pecuniary fine shall not be imposed by the SCIT.

(4) Article 8-3 is in line with the Constitution and the Intents of J.Y. Interpretation No. 585

Article 8-3 of the SCITA provides that, "[i]nvestigation personnel of the Commission are entitled to ask the local government, investigating and prosecuting

4、真調會條例第八條之三規定與憲法及本院釋字第五八五號解釋意旨尚無不合

真調會條例第八條之三規定：「本會調查人員必要時，得知會當地政府、檢察機關或其他有關機關協助。」「本會調查人員於調查證據遭遇抗拒或

organs or other related agencies to provide assistance, if necessary." "If the investigation personnel encounter resistance at the time of evidence investigation or conservation of evidence, they are entitled to request the military police or police to provide assistance for necessary measures." The Legislative Yuan's investigation power is a subsidiary power necessary for the said Yuan to exercise its constitutional powers and authorities. The investigation personnel of the SCIT exercise the Legislative Yuan's investigation power to ascertain the truth of the 319 Shooting and can ask the aforesaid organs to provide assistance, if necessary. Due to the mutual respect between organs, if the said organ agrees to provide assistance, it shall not mean the SCIT directs or commands the said organ. Therefore, there is no violation of the principle of separation of powers.

為保全證據時，得通知憲警機關協助，作必要之措施。」按立法院調查權係立法院行使其憲法職權所必要之輔助性權力，真調會調查人員依法行使三一九槍擊事件真相立法院調查權，於必要時通知請求上開機關協助，基於機關間互相尊重，如經上開機關同意而提供協助，尚非真調會指揮調度該機關，自不生違反權力分立原則之問題。

3. Conclusion

(1) Article 4-II, Article 8, Article 8-1, Article 8-2-I, II and III regarding reports and public announcements; Article 8-2-V and VI, Article 8-3, Article 11-II regarding

三、結論

1、真調會條例第四條第二項、第八條、第八條之一、第八條之二第一項、第二項、第三項關於報告並公布部分、第五項、第六項、第八條之三、第

secondment of officials from administrative organs; Article 11-IV and Article 15-I of the SCITA are in line with the Constitution and J.Y. Interpretation No. 585.

十一條第二項關於調用行政機關人員部分、第四項、第十五條第一項規定，與憲法及本院釋字第五八五號解釋意旨並無不符。

(2) Article 8-2-III regarding pecuniary fines and Article 8-2-IV are contrary to the intents of J.Y. Interpretation No. 585. Article 11-III is contrary to the principles of the separation of powers and checks and balances, and shall become null and void as of the date of the promulgation hereof.

2、同條例第八條之二第三項關於罰鍰部分、第四項規定，與本院釋字第五八五號解釋意旨不符；第十一條第三項規定與憲法所要求之權力分立制衡原則不符，均應自本解釋公布之日起失其效力。

(3) In respect of the Articles of the SCITA other than the Disputed Provisions (hereinafter the "Other Articles"), which the Petitioners also assert are in violation of the Constitution, the Petitioners have failed to indicate the specific reasons for unconstitutionality. Therefore, the afore said portion of the petition is contrary to Item 3 of Article 5-I of the Constitutional Interpretation Procedure Act and is hereby rejected in accordance with Article 5-III of the same Act.

3、聲請人另聲請解釋真調會條例除系爭規定外之其他條文（以下簡稱其他條文）均違憲部分，未具體指摘其他條文規定究竟如何牴觸憲法，是此部分聲請核與司法院大法官審理案件法第五條第一項第三款規定不合，依同條第三項規定，應不受理。

(4) As to the petition for preliminary

4、本件暫時處分之聲請，系爭規

injunction regarding the Disputed Provisions of the SCITA, it is no longer necessary to examine the petition since an interpretation has been given for the case on merit. In addition, since the petition for the interpretation of Other Articles of the SCITA has been rejected, the petition for preliminary injunction regarding the Other Articles shall not be reviewed.

定部分因本案業經作成解釋，已無須予以審酌；其他條文部分之釋憲聲請既應不受理，則該部分暫時處分之聲請亦失所附麗，併此敘明。

Justice Yu-Hsiu Hsu filed concurring opinion in part.

本號解釋許大法官玉秀提出部分協同意見書。

EDITOR'S NOTE:

Summary of facts: The Justices of the Judicial Yuan issued J. Y. Interpretation No. 585 on December 15, 2004, declaring that part of the Statute on the Special Commission for the Investigation of Truth Concerning the 319 Shooting Incident (hereinafter "former Statute"), promulgated on September 24 of the same year, exceeded the permissible scope of the Legislative Yuan's investigative power, and shall be invalid as of the issuance date of the Interpretation.

編者註：

事實摘要：司法院大法官於九十三年十二月十五日作成釋字第五八五號解釋，宣告同年九月二十四日制定公布之三一九槍擊事件真相調查特別委員會條例（以下簡稱「舊真調會條例」）部分之規定，逾越立法院調查權所得行使之範圍，應自解釋公布之日起失其效力。

The Legislative Yuan subsequently

嗣立法院於九十五年四月十一日

amended Articles 2 to 4, Articles 8, Articles 11 to 13, Articles 15 and 17, added Articles 8-1 to 8-3, and repealed Article 16 on April 11, 2006, and the President promulgated the Statute on May 1 of the same year.

修正通過真調會條例第二條至第四條、第八條、第十一條至第十三條、第十五條、第十七條規定、增訂第八條之一至第八條之三、刪除第十六條，並經總統於同年五月一日公布。

Yet the Petitioners co-signed [the petition] arguing that the entire design of the Statute was inadequate and grossly violated the Constitution, rendering it hardly compatible with the order of constitutional democracy. They petitioned for a declaration that all provisions are unconstitutional and that temporary dispoisitions need to be adopted before the interpretation is issued so to preserve the constitutional legal and public interest prior to the announcement of the constitutionality of the Statute.

惟聲請人立法委員等人連署認修正公布真調會條例整體規定設計失當嚴重違憲，難以見容於自由民主憲政秩序，聲請宣告全部條文違憲無效，並聲請在真調會條例是否違憲作成解釋前，採取保全憲法法益及公共利益之暫時處分。

J. Y. Interpretation No.634（November 16, 2007）*

ISSUE: Is Article 18, Paragraph 1, of the Securities Exchange Act as amended on January 29, 1988, and the rules and regulations promulgated thereunder in contravention to the Constitution ?

RELEVANT LAWS:

Articles 11, 15 and 23 of the Constitution（憲法第十一條、第十五條、第二十三條）; Articles 1 and 18 of the Securities Exchange Act (as amended on January 29, 1988)（證券交易法第一條與第十八條，七十七年一月二十九日修正公布）; Article 175 of the Securities Exchange Act (as amended on February 6, 2002)（證券交易法第一百七十五條，九十一年二月六日修正公布）; Article 121 of the Securities Investment Trust and Advisor Act （證券投資信託與顧問法第一百二十一條）; Articles 2, 4, 5, Paragraph 1, and 23 of the Rules Governing Investment Advisory Enterprises (as promulgated on October 9, 2000 [abolished on November 1, 2004])（證券投資顧問事業管理規則第二條、第四條、第五條第一項、第二十三條，八十九年十月九日修正發布，九十三年十一月一日起不再適用）.

KEYWORDS:

securities（有價證券）, investor protection（投資人保護）, public interests（公共利益）, securities investment advisory

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* Translated by Professor Chun-Jen Chen.

** Contents within frame, not part of the original text, are added for reference purposes only.

enterprise（證券投資顧問事業）, right to work（工作權）, freedom of occupation（職業自由）, freedom of speech（言論自由）, commercial speech（經濟性言論）, recommendation（推介）, lectures and courses（講習）, discretionary investment account（全權委託）, agency-in-charge（主管機關）, in contravention to（牴觸）, principle of proportionality（比例原則）, self-fulfillment（自我實現）.**

HOLDING: As amended on January 29, 1988, Article 18, Paragraph 1, of the Securities Exchange Act prescribed that securities investment advisory enterprises shall be approved by the agency-in-charge before conducting their business. When interpreting this paragraph in accordance with the legislative intent and the constitutional guarantee of the freedom of speech, its scope shall not include those who conduct the business of holding or providing securities investment lectures or courses with a view to furnish general securities investment information alone and not with a view to furnish, directly or indirectly, the valuation analyses or investment recommendations of individual securities. Therefore, Article 5, Paragraph

解釋文：中華民國七十七年一月二十九日修正公布之證券交易法第十八條第一項原規定應經主管機關核准之證券投資顧問事業，其業務範圍依該規定之立法目的及憲法保障言論自由之意旨，並不包括僅提供一般性之證券投資資訊，而非以直接或間接從事個別有價證券價值分析或推介建議為目的之證券投資講習。八十九年十月九日修正發布之證券投資顧問事業管理規則（已停止適用）第五條第一項第四款規定，於此範圍內，與憲法保障人民職業自由及言論自由之意旨尚無牴觸。

1, Subparagraph 4 of the Rules Governing Investment Advisory Enterprises, as amended on October 9, 2000 (which is no longer effective) was promulgated within its statutory authorization and was not in contravention to the constitutional guarantees of people's freedom of occupation and freedom of speech.

REASONING: People's freedom to choose occupations falls under the constitutional guarantee of people's right to work under Article 15 of the Constitution. People's occupations are closely related to public interests. Therefore, any subjective condition restricting the choice of occupations shall only be imposed by law or regulation promulgated under clear statutory authorization which is within the scope of Article 23 of the Constitution, and the purpose of imposing such subjective conditions shall be for important public interests and the means taken shall be substantially related to the end intended to be accomplished in order to be in accordance with the constitutional mandate of the principle of proportionality. Article 11 of the Constitution guarantees people's

解釋理由書：人民之工作權為憲法第十五條規定所保障，其內涵包括人民選擇職業之自由。人民之職業與公共福祉有密切關係，故對於選擇職業應具備之主觀條件加以限制者，於符合憲法第二十三條規定之限度內，得以法律或法律明確授權之命令加以限制，惟其目的須為重要之公共利益，且其手段與目的之達成有實質關聯，始符比例原則之要求。憲法第十一條保障人民之言論自由，乃在保障意見之自由流通，使人民有取得充分資訊及自我實現之機會，經濟性言論所提供之訊息，內容非虛偽不實，或無誤導作用，而有助於消費大眾為經濟上之合理抉擇者，應受憲法言論自由之保障。惟國家為重要公益目的所必要，仍得於符合憲法第二十三條規定之限度內，以法律或法律明確授權之命令，採取與目的達成有實質關聯之手

freedom of speech to protect free communications of opinions to enable people to enjoy the opportunity to gather adequate information and to achieve self-fulfillment. Information furnished by commercial speeches shall fall under the constitutional guarantee of the freedom of speech if it is not false or misleading and helps the consuming public to make economically reasonable choices. However, the state may impose restrictions upon people's freedom of speech for important public interest purposes as long as it does so by law or regulation promulgated under clear statutory authorization which is within the scope of Article 23 of the Constitution, and the means taken are substantially related to the end intended to be accomplished.

As amended on January 29, 1988, Article 18, Paragraph 1 of the Securities Exchange Act (*hereinafter* the Securities Act) prescribed that, "The operation of …… securities investment advisory enterprises …… shall be approved by the agency-in-charge." Paragraph 2 of the same Article prescribed that, "The matters

段予以限制。

七十七年一月二十九日修正公布之證券交易法（以下簡稱「證交法」）第十八條第一項原規定：「經營……證券投資顧問事業……，應經主管機關之核准。」同條第二項規定：「前項事業之管理、監督事項，由行政院以命令定之。」（依據九十三年六月三十日公布之證券投資信託及顧問法第一百二十

with regards to the governance and supervision of the enterprises stipulated in the proceeding paragraph shall be promulgated by the Executive Yuan."(Pursuant to Article 121 of the Securities Investment Trust and Advisor Act enacted on June 30, 2004, the prescription of Article 18 of the Securities Act with respect to the securities investment advisory enterprises is no longer in effect.) As amended on February 6, 2002, Article 175 of the Securities Act prescribed that, "Any person who violates prescriptions under …… Article 18, Paragraph 1 …… shall be punished with imprisonment for no more than two years, detention, and/or a fine of not more than NT$1.8 million." Pursuant to the statutory authorization of Article 18, Paragraph 2 of the Securities Act, on October 9, 2000, the Executive Yuan promulgated the Rules Governing Investment Advisory Enterprises (*hereinafter* the Governing Rules), which on November 1, 2007 [2004 under "Relevant Laws" above.], were declared no longer applicable under Article 121 of the Securities Investment Trust and Advisor Act. Article 2, Paragraph 1 of the Governing

一）條規定，證交法第十八條所定證券投資顧問事業之規定，自九十三年十一月一日起，不再適用）九十一年二月六日修正之同法第一百七十五條並規定：「違反第十八條第一項……之規定者，處二年以下有期徒刑、拘役或科或併科新臺幣一百八十萬元以下罰金。」行政院於八十九年十月九日依據證交法第十八條第二項規定之授權，修正發布之證券投資顧問事業管理規則（以下簡稱「管理規則」，依據證券投資信託及顧問法第一百二十一條規定，自九十三年十一月一日起，不再適用）第二條第一項規定：「本規則所稱證券投資顧問事業，指為獲取報酬，經營或提供有價證券價值分析、投資判斷建議，或基於該投資判斷，為委任人執行有價證券投資之業務者。」第二項規定：「前項所稱報酬，包含直接或間接自委任人或第三人取得之任何利益。」第五條第一項規定：「證券投資顧問事業得經營下列業務，其種類範圍以經證期會核准者為限：一、接受委任，對證券投資有關事項提供研究分析意見或推介建議。二、接受客戶全權委託投資業務。三、發行有關證券投資之出版品。四、舉辦有關證券投資之講習。五、其他經證期會核准之有關業務。」是依上開規定，如從

Rules prescribed that, “The term ‘securities investment advisory enterprises’ as used in the Governing Rules refers to those enterprises which are in or manage the business of providing securities valuation analyses, investment judgments and recommendations to, or execute securities investment transactions for, their clients in exchange for remunerations.” Paragraph 2 of the same Article prescribed that, “The remunerations as prescribed in the proceeding paragraph include any benefit received directly or indirectly from a client or from third parties.” Article 5, Paragraph 1 of the Governing Rules prescribed that, “A securities investment advisory enterprise may engage in the following business activities whose scopes and categories are pre-approved by the Securities and Futures Commission: (i) Accepting a client’s retention to provide securities investment-related researches, analyses, recommendations or advice; (ii) Managing a client’s discretionary investment account; (iii)Issuing securities investment-related publications; (iv) Holding or providing securities investment-related lectures or courses; and (v) Other related

事管理規則第五條第一項規定之業務者，依證交法第十八條第一項規定應先經主管機關核准，如有違反，即依同法第一百七十五條規定予以處罰。

business as approved by the Securities and Futures Commission." According to the foregoing law and regulation, those who want to conduct the business prescribed by Article 5, Paragraph 1 of the Governing Rules shall be pre-approved by the agency-in-charge under Article 18, Paragraph 1 of the Securities Act; one who fails to do so will be subject to criminal penalty as prescribed in Article 175 of the Securities Act.

Although the Securities Act is silent with respect to the definition of the term 'securities investment advisory enterprise' while taking into account the special characteristics of our securities market and the development of our securities investment advisory industry, the scope of the foregoing prescribed, approval-needed business includes providing information, analyses, recommendations and advice on securities investment or managing clients' discretionary investment accounts according to the legislative intent of Article 18 of the Securities Act and to the then current practices of the securities investment industry before the amendments of the

證券投資顧問事業之定義，證交法雖未作明文規定，惟依同法第十八條之意旨，及於八十九年十月九日管理規則修正發布前，證券投資顧問事業得經營之業務範圍，實務上係以提供證券投資資訊及分析建議為限，尚未及於接受客戶全權委託投資之業務等我國證券市場特性暨證券投資顧問事業之發展情形，可知上開法律規定應經主管機關核准始得經營之事業，包括提供證券投資之資訊及分析建議，或接受客戶全權委託投資等二類專業服務。是管理規則第二條將證券投資顧問事業定義為：直接或間接自委任人或第三人獲取報酬，經營或提供有價證券價值分析、投資判斷建議，或基於該投資判斷，為委任人執

Governing Rules on October 9, 2000, limiting the scope of business to provide securities investment information, analyses, recommendations and advice but not to the management of clients' discretionary investment accounts. Thus, the definition of a securities investment advisory enterprise as so prescribed under Article 2 of the Governing Rules, as being an enterprise which is in or manages the business of providing securities valuation analyses, investment judgments and recommendations to, or executes securities investment transactions for, its clients in exchange for remunerations, directly or indirectly, did not exceed the scope of those securities investment advisory enterprises that Article 18 of the Securities Act was intended to regulate. Because holding or providing securities investment-related lectures or courses will involve providing securities investment information, analyses, recommendations and advice, Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules expressly prescribed holding or providing securities investment-related lectures or courses as regulated and pre-approval required

行有價證券投資業務者而言，並未逾越證交法第十八條第一項證券投資顧問事業所欲規範之範圍。因舉辦有關證券投資之講習，涉及證券投資之資訊提供及分析建議，故管理規則第五條第一項第四款規定，亦將舉辦有關證券投資之講習，列舉為應經主管機關核准之證券投資顧問事業之一種。

securities investment advisory business activities.

Hence, pursuant to the abovementioned Article 18, Paragraph 1 of the Securities Act and Article 5 of the Governing Rules, people who want to conduct the business activities of holding or providing securities investment-related lectures or courses shall be pre-approved as qualified securities investment advisory enterprises by the agency-in-charge and shall meet certain criteria with respect to professional qualifications and capitalization (*See* Articles 4 and 23 of the Governing Rules.). Accordingly, the foregoing law and regulation imposes subjective conditions restricting the freedom to choose occupations upon those who want to conduct the business activities of holding or providing securities investment-related lectures or courses. The legislative intent of Article 18 of the Securities Act is to protect investment and to develop the national economy in light of the risk and sophistication involved in securities investment and taking into account the fact that securities investment advisory

人民欲舉辦有關證券投資講習者，依前開證交法第十八條第一項及管理規則第五條第一項第四款之規定，須為經主管機關核准之證券投資顧問事業，並要求從事上開業務者須具備一定之專業資格及組織規模（管理規則第四條、第二十三條參照）；故上開規定係對欲從事有關證券投資講習者之職業選擇自由為主觀條件之限制。查證交法第十八條第一項之立法意旨，係鑒於證券投資本具有一定之風險性及專業性，而證券投資顧問事業關係證券市場秩序維持與投資人權益保護之公共利益至鉅，故就該事業之成立管理採取核准設立制度，俾提升並健全該事業之專業性，亦使主管機關得實際進行監督管理，以保障投資，發展國民經濟（同法第一條規定參照），主管機關亦依上開意旨訂定管理規則。是證交法第十八條第一項及管理規則第五條第一項第四款之規範目的，係為建立證券投資顧問之專業性，保障委任人獲得忠實及專業服務之品質，避免發生擾亂證券市場秩序之情事，其所欲追求之目的核屬實質重要之公共利益，符合憲法第二十三條對系爭

enterprises are closely related to the maintenance of an orderly securities market and protection of securities investors; therefore, the formation and governance of securities investment advisory enterprises shall be subject to the approval and supervision of the agency-in-charge in order to promote and strengthen their sophistication (*See* Article 1 of the Securities Act.). In accordance with the legislative intent and statutory authorization of Article 18 of the Securities Act, the Governing Rules were promulgated by the agency-in-charge. In sum, Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules were enacted and promulgated with a view to establish the sophistication of securities investment advisory enterprises, to ensure their clients will receive faithful and professional quality service, and to prevent the occurrence of events that will disturb the market order. The end of Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules intended to be accomplished falls under the important category of public

規範目的正當性之要求。

interests and is consistent with the scope and mandate of Article 23 of the Constitution.

People who hold or provide securities investment related-lectures or courses do so with a view to furnish securities investment-related information. The information furnished is associated with economic activities and belongs to the expression or distribution of personal securities investment opinions or information which falls under the constitutional guarantee of the freedom of speech under Article 11 of the Constitution, if there is no false or misleading statement, and gives participants an opportunity to receive securities investment information. However, pursuant to Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules, holding or providing securities investment-related lectures or courses is within the scope of regulated business activities of securities investment advisory enterprises and can only be conducted by qualified securities investment advisory enterprises. Thus, Article 18,

按人民舉辦有關證券投資之講習，係在提供證券投資相關資訊，其內容與經濟活動有關，為個人對證券投資之意見表達或資訊提供，其內容非虛偽不實，或無誤導作用，而使參與講習者有獲得證券投資相關資訊之機會，自應受憲法第十一條言論自由之保障。然依證交法第十八條第一項及管理規則第五條第一項第四款規定，舉辦有關證券投資講習屬證券投資顧問事業之營業範圍者，必須經主管機關核准取得證券投資顧問事業之資格，方得為之。是依上開規定之規範內涵，除限制欲舉辦有關證券投資講習者之職業自由外，亦對其言論自由有所限制。上開規定所欲追求之目的固屬實質重要之公共利益，已如前述，惟其限制手段與目的之達成須具有實質關聯，始符憲法第二十三條之比例原則，而未違背憲法保障人民職業自由及言論自由之意旨。

Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules restrict not only people's freedom of occupation, but also people's freedom of speech as well. Although we have held that the end of Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules is to uphold the important public interests, the means taken shall be substantially related to the end intended to be accomplished in order to be in accordance with the constitutional mandate of the principle of proportionality under Article 23 of the Constitution and thus is not in contravention to the constitutional guarantees of people's freedom of occupation and freedom of speech.

From the perspectives of managing or conducting business activities of providing securities investment information, analyses, recommendations and advice, the purposes of Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules prescribing securities investment advisory

按證交法第十八條第一項及管理規則第五條第一項第四款規定之證券投資顧問事業，就經營或提供有價證券價值分析、投資判斷建議之業務而言，係在建立證券投資顧問之專業性，保障投資人於投資個別有價證券時，獲得忠實及專業之服務品質，並避免發生擾亂證券市場秩序之情事，依此立法目的及憲

enterprises are to establish the sophistication of securities investment advisory enterprises, to ensure their clients will receive faithful and professional quality service, and to prevent the occurrence of events that will disturb the market order. Therefore, according to the legislative intent and the constitutional guarantees of freedom of occupation and freedom of speech, those who conduct the business of holding or providing securities investment-related lectures or courses are to do so with a view to provide general securities investment information and are not to conduct such business with a view to furnish, directly or indirectly, valuation analyses, recommendations or advice on individual securities (For instance, though the securities investment information furnished during securities investment lectures or courses belongs to a specific category of securities, the lectures or courses will be deemed as ones that are held or provided in order to furnish indirectly securities investment information, analyses, recommendation and advice if the furnished securities investment information objectively has the substantial effects of

法保障言論自由之意旨，如僅提供一般性之證券投資資訊，而非以直接或間接從事個別有價證券價值分析或推介建議為目的之證券投資講習（例如講習雖係對某類型有價證券之分析，而其客觀上有導致個別有價證券價值分析之實質效果者，即屬間接提供個別有價證券價值分析之證券投資講習），自不受上開法律之限制。證交法第十八條第一項及管理規則第五條第一項第四款規定就人民舉辦有關證券投資講習業務者，須為經主管機關核准之證券投資顧問事業，並要求從事上開業務者須具備一定之專業資格及組織規模，衡諸我國證券交易市場投資人結構特性，及證券投資顧問專業制度之情況，尚屬實質有助於實現上開目的之手段；且其所納入規範之證券投資講習之範圍，於上開解釋意旨範圍內，對建立證券投資顧問之專業性與保障投資人亦有實質之助益。是證交法第十八條第一項與管理規則第五條第一項第四款規定人民舉辦有關證券投資講習業務，須經主管機關核准設立證券投資顧問事業始得為之，其限制手段與目的達成具有實質關聯，符合比例原則，與憲法保障人民職業自由及言論自由之意旨尚無牴觸。

leading to the valuation analysis of individual securities.), and shall not be subject to the restrictions imposed by the above-mentioned law and regulation. Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules prescribe that people who want to conduct the business activities of holding or providing securities investment-related lectures or courses shall be pre-approved as qualified securities investment advisory enterprises by the agency-in-charge and shall meet certain professional qualification and capitalization criteria. After taking into account the structural characteristics of securities investors in Taiwan's securities market and the circumstances of the professional system of the securities investment advisory industry, we are of the opinion that the means taken under Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules are substantially helpful to realize the end intended to be accomplished by the law and the regulation at issue. We are also of the opinion that the scope of regulated securities investment

lectures or courses is substantially helpful to establish the sophistication of securities investment advisors and to protect securities investors. Hence, we hold that the means taken and the end intended to be accomplished of Article 18, Paragraph 1 of the Securities Act and Article 5, Paragraph 1, Subparagraph 4 of the Governing Rules prescribing that only qualified securities investment advisory enterprises approved by the agency-in-charge can hold or provide securities investment-related lectures or courses are substantially related, are in accordance with the principle of proportionality, and are not in contravention to the constitutional guarantees of freedom of occupation and freedom of speech.

EDITOR'S NOTE:

Summary of facts: Without gaining approval from the governing authority (the Securities and Futures Commission), the Petitioner advertised in *The Investor* and other newspapers, starting from November, 2001, to recruit from the general public to attend security investment classes held once every week for two-

編者註：

事實摘要：聲請人未經主管機關（證期會）之核准，自民國九十年十一月起，於財訊快報等報紙刊登廣告，以每期二個月、每週上課一次，收取費用新台幣十萬元之條件，招攬一般民眾參加其所舉辦之證券投資講習課程，並於授課時提供證券交易市場分析資料，從事有價證券價值分析及投資判斷之建議

month at NT$100,000. Analytical information of the securities market was provided in the classes on the valuation of securities and recommendations of investment decisions (such as stock leveraging and selection techniques). Many individuals paid to attend the classes. After the investigations, the court sentenced the Petitioner to 3 months imprisonment convertible to fine, and a two-year probation.

（如操盤術及選股術），多人先後繳費上課。案經移送偵辦，經法院判決確定，有期徒刑三個月，得易科罰金，緩刑二年。

The Petitioner argued that Article 18, Paragraph 1 of the Securities Exchange Act on post-approval operation, Article 175 on penalties, Article 2 of the Rules Governing Investment Consulting Companies on the definition of investment consulting businesses, and Article 5, Paragraph 1, Subparagraph 4 on the conducting of security investment-related seminars, among other things, contradict the freedom of speech under Article 11, the right to work under Article 15, and fundamental restrictions under Article 23 of the Constitution, and filed the petition for interpretation.

聲請人認上開確定終局判決所適用之證交法第十八條第一項核准後經營、第一百七十五條之罰則、管理規則第二條證券投資顧問事業之定義及第五條第一項第四款舉辦有關證券投資之講習等規定有牴觸憲法第十一條言論自由、第十五條工作權及第二十三條基本權限制之規定疑義，爰聲請解釋。

J. Y. Interpretation No.635（November 30, 2007）*

ISSUE: Is the Ministry of Finance directive unconstitutional in construing that the farmland purchased in the name of a farmer by a person not engaging in self-tilling is taxable retroactively for increase in the land value ?

RELEVANT LAWS:

The Constitution, Articles 7, 15, 19; Article 143, Paragraphs 3 and 4（憲法第七條、第十五條、第十九條、第一百四十三條第三項、第四項）; Land Tax Act, Article 28, the first sentence; Article 39-2, Paragraph 1, as amended on October 30, 1989（七十八年十月三十日修正公布土地稅法第二十八條前段、第三十九條第一項）; Agricultural Development Act, Article 27, as amended on August 1, 1983（七十二年八月一日修正公布之農業發展條例第二十七條）; Ministry of Finance Directive No. Tai-Tsai-Shui 821498791 of October 7, 1993（財政部八十二年十月七日台財稅第八二一四九八七九一號函）; J. Y. Interpretations Nos. 420, 460, 496, 519, 565, 597, 607, 622 and 625（司法院釋字第四二０、四六０、四九六、五一九、五六五、五九七、六０七、六二二、六二五號解釋）.

KEYWORDS:

differential tax treatment（差別之租稅對待）, scope of

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* Translation by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposes only.

proper and reasonable taxation（正當合理之課稅範圍）, principle of clarity of law（法律明確性原則）, general methods of interpretation of law（一般法律解釋方法）, actual taxpaying ability（實質稅負能力）, total increased price of the land（土地漲價總數額）.**

HOLDING: The differential tax treatment provided in the Land Tax Act, Article 39-2, Paragraph 1, as amended on October 30, 1989 is consistent with the principle of equality under the Constitution. The Ministry of Finance Directive No. Tai-Tsai-Shui 821498791 of October 7, 1993, being intended to construe such statute by virtue of its statutory authority as the competent agency, is consistent with the legislative purpose of such statute as well as the agricultural and tax policies of the State without having gone beyond the scope of proper and reasonable taxation to be imposed on the people, and is not contrary to the principle of clarity of law and the provisions of Article 7 and Article 19 of the Constitution, nor does it jeopardize the people's property right protected under Article 15 of the Constitution.

解釋文：中華民國七十八年十月三十日修正公布之土地稅法第三十九條之二第一項規定所為租稅之差別對待，符合憲法平等原則之要求。又財政部八十二年十月七日台財稅第八二一四九八七九一號函，係主管機關依其法定職權就上開規定所為之闡釋，符合立法意旨及國家農業與租稅政策，並未逾越對人民正當合理之稅課範圍，與法律明確性原則及憲法第七條、第十九條之規定，均無牴觸，亦未侵害人民受憲法第十五條保障之財產權。

REASONING: The provision of Article 19 of the Constitution that the people shall have the duty to pay tax in accordance with law means that, in imposing on the people the duty to pay tax and allowing the people tax benefits in the form of exemption and reduction, the State must prescribe by law such constituent elements of taxation as the taxpaying bodies, taxable objects, tax bases, and tax rates. However, it is not feasible for the law to go into all the details, and necessary interpretations by way of administrative orders in relation to detail and technical matters of taxation are not disallowed. Where the competent agency has any doubt about the application of a statute within the scope of its power and issues a directive to interpret the law by virtue of its statutory authority, it is not against the principle of taxation by law and the principle of equal taxation insofar as such interpretation is made in adherence to the relevant principles embodied in the Constitution and in consistence with the general methods of interpretation of law, the legislative purpose of such law and the

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等租稅構成要件，以法律定之，惟法律之規定不能鉅細靡遺，有關課稅之技術性及細節性事項，尚非不得以行政命令為必要之釋示。故主管機關於職權範圍內適用之法律條文發生疑義者，本於法定職權就相關規定予以闡釋，如係秉持相關憲法原則，無違於一般法律解釋方法，且符合各該法律之立法目的、租稅之經濟意義，即與租稅法律主義、租稅公平原則無違（本院釋字第四二０號、第四六０號、第四九六號、第五一九號、第五九七號、第六０七號、第六二二號、第六二五號解釋參照）。又納稅義務人固應按其實質稅負能力，負擔應負之稅捐，惟為增進公共利益，以法律或其明確授權之命令，設例外或特別規定，給予特定範圍納稅義務人減輕或免除租稅之優惠措施，而為有正當理由之差別待遇者，尚非憲法第七條規定所不許（本院釋字第五六五號解釋參照）。

economic meaning of taxation. (*See* our holdings in J. Y. Interpretations Nos. 420, 460, 496, 519, 597, 607, 622 and 625). Furthermore, while taxpayers should pay taxes for which they are responsible based on their actual taxpaying ability, it is not disallowed by Article 7 of the Constitution to specify, with reasonable cause, differential treatment by way of exceptions or special provisions within the scope of discretion authorized by law to grant taxpayers of a particular class tax benefits in the form of tax reduction or exemption in order to promote the public interest (*See* J. Y. Interpretation No. 565).

It is provided in the Constitution, Article 143, Paragraph 3, that "If the value of a piece of land has increased, not through the exertion of labor or the employment of capital, the State shall levy thereon on increment tax, the proceeds of which shall be enjoyed by the people in common." Thus, the Land Tax Act provides in Article 28, the first sentence, that "in the case of transfer of the ownership to a piece of land of which the price has been assessed, land value increment tax

憲法第一百四十三條第三項規定：「土地價值非因施以勞力資本而增加者，應由國家徵收土地增值稅，歸人民共享之。」故土地稅法第二十八條前段規定：「已規定地價之土地，於土地所有權移轉時，應按其土地漲價總數額徵收土地增值稅。」惟國家對於土地之分配與整理，應以扶植自耕農及自行使用土地人為原則，憲法第一百四十三條第四項定有明文，是七十二年八月一日修正公布之農業發展條例第二十七條規定：「農業用地在依法作農業使用期

shall be levied on the basis of the total increased price of the land." However, it is explicitly prescribed by the Constitution in Article 143, Paragraph 4, that in the distribution and readjustment of land the State shall in principle assist self-tilling landowners and persons who make use of the land by themselves. Hence, the Agricultural Development Act, Article 27, as amended on August 1, 1983, provides: "Farmland transferred during the time of its legal use for agricultural purposes to a self-tilling farmer for continued tilling is exempt from payment of the land value increment tax." In alignment with the statute, the Land Tax Act, Article 39-2, Paragraph 1, as amended on October 30, 1983, provides: "Farmland transferred during the time of its legal use for agricultural purpose to a self-tilling farmer for continued tilling is exempt from payment of the land value increment tax." It is an incentive in the form of exemption of the land value increment tax accorded to self-tilling farmers in the case of acquisition of farmland and is a measure of tax privilege adopted by the legislators to ensure permanent agricultural development,

間，移轉與自行耕作之農民繼續耕作者，免徵土地增值稅。」為資配合，七十八年十月三十日修正公布之土地稅法第三十九條之二第一項爰明定：「農業用地在依法作農業使用時，移轉與自行耕作之農民繼續耕作者，免徵土地增值稅。」可知此係就自行耕作之農民取得農業用地者，予以免徵土地增值稅之獎勵。此乃立法者為確保農業之永續發展，促進農地合理利用與調整農業產業結構所為之租稅優惠措施，其租稅優惠之目的甚為明確，亦有助於實現憲法第一百四十三條第四項規定之意旨。立法者就自行耕作之農民取得農業用地，與非自行耕作者取得農業用地間，為租稅之差別對待，具有正當理由，與目的之達成並有合理關聯，符合憲法平等原則之要求。

promote the rational utilization of farmland and adjust the structure of the agricultural industry. Its purpose of tax benefit is very clear and is helpful in achieving the aim intended by Article 143, Paragraph 4, of the Constitution. The differential tax treatment designed by the legislature between the acquisition of farmland by self-tilling farmers and by non-self-tilling persons is justifiable and is reasonably related with the achievement of the legislative purpose, and it is consistent with the principle of equality required by the Constitution.

Where a piece of farmland is transferred during the time of its legal use for agricultural purpose to a person not engaging in self-tilling, but the ownership thereto is registered in the name of a self-tilling farmer, such transfer is not consistent with the legislative purpose of the Land Tax Act, Article 39-2, Paragraph 1, cited above, and is of course taxable for the total amount of value increase of the land at the time of transfer under the Constitution in Article 143, Paragraph 3, and the Land Tax Act, Article 28, the first

農業用地在依法作農業使用時，移轉於非自行耕作之人，而以自行耕作之農民名義為所有權移轉登記者，不符土地稅法第三十九條之二第一項之上開立法意旨，自應依憲法第一百四十三條第三項及土地稅法第二十八條前段規定，於土地所有權移轉時，按其土地漲價總數額徵收土地增值稅。財政部八十二年十月七日台財稅第八二一四九八七九一號函略謂：「取得免徵土地增值稅之農業用地，如經查明係第三者利用農民名義購買，應按該宗土地原免徵之土地增值稅額補稅。」乃主管機關本於法

sentence. The Ministry of Finance Directive No. Tai-Tsai-Shui 821498791 of October 7, 1993, requiring in brief that "if the acquisition of farmland which is exempt from the land value increment tax is identified to have been made by a third person in the name of a farmer, it is taxable retroactively for the land value increment tax originally exempted for such land" is a specific and explicit administrative regulation of an interpretative nature established by the competent agency by virtue of its power and functions in relation to the provision of the Land Tax Act, Article 39-2, Paragraph 1. The directive, in maintaining that the land which is exempted from the land value increment tax is limited to farmland whose ownership is transferred to a self-tilling farmer, is consistent with the legislative purpose of the above-cited Agricultural Development Act, Article 27, and the Land Tax Act, Article 39-2, Paragraph 1, as well as the agricultural and taxation policies of the State, and has not gone beyond the scope of proper and reasonable taxation to be imposed on the people, nor does it conflict with the principle of clarity of law

定職權，就土地稅法第三十九條之二第一項規定所為具體明確之解釋性行政規則，該函釋認依上開規定得免徵土地增值稅者，係以農業用地所有權移轉於自行耕作之農民為限，符合前述農業發展條例第二十七條、土地稅法第三十九條之二第一項之立法意旨及國家之農業與租稅政策，並未逾越對人民正當合理之稅課範圍，與法律明確性原則及憲法第七條、第十九條之規定，均無牴觸，亦未侵害人民受憲法第十五條保障之財產權。

and the provisions of Article 7 and Article 19 of the Constitution or jeopardize the people's property right protected under Article 15 of the Constitution.

EDITOR'S NOTE:

Summary of facts: Company A purchases farmland, and registers it as a trust under the name of B, a third party. Company A later terminated the trust relationship with B and sued to request the return of the disputed farmland, and change the registration to that of C, the Petitioner. The final judgment affirmed such registration.

Petitioner C brought the certificate of the final judgment to the Internal Revenue Service to apply for tax exemption on appreciated land value. The agency denied the request after review, and issued notice to levy the land apprefiation tax on the disputed farmland.

Petitioner C challenges the differential tax treatment under the Ministry of Finance administrative interpretation Tai-Tsai-Shui No. 821498791 Memorandum

編者註：

事實摘要：A 公司購買農業用地，信託登記於案外人 B 名下。嗣 A 公司終止與 B 之信託關係，本於信託物返還請求權，訴請 B 將系爭農業用地返還，改登記於聲請人 C 名下。案經判決確定移轉登記於聲請人 C。

聲請人 C 持上開判決確定證明書，向稅捐稽徵處申請免徵土地增值稅，經審查後予以否准，並發單課徵系爭農業用地之土地增值稅。

聲請人 C 對財政部八十二年十月七日台財稅第八二一四九八七九一號租稅之差別對待函釋，有牴觸憲法第七條平等權、第十九條依法律納稅之義務及

of October 7, 1993, in that it contradicts the right of equality under Article 7, duty to pay tax under Article 19 , and the restrictions on fundamental rights under Article 23 of the Constitution, and filed the petition for interpretation.

第二十三條基本權之限制等疑義，爰聲請解釋。

J. Y. Interpretation No.636（February 1, 2008）*

ISSUE: Do Articles 2, 6, 10, 12, 14, 15, and 21 of the Act for Eliminating Hoodlums conflict with relevant principles of the Constitution ?

RELEVANT LAWS:

Articles 8, 16, and 23 of the Constitution（憲法第八條、第十六條、第二十三條）; Articles 2, 6, 10, 12, 14, 15, and 21 of the Act for Eliminating Hoodlums（檢肅流氓條例第二條、第六條、第十條、第十二條、第十四條、第十五條、第二十一條）; Article 166, Paragraph 1; Article 166-6, Paragraph 1; Article 168; Article 169; Article 176-1; Article 184, Paragraph 2; and Articles 187 to 189 of the Code of Criminal Procedure（刑事訴訟法第一百六十六條第一項、第一百六十六條之六第一項、第一百六十八條、第一百六十九條、第一百七十六條之一、第一百八十四條第二項、第一百八十七條至第一百八十九條）；Article 11 of the Witness Protection Act（證人保護法第十一條）.

KEYWORDS:

Hoodlum elimination（檢肅流氓）, principle of legal clarity（法律明確性原則）, due process of law（正當法律程序）, the right to appear and be heard（到場陳述意見之權利）, the right to confront and examine witnesses（對質詰問證人的權

* Translated by Jaw-Pern Wang, Margaret K. Lewis.

** Contents within frame, not part of the original text, are added for reference purposes only.

利）, the right to access court files（閱卷權）, the principle of proportionality（比例原則）, the right to defend oneself in a legal action（訴訟上防禦權）, the right to institute legal proceedings（訴訟權）.**

HOLDING: The provision of Article 2, Section 3, of the Act for Eliminating Hoodlums (hereinafter referred to as the "Act") regarding the acts of "committing blackmail and extortion, forcing business transactions, and manipulating matters behind the scenes to accomplish the foregoing"; the provision of Section 4 of the same Article regarding the acts of "managing or controlling professional gambling establishments, establishing brothels without authorization, inducing or forcing decent women to work as prostitutes, working as bodyguards for gambling establishments or brothels, or relying on superior force to demand debt repayment"; and the provision of Article 6, Paragraph 1, regarding "serious circumstances" do not violate the principle of legal clarity. Although the provisions of Article 2, Section 3, regarding the acts of

解釋文：檢肅流氓條例（以下簡稱本條例）第二條第三款關於敲詐勒索、強迫買賣及其幕後操縱行為之規定，同條第四款關於經營、操縱職業性賭場，私設娼館，引誘或強逼良家婦女為娼，為賭場、娼館之保鏢或恃強為人逼討債務行為之規定，第六條第一項關於情節重大之規定，皆與法律明確性原則無違。第二條第三款關於霸佔地盤、白吃白喝與要挾滋事行為之規定，雖非受規範者難以理解，惟其適用範圍，仍有未盡明確之處，相關機關應斟酌社會生活型態之變遷等因素檢討修正之。第二條第三款關於欺壓善良之規定，以及第五款關於品行惡劣、遊蕩無賴之規定，與法律明確性原則不符。

"occupying territory," "eating and drinking without paying," and "coercing and causing trouble" might not be difficult for the regulated person to understand, there are still aspects of these provisions that are insufficiently clear. Therefore, the relevant authorities shall re-examine and revise these provisions by taking into account factors such as the changing patterns of society. Further, the provision of Article 2, Section 3, regarding the act of "tyrannizing good and honest people" as well as the provision of Article 2, Section 5, regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals" are inconsistent with the principle of legal clarity.

Regarding the determination that a person is a hoodlum under Article 2 of the Act, in accordance with due process of law, the reported person shall have the right to appear and be heard during the examination procedure. After a person is determined to be a hoodlum and appears voluntarily before the police pursuant to a lawful summons, if the case

本條例第二條關於流氓之認定，依據正當法律程序原則，於審查程序中，被提報人應享有到場陳述意見之權利；經認定為流氓，於主管之警察機關合法通知而自行到案者，如無意願隨案移送於法院，不得將其強制移送。

is transferred to the court against the person's wishes, the police may not compel him to be transferred.

Article 12, Paragraph 1, of the Act restricts the transferred person's rights to confront and examine witnesses and to access court files without taking into consideration whether, in view of the individual circumstances of the case, other less intrusive measures are sufficient to protect the witness's safety and the voluntariness of his testimony. This provision is clearly an excessive restriction on the transferred person's right to defend himself in a legal action and is inconsistent with the principle of proportionality under Article 23 of the Constitution. This provision further violates the principle of due process of law under Article 8 of the Constitution and the right to institute legal proceedings under Article 16 of the Constitution.

本條例第十二條第一項規定，未依個案情形考量採取其他限制較輕微之手段，是否仍然不足以保護證人之安全或擔保證人出於自由意志陳述意見，即得限制被移送人對證人之對質、詰問權與閱卷權之規定，顯已對於被移送人訴訟上之防禦權，造成過度之限制，與憲法第二十三條比例原則之意旨不符，有違憲法第八條正當法律程序原則及憲法第十六條訴訟權之保障。

The provision regarding the mutual set-off of time in Article 21, Paragraph 1, of the Act does not conflict with the principle of proportionality under Article

本條例第二十一條第一項相互折抵之規定，與憲法第二十三條比例原則並無不符。同條例第十三條第二項但書關於法院毋庸諭知感訓期間之規定，有

23 of the Constitution. The proviso of Article 13, Paragraph 2, of the Act, which provides that court rulings need not specify the term of reformatory training, leads to concerns that the physical freedom of the person receiving reformatory training might be excessively deprived of. The relevant authorities shall re-examine and revise this proviso.

導致受感訓處分人身體自由遭受過度剝奪之虞，相關機關應予以檢討修正之。

The provisions of Article 2, Section 3, regarding "tyrannizing good and honest people," Section 5 of the same Article regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals," and Article 12, Paragraph 1, regarding excessively restricting the transferred person's rights to confront and examine witnesses and to access court files are all inconsistent with relevant principles in the Constitution. These provisions shall become null and void no later than one year from the date of this Interpretation.

本條例第二條第三款關於欺壓善良，第五款關於品行惡劣、遊蕩無賴之規定，及第十二條第一項關於過度限制被移送人對證人之對質、詰問權與閱卷權之規定，與憲法意旨不符部分，應至遲於本解釋公布之日起一年內失其效力。

REASONING: The physical freedom of a person is an important fundamental human right, and fully safeguarding

解釋理由書：人民身體自由享有充分保障，乃行使憲法所保障其他自由權利之前提，為重要之基本人權。故

this right is a prerequisite to exercising other freedoms protected by the Constitution. Accordingly, Article 8 of the Constitution specifically provides for the protection of physical freedom in detail. Article 8, Paragraph 1, provides, "Physical freedom shall be guaranteed to the people. In no case except that of *flagrante delicto*, which shall be separately prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in accordance with procedures prescribed by law may be resisted." Considering the intent of this clause, in exercising the state's power to restrict a person's physical freedom, the government must abide by statutory procedures and, within certain limits, act in accordance with constitutional parameters. Regarding so-called "procedures prescribed by law," according to this Council's past Interpretations, so long as the restraint on a person's

憲法第八條對人民身體自由之保障，特詳加規定，其第一項規定「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」考其意旨，係指國家行使公權力限制人民身體自由，必須遵循法定程序，在一定限度內為憲法保留之範圍。所謂法定程序，依本院歷來之解釋，凡拘束人民身體自由於特定處所，而與剝奪人民身體自由之刑罰無異者，不問其限制人民身體自由出於何種名義，除須有法律之依據外，尚須分別踐行正當法律程序，且所踐行之程序，應與限制刑事被告人身自由所踐行之正當法律程序相類。本院釋字第三八四號、第五六七號解釋，即係本此意旨審查本條例感訓處分與戡亂時期預防匪諜再犯管教辦法管訓處分之相關規定。

physical freedom to a certain place is tantamount to a form of criminal punishment that deprives a person of physical freedom-irrespective of the name used for the restraint-the restraint must not only have a statutory foundation, but it must also fulfill the requirements of due process of law. The procedures shall also be of the same type as used in meeting due process requirements when restricting a criminal defendant's physical freedom. This Council's Interpretations Nos. 384 and 567 used the same principles as above to review the provisions of the Act that concern reformatory training, and the same principles were also used to review the disciplinary action of "control and training" under the Disciplinary Measures for the Prevention of Repeat Offenses by Communist Spies during the Period of Communist Rebellion.

In accordance with the rule of law, when statutes are used to restrict people's rights, the statute's constitutive elements shall conform to the principle of legal clarity. This enables the regulated person to foresee the legal consequences of

基於法治國原則，以法律限制人民權利，其構成要件應符合法律明確性原則，使受規範者可能預見其行為之法律效果，以確保法律預先告知之功能，並使執法之準據明確，以保障規範目的之實現。依本院歷來解釋，法律規定所

his behavior in order that the fair notice function of the law is ensured. It further creates clear standards for enforcing the law so as to ensure that the statutory purpose can be achieved. According to this Council's past Interpretations, the concepts used in a statute do not violate the principle of legal clarity if their meanings are not difficult for regulated persons to understand through the statute's text and legislative purpose, and further if the meanings can be confirmed through judicial review (*See* Interpretations Nos. 432, 491, 521, 594, 602, 617, 623). In addition, according to Article 8 of the Constitution, the state's power to restrict people's physical freedom is, within certain limits, reserved in the Constitution. If a statutory provision creates a severe restraint on people's physical freedom that is tantamount to criminal punishment, whether the elements of the offense conform to the principle of legal clarity shall receive relatively strict scrutiny.

使用之概念，其意義依法條文義及立法目的，如非受規範者難以理解，並可經由司法審查加以確認，即與法律明確性原則無違（本院釋字第四三二號、第四九一號、第五二一號、第五九四號、第六０二號、第六一七號及第六二三號解釋參照）。又依前開憲法第八條之規定，國家公權力對人民身體自由之限制，於一定限度內，既為憲法保留之範圍，若涉及嚴重拘束人民身體自由而與刑罰無異之法律規定，其法定要件是否符合法律明確性原則，自應受較為嚴格之審查。

Article 2 of the Act expressly provides the definition of "hoodlum." Section 3 therein describes the hoodlum acts of "

本條例第二條明文規定流氓之定義，其中第三款所謂霸佔地盤、敲詐勒索、強迫買賣、白吃白喝、要挾滋事及

occupying territory, committing blackmail and extortion, forcing business transactions, eating and drinking without paying, coercing and causing trouble, or manipulating matters behind the scenes to accomplish the foregoing." Based on ordinary people's experience of life and understanding of language, as well as the practice of judicial review, the acts of "committing blackmail and extortion" and "forcing business transactions" are sufficient to be understood as using fraud, intimidation, violence, coercion, or similar acts to mislead or suppress a victim's free will and cause him or her to surrender money or property or to complete certain business transactions. The act of "manipulating matters behind the scenes to accomplish the foregoing" is sufficient to be understood as actual control of other people's formation of ideas, decisions to act, and carrying out of acts. The meanings of the above constitutive elements of hoodlum acts are foreseeable by the regulated person and can further be confirmed through judicial review. The above elements thus do not violate the principle of legal clarity. As for "occupying territory,"

為其幕後操縱，係針對流氓行為之描述。依據一般人民日常生活與語言經驗，以及司法審查之實務，敲詐勒索與強迫買賣，足以理解為對被害人施以詐術、恐嚇、強暴、脅迫等行為，誤導或壓制被害人自由意志，而使被害人交付財物或完成一定之買賣行為；幕後操縱，則足以理解為對他人行為意思之形成、行為之決定與行為之實施為實質上之支配。上開構成要件行為之內涵，均為受規範者所得預見，並可經由司法審查加以確認，俱與法律明確性原則尚無違背。至霸佔地盤，依其文義，所謂霸佔固然足以理解為排除他人合法權益、壟斷特定利益之行為，而地盤，則可指涉特定之空間，亦可理解為佔有特定之營業利益或其他不法利益；白吃白喝，應可理解為吃喝拒不付帳，以獲取不法財物；要挾滋事之要挾，足以理解為強暴、脅迫或恐嚇等行為。此等流氓行為構成要件所涵攝之行為類型，一般人民依其日常生活及語言經驗，固然尚非完全不能預見，亦非司法審查所不能確認，惟排除他人之壟斷行為，其具體態樣及內涵如何，所謂地盤是否僅限於一定之物理空間，吃喝以外之生活消費，是否亦可涵蓋於白吃白喝構成要件範圍之內，以及滋事所指涉之行為內容究竟

judging by its context, "occupying" is no doubt sufficient to be understood as the act of excluding other people's lawful rights and monopolizing certain interests. "Territory" could refer to a certain physical space, or be understood as possessing specific business interests or other unlawful interests. Regarding "eating and drinking without paying," it could be understood as refusing to pay the bill after eating and drinking in order to gain unlawful money or property. "Coercing" in "coercing and causing trouble," is sufficient to be understood as using violence, force, intimidation, or similar acts. Ordinary people can understand these kinds of hoodlum acts based on their experience of life and understanding of language, and judicial review can confirm the constitutive elements of these hoodlum acts. However, how to define the concrete form and content of the act of monopolizing by excluding other people is insufficiently clear. Whether the territory is limited to a certain physical space, whether other consumer activities are included in the scope of "eating and drinking without paying," and what actually are the

為何，均有未盡明確之處，相關機關應斟酌社會生活型態之變遷等因素，檢討具體描述法律構成要件之可能性。

acts that constitute "causing trouble" are all insufficiently clear. Therefore, the relevant authorities shall evaluate the possibility of concretely describing the statute's constitutive elements by taking into account factors such as the changing patterns of society.

Article 2, Section 4, of the Act describes the hoodlum acts of "managing or controlling professional gambling establishments, establishing brothels without authorization, inducing or forcing decent women to work as prostitutes, working as bodyguards for gambling establishments or brothels, or relying on superior force to demand debt repayment." "Managing or controlling professional gambling establishments" refers to the acts of providing places for gambling and gathering people together to gamble with the intention of making a profit. "Establishing brothels without authorization" is sufficient to be understood as acting without permission as an intermediary for sexual transactions and exploiting the earnings. "Working as bodyguards for gambling establishments or brothels" refers to assisting with the

本條例第二條第四款所謂經營、操縱職業性賭場，私設娼館，引誘或強逼良家婦女為娼，為賭場、娼館之保鏢或恃強為人逼討債務，亦均屬對於流氓行為之描述。經營、操縱職業性賭場，乃指意圖營利提供賭博場所及聚眾賭博之行為；私設娼館，足以理解為未經許可而媒介性交易並剝削性交易所得；為賭場、娼館之保鏢，乃經營、操縱賭場及經營娼館行為之協助行為；恃強為人逼討債務，乃以強暴、脅迫等方法為他人催討債務；引誘良家婦女為娼，係以非強暴脅迫之方法，使婦女產生性交易意願之行為；強逼良家婦女為娼，則係施強暴、脅迫等方法，使婦女為性交易行為。上開構成要件行為，皆為社會上所常見之經濟性剝削行為，其所涵攝之行為類型與適用範圍，並非一般人民依其日常生活及語言經驗所不能預見，亦非司法審查所不能確認，與法律明確性

management and control of gambling establishments and with the management of brothels. "Relying on superior force to demand debt repayment" refers to demanding debt payment from others by violence, coercion, or similar means. "Inducing decent women to work as prostitutes" refers to causing a woman to have the intention to trade sex for money by means other than violence or coercion. "Forcing decent women to work as prostitutes" refers to causing a woman to trade sex for money by violence, coercion, or similar means. All of the above constitutive elements of hoodlum acts are acts of economic exploitation that are commonly seen in society. Ordinary people can foresee the types of acts and the scope of their applications based on their experience of life and understanding of language, and this can further be confirmed through judicial review. The above acts thus do not violate the principle of legal clarity.

原則均無違背。

The provision of Article 2, Section 3, regarding "tyrannizing good and honest people" and the provision of Section 5 of

本條例第二條第三款規定之欺壓善良、第五款規定之品行惡劣、遊蕩無賴均屬對個人社會危險性之描述，其所

the same Article regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals" both describe a person's potential to endanger society. The types of acts covered by the above provisions are excessively vague such that ordinary people, based on their experience of life and understanding of language, cannot foresee what acts are covered, nor can this be confirmed through judicial review. In practice, these provisions would normally have to be merged with other factors such as acts of violence, coercion, intimidation, or similar acts, or merged with provisions in other sections of the same Article. Although Section 5 further provides that "the facts are sufficient to provide an understanding that the acts have undermined social order or endangered the life, body, freedom, or property of others," the acts covered by the above basic constitutive elements of the offenses are still not clear, and the scope of the overall elements of the offenses is not concrete and clear. Accordingly, the above provisions of "tyrannizing good and honest people" and "people who are habitually morally

涵攝之行為類型過於空泛，非一般人民依其日常生活及語言經驗所能預見，亦非司法審查所能確認，實務上常須與強暴、脅迫、恐嚇等行為或與同條文其他各款規定合併適用。此基本構成要件所涵攝之行為內容既不明確，雖第五款另規定「有事實足認為有破壞社會秩序或危害他人生命、身體、自由、財產之習慣」，亦不能使整體構成要件適用之範圍具體明確，因此上開欺壓善良及品行惡劣、遊蕩無賴之規定，與法律明確性原則不符。

corrupt or who habitually wander around and act like rascals" are inconsistent with the principle of legal clarity.

Article 6, Paragraph 1, of the Act provides, "When a person is determined to be a hoodlum and the circumstances are serious, the police precinct of the directly governed municipality or police department of the county (city), with the consent of the directly supervising police authorities, may summon the person to appear for questioning without prior warning. If the summoned person does not appear after receiving lawful notice and does not have proper grounds for failing to appear, then the police may apply to the court for an arrest warrant. However, if the facts are sufficient to lead the police to believe that the person is a flight risk and there are exigent circumstances, then the police may arrest him without a warrant." So-called "serious circumstances" shall be determined according to the common societal conception of this provision and shall take into consideration the means used to carry out the act, the number of victims, the degree of harm, and the

本條例第六條第一項規定「經認定為流氓而其情節重大者，直轄市警察分局、縣（市）警察局經上級直屬警察機關之同意，得不經告誡，通知其到案詢問；經合法通知，無正當理由不到場者，得報請法院核發拘票。但有事實足認為其有逃亡之虞而情況急迫者，得逕行拘提之。」所謂情節重大者，依一般社會通念，應審酌實施流氓行為之手段、被害之人數、被害人受害之程度、破壞社會秩序之程度等一切情節是否重大予以認定，核與法律明確性原則尚無牴觸。

degree to which social order was undermined when examining the totality of the circumstances to determine whether the circumstances are serious. This provision does not contradict the principle of legal clarity.

Article 2 of the Act provides, "The police precinct of the directly governed municipality or police department of the county (city) shall provide concrete facts and evidence and, after examining the case with other concerned public security units, report the case to the directly supervising police authorities for re-examination and determination." The preliminary examination as to whether a person is a hoodlum by the police precinct of the directly governed municipality or police department of the county (city) is conducted by the Examination Group for Eliminating Hoodlums, which is a committee composed of the precinct chief for the directly governed municipality-or police department of the county (city) for all other localities-as well as responsible senior officials from the local branches of the Investigation Bureau and Military Police

本條例第二條規定「由直轄市警察分局、縣（市）警察局提出具體事證，會同其他有關治安單位審查後，報經其直屬上級警察機關複審認定之。」直轄市警察分局、縣（市）警察局認定流氓之初審程序，由直轄市警察分局長、縣（市）警察分局長會同所在地調查處（站）、憲兵調查組等主管首長組成檢肅流氓審查小組，並以會議方式審查認定之（本條例施行細則第六條參照）。直轄市警察局與內政部警政署認定流氓之複審程序，則設置流氓案件審議及異議委員會，由警察機關、檢察官、法學專家及社會公正人士共同組成，並以會議方式審查認定之（本條例施行細則第七條第二項參照）。此等規定旨在藉由審查委員會組成之多元化，保障被提報人獲得公正之審查結果。

Command (*See* Article 6 of the Act's Implementing Regulations). The reexamination and determination procedures by the police departments of the directly governed municipalities and the National Police Agency within the Ministry of Interior are conducted by the Committee for the Deliberation of and Objections to Hoodlum Cases, which is composed of police, prosecutors, legal specialists, and impartial members of society (*See* Article 7, Paragraph 2, of the Act's Implementing Regulations). The above provision seeks to ensure that the reported person obtains a fair result through use of a committee composed of diverse members.

Although a diverse membership is conducive to promoting the objectivity of the committee's examination, the reported person must have an opportunity for defense in order to protect his right to defend himself. The reported person must have the right to be heard during the proceedings, in addition to the right to obtain relief after obtaining an unfavorable decision. In order to comply with due process of law, the law shall grant the

審查委員會組成之多元化，固然有助於提升其審查之客觀性，惟欲保障被提報人之防禦權，必須賦予被提報人辯護之機會，除應保障其於受不利益之決定時，得以獲得事後之救濟外，更須於程序進行中使其享有陳述意見之權利。是故於審查委員會之流氓審查程序中，法律自應賦予被提報人陳述意見之機會，始符合正當法律程序原則。

reported person the right to be heard during the examination committee's proceedings to determine whether the person is a hoodlum.

The first part of Article 6, Paragraph 1, of the Act provides that when a person is determined to be a hoodlum and the circumstances are serious, if the person summoned by the police does not comply after having received lawful notice and does not have proper grounds for failing to appear, the police may apply to the court for an arrest warrant. If a person is arrested with a warrant issued by the court, he shall be transferred to the court for hearing after his arrest (*See* Article 9, Paragraph 1, of the Act). If a person voluntarily appears before and is questioned by the police but does not wish to be transferred to the court, the police may not compel him to be transferred to the court. Doing otherwise would violate due process of law. The procedures provided for in the first part of Article 7, Paragraph 1, of the Act shall, as a matter of course, be interpreted in the same manner.

本條例第六條第一項前段規定，情節重大之流氓，經警察機關合法通知，無正當理由不到場者，得報請法院核發拘票。如係依據法院核發之拘票拘提到案者，於到案後自應依法移送法院審理（本條例第九條第一項參照）；其自行到案者，經詢問後，如無意願隨案移送法院，即不得將其強制移送，方與正當法律程序原則無違。又本條例第七條第一項前段規定之程序，亦應為相同之處理，自屬當然。

Article 12, Paragraph 1, of the Act provides, "In order to protect informants, victims, and witnesses under this Act, the courts and police may, when necessary, summon them individually and in private, and further use code names in place of their real names and identities when making the transcript and documents. When the facts are sufficient to believe that an informant, victim, or witness is threatened with violence, coercion, intimidation, or other retaliatory acts, the court may refuse to allow the accused hoodlum to confront and examine the informant, victim, or witness, either based on the request of the informant, victim, or witness or *ex officio*. The court may further refuse to allow the accused hoodlum's lawyer to view, copy, or photograph documents and testimony in the file that might reveal the real names and identities of informants, victims, or witnesses. The court may further request that the police take necessary protective measures before or after questioning informants, victims, or witnesses. However, the judge shall tell the accused hoodlum the essential points of the transcripts and documents that are admissible as

本條例第十二條第一項規定「法院、警察機關為保護本條例之檢舉人、被害人或證人，於必要時得個別不公開傳訊之，並以代號代替其真實姓名、身分，製作筆錄及文書。其有事實足認檢舉人、被害人或證人有受強暴、脅迫、恐嚇或其他報復行為之虞者，法院得依檢舉人、被害人或證人之聲請或依職權拒絕被移送裁定人與之對質、詰問或其選任律師檢閱、抄錄、攝影可供指出檢舉人、被害人或證人真實姓名、身分之文書及詰問，並得請求警察機關於法院訊問前或訊問後，採取必要之保護措施。但法官應將作為證據之筆錄或文書向被移送裁定人告以要旨，訊問其有無意見陳述。」准許法院於有足以認定檢舉人、被害人或證人可能受強暴、脅迫、恐嚇或其他報復行為之事實時，得依該等證人之聲請或依職權，剝奪被移送人及其選任律師對該等證人之對質、詰問權，以及對可供辨識該等證人身分相關資料之閱卷權。

evidence and give the accused hoodlum an opportunity to state his opinion." The above provisions allow the court to deprive the accused hoodlum and his lawyer of the right to confront and examine witnesses as well as the right to access relevant materials in the case file that could identify witnesses, either based on the request of a witness or *ex officio*, when the facts are sufficient to believe that an informant, victim, or witness might suffer violence, coercion, intimidation, or other retaliatory acts.

A criminal defendant's right to examine witnesses seeks to guarantee his right to adequately defend himself in a legal action. It is also a right protected by the requirements of due process of law under Article 8, Paragraph 1, of the Constitution and by the right to institute legal proceedings under Article 16 of the Constitution (*See* Interpretation No. 582). A person (including informants and victims) is obligated to serve as a witness in another person's criminal proceeding, except as otherwise provided by law. A witness shall fulfill his obligations to appear in

查刑事被告詰問證人之權利，旨在保障其在訴訟上享有充分之防禦權，乃憲法第八條第一項正當法律程序規定所保障之權利，且為憲法第十六條所保障人民訴訟權之範圍（本院釋字第五八二號解釋參照）。刑事案件中，任何人（包括檢舉人、被害人）於他人案件，除法律另有規定外，皆有為證人之義務，證人應履行到場義務、具結義務、受訊問與對質、詰問之義務以及據實陳述之義務（刑事訴訟法第一百六十六條第一項、第一百六十六條之六第一項、第一百六十八條、第一百六十九條、第一百七十六條之一、第一百八十四條第

court, to take an oath, to be questioned, confronted, and examined, and to speak the truth (*See* Article 166, Paragraph 1; Article 166-6, Paragraph 1; Articles 168, 169, and 176-1; Article 184, Paragraph 2; and Articles 187 to 189 of the Code of Criminal Procedure). The transferred person in the hoodlum prevention proceeding might be subjected to reformatory training, which is a severe restraint on physical freedom. His right to confront and examine witnesses shall receive the same constitutional protections as those granted to criminal defendants. Accordingly, a person is obligated to serve as a witness in another person's hoodlum prevention proceeding and may not refuse to be confronted or examined by the transferred person or his defense lawyer. Nonetheless, to protect witnesses from endangering their lives, bodies, freedom, or property as a result of being confronted and examined, the transferred person's and his defense lawyer's right to confront and examine witnesses may be restricted by concrete and clear statutory provisions. Any such restrictions must comply with the requirements of Article 23 of the

二項、第一百八十七條至第一百八十九條參照）。檢肅流氓程序之被移送人可能遭受之感訓處分，屬嚴重拘束人身自由之處遇，其對證人之對質、詰問權，自應與刑事被告同受憲法之保障。故任何人於他人檢肅流氓案件，皆有為證人之義務，而不得拒絕被移送人及其選任律師之對質與詰問。惟為保護證人不致因接受對質、詰問，而遭受生命、身體、自由或財產之危害，得以具體明確之法律規定，限制被移送人及其選任律師對證人之對質、詰問權利，其限制且須符合憲法第二十三條之要求。

Constitution.

Article 12, Paragraph 1, of the Act provides in general terms that "the facts are sufficient to believe that an informant, victim, or witness is threatened with violence, coercion, intimidation, or other retaliatory acts," but it fails to take into consideration whether, in view of the individual circumstances of the case, other less intrusive measures are sufficient to protect the witness's safety and the voluntariness of his testimony, such as wearing a mask, altering the person's his voice or appearance, using a video transmission, or using other suitable means of separation when witnesses are confronted and examined (*See* Article 11, Paragraph 4, of the Witness Protection Act). The above provision abruptly deprives the transferred person of his right to confront and examine witnesses as well as depriving him of his right to access court files, which is clearly an excessive restriction on the transferred person's right to defend himself in a legal action and does not conform with the purpose of the principle of proportionality under Article 23 of the Constitution.

本條例第十二條第一項僅泛稱「有事實足認檢舉人、被害人或證人有受強暴、脅迫、恐嚇或其他報復行為之虞」，而未依個案情形，考量採取其他限制較輕微之手段，例如蒙面、變聲、變像、視訊傳送或其他適當隔離方式為對質、詰問（證人保護法第十一條第四項參照），是否仍然不足以保護證人之安全或擔保證人出於自由意志陳述意見，即驟然剝奪被移送人對證人之對質、詰問權以及對於卷證之閱覽權，顯已對於被移送人訴訟上之防禦權，造成過度之限制，而與憲法第二十三條比例原則之意旨不符，有違憲法第八條正當法律程序原則及憲法第十六條訴訟權之保障。

Therefore, this provision violates the guarantees of the principle of due process of law under Article 8 of the Constitution and the right to institute legal proceedings under Article 16 of the Constitution.

Article 21, Paragraph 1, of the Act provides, "If the hoodlum act for which the person is committed to reformatory training also violates criminal laws and becomes the basis for a criminal conviction, time spent serving fixed-term imprisonment, detention, or rehabilitation measures and time spent in reformatory training shall be mutually set off on a one-day-for-one-day basis." If a hoodlum act also violates criminal laws, the person who committed the act may be subject to reformatory training in addition to receiving criminal punishments and rehabilitation measures based on the same facts. The Act therefore provides that time spent serving criminal punishments or rehabilitation measures under criminal laws shall be mutually set-off from time spent in reformatory training. The purpose is to ensure that a person's constitutionally protected right to physical freedom will not

本條例第二十一條第一項規定「受裁定感訓處分之流氓行為，同時觸犯刑事法律者，經判決有罪確定，其應執行之有期徒刑、拘役或保安處分，與感訓期間，相互折抵之。其折抵以感訓處分一日互抵有期徒刑、拘役或保安處分一日。」係因流氓行為如同時觸犯刑事法律，行為人可能於受刑罰及保安處分宣告之外，復因同一事實而受感訓處分，故規定感訓處分與刑罰或刑法上之保安處分應互相折抵，使行為人受憲法保障之身體自由，不致因不同之訴訟程序，而遭受過度之限制。惟因同條例第十三條第二項規定「法院審理之結果，認應交付感訓者，應為交付感訓處分之裁定，但毋庸諭知其期間」；且第十九條第一項規定「感訓處分期間為一年以上三年以下。但執行滿一年，執行機關認無繼續執行之必要者，得檢具事證報經原裁定法院許可，免予繼續執行」，於先執行刑罰、保安處分已滿三年時，因可完全折抵，即無須再執行感訓處

be excessively restricted as a result of different legal proceedings. However, Article 13, Paragraph 2, of the Act provides, "If the court decides to impose reformatory training, it shall deliver a written decision of its ruling to impose reformatory training but need not specify the term thereof." Article 19, Paragraph 1, provides, "The term of reformatory training is set at more than one year and less than three years. After completion of one year, if the executing authorities believe that it is unnecessary to continue reformatory training, they may report, with facts and evidence, to the original ruling court for its permission and exempt the person from further reformatory training." When criminal punishment or rehabilitation measures have already been carried out for more than three years, then there is no need to commence reformatory training because of the mutual set-off provision. This situation does not raise doubts regarding excessive restrictions on people's physical freedom. However, when criminal punishment or rehabilitation measures have been carried out for less than three years, the amount of time that

分，而無過度限制人民身體自由之疑慮；但於先執行刑罰、保安處分未滿三年時，因感訓處分之期間未經諭知，無從計算可折抵之期間，如將上開第十九條規定解為應再繼續執行至少一年之感訓處分，可能使受感訓處分人之身體自由過度遭受限制。是上開第十三條第二項但書之規定，有導致受感訓處分人身體自由遭受過度限制之虞，相關機關應予以檢討修正之。

can be deducted from the upcoming time in reformatory training cannot be calculated because the term of reformatory training has not been declared. If the aforementioned Article 19 is interpreted as meaning that reformatory training shall then be enforced for a minimum of one year, the physical freedom of the person subject to reformatory training might be excessively restricted. Accordingly, the aforementioned proviso of Article 13, Paragraph 2, might lead to excessive restrictions on the personal freedom of a person subject to reformatory training. The relevant authorities shall re-examine and revise the provision.

In light of the fact that amending the law requires a certain period of time-and so that the relevant authorities can conduct a comprehensive analysis of the Act by taking into consideration both the need to protect people's rights and the need to maintain social order-those parts of the following provisions that are inconsistent with relevant principles of the Constitution shall become null and void no later than one year from the date of this

鑒於法律之修正尚須經歷一定時程，且為使相關機關能兼顧保障人民權利及維護社會秩序之需要，對本條例進行通盤檢討，本條例第二條第三款關於欺壓善良，第五款關於品行惡劣、遊蕩無賴之規定，及第十二條第一項關於過度限制被移送人對證人之對質、詰問權與閱卷權之規定，與憲法意旨不符部分，應至遲於本解釋公布之日起一年內失其效力。

Interpretation: Article 2, Section 3, regarding the act of "tyrannizing good and honest people," Section 5 of the same Article regarding "people who are habitually morally corrupt or who habitually wander around and act like rascals," and Article 12, Paragraph 1, which excessively restricts the transferred person's right to confront and examine witnesses and to access court files.

As for the petitioners' position that the constitutionality of the provisions of Article 2, Paragraph 1, and Articles 10, 14, and 15 of the Act are in doubt, they are not the legal provisions that the judge in the case at hand shall apply. The constitutionality of these provisions does not influence the results of the court's ruling. In addition, the petitioners allege that the constitutionality of Article 2, Section 2; the proviso of Article 6, Paragraph 1; the proviso of Article 7, Paragraph 1; and Articles 9, 11, 22, and 23 are in doubt, and further question the constitutionality of the Act as a whole. The grounds raised by the petitioners in support of the unconstitutionality of the foregoing provisions

至聲請人之聲請意旨主張本條例第二條第一款、第十條、第十四條、第十五條規定有違憲之疑義，查上開規定並非法官於審理原因案件時所應適用之法律，該等規定是否違憲，於裁定之結果不生影響；另聲請意旨主張本條例第二條第二款、第六條第一項但書、第七條第一項但書、第九條、第十一條、第二十二條、第二十三條與本條例之存在有違憲之疑義，查聲請人就前揭規定如何違反憲法所為之論證，尚難認已提出客觀上形成確信法律為違憲之具體理由。此二部分之聲請，核與本院釋字第三七一號及第五七二號解釋所定之聲請解釋要件不合，均應不予受理，併此指明。

are insufficient to constitute concrete reasons for an objective belief that the statute is unconstitutional. These two parts of the petition do not meet the requirements set forth in this Council's Interpretations Nos. 371 and 572 and are therefore dismissed.

Justice Tzu-Yi Lin filed concurring opinion in part, in which Justice Tzong-Li Hsu joined.

Justice Tzong-Li Hsu filed concurring opinion in part, in which Justice Tzu-Yi Lin and Justice Yu-Hsiu Hsu joined.

本號解釋林大法官子儀、許大法官宗力共同提出部分協同意見書；許大法官宗力、林大法官子儀、許大法官玉秀共同提出部分協同意見書。

EDITOR'S NOTE:

Summary of facts: (1) In reviewing a case, a judge of the Taiwan Taoyuan District Court believed the applicable Articles 2, 6, 7, 9 to 11, 12 to 15, 19, 21, 22, and 23 of the Act for Eliminating Hoodlums, and Articles 5 and 46 of the Implementing Regulations of that Act may violate the principle of equality under Article 7, due process of law, the principle of clarity and definiteness of law under Article 8, the fundamental right to institute legal proceedings under Article 16, as well as the

編者註：

事實摘要：（一）臺灣桃園地方法院法官審理案件，認所應適用之檢肅流氓條例第二條、第六條、第七條、第九條至第十一條、第十二條至第十五條、第十九條、第二十一條、第二十二條、第二十三條及該條例施行細則第五條與第四十六條規定，有違反憲法第七條之平等原則、第八條之正當法律程序、法律明確性原則、第十六條之訴訟基本權及第二十三條之法律保留原則與比例原則之疑義，經裁定停止訴訟程序，聲請解釋。

principle of proportionality under Article 23 of the Constitution, thus ruled to stay the proceeding and filed the petition for interpretation.

(2) In reviewing a case, a magistrate judge of the Taiwan Taichung District Court believed the applicable Article 2, Section 3 of the Act for Eliminating Hoodlums concerning the so called "coercing and causing trouble," and "tyrannizing good and honest individuals," as well as Section 5 concerning "corrupt character," and "loitering around and rascal behavior," among other elements that constitute a hoodlum, are strongly based on value judgment, and are regarded as *unbestimmte Rechtsbegriffe* or indefinite legal concept, and raises the question of contradicting the protection of physical freedom under Article 8 of the Constitution, thus ruled to stay the proceeding and filed the petition for interpretation.

（二）臺灣臺中地方法院治安法庭法官審理案件，認其所適用之檢肅流氓條例第二條第三款所謂「要挾滋事」、「欺壓善良」，及第五款所謂「品行惡劣」、「遊蕩無賴」等流氓之構成要件，具有強烈之價值判斷，屬於不確定法律概念，有牴觸憲法第八條人身自由保障之疑義，經裁定停止訴訟程序，聲請解釋。

J. Y. Interpretation No.637（February 22, 2008）*

ISSUE: Is Article 14-1 of the Public Functionary Service Act unconstitutional ?

RELEVANT LAWS:

The Constitution, Article 23（憲法第二十三條）; Public Functionary Service Act, Article 14-1 and Article 22-1, Paragraph 1（公務員服務法第十四條之一、第二十二條之一第一項）; J. Y. Interpretations Nos. 404, 433, 510, 584, 596, 612, 618 and 634（司法院釋字第四０四號、第四三三號、第五一０號、第五八四號、第五九六號、第六一二號、第六一八號、第六三四號解釋）.

KEYWORDS:

public functionary（公務員）, freedom of work（工作之自由）, freedom to choose an occupation（選擇職業之自由）, relationship of official service under the public law（公法上職務關係）, right of protection of status（身分保障權利）, special duty to the State（對國家之特別義務）, unfair competition（不正競爭）, conflict of interest（利益衝突）, transport of benefits（利益輸送）.**

HOLDING: The provision of Article 14-1 of the Public Functionary Service Act that "a public functionary

解釋文：公務員服務法第十四條之一規定：「公務員於其離職後三年內，不得擔任與其離職前五年內之職務

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposes only.

may not take the office of director, corporate auditor, manager, shareholder conducting the company business, or advisor of a business entity within three years after he leaves his post if the entity is directly or indirectly related with the duty which he performed during the five years prior to his departure from his government post" is intended to maintain, with a legitimate purpose, the important public interest in the qualities of fairness and integrity of public functionaries by imposing a restriction on the freedom of former public functionaries in choosing their employment. The restrictive measure taken by the legislature is materially related with the achievement of such purpose and is essential to the protection of such important public interest. It is not in conflict with the provision of Article 23 of the Constitution, nor is it contrary to the intention contemplated by the Constitution in protecting the right of work of the people.

直接相關之營利事業董事、監察人、經理、執行業務之股東或顧問。」旨在維護公務員公正廉明之重要公益，而對離職公務員選擇職業自由予以限制，其目的洵屬正當；其所採取之限制手段與目的達成間具實質關聯性，乃為保護重要公益所必要，並未牴觸憲法第二十三條之規定，與憲法保障人民工作權之意旨尚無違背。

REASONING: Article 15 of the Constitution provides that the people shall be guaranteed the right of work. That the

解釋理由書：憲法第十五條規定人民之工作權應予保障，人民有從事工作及選擇職業之自由，迭經本院釋字

people shall have the freedom to work and to choose an occupation has been repeatedly affirmed by us in J. Y. Interpretations Nos. 404, 510, 584, 612 and 634. There is between the State and a public functionary a relationship of official service under the public law, whereby the public functionary is accorded a right of protection of his status and is charged with special duty to the State. His rights protected by the Constitution are thus restrained to a reasonable extent. Our Interpretations Nos. 433, 596 and 618 provide adequate reference. While the official service relationship between a public functionary and the State under the public law is terminated after the public functionary leaves his employment with the government, the Constitution does not disallow the State to impose restrictions on his freedom to choose his employment by legally requiring him to perform special duties under certain circumstances to the extent consistent with the provision of Article 23 of the Constitution, for the purpose of protecting the important public interest of the State, with which the exercise of his official duty was closely related.

第四０四號、第五一０號、第五八四號、第六一二號與第六三四號解釋在案。國家與公務員間具公法上職務關係，公務員依法享有身分保障權利，並對國家負有特別義務，其憲法上所保障之權利即因此受有相當之限制，本院釋字第四三三號、第五九六號與第六一八號解釋足資參照。公務員離職後與國家間公法上職務關係雖已終止，惟因其職務之行使攸關公共利益，國家為保護重要公益，於符合憲法第二十三條規定之限度內，以法律課予特定離職公務員於一定條件下履行特別義務，從而對其選擇職業自由予以限制，尚非憲法所不許。

The provision of Article 14-1 of the Public Functionary Service Act that "a public functionary may not take the office of director, supervisor, manager, shareholder conducting the company business, or advisor of a for-profit business entity within three years after he leaves his post if the entity is directly or indirectly related with the duty which he performed during the last five years before he left his post" is intended to prevent a government official, after leaving his post, from skillfully securing personal benefit by virtue of his connection with the agency with which he worked before, or helping the business entities with which he works to engage in unfair competition by utilizing the information known to him because of his previous official duties. The provision also serves the purpose of preventing conflict of interest and transport of benefits by a public functionary during his employment by means of establishment of a close personal connection through collaboration with business entities for the purpose of making private pre-arrangement for his employment after he leaves his government

公務員服務法第十四條之一規定：「公務員於其離職後三年內，不得擔任與其離職前五年內之職務直接相關之營利事業董事、監察人、經理、執行業務之股東或顧問。」旨在避免公務員於離職後憑恃其與原任職機關之關係，因不當往來巧取私利，或利用所知公務資訊助其任職之營利事業從事不正競爭，並藉以防範公務員於在職期間預為己私謀離職後之出路，而與營利事業掛鉤結為緊密私人關係，產生利益衝突或利益輸送等情形，乃為維護公務員公正廉明之重要公益，其目的洵屬正當。

post. The statute is aimed at maintaining the important public interest in the qualities of fairness and integrity of public functionaries and hence is proper.

In view of the difference in the nature of occupations, the Constitution allows different degrees of restrictions on the freedom to choose an occupation. In prescribing that public functionaries may not take specific positions within a certain period after they leave their official posts, the aforesaid provision is designed to help prevent situations involving conflict of interest or transport of benefits. Moreover, the restriction imposed by such provision on the freedom of public functionaries to choose their employment after they leave their official duties covers only specific types of positions rather than all posts with the business entities directly related with their official duties, nor does it prohibit them from freely choosing positions that are not directly related with their official duties. Furthermore, it is not impossible for a public functionary to foresee such restriction and therefore to make preparation in advance. Accordingly, the

對職業自由之限制，因其內容之差異，在憲法上有寬嚴不同之容許標準。因上開規定限制離職公務員於一定期間內不得從事特定職務，有助於避免利益衝突或利益輸送之情形，且依上開規定對離職公務員職業自由之限制，僅及於特定職務之型態，尚非全面禁止其於與職務直接相關之營利事業中任職，亦未禁止其自由選擇與職務不直接相關之職業，而公務員對此限制並非無法預見而不能預作準備，據此對其所受憲法保障之選擇職業自由所為主觀條件之限制尚非過當，與目的達成間具實質關聯性，乃為保護重要公益所必要，並未牴觸憲法第二十三條之規定，與憲法保障人民工作權之意旨尚無違背。

restriction imposed on their subjective qualifications in connection with their freedom of choice of employment protected by the Constitution is not excessive. Rather, it is materially related with the achievement of the purpose and is essential to the protection of important public interest. It is thus not in conflict with the provision of Article 23 of the Constitution, nor is it contrary to the intention contemplated by the Constitution in protecting the right of work of the people.

We must point out incidentally that Article 14-1 of the Public Functionary Service Act is enacted by way of a legislation of employment prohibition, whereby anyone who violates the provision is punishable under Article 22-1, Paragraph 1, thereof with imprisonment for not more than two years and, in addition thereto, a fine of no more than NT$1,000,000 may be imposed. As this provision specifically concerns the right and interest of former public functionaries, it is appropriate that the law be reviewed and amended by the legislature by taking into consideration the result of actual enforcement thereof

惟公務員服務法第十四條之一之規定，係採職務禁止之立法方式，且違反此項規定者，依同法第二十二條之一第一項規定，處二年以下有期徒刑，得併科新台幣一百萬元以下罰金，攸關離職公務員權益甚鉅，宜由立法機關依上開法律規定之實際執行情形，審酌維護公務員公正廉明之重要公益與人民選擇職業自由之均衡，妥善設計，檢討修正，併此指明。

and implementing a well-designed system that provides a balance between the important public interest in maintaining the qualities of fairness and integrity of public functionaries and the freedom of the people to choose their careers.

Justice Chen-Shan Li filed concurring opinion in part.

Justice Yu-Hsiu Hsu filed concurring opinion in part.

本號解釋李大法官震山提出部分協同意見書；許大法官玉秀提出部分協同意見書。

EDITOR'S NOTE:

Summary of facts: The defendant was employed at the Department of Public Works of the Taichung City Government from 1993 to 1998 and was immediately appointed as the president of a certain construction company after leaving government. The Taichung District Prosecutors Office subsequently placed them under investigation due to the company's involvement in bid rigging activities related to the construction project of a certain government agency. In addition to violating the Government Procurement Act, the Taichung District Prosecutors Office also charged the defendant for

編者註：

事實摘要：被告於民國八十四年至八十七年任職臺中市政府工務局，離職後隨即受聘任某營造公司總經理，後因該公司參與某機關之營建工程有圍標情事，而遭臺中地檢署偵辦。臺中地檢署除就違反政府採購法部分提起公訴外，另以其違反公務員服務法第十四條之一公務員於其離職後三年內，不得擔任與其離職前五年內之職務直接相關之營利事業經理，依同法第二十二條之一處罰規定，予以起訴。

violation of Article 14-1 of the Public Functionary Service Act, which provides that a former civil servant may not assume any managerial position at any business within three years after leaving office directly related to the duties five years prior to the departure. The indictment was based on the penalty provisions under Article 22-1 of the same Act.

The Judge of the Taiwan Taichung District Court reviewing the case believed that the applicable Article 14-1 of the Public Functionary Service Act may violate the meanings and purpose of the people's right to work under the Constitution. The judge thus ruled to stay the proceeding and filed the petition for a constitutional interpretation in accordance with J.Y. Interpretation No. 371.

臺灣臺中地方法院法官審理該案件，認所應適用之公務員服務法第十四條之一，有牴觸憲法保障人民工作權之意旨，依本院釋字第三七一號解釋法官聲請釋憲，裁定停止訴訟程序，聲請解釋。

J. Y. Interpretation No.638（March 7, 2008）*

ISSUE: Is Article 8 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations, as promulgated on May 13, 1997, in contravention to the Constitution ?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; J.Y. Interpretations Nos. 394, 402 and 619（司法院釋字第三九四號、第四０二號、第六一九號解釋）; Articles 26 and 178 of the Securities Exchange Act (as amended on July 19, 2000)（證券交易法第二十六條與第一百七十八條，八十九年七月十九日修正公布）; Article 14, Paragraph 1, of the Administrative Sanction Act（行政罰法第十四條第一項）; Article 2 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations (as promulgated on April 25, 1989)（公開發行公司董事、監察人股權成數及查核實施規則第二條，七十八年四月二十五日修正發布）; Articles 4 and 5 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations (as promulgated on January 10, 1989)（公開發行公司董事、監察人股權成數及查核實施規則第四條、第五條，

* Translated by Professor Chun-Jen Chen.

** Contents within frame, not part of the original text, are added for reference purposes only.

七十八年一月十日修正發布）; Article 8 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations (as promulgated on May 13, 1997)（公開發行公司董事、監察人股權成數及查核實施規則第八條，八十六年五月十三日修正發布）.

KEYWORDS:

shareholding percentage（股權成數）, legal person（法人）, publicly-held corporation（公開發行公司）, securities（證券）, director（董事）, supervisor（監察人）, administrative sanction（行政罰）, pecuniary fine（罰鍰）, administrative disciplinary action（行政制裁）, duty under administrative law（行政法義務）, exceed（踰越）, agency-in-charge（主管機關）, punitive（裁罰性）, principle of proportionality（比例原則）, principle of legal reservation（法律保留原則）, principle of *res judicata*（一事不二罰原則）.**

HOLDING: As promulgated on May 13, 1997, Article 8 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations prescribed that, "Where the directors or supervisors of a publicly-held corporation as a whole respectively fail to make up the difference between their shareholdings

解釋文：中華民國八十六年五月十三日修正發布之公開發行公司董事、監察人股權成數及查核實施規則第八條：「全體董事或監察人未依第四條及第五條規定期限補足第二條所定持股成數時，依證券交易法第一百七十八條第一項第四款規定處罰全體董事或監察人（第一項）。董事或監察人以法人身份當選者，處罰該法人負責人；以法人代

and the specified percentages of the total shares outstanding under Article 2 within the period prescribed under Articles 4 and 5, the directors or supervisors as a whole respectively shall be punishable under Article 178, Paragraph 1, Subparagraph 4 of the Securities and Exchange Act (Paragraph 1). Where a legal person is elected as a director or a supervisor and is found to be in violation of the preceding paragraph, the person who is in charge of the legal person shall be subject to the punishment; where the representative of a legal person is elected as a director or a supervisor and is found to be in violation of the preceding paragraph, such a representative shall be subject to the punishment (Paragraph 2)." Paragraph 1 and the second half of Paragraph 2 of the above-quoted regulation were promulgated to punish those who violate the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations promulgated under Article 26, Paragraph 2 of the Securities Exchange Act in accordance with Article 178, Paragraph 1, Subparagraph 4 of the Securities

表人身份當選者，處罰該代表人（第二項）。」其第一項及第二項後段規定，乃就違反主管機關依證券交易法第二十六條第二項所定之公開發行公司董事、監察人股權成數及查核實施規則，而應依八十九年七月十九日修正公布之證券交易法第一百七十八條第一項第四款規定處罰時之處罰對象及違反行政法上義務之人為多數時之歸責方式所為之規定，涉及人民權利之限制，並無法律依據或法律具體明確之授權，與憲法第二十三條規定之法律保留原則尚有未符，應於本解釋公布之日起六個月內失其效力。

Exchange Act, as amended on July 19, 2000, to hold them jointly and severally liable for breaching their collective duty under administrative law. Both Paragraph 1 and the second half of Paragraph 2 limit people's rights and were promulgated without statutory authorization; hence, they are in contravention to the principle of legal reservation under Article 23 of the Constitution. Accordingly, Paragraph 1 and the second half of Paragraph 2 of Article 8 of the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations, as promulgated on May 13, 1997, shall no longer be applicable six months after this Interpretation is published.

REASONING: We have repeatedly held that the punishment for people's breaches of duty under administrative law limits people's rights, and both the elements of the punishment and the legal effects shall be prescribed by law or regulation with clear statutory authorization in order to be in accordance with the principle of legal reservation under Article 23 of

解釋理由書：對於人民違反行政法上義務之裁罰，涉及人民權利之限制，其處罰之構成要件、法律效果，應以法律定之；以命令為之者，應有法律明確授權，始符合憲法第二十三條法律保留原則之意旨，本院釋字第三九四號、第四０二號、第六一九號解釋足資參照。行政罰之處罰，以違反行政法上義務為前提，而實施處罰構成要件行為

the Constitution (*See* J.Y. Interpretations Nos. 394, 402 and 619). The punishment of an administrative sanction is premised upon the breach of administrative duty. A person who institutes the action which in turn constitutes the elements of breaching the duty under administrative law shall be subject to punishment under relevant law and regulation. The legislative branch may enact a law to impose special duties on specific persons to prevent others from breaching their duties under administrative law and thus make those specific persons liable for failing to fulfill their administrative duties. Hence, the stipulation of liable persons in administrative sanctions actually involves the limitation on people's rights and can not be regulated by regulation without an enactment or a clear statutory authorization in order to be in accordance with the requirements of legality and clarity of punishment in a rule-of-law nation. When there are multiple persons who breach the same administrative duty under law, their individual liability shall in principle be determined in accordance with the degree of respective individual

之義務主體，自屬依法處罰之對象。立法者並非不得就他人違反行政法上義務之行為，課特定人防止之義務，並因其違反此一防止義務而使其成為行政處罰之對象。是行政處罰之處罰對象規定，亦涉及人民權利之限制，為符合法治國家處罰法定與處罰明確性之要求，除有法律或法律具體明確授權之法規命令為依據外，不得逕以行政命令訂之。又如違反同一行政法上義務者有多數人時，其歸責方式，以按其行為情節之輕重分別處罰為原則（行政罰法第十四條第一項規定參照），若就其是否應負各平均分擔責任等歸責方式，有為不同於上開原則規定之必要者，涉及人民權利限制之程度，亦應另以法律或法律具體明確授權之法規命令為特別規定，始符合憲法第二十三條之法律保留原則。至各該法律或法規命令之內容，均應符合比例原則，自不待言。

breaches (*See* Article 14, Paragraph 1 of the Administrative Sanction Act). If the legislative branch deems it necessary to utilize a different way to determine individual liability, because of the involvement of limitation on people's rights, it may do so by enacting a law to stipulate the individual liability or to authorize the promulgation of a regulation to enable the agency-in-charge to stipulate the individual liability in order to be in accordance with the principle of legal reservation under Article 23 of the Constitution. It goes without saying that the contents of the relevant law or regulation shall be in accordance with the principle of proportionality.

Article 26 of the Securities Exchange Act prescribes that, "The shareholding of non-bearer shares of directors or supervisors of a publicly-held corporation as a whole respectively shall not be less than a specified percentage of the total shares outstanding (Paragraph 1). The enforcement rules and review procedures for directors' and supervisors' shareholding percentages pursuant to the preceding

證券交易法第二十六條規定：「凡依本法公開募集及發行有價證券之公司，其全體董事及監察人二者所持有記名股票之股份總額，各不得少於公司已發行股份總額一定之成數（第一項）。前項董事、監察人股權成數及查核實施規則，由主管機關以命令定之（第二項）。」上開證券交易法第一百七十八條第一項第四款並規定，違反主管機關依第二十六條第二項所定之公開

paragraph shall be promulgated by the agency-in-charge (Paragraph 2).” Furthermore, Article 178, Paragraph 1, Subparagraph 4 prescribes that anyone who violates the Enforcement Rules and Review Procedures for Directors’ and Supervisors’ Shareholding Percentages at Publicly-held Corporations promulgated by the agency-in-charge under Article 26, Paragraph 2 of the Securities Exchange Act shall be punished with a pecuniary fine of not less than New Taiwan Dollars (NTD) 120,000 and not more than NTD 600,000. Paragraph 2 of the same article also prescribes that in addition to the pecuniary fine stipulated in the preceding paragraph, the agency-in-charge shall order the violator to comply with the law and regulation within a specified period of time. If the violator fails to comply, the agency-in-charge may set a new period of time for compliance and impose an additional pecuniary fine of not less than NTD 240,000 and not more than NTD 1,200,000 upon the violator for each subsequent failure to comply until the corrective action has been taken.

發行公司董事、監察人股權成數及查核實施規則之規定者，處新臺幣十二萬元以上六十萬元以下罰鍰。同條第二項復規定，主管機關除依第一項第四款規定裁處罰鍰外，並應責令限期辦理；逾期仍不辦理者，得繼續限期令其辦理，並按次連續各處新臺幣二十四萬元以上一百二十萬元以下罰鍰，至辦理為止。

Pursuant to the statutory authorization of Article 26, Paragraph 2 of the Securities Exchange Act, the agency-in-charge promulgated "the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations" (*hereinafter* the "Enforcement Rules"). Several amendments were made subsequently. As amended and promulgated on April 25, 1989, Article 2 of the Enforcement Rules prescribed that the shareholding of non-bearer shares of directors or supervisors of a publicly-held corporation as a whole respectively shall not be less than a specified percentage of the total shares outstanding. As amended and promulgated on January 10, 1989, Article 4 of the Enforcement Rules prescribed that upon their elections in the shareholder meeting, if the shareholdings of the entire body of directors and supervisors respectively are less than the percentage specified under Article 2, the directors or supervisors as a whole shall make up the difference within one month. Article 5, Paragraph 1 of the Enforcement Rules prescribed that if during his/her

主管機關依證券交易法第二十六條第二項規定之授權，數度修正發布「公開發行公司董事、監察人股權成數及查核實施規則」（以下簡稱實施規則）。七十八年四月二十五日修正發布之實施規則第二條規定，公開發行公司全體董事及監察人所持有記名股票之股份總額，各不得少於公司已發行股份總額之一定成數；七十八年一月十日修正發布之實施規則第四條規定，公開發行公司股東會選舉之全體董事或監察人，選任當時所持有記名股票之股份總額不足第二條所定成數時，應由全體董事或監察人於就任後一個月內補足之。第五條第一項規定，公開發行公司之董事或監察人，在任期中轉讓股份或部分解任，致全體董事或監察人持有股份總額低於第二條所定之成數時，全體董事或監察人應於一個月內補足之。第五條第二項規定，若全體董事或監察人持有股份總額有低於第二條所定成數者，公司應即通知全體董事或監察人依前項所訂期限補足。是公開發行公司全體董事或監察人經合法通知，而未依上開實施規則第四條或第五條規定期限補足第二條所定持股成數時，因其違反補足義務，自應依上開證券交易法第一百七十八條第一項第四款規定處罰。

term of office any director or supervisor of a publicly-held corporation transfers his/her shares or resigns and such a transfer or resignation makes the shareholdings of directors or supervisors as a whole respectively fall under the percentages specified under Article 2, the directors or supervisors as a whole respectively shall make up the difference within one month. Article 5, Paragraph 2 of the Enforcement Rules prescribed that if the shareholdings of directors or supervisors as a whole respectively fall under the percentages specified under Article 2, the corporation shall notify all directors or supervisors respectively to make up the difference within the period prescribed by the preceding paragraph. Hence, if upon the receipt of lawful notifications, the directors or supervisors of a publicly-held corporation as a whole respectively fail to make up the difference between their shareholdings and the specified percentages of the total shares outstanding under Article 2 within the period prescribed under Articles 4 and 5, due to their breaches of their duty to make up, they shall be subject to the punishment under Article

178, Paragraph 1, Subparagraph 4 of the Securities Exchange Act.

As promulgated on May 13, 1997, Article 8 of the Enforcement Rules prescribed that, "Where the directors or supervisors of a publicly-held corporation as a whole respectively fail to make up the difference between their shareholdings and the specified percentages of the total shares outstanding under Article 2 within the period prescribed under Articles 4 and 5, the directors or supervisors as a whole respectively shall be punishable under Article 178, Paragraph 1, Subparagraph 4 of the Securities and Exchange Act" (Paragraph 1). Where a legal person is elected as a director or a supervisor and is found to be in violation of the preceding paragraph, the person who is in charge the legal person, shall be subject to the punishment; where the representative of a legal person is elected as a director or a supervisor and is found to be in violation of the preceding paragraph, such a representative shall be subject to the punishment" (Paragraph 2). The clause "the directors or supervisors as a whole respectively

八十六年五月十三日修正發布之實施規則第八條規定：「全體董事或監察人未依第四條及第五條規定期限補足第二條所定持股成數時，依證券交易法第一百七十八條第一項第四款規定處罰全體董事或監察人（第一項）。董事或監察人以法人身份當選者，處罰該法人負責人；以法人代表人身份當選者，處罰該代表人（第二項）。」第一項所謂「處罰全體董事或監察人」，除以全體董事或監察人為違反同一行政法上義務者外，並明定為「處罰全體」，則係就違反同一行政法上義務者為多數人時之歸責方式，為特別規定；第二項後段規定「處罰該代表人」，係就違反行政法上義務之人為法人者，逕以行政命令訂定應以代表該法人當選董事或監察人之人為處罰對象。惟查前開證券交易法第二十六條第二項規定授權主管機關訂定法規命令之範圍，僅及於「董事、監察人股權成數及查核實施規則」，並未就處罰對象、多數人共同違反義務時之歸責方式，授權主管機關為特別之規定，上開實施規則第八條第一項及第二項後段規定，顯然逾越證券交易法第二十六

shall be punishable" in Article 8, Paragraph 1 of the Enforcement Rules is a special rule to "punish all violators as a whole" for they all are violators of the same duty under administrative law and for there are multiple persons who breached the same administrative duty under law. The second half of Paragraph 2 of Article 8 of the Enforcement Rules making "the representative punishable" is also a special rule to hold the representative of a legal person who is elected as a director or supervisor in his/her individual capacity directly liable because the real violator is a legal person. Nevertheless, Article 26, Paragraph 2 of the Securities Exchange Act simply authorizes the agency-in-charge to promulgate "the Enforcement Rules and Review Procedures for Directors' and Supervisors' Shareholding Percentages at Publicly-held Corporations", and the statutory language is silent in respect to the liable persons and the determination of individual liability for multiple persons who breach the same duty collectively. Thus, Paragraph 1 and the second half of Paragraph 2 of Article 8 of the Enforcement Rules apparently

條第二項規定授權之範圍。另查上開證券交易法第一百七十八條第一項第四款僅規定人民違反行政法上義務之行為態樣及其法律效果，既未就歸責方式或處罰對象為特別規定，亦未授權主管機關為補充之規定。綜此以觀，上開實施規則第八條第一項及第二項後段規定，係就公開發行公司全體董事或監察人持有股權成數，違反主管機關依證券交易法第二十六條第二項所定之公開發行公司董事、監察人股權成數及查核實施規則之規定，而應依前述證券交易法第一百七十八條第一項第四款規定處罰時之歸責方式及處罰對象所為之規定，並無法律依據或法律之明確授權，與憲法第二十三條規定之法律保留原則尚有未符，應於本解釋公布之日起六個月內失其效力。

exceed the statutory authorization of Article 26, Paragraph 2 of the Securities Exchange Act. Moreover, Article 178, Paragraph 1, Subparagraph 4 of the Securities Exchange Act only prescribes the categories and legal effects of people's breaches of the duties under administrative law. It does not prescribe the way of attribution or the liable persons, nor does it authorize the agency-in-charge to promulgate supplemental regulation. To sum up, Paragraph 1 and the second half of Paragraph 2 of Article 8 of the Enforcement Rules were promulgated to punish those who violate the Enforcement Rules promulgated under Article 26, Paragraph 2 of the Securities Exchange Act in accordance with Article 178, Paragraph 1, Subparagraph 4 of the Securities Exchange Act to hold them jointly and severally liable for breaching their collective administrative duty under law of preventing their shareholdings as a whole respectively from falling under the specified percentage of the total shares outstanding. Both Paragraph 1 and the second half of Paragraph 2 of Article 8 of the Enforcement Rules are promulgated with

out clear statutory authorization, and are in contravention to the principle of legal reservation under Article 23 of the Constitution. Thus, they shall no longer be applicable six months after this Interpretation is published.

With respect to the regulation that the directors and supervisors should make up the difference between their shareholding and the specified percentage of the total shares outstanding, it falls within the scope of administrative duties under law. Therefore, it is not punitive in nature and hence is different from a pecuniary fine, which is a kind of administrative sanction in nature. If a relevant law or regulation holds one who violates the administrative duty under law to be punishable and offers no exemption for fulfilling his/her administrative duty under law, such law or regulation will not give rise to the issue of the principle of *res judicata*. It goes without saying that the legislative branch shall take into account the legislative purpose of the Securities Exchange Act, within a reasonable and necessary scope, to enact a law to stipulate or to authorize

至於補足股份成數，係屬行政法上之義務，不具裁罰性，與罰鍰為行政制裁之性質不同，相關法令如規定違反行政法上義務之人受處罰後，仍不能免除其義務之履行，尚不生違反一事不二罰原則問題。又依證券交易法公開募集及發行有價證券之公司，其全體董事或監察人未依法定期限補足法定持股成數時，究應使個別董事或監察人負個別責任、各平均分擔責任或其他歸責方式？董事或監察人以法人代表人身分當選者，如何就其所負行政法上義務之不同，明定究應以該法人或該法人之代表人為處罰對象？均應衡酌證券交易法之立法目的，於合理且必要之範圍內，以法律或法律明確授權之命令詳為訂定，自不待言。另應否以法律強制公開發行公司全體董事及監察人持有公司已發行股份總額一定成數之記名股票，宜視證券市場發展情形，基於發展國民經濟及有效保障投資之目的等，隨時檢討改

the agency-in-charge to stipulate whether individual directors or supervisors who as a whole fail to make up the difference between their collective shareholdings and the specified percentage of the total shares outstanding shall be either jointly liable, or equally liable, or liable under some other stipulation, and whether the liable person shall be the legal person or the representative of the legal person when the representative of a legal person is elected as a director or supervisor and how to differentiate the different administrative duties imposed under law. Besides, it is also noteworthy that the appropriateness of enacting a law to impose a mandatory duty on directors and supervisors of publicly-held corporations to require them to own collectively a specified percentage of the total shares outstanding shall be continuously under review while taking into account the development of securities markets and the purposes of developing the national economy and of protecting investors.

進，均併予指明。

Justice Feng-Zhi Peng filed concurring opinion.

本號解釋彭大法官鳳至提出協同意見書；林大法官錫堯、彭大法官鳳至

Justice Sea-Yau Lin filed concurring opinion, in which Justice Feng-Zhi Peng joined.

Justice Yu-Hsiu Hsu filed dissenting opinion in part.

大法官林錫堯提出協同意見書，彭鳳至大法官加入；許大法官玉秀提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner is the legal representative of Company AX to sit on the board of Company XA. Company A sent out a notification to all directors in 2000 requiring the directors to make up the statutory shareholding within one month of service of such notice because the shares of all directors did not meet the requirement under Article 2, Section 4 of the "Implementing Rules on the Share Percentage and Inspection of Directors and Supervisorsfor Public Trading Companies" ("Implementing Rules" Amended and promulgated on April 25, 1989).

編者註：

事實摘要：緣聲請人係 A 公司之法人董事=甲公司之代表人，A 公司於八十九年間發函通知全體董事，以全體董事之持股總數未達「公開發行公司董事、監察人股權成數及查核實施規則」（下稱實施規則）第二條第四款規定（七十八年四月二十五日修正發布）之標準，請於文到一個月內補足法定持股數。

However, the directors as a whole did not make up the difference in time as required. The governing authority then fined Company ANT$600,000 to all the directors of Company A. The Petitioner

惟該公司全體董事並未依限補足持股數，主管機關爰對 A 公司全體董事處罰鍰新臺幣六十萬元整。聲請人不服，提起行政訴訟，經最高行政法院判決駁回確定。

initiated an administrative action but was finally dismissed by the Supreme Administrative Court.

The Petitioner argued that Article 178, Paragraph 1, Section 4 of the Securities Exchange Act (amended and promulgated on July 19, 2000) and Article 8 of the Implementation Rules at the time of the final judgment penalizing the directors or supervisors as a whole contradict the protection of property right under Article 15 and the principles of legal reservation, principle of proportionality as well as the principle of clarity and definiteness of authorization under Article 23 of the Constitution, and petitioned the Justices for Interpretation.

聲請人認確定終局判決所適用行為時之證券交易法第一百七十八條第一項第四款（八十九年七月十九日修正公布）及實施規則第八條之規定處罰全體董事或監察人，有牴觸憲法第十五條財產權保障、第二十三條法律保留原則、比例原則、授權明確性原則等之疑義，聲請大法官解釋。

J. Y. Interpretation No.639（March 21, 2008）*

ISSUE: Are Articles 416, Paragraph 1, Subparagraph 1, and 418 of the Criminal Procedure Code unconstitutional ?

RELEVANT LAWS:

Articles 7, 8, 16 and 23 of the Constitution（憲法第七條、第八條、第十六條及第二十三條）； Article 279, Paragraphs 1 and 2; Article 403; Article 404, Subparagraph 2; Article 416, Paragraph 1, Subparagraph 1; and Article 418 of the Criminal Procedure Code（刑事訴訟法第二百七十九條第一項及第二項、第四百零三條、第四百零四條第二款、第四百十六條第一項第一款、第四百十八條）; J. Y. Interpretations Nos. 384, 392, 396, 436, 442, 512, 567, and 574（司法院釋字第三八四號、第三九二號、第三九六號、第四三六號、第四四二號、第五一二號、第五六七號及第五七四號解釋）.

KEYWORDS:

detain（羈押）, interlocutory appeal（抗告）, due process（正當法律程序）, equal protection（平等保障）, the number of trial instances（審級）. **

HOLDING: The "court" provided in Article 8 of the Constitution includes a ently in accordance with laws. Article

解釋文：憲法第八條所定之法院，包括依法獨立行使審判權之法官。刑事訴訟法第四百十六條第一項第一款

* Translated by Professor Dr. Ming-Woei Chang

** Contents within frame, not part of the original text, are added for reference purposes only.

judge who makes judgments independently in accordance with laws. Article 416, Paragraph 1, Subparagraph 1, of the Criminal Procedure Code, which allows the presiding judge, commissioned judge or requisitioned judge to detain, does not contravene Article 8 of the Constitution. Articles 416, Paragraph 1, Subparagraph 1, and 418 of the Criminal Procedure Code, which only allow the detained to appeal to the court to have such measure set aside or altered, instead of making an interlocutory appeal, are reasonable restraints imposed by the legislature within the scope of its authority in order to accelerate the procedure. However, it is within the legislature's authority to determine, and hence there should be no violation of Articles 16 and 23 of the Constitution. Because an appeal to the court to have such measure set aside or altered will still be decided by an independent adjudicative court, the said Articles have already provided the detained with reasonable procedural protections, which do not conflict with the due process clause under Article 8 of the Constitution. While Articles 403, 404, Subparagraph 2, 416, Paragraph 1,

就審判長、受命法官或受託法官所為羈押處分之規定，與憲法第八條並無牴觸。刑事訴訟法第四百十六條第一項第一款及第四百十八條使羈押之被告僅得向原法院聲請撤銷或變更該處分，不得提起抗告之審級救濟，為立法機關基於訴訟迅速進行之考量所為合理之限制，未逾立法裁量之範疇，與憲法第十六條、第二十三條尚無違背。且因向原法院聲請撤銷或變更處分之救濟仍係由依法獨立行使職權之審判機關作成決定，故已賦予人身自由遭羈押處分限制者合理之程序保障，尚不違反憲法第八條之正當法律程序。至於刑事訴訟法第四百零三條、第四百零四條第二款、第四百十六條第一項第一款與第四百十八條之規定，使羈押被告之決定，得以裁定或處分之方式作成，並因而形成羈押之被告得否抗告之差別待遇，與憲法第七條保障之平等權尚無牴觸。

Subparagraph 1, and 418 of the Criminal Procedure Code differentiate the two forms in which a decision to detain the accused may be made, either by a measure of the a judge or a ruling of the court, in the right of the detained to make an interlocutory appeal, such difference does not contravene the equal protection clause of Article 7 of the Constitution.

REASONING: Article 8, Paragraph 1, of the Constitution provides: "Physical freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law ……;" and Article 8, Paragraph 2, of the Constitution provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention …… shall, within 24 hours, turn him over to a competent court for trial. The said person, or any

解釋理由書：憲法第八條第一項規定：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰」、第二項規定：「人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應……至遲於二十四小時內移送該管法院審問。本人或他人亦得聲請該管法院，於二十四小時內向逮捕之機關提審」。本院釋字第三九二號解釋闡述其意旨，認關於羈押被告之各項處分權應限由「法院」行使，乃因法院職司獨立審判，在功能組織及程序設計上適於落實憲法對人身自由之保障。該號解釋理由書進而揭示：「就審判之訴訟程序而言，法院（狹義法院）實與法官同義，均係指行使審判權之機關，兩者原則上得予相互

other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial."Our Interpretation No. 392 held that the authority to detain the accused is vested in the court because the court that renders judgments independently in accordance with laws is an appropriate procedural institution designed to protect physical freedom constitutionally. The reasoning part of the said Interpretation further stated: "In a procedural sense, a court (a court in a restrictive definition) is equated with a judge. Both of them refer to a body exercising adjudicative power and are interchangeable," and "as to matters of exercising adjudicative power, the judge is on a par with the court in most statutory provisions." As a result, the "court" provided in Article 8 of the Constitution includes a judge who exercises adjudicative powers independently in accordance with laws. Pursuant to Paragraphs 1 and 2 of Article 279 of the Criminal Procedure Code, which respectively provide: "An associate judge may be commissioned in a preliminary process to prepare for the trial of a

為替代之使用」、「關於審判權行使之事項，其所謂之法官當然即等於法院」等語。基此，憲法第八條所定之法院，自包括依法獨立行使審判權之法官。刑事訴訟法第二百七十九條第一項及第二項規定：「行合議審判之案件，為準備審判起見，得以庭員一人為受命法官，於審判期日前，使行準備程序」、「受命法官行準備程序，與法院或審判長有同一之權限」，則受命法官於準備程序中係依合議庭之授權而行使審判權，是同法第二百七十九條、第四百十六條第一項第一款有關受命法官得為關於羈押處分之規定，與憲法第八條文義相符，並無牴觸憲法之疑義。

case which should be tried by a panel of judges;" and "A judge so commissioned shall have the same power as the court or presiding judge to prepare for the trial in a preliminary process," the commissioned judge authorized by a panel of judges is entitled to exercise adjudicative power in a preliminary process. Therefore, Articles 279 and 416, Paragraph 1, Subparagraph 1, which permit a commissioned judge to detain, do comply with the context of Article 8 of the Constitution, and there is no doubt the said Articles do not conflict with the Constitution.

Both Article 416, Paragraph 1, Subparagraph 1, which provides: "A person who disagrees with one of the following measures taken by a presiding judge, commissioned judge, requisitioned judge, or public prosecutor may apply to the court to which such officer is attached to have such measure set aside or altered: 1. the measure relating to detention ……;" and Article 418, Paragraph 1, which provides: "An interlocutory appeal may not be taken against a ruling by a court upon an application pursuant to Article

刑事訴訟法第四百十六條第一項第一款規定：「對於審判長、受命法官、受託法官或檢察官所為下列處分有不服者，受處分人得聲請所屬法院撤銷或變更之：一、關於羈押……之處分」，第四百十八條第一項前段及第二項分別規定：「法院就第四百十六條之聲請所為裁定，不得抗告」、「依本編規定得提起抗告，而誤為撤銷或變更之聲請者，視為已提抗告；其得為撤銷或變更之聲請而誤為抗告者，視為已有聲請」，旨在求訴訟之迅速進行，並對直接影響人民自由之決定賦予即時救濟之

416,"and "Where an interlocutory appeal may be taken pursuant to provisions of this part and taking such an appeal was mistaken for an application for setting aside or alteration, an interlocutory appeal shall be deemed to have been taken. Where an application for setting aside or alteration may be filed and filing such an application was mistaken for an interlocutory appeal, an application for setting aside or alteration shall be deemed to have been filed," are designed to accelerate the procedure, and to provide immediate remedial opportunities for those whose freedom is directly affected. Although the said Articles prohibit the detained from seeking remedies with an appellate court, our Interpretations have repeatedly held that it is not unconstitutional for the legislative authority to restrict the availability of higher instance, considering the type, nature and purpose of the legal actions, the function of litigious systems, the efficient distribution of judicial resources and so forth, since the number of trial instances is not the core part of the right to trial (*See* Interpretations Nos. 396, 442, 512, and 574). The aforementioned Articles are

機會。其雖限制人民提起抗告之權利，惟審級制度並非訴訟權保障之核心內容，立法機關非不得衡量訴訟案件之性質、訴訟制度之功能及司法資源之有效運用等因素，決定是否予以限制，迭經本院解釋在案（本院釋字第三九六號、第四四二號、第五一二號及第五七四號解釋參照）。上開規定為立法機關基於訴訟經濟之考量所為合理之限制，未逾立法裁量之範疇，與憲法第十六條、第二十三條尚無違背。

reasonable restraints based upon legislative concerns about procedural economy and do not go beyond the legislature's authority to determine; hence there should be no violation of Articles 16 and 23 of the Constitution.

While our Interpretations held that physical freedom is an important fundamental human right, which deserves full protection, and any deprivation thereof and limitation thereon should comply with due process (*See* Interpretations Nos. 384, 436, and 567), in determining whether the related procedural rules are due and reasonable, in addition to the specific requirement provided by the Constitution and the related fundamental human right, the legislature must take into consideration the field to which the case relates, the strength and scope of fundamental right infringement, the public interests pursued, the substitute, and possible procedural costs case by case before any decision is made. According to Articles 416, Paragraph 1, Subparagraph 1, and 418 of the Criminal Procedure Code there is no remedy for a procedural measure. Based upon

本院解釋固曾宣示人身自由為重要之基本人權，應受充分之保護，對人身自由之剝奪或限制尤應遵循正當法律程序之意旨（本院釋字第三八四號、第四三六號、第五六七號解釋參照），惟相關程序規範是否正當、合理，除考量憲法有無特別規定及所涉基本權之種類外，尚須視案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為個案認定。經查刑事訴訟法第四百十六條第一項第一款及第四百十八條係在關於訴訟程序之處分不得救濟之原則，基於憲法第八條保障人身自由在權利保護上之特殊地位，例外地賦予救濟途徑，雖不得向上級法院提起，惟仍由依法獨立行使職權之審判機關作成決定，且係由審理受羈押被告之合議庭以外之另一合議庭審理，是整體而言，系爭規定業已提供羈押之被告合理之程序保障，尚不違反憲

the specific status of physical freedom in the field of human rights protection of Article 8 of the Constitution, the Criminal Procedure Code provides an exceptional remedy. Even though the detained is not allowed to appeal to an appellate court, it is reasonable to have another panel of judges, other than the detention-deciding one, review the decision as an independent adjudicative body. As a whole, the said rules have already provided the detained with reasonable procedural protections, hence there is no violation of the due process clause of Article 8 of the Constitution.

法第八條正當法律程序之要求。

Pursuant to Articles 403, 404, Subparagraph 2, 416, Paragraph 1, and 418, a decision to detain may be made either in the form of a ruling by the court or a measure by a judge, and different remedial approaches are provided respectively. A ruling may be appealed to an appellate court, while a measure may be set aside or altered by another panel of judges of the same court to which the deciding judge is attached. Whether such difference violates the equal protection clause of Article 7 of

至於刑事訴訟法第四百零三條、第四百零四條第二款及同法第四百十六條第一項第一款與第四百十八條之規定，使羈押被告之決定，得以裁定或處分之方式作成，並因而形成羈押之被告向上級法院抗告或向原所屬法院另組合議庭聲請撤銷或變更之差別待遇，是否違反憲法第七條保障之平等權而違憲之問題。按行合議審判之案件，由審判長、受命法官或受託法官一人作成之羈押決定為「處分」，其餘偵查中聲請羈押之案件，由輪值法官一人或三人，及

the Constitution, therefore, becomes a question. In a case which should be tried by a panel of judges, a decision to detain made by a presiding judge, a commissioned judge, or a requisitioned judge, is named a measure; in other cases, a decision to detain, filed by a public prosecutor during an investigative process, made by one or three on-duty judges or by a judge or a panel of three judges in the trial is called a ruling of a court. Article 416, Paragraph 1, provides a different remedial approach from an interlocutory appeal based upon the form in which the decision to detain is made. Although different approaches to remedy relate to restraint on physical freedom, while trial instances are not at the core of protection of the right to trial, having a decision to detain reviewed by the upper instance, or by another panel of judges of the same court, both of which would independently exercise adjudicative power, makes little difference in remedy. It is not necessary to adopt a more stringent way to examine. The said rules only allow the detained to apply to another panel of judges of the same court to which the deciding panel is attached to

審判中由獨任法官一人或合議庭法官三人作成之羈押決定，均屬「裁定」，是刑事訴訟法第四百十六條第一項係以決定方式之不同，作為不同救濟途徑之分類標準。系爭不同救濟制度之差別待遇固涉及限制人身自由之訴訟救濟，然因審級制度尚非訴訟權保障之核心內容，且由上級法院或原所屬法院之另一合議庭管轄羈押救濟程序，其在訴訟救濟功能上均由職司獨立審判之法院為之，實質差異亦甚為有限，故無採取較嚴格審查之必要。查系爭規定僅賦予羈押之被告向原所屬法院之另一合議庭聲請撤銷或變更，而不許向上級法院抗告，乃立法者基於訴訟經濟及維繫訴訟體系一致性之考量，目的洵屬正當。且上開分類標準暨差別待遇之手段與該目的之間亦有合理關聯。是刑事訴訟法第四百十六條第一項第一款與第四百十八條之規定，未逾越立法裁量之範疇，與憲法第七條尚無牴觸。

have such measure set aside or altered, instead of appealing to an appellate court. The legislature's goal in designing the said rules is warranted based upon its concerns to promote procedural economy and to maintain the consistence of the trial system. And the aforementioned standard to classify and the approach to differentiate reasonably relate to the purposes. As a result, Articles 416, Paragraph 1, Subparagraph 1, and 418 of the Criminal Procedure Code are within the legislature's authority to determine; hence there should be no violation of Article 7 of the Constitution.

Justice Chen-Shan Li filed concurring opinion.

Justice Tzu-Yi Lin filed concurring opinion in part and dissenting opinion in part.

本號解釋李大法官震山提出協同意見書；林大法官子儀提出部分協同、部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner was convicted of gambling. The Chiayi District Court determined that no further detention was needed since the Petitioner was still in prison serving the sentence

編者註：

事實摘要：聲請人因犯賭博案件，經嘉義地院認聲請人仍在監執行前案，尚無再予羈押之必要。嗣聲請人於前案徒刑執行完畢後，經本案之受命法官訊問，認有羈押之必要，遂予以羈

from a previously committed crime. Upon the petitioner's completion of the previous sentence, the Judge assigned to the present case, after questioning, found it necessity to detain the Petitioner and ruled accordingly.

押。

The Petitioner appealed based on the remedial measure check-marked on the writ of detention that "appeal can be filed with the court by stating reasons in writing within five days." The Tainan Branch of the Taiwan High Court vacated the ruling and remanded the case back to the Taiwan Chiayi District Court. Upon reconsideration by that court, the judge on duty, after questioning, ruled to detain the defendant and check-marked on the writ of detention "the remedial measure to contest the detention sanction" that "[the detained] may petition to the court within five days in writing to revoke or alter [the ruling]."

聲請人依押票所勾載之救濟方法「得於五日內以書狀敘述理由，向法院提出抗告」提起抗告，經臺灣高等法院臺南分院認為抗告有理由，而裁定「原裁定撤銷，發回臺灣嘉義地方法院」。案經嘉義地院重為審酌，由值班法官訊問被告，決定羈押，並於押票上勾選「不服羈押處分之救濟方法」為「得於五日內以書狀敘述理由，向法院聲請撤銷或變更」。

The Petitioner once again contested the second decision to detain and appealed to the Tainan Branch of the Taiwan High Court. However, given that the penal of

聲請人不服第二次羈押決定，再度向臺南高分院提起抗告。惟經嘉義地院合議庭作成裁定，認僅得向嘉義地院聲請撤銷或變更，雖誤為抗告，仍視為

the Chiayi District Court had ruled that the Petitioner could only petition to the Chiayi District Courtto revoke or alter the decision, the appeal, while erroneously made, should nevertheless be regarded as having raised the objection. The penal of Chiayi District Court further ruled to deny the Petitioner's motion with prejudice.

已聲明異議。嘉義地院合議庭並進而駁回聲請人之聲請，該裁定依法不得抗告。

The Petitioner argued that Article 416, Paragraph 1 and Article 418 of the Criminal Procedure Code being applied in the final ruling render the detained defendant only able to petition to the original court to revoke or alter a ruling contradict the Constitution, and filed petition for interpretation.

聲請人認上開確定終局裁定所適用之刑事訴訟法第四百十六條第一項及第四百十八條使羈押之被告僅得向原法院聲請撤銷或變更該處分，有牴觸憲法之疑義，聲請解釋。

J. Y. Interpretation No.640（April 3, 2008）*

ISSUE: May a tax collection agency impose a procedural burden on taxpayers for random audits not authorized by the statutes ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 80, Paragraph 3, first portion, of the Income Tax Law（所得稅法第八十條第三項前段）; Articles 103 and 110 of the Income Tax Law（所得稅法第一百零三條、第一百十條）; Articles 21 and 30 of the Tax Collection Act（稅捐稽徵法第二十一條及第三十條）; Outline for Simplified Tax Audits of Businesses, Cram Schools, Kindergartens and Nursery Schools promulgated by the Ministry of Finance, Bureau of Revenue, Northern District of Taiwan（財政部臺灣省北區國稅局書面審核綜合所得稅執行業務者及補習班幼稚園托兒所簡化查核要點）.

KEYWORDS:

Taxpayer（納稅義務人）, tax collection agency（稽徵機關）, income tax return（所得稅結算申報書）, paper review（書面審查）, income tax filing amount（申報所得額）, tax audit（稅務查核）, random sample（抽查）, doctrine of taxation per legislation（租稅法律主義）.**

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* Translated by Prof. Huai-Ching Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

HOLDING: Article 80, Paragraph 3, first portion of the Income Tax Law, amended and promulgated on January 29, 1963, provides that, if the income tax filing amount exceeds that for the standard income level established by the tax agency for a particular kind of business pursuant to Paragraph 2 of the abovementioned statute, said income tax filing amount is deemed an acceptable tax basis for paper review. Therefore, a tax collection agency may not issue orders for additional audit procedures to inspect the accounting books, receipts, and records of the taxpayer. On May 23, 1997, the Ministry of Finance, Bureau of Revenue, Northern District of Taiwan, issued an Outline for Simplified Tax Audits of Businesses, Cram Schools, Kindergartens and Nursery Schools. Key Point 7 of the Outline provides, "When conducting paper reviews, the tax agents may examine a random sample of ten percent of the tax returns and further audit taxpayers' bookkeeping records and receipts." This random audit of individual taxpayers whose income tax filing amount has exceeded the standard income level for a particular

解釋文：中華民國五十二年一月二十九日修正公布之所得稅法第八十條第三項前段所定，納稅義務人申報之所得額如在稽徵機關依同條第二項核定各該業所得額之標準以上者，即以其原申報額為準，係指以原申報資料作為進行書面審查所得額之基準，稽徵機關自不得逕以命令另訂查核程序，調閱帳簿、文據及有關資料，調查核定之。財政部臺灣省北區國稅局於八十六年五月二十三日訂定之財政部臺灣省北區國稅局書面審核綜合所得稅執行業務者及補習班幼稚園托兒所簡化查核要點第七點：「適用書面審查案件每年得抽查百分之十，並就其帳簿文據等有關資料查核認定之。」對申報之所得額在主管機關核定之各該業所得額之標準以上者，仍可實施抽查，再予個別查核認定，與所得稅法第八十條第三項前段規定顯不相符，增加人民法律所未規定之租稅程序上負擔，自有違憲法第十九條租稅法律主義，應自本解釋公布之日起至遲一年內失效。本院釋字第二四七號解釋應予補充。

kind of business established by the tax collection agency is contrary to Article 80, Paragraph 3, first portion, of the Income Tax Law. It imposes a procedural burden on the tax payer not authorized by the statutes and violates the doctrine of taxation per legislation mandated by Article 19 of the Constitution. Therefore, said Key Point 7 shall become null and void no later than one year from the date of publication of this Interpretation. J.Y. Interpretation No. 247 of this Court is hereby supplemented.

REASONING: Article 19 of the Constitution provides that the people shall have the duty of paying taxes in accordance with law. It means that whenever the government imposes a tax duty on the people, or provides a benefit for lessening the tax burden of the people, it shall prescribe the elements of a tax, e.g., the tax paying subject, taxable object, tax base, tax rate, method of payment, duration of payment, etc., and the collection procedures, according to the statutes. Therefore, no matter concerning a tax collection procedure shall be prescribed by administrative

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率、納稅方法、納稅期間等租稅構成要件及租稅稽徵程序，以法律定之。是有關稅捐稽徵之程序，除有法律明確授權外，不得以命令為不同規定，或逾越法律，增加人民之租稅程序上負擔，否則即有違租稅法律主義。

orders that are contrary to, or exceed the scope of laws, or increase the procedural burdens on the people, unless clearly authorized by the statutes. Otherwise, such orders will be in violation of the doctrine of taxation per legislation.

Article 80 of the Income Tax Law, amended and promulgated on January 29, 1963, provides: "The tax collection agency, after receipt of the tax returns, shall dispatch agents to investigate and to determine the taxpayer's income and taxable amount (Paragraph 1). For the above-mentioned investigation, the collection agency may, taking into account the number of taxpayers, use a random sampling method to determine the standard income level for a particular kind of business (Paragraph 2). If the taxpayer's income tax filing amount exceeds that for the standard income level, it shall be accepted as tax basis for calculation. If the filing amount falls below the standard income level, the collection agency shall conduct an individual audit (Paragraph 3)." Therefore, if the tax collection agency has established the filing amount for the

中華民國五十二年一月二十九日修正公布之所得稅法第八十條規定：「稽徵機關接到結算申報書後，應派員調查，核定其所得額及應納稅額（第一項）。前項調查，稽徵機關得視當地納稅義務人之多寡，採分業抽樣調查方法，核定各該業所得額之標準（第二項）。納稅義務人申報之所得額，如在前項規定標準以上，即以其原申報額為準，如不及前項規定標準者，應再個別調查核定之（第三項）。」是稽徵機關已依所得稅法第八十條第二項核定各該業所得額標準者，納稅義務人申報之所得額，如在上項標準以上，依同條第三項前段規定，即以其原申報額為準，旨在簡化稽徵手續，期使徵納兩便，並非謂納稅義務人申報額在標準以上者，即不負誠實申報之義務。故倘有匿報、短報或漏報等情事，仍得另依所得稅法第一百零三條、第一百十條、稅捐稽徵法第二十一條及第三十條等規定，調查課

standard income level for a particular kind of business pursuant to Article 80, Paragraph 2 of the Income Tax Law, and the taxpayer's filing amount has exceeded said standard, it shall be accepted as tax basis per the first portion of Paragraph 3. The statute's purpose is to simplify the tax collection process for the convenience of both the tax collection agency and taxpayer. However, it does not exempt the taxpayer whose income tax filing amount has exceeded the established standard from the duty of honest filing. Should deliberate concealment, deficiency, or neglect be found in the tax return, the collection agency may still conduct an investigation on this matter, and levy a fine or deficiency payment on the taxpayer pursuant to Articles 103 and 110 of the Income Tax Law, and Articles 21 and 30 of the Tax Collection Act (*Please refer to* J.Y. Interpretation No. 247).

稅資料，予以補徵或裁罰（本院釋字第二四七號解釋參照）。

The norms of collection procedure not only may affect the taxpayer's operative costs and expenses, but also may change the substance of his/her tax obligations. Therefore, the collection procedure

稅捐稽徵程序之規範，不僅可能影響納稅義務人之作業成本與費用等負擔，且足以變動人民納稅義務之內容，故有關稅捐稽徵程序，應以法律定之，如有必要授權行政機關以命令補充者，

should be prescribed by the statutes, and if a supplementary administrative order is needed, its legislative authorization must be specific and unambiguous so as to be in compliance with the doctrine of taxation per legislation mandated by Article 19 of the Constitution. Article 80, Paragraph 3, first portion, of the Income Tax Law provides that, if the income tax filing amount exceeds that for the standard income level established by the tax agency for a particular kind of business pursuant to Paragraph 2 of the abovementioned statute, said filing amount is accepted as tax basis for calculations in the paper review. Therefore, a tax collection agency may not issue orders for additional procedures to audit the accounting books, receipts, and records of the taxpayer. On May 23, 1997, the Ministry of Finance, Bureau of Revenue, Northern District of Taiwan, issued an Outline for Simplified Tax Audits Businesses, Cram Schools, Kindergartens and Nursery Schools. Key Point 7 of said Outline provides: "When conducting paper reviews, the tax agent may examine a random sample of ten percent of the tax returns and further audit

其授權之法律應具體明確，始符合憲法第十九條租稅法律主義之意旨。故所得稅法第八十條第三項前段所定，納稅義務人申報之所得額如在稽徵機關依同條第二項核定各該業所得額之標準以上者，即以其原申報額為準，係指以原申報資料作為進行書面審查所得額之基準，稽徵機關自不得逕以命令另訂查核程序，調閱帳簿、文據及有關資料，調查核定之。財政部臺灣省北區國稅局於八十六年五月二十三日訂定之財政部臺灣省北區國稅局書面審核綜合所得稅執行業務者及補習班幼稚園托兒所簡化查核要點第七點:「適用書面審查案件每年得抽查百分之十，並就其帳簿文據等有關資料查核認定之。」對申報之所得額在主管機關核定之各該業所得額之標準以上者，仍可實施抽查，再予個別查核認定，與上開所得稅法第八十條第三項前段規定顯不相符，增加人民法律所未規定之租稅程序上負擔，揆諸首揭說明，自有違憲法第十九條租稅法律主義，應自本解釋公布之日起至遲一年內失效。至另發現有匿報、漏報所得額情事，稽徵機關自得依所得稅法第一百零三條、第一百十條、稅捐稽徵法第二十一條及第三十條等規定，調查課稅資料，予以補徵或裁罰，自不待言。本院

the bookkeeping records and receipts of the taxpayer." This random audit of an individual taxpayer whose filing amount exceeds the standard income level for a particular kind of business established by the tax collection agency is contrary to the provision of Article 80, Paragraph 3, first portion, of the Income Tax Law. It imposes a procedural burden on the taxpayer that is not legislatively authorized. In light of the above reasoning, it violates the doctrine of taxation per legislation mandated by Article 19 of the Constitution. Therefore, said Key Point 7 shall become null and void no later than one year from the date of publication of this Interpretation. Should deliberate concealment, deficiency, or neglect be found in the tax return, it is obvious that the tax collection agency is empowered to investigate the matter, and to levy a fine or deficiency payment on the taxpayer, if noncompliance is found, according to Articles 103 and 110 of the Income Tax Law, and Articles 21 and 30 of the Tax Collection Act. J.Y. Interpretation No. 247 of this Court is hereby supplemented.

釋字第二四七號解釋應予補充。

To promote honesty in filing and to preserve fairness in taxation, in some cases the tax collection agency may decide that it is necessary to conduct a random audit even though the income tax filing amount meets the established standard income level for a particular kind of business. It is hereby pointed out that, if said agency wishes to do so, it should make a proposal to amend the relevant tax codes.

財稅機關如為促使納稅義務人誠實申報，維護納稅公平，認縱令申報所得額已達主管機關核定之各該業所得額標準，仍有實施抽查核定之必要時，自可檢討修正相關稅法條文予以明定，併此指明。

EDITOR'S NOTE:

Summary of facts: The National Tax Administration of Northern Taiwan Province, Ministry of Finance conducted random audit on the Petitioner's income tax return and reassessed the Petitioner's business income in accordance with Point 7 of the "Outline of Simplified Tax Auditing of Businesses, Cram Schools, Kindergartens and Nursery Schools" (hereinafter"Audit Outline") stipulated by that agency on May 23, 1997. The Petitioner contested the ruling and sought [administrative] remedy. The Supreme Administrative Court denied the request.

編者註：

事實摘要：聲請人因綜合所得稅結算申報案件，經財政部臺灣省北區國稅局，依該局八十六年五月二十三日訂定之「財政部臺灣省北區國稅局書面審核綜合所得稅執行業務者及補習班幼稚園托兒所簡化查核要點」（下稱查核要點）第七點規定，實施抽查並重行核定執行業務所得額。聲請人不服，提起救濟，經最高行政法院裁定駁回而告確定。

The Petitioner argued that Point 7 of the Audit Outline being applied by the final judgment on random auditing and reassessment of business income is inconsistent with the front paragraph of Article 80, Paragraph 3 of the Income Tax [Internal Revenue Code], amended and promulgated on January 29, 1963, which stipulates that the originally filed income shall govern when the amount being filed exceeds the assessed amount. The Petitioner believes it contradicts the principle of taxation by statutory authorization under Article 19 of the Constitution and petitioned for interpretation.

聲請人認確定終局裁定所適用行為時之查核要點第七點實施抽查並重行核定執行業務所得額與五十二年一月二十九日修正公布之所得稅法第八十條第三項前段申報所得逾核定額者以原報額為準不符，認有牴觸憲法第十九條依法納稅之疑義，聲請解釋。

J. Y. Interpretation No.641（April 18, 2008）*

ISSUE: Is the uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law unconstitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 21 of the Cigarette and Alcohol Tax Law（煙酒稅法第二十一條）.

KEYWORDS:

property right（財產權）, the proportionality principle（比例原則）, public interests（公共利益）, substantive due process（實質正義）.**

HOLDING: Article 21 of the Cigarette and Alcohol Tax Law provides that: "Rice wine sold exclusively by the Cigarette and Alcohol Public Distribution Bureau before this Law came into effect shall be sold according to the original sales price. Anyone who sells rice wine at a price higher than the original sales price shall be fined NT $2000 per bottle of rice wine sold." While legislators have taken

解釋文：菸酒稅法第二十一條規定：「本法施行前專賣之米酒，應依原專賣價格出售。超過原專賣價格出售者，應處每瓶新臺幣二千元之罰鍰。」其有關處罰方式之規定，使超過原專賣價格出售該法施行前專賣之米酒者，一律處每瓶新臺幣二千元之罰鍰，固已考量販售數量而異其處罰程度，惟採取劃一之處罰方式，於個案之處罰顯然過苛時，法律未設適當之調整機制，對人民

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purposes only.

sales quantities into consideration when they enacted different levels of penalty, the Cigarette and Alcohol Tax Law nevertheless does not provide any adjustment measure when the fine imposed upon certain individual cases in accordance with the uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law is patently severe. The heavy restriction imposed by the uniform fine provision set forth in Article 21 of the said Law on the citizen's property right guaranteed under Article 15 of the Constitution is improper and inconsistent with the proportionality principle under Article 23 of the Constitution. Therefore, the competent authority shall immediately revise the uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law and shall cease to apply the uniform fine provision one year after the announcement of this judicial interpretation.

受憲法第十五條保障之財產權所為限制，顯不符妥當性而與憲法第二十三條之比例原則尚有未符，有關機關應儘速予以修正，並至遲於本解釋公布之日起屆滿一年時停止適用。

Before the uniform fine provision at issue is revised, all of the fines imposed upon individual cases that were patently severe in accordance with the uniform fine provision set forth in Article 21 of the

系爭規定修正前，依該規定裁罰及審判而有造成個案顯然過苛處罰之虞者，應依菸酒稅法第二十一條規定之立法目的與個案實質正義之要求，斟酌出售價格、販賣數量、實際獲利情形、影

Cigarette and Alcohol Tax Law shall be modified pursuant to the legislative intent of Article 21 of the said Law and substantive due process. The competent authority shall consider the sales price, sales quantity, actual profits earned from selling rice wine at a higher price, negative impact on the market stability and other relevant factors in these individual cases for the purpose of deciding the adequate amount of fine that should be imposed in each case.

REASONING: When it is possible and necessary to differentiate levels of administrative penalty imposed upon an individual who violates obligations set forth in the administrative law, the competent authority shall impose penalty based on the seriousness of violation. To effectively enforce the law, legislators have specifically enacted different levels of penalty to punish an individual who violates obligations set forth in Article 21 of the Cigarette and Alcohol Tax Law. While legislators are not prohibited under the Constitution from enacting different levels of penalty without giving the competent

響交易秩序之程度，及個案其他相關情狀等，依本解釋意旨另為符合比例原則之適當處置，併予指明。

解釋理由書：對人民違反行政法上義務之行為處以罰鍰，其違規情節有區分輕重程度之可能與必要者，應根據違反義務情節之輕重程度為之，使責罰相當。立法者針對特別應予非難之違反行政法上義務行為，為求執法明確，以固定之方式區分違規情節之輕重並據以計算罰鍰金額，而未預留罰鍰之裁量範圍者，或非憲法所不許，惟仍應設適當之調整機制，以避免個案顯然過苛之處罰，始符合憲法第二十三條規定限制人民基本權利應遵守比例原則之意旨。

authority the discretion to decide the amount of fine imposed, legislators nonetheless shall provide adjustment measures to the competent authority pursuant to the proportionality principle under Article 23 of the Constitution to avoid imposing fines that are too severe in certain individual cases.

Ever since rice wine was sold exclusively by the Cigarette and Alcohol Public Distribution Bureau at a uniform price, it has been one of the most popular consumer goods in this country. Because cigarette and alcohol are now available on the free market and also because of the ongoing trade negotiations with the World Trade Organization, retailers and the general public have stocked up on rice wine in anticipation of price hikes and shortage of supply, resulting in market disruptions and harm to the general consumer. Article 21 of the Cigarette and Alcohol Tax Law, which was promulgated on April 19th, 2000, and came into effect on January 1, 2002, provides that: "Rice wine sold exclusively by the Cigarette and Alcohol Public Distribution Bureau before this

米酒在長期菸酒專賣、價格平穩之制度下，乃國人之大量消費品，惟歷經菸酒專賣改制與加入世界貿易組織（World Trade Organization）談判之影響，零售商與民眾預期米酒價格上漲，而國人之料理習俗與飲食習慣，一時難以更易，故坊間出現囤積爭購行為，造成市場混亂，消費者權益受損情形。中華民國八十九年四月十九日公布、九十一年一月一日施行之菸酒稅法第二十一條規定：「本法施行前專賣之米酒，應依原專賣價格出售。超過原專賣價格出售者，應處每瓶新臺幣二千元之罰鍰。」乃課人民就該法施行前專賣之米酒應依原專賣價格出售之行政法上義務，並對違反此一行政法上義務者，處以罰鍰，以維護穩定米酒價格、維持市場供需之公共利益，本質上乃為穩定米酒市場所採之經濟管制措施，揆諸專賣

Law came into effect shall be sold according to the original sales price. Anyone who sells rice wine at a price higher than the original sales price shall be fined NT $2000 per bottle of rice wine sold." The objective of Article 21 of the said Law was to prevent price hikes and maintain the rice wine supply by imposing an administrative duty on anyone who sells rice wine to sell it at the original sales price and by penalizing violators with a fine of NT $2000 per bottle of rice wine sold. Article 21 of the Cigarette and Alcohol Tax Law was an economic control measure adopted by legislators to maintain the market stability. The legislative intent of Article 21 of the said Law was legitimate in light of the shortage of rice wine and market disruptions after cigarettes and alcohol were made available on the free market. In addition, penalizing violators with a fine of NT $2000 per bottle of rice wine sold is not only an effective method to enforce the administrative duty set forth in Article 21 of the Cigarette and Alcohol Tax Law, but also a proper method to achieve the administrative objective.

改制前後，米酒短缺，市場失序，致有民眾須持戶口名簿排隊購買之情形，其立法目的洵屬正當。又罰鍰係對違反行政法上義務者施以制裁，乃督促人民履行其行政法上義務之有效方法，是該規定為達行政目的所採取處以罰鍰之手段，亦屬適合。

To determine the proper penalty for those who violate the administrative duty set forth in Article 21 of the Cigarette and Alcohol Tax Law, legislators shall take the culpability of violators, and the significance and imminence of protecting the public interests into consideration. Article 21 of the said Law provides that anyone who sells rice wine at a price higher than the original sales price shall be fined NT $2000 per bottle of rice wine sold. Except in the case of those who were qualified for exemption of penalty under the administrative law, the competent authority or court did not have any discretion to modify the penalty based on the totality of the circumstances in a given case. While the penalty prescribed in Article 21 of the Cigarette and Alcohol Tax Law was harsh, it was a necessary measure when there were no other effective methods to prevent price hikes and maintain the rice wine supply. In addition, with clear specification of the prohibitive act and the penalty of violation, Article 21 of the said Law was effective and reasonable in deterring individuals from committing the prohibited act. Nonetheless, the uniform

至於處以罰鍰之方式，於符合責罰相當之前提下，立法者得視違反行政法上義務者應受責難之程度，以及維護公共利益之重要性與急迫性等，而有其形成之空間。菸酒稅法第二十一條規定，乃以「瓶」為計算基礎，使超過原專賣價格出售該法施行前專賣之米酒者，每出售一瓶，即處以新臺幣二千元之罰鍰，受處罰者除有行政罰法減免處罰規定之適用者外，行政機關或法院並無綜合個案一切違法情狀以裁量處罰輕重之權限，立法固嚴，揆諸為平穩米酒價格及維持市場供需，其他相關法律並無與菸酒稅法第二十一條規定達成相同立法目的之有效手段，且上開規定之違法行為態樣及法律效果明確，易收遏阻不法之效，是尚屬維護公益之必要措施。但該條規定以單一標準區分違規情節之輕重並據以計算罰鍰金額，如此劃一之處罰方式，於特殊個案情形，難免無法兼顧其實質正義，尤其罰鍰金額有無限擴大之虞，可能造成個案顯然過苛之處罰，致有嚴重侵害人民財產權之不當後果，立法者就此未設適當之調整機制，其對人民受憲法第十五條保障之財產權所為限制，顯不符妥當性而有違憲法第二十三條之比例原則，有關機關應儘速予以修正，並至遲於本解釋公布之

fine provision set forth in Article 21 of the said Law has led to unfair results of excessive fines in certain individual cases, and has violated the substantive due process because there is no limit on the amount of fine. This could result in a severe penalty and thereby infringe the citizens' property right. In addition, legislators did not provide any adequate adjustment measure in Article 21 of the said Law. Specifically, there was no limit on the amount of fine that could be levied to protect the citizens' property right guaranteed under Article 15 of the Constitution. The uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law is therefore improper and inconsistent with the proportionality principle under Article 23 of the Constitution. Therefore, the competent authority shall immediately revise the uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law and shall cease to apply the uniform fine provision one year after the announcement of this judicial interpretation.

日起屆滿一年時停止適用。

Before the uniform fine provision at

系爭規定修正前，依該規定裁罰

issue is revised, all those fines imposed upon individual cases that were patently severe in accordance with the uniform fine provision set forth in Article 21 of the Cigarette and Alcohol Tax Law shall be modified pursuant to the legislative intent of Article 21 of the said Law and substantive due process. The competent authority shall consider the sales price, sales quantity, actual profits earned from selling rice wine at a higher price, negative impact on the market stability and other relevant factors in these individual cases for the purpose of deciding the adequate amount of fine that should be imposed in each case.

及審判而有造成個案顯然過苛處罰之虞者，應依菸酒稅法第二十一條規定之立法目的與個案實質正義之要求，斟酌出售價格、販賣數量、實際獲利情形、影響交易秩序之程度，及個案其他相關情狀等，依本解釋意旨另為符合比例原則之適當處置，併予指明。

Justice Chen-Shan Li filed concurring opinion, in which Justice Yu-Hsiu Hsu joined.

本號解釋李大法官震山、許大法官玉秀共同提出協同意見書。

EDITOR'S NOTE:

Summary of facts: Person A sold more than 50,000 bottles of old rice wine manufactured by the former Taiwan Tobacco and Liquor Corporation, with price originally fixed at at NT$21 per bottle, at NT$54 and NT$52 per bottle respectively,

編者註：

事實摘要：緣 A 將原專賣價格每瓶二十一元之前臺灣省菸酒公賣局所產製之舊裝米酒，分別以五十四元及五十二元價格，銷售五萬餘瓶，均已違反九十一年一月一日施行之菸酒稅法第二十一條：「本法施行前專賣之米酒，應依

and violated. Article 21 of the Cigarette and Alcohol Tax Law, effective as of January 1, 2002, which stipulates: "Rice wines sold exclusively before this Act came into effect shall be sold according to the originally fixed price. Anyone who sells more than the original fixed price shall be fined NT$2,000 for each bottle sold."

原專賣價格出售。超過原專賣價格出售者，應處每瓶新臺幣二千元之罰鍰。」之規定。

Accordingly, the Taipei National Tax Administration determined to impose fine on A. A argued that the profit generated from the sale was only about NT$1.7 million plus whereas the originally assessed fine was NT$105.6 million, and petitioned for re-examination and filed an administrative appeal, but both were denied. A then filed an action at the Taipei Administrative High Court requesting revocation of the original disposition.

案經財政部臺北市國稅局依上開規定處罰。A 認為其獲利僅約一百七十多萬元，原核定罰鍰竟為一億五百六十萬元，申請復查及提起訴願，均遭駁回；向臺北高等行政法院起訴，請求撤銷原處分。

The Third Division of the Taipei High Administrative Court believed that the disputed provision being applied may contradict the property right under Article 15 and restrictions on fundamental rights under Article 23 of the Constitution and filed petition for interpretation.

臺北高等行政法院第三庭，認所適用之系爭規定，有牴觸憲法第十五條財產權及第二十三條基本權限制之疑義，爰聲請解釋。

J. Y. Interpretation No.642（May 9, 2008）*

ISSUE: Are Article 44 of the Tax Levy Act and the related Ministry of Finance directive consistent with the Constitution ?

RELEVANT LAWS:

Articles 11 and 44 of the Tax Levy Act（稅捐稽徵法第十一條、第四十四條）; Articles 15, 19 and 23 of the Constitution（憲法第十五條、第十九條、第二十三條）; J. Y. Interpretation No. 252（司法院釋字第二五二號）; Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 841637712 (July 26, 1995)（財政部中華民國八十四年七月二十六日台財稅字第八四一六三七七一二號函）.

KEYWORDS:

Ministry of Finance（財政部）, Tax Levy Act（稅捐稽徵法）, profit-making enterprise（營利事業）, voucher（憑證）, original evidence（原始憑證）, principle of proportionality（比例原則）, right of property（財產權）, taxing authority（稽徵機關）, administrative agency（行政機關）.**

HOLDING: As prescribed in Article 44 of the Tax Levy Act, if a profit-making enterprise preserves vouchers and

解釋文：稅捐稽徵法第四十四條規定營利事業依法應保存憑證而未保存者，應就其未保存憑證經查明認定之總

* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

** Contents within frame, not part of the original text, are added for reference purposes only.

certificates as evidence according to law, yet fails to comply with the Act, it shall be liable for a fine of five (5%) percent of the total amount of the aforesaid relevant vouchers and certificates, as verified and determined. In the event that a profit-making enterprise has given or obtained vouchers, and they are duly and accurately recorded in account books, and if, prior to the completion of the administrative procedures or conclusion of relief measures, the original evidence has been furnished or equivalent evidence required to be preserved can be obtained, then such profit-making enterprise will be in accord with the legislative purpose. In such case, a business enterprise shall not be punished under the Act since the obligation of preservation of vouchers and certificates has not been violated. Within the scope of this application, the part of said Article 44 that levies a fine for the failure to preserve evidence does not contradict the principle of proportionality (*Verhältnismässigkeitsprinzip*) set out in Article 23 of the Constitution or the protection of the people's right of property stated in Article 15 thereof.

額，處百分之五罰鍰。營利事業如確已給與或取得憑證且帳簿記載明確，而於行政機關所進行之裁處或救濟程序終結前，提出原始憑證或取得與原應保存憑證相當之證明者，即已符合立法目的，而未違背保存憑證之義務，自不在該條規定處罰之列。於此範圍內，該條有關處罰未保存憑證之規定，與憲法第二十三條比例原則及第十五條保護人民財產權之意旨尚無牴觸。

As indicated in the Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 841637712 (July 26, 1995), a profit-making enterprise that fails to preserve vouchers according to law shall obtain equivalent evidence that is required to be preserved so as to be exempted from the relevant punishment provisions before a report is made to, or an investigation proceeding is initiated by the examiner of the taxing authority or the Ministry of Finance. In regards to the extent that it is inconsistent with the scope of this Interpretation in the subject case, the above Directive shall no longer be cited as of the date of this Interpretation.

財政部中華民國八十四年七月二十六日台財稅字第八四一六三七七一二號函示，營利事業未依法保存憑證，須於未經檢舉及未經稽徵機關或財政部指定之調查人員進行調查前，取得與原應保存憑證相當之證明者，始得免除相關處罰，其與本解釋意旨不符部分，自本解釋公布之日起，應不予援用。

REASONING: Article 44 of the Tax Levy Act provides: “Where a profit-making enterprise fails to give others vouchers as required by law, or fails to obtain vouchers from others, and fails to preserve documentary evidence as required, a fine in an amount equivalent to five (5%) percent of the total amount of the relevant certificates as verified and determined shall be imposed on such enterprise.” Such fine is proper and

解釋理由書：稅捐稽徵法第四十四條規定：「營利事業依法規定應給與他人憑證而未給與，應自他人取得憑證而未取得，或應保存憑證而未保存者，應就其未給與憑證、未取得憑證或未保存憑證，經查明認定之總額，處百分之五罰鍰。」係為使營利事業據實給與、取得及保存憑證，俾交易前後手稽徵資料臻於翔實，建立正確課稅憑證制度，以實現憲法第十九條之意旨（本院釋字第二五二號解釋參照），立法目的

legitimate, based upon the legislative purpose of Article 44 stated above, to compel a profit-making enterprise to give vouchers to, or obtain vouchers from, others and to preserve such vouchers as required, which will truly reflect all transactions that have taken place. This is necessary to ensure that there will be detailed and accurate documentation of such transactions to maintain the integrity of the tax voucher system so as to achieve the legislative intent as set out in Article 19 of the Constitution (*See* J.Y. Interpretation No. 252). The requirement of preservation of documentary evidence above-mentioned is to urge the people to observe the obligations as stipulated in Article 11 of the Tax Levy Act by way of imposing a fine for non-compliance. In view of the protection of the property right in Article 15 of the Constitution and the principle of proportionality (*Verhältnismässigkeitsprinzip*) in Article 23 thereof, if a profit-making enterprise has given vouchers to, or obtained vouchers from, others and duly entered the relevant data into account books, and prior to the rendering of a decision by the administrative agency or relief procedures

洵屬正當。其中有關「應保存憑證」之規定，乃在以罰鍰之方式督促人民遵守稅捐稽徵法第十一條所規定之義務。依憲法第十五條保障人民財產權及第二十三條比例原則之意旨，如營利事業確已給與或取得憑證且帳簿記載明確，而於行政機關所進行之裁處或救濟程序終結前，提出原始憑證或取得與原應保存憑證相當之證明者，即已符合上開立法目的，而未違背保存憑證之義務，自不在該條規定處罰之列。於此範圍內，上開稅捐稽徵法第四十四條規定，就有關違反應保存憑證義務之行為處以罰鍰，與憲法第十五條及第二十三條之意旨尚無牴觸。

thereof, the original evidence, or other evidence equivalent to the original required to be preserved has been provided, then the legislative purpose will be satisfied and no obligation to preserve the evidence will be violated. No fine shall therefore be imposed. As regards the extent of the explanations above, a fine imposed due to violation of the obligation to preserve vouchers in the foregoing Article 44 of the Tax Levy Act does not contradict the legislative purpose of Articles 15 and 23 of the Constitution.

As stated in the Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 841637712 (July 26, 1995), a profit-making enterprise that fails to preserve vouchers as required by law shall obtain equivalent evidence that is required to be preserved so as to be exempt from punishment; however, the deadline for obtaining equivalent evidence shall be prior to the report made to, or the investigation proceeding initiated by, the designated examiner of the taxing authority or the Ministry of Finance. Only when the above timeline is met can the punishment be waived pursuant to Article 48-1

財政部八十四年七月二十六日台財稅字第八四一六三七七一二號函示，營利事業未依法保存憑證，須於未經檢舉及未經稽徵機關或財政部指定之調查人員進行調查前，取得與原應保存憑證相當之證明者，始得依同法第四十八條之一規定免除相關處罰，此一函釋未顧及營利事業帳簿記載明確，且不涉及逃漏稅捐，而於行政機關所進行之裁處或救濟程序終結前，提出原始憑證或取得與原應保存憑證相當之證明者，應不在同法第四十四條規定處罰範圍之內，上開函釋概以未經檢舉或調查前即取得與原應保存憑證相當之證明者，始予以免

of the Tax Levy Act. The above Directive has overlooked the situation where a profit-making enterprise has kept a clear record in the account books, yet without the evasion of tax. If, prior to the rendering of a decision by the administrative agency or completion of administrative relief, the original evidence has been submitted or other vouchers equivalent to the original required to be preserved can be obtained, then it does not fall under the scope of punishment set forth in Article 44 of the Tax Levy Act. Further, the above Directive will only exempt such business enterprise that has not been reported to, or investigated by, the taxing authority or the Ministry of Finance. In regards to the extent that it is inconsistent with the scope of this Interpretation in the subject case, the above Directive shall no longer be cited as of the date of this Interpretation.

罰，其與本解釋意旨不符部分，自本解釋公布之日起，應不予援用。

Justice Yu-Hsiu Hsu filed dissenting opinion .

本號解釋許大法官玉秀提出不同意見書。

EDITOR'S NOTE:

Summary of facts: In 2005, the

編者註：

事實摘要：財政部國稅局於九十

National Tax Administration, Ministry of Finance found out that the Petitioner, Company A, failed to preserve a total of 18 accounting vouchers between May and August 2000. The total amount covered by the vouchers was more than NT$500 Million (same currency unit *infra*). A $20 Million fine was imposed.

四年間，查得聲請人 A 公司未保存八十九年五月至十月間之會計憑證共十八張，憑證上金額合計為新台幣（以下同）五億多元，處以二千多萬元罰鍰。

The Petitioner requested for re-examination, and during which time, submitted copy of the invoiceswith purchasers' verifying signatures and stamps for review, but no alteration of the ruling was granted. The Petitioner then filed an administrative action, but was finally denied by the Taipei High Administrative Court and became final.

聲請人申請復查，並於復查時提示經買受人簽章證明之發票收執聯供審核，但未獲變更；提起行政訴訟，經臺北高等行政法院駁回確定。

The Petitioner argued that the penalty for failure to preserve vouchers under Article 44 of the Tax Collection Act and the Ministry of Finance Tai Tsai Shui Tze No. 841637712 Memorandum (July 26, 1995) exempting penalties for failure to preserve vouchers apply only when [corrective action is taken] prior to being reported or investigated contradictthe

聲請人認上開裁判所適用之稅捐稽徵法第四十四條未保存憑證之處罰及財政部八十四年七月二十六日台財稅字第八四一六三七七一二號函釋未保存憑證，須於未經檢舉或調查前始免除處罰，有牴觸憲法第十五條財產權及第二十三條基本權限制規定之疑義，聲請解釋。

property right under Article 15 and restrictions on fundamental rights under Article 23 of the Constitution and filed petition for interpretation.

J. Y. Interpretation No.643（May 30, 2008）*

ISSUE: Is Article 45, Paragraph 2, of the Rules Governing Staff Members of Industrial and Commercial Organizations unconstitutional ?

RELEVANT LAWS:

The Constitution, Articles 15, 22, 23（憲法第十五條、第二十二條、第二十三條）; Commercial Organizations Act; Articles 1, 5 and 72（商業團體法第一條、第五條、第七十二條）; Rules Governing Staff Members of Industrial and Commercial Organizations, Article 45, Paragraph 2（工商團體會務工作人員管理辦法第四十五條第二項）; Constitutional Interpretation Procedure Act, Article 5, Paragraph 1, Subparagraph 2; Paragraph 3（司法院大法官審理案件法第五條第一項第二款、第二項）.

KEYWORDS:

commercial organization（商業團體）, freedom of contract（契約自由）, retirement pension（退休金）, functional orders（職權命令）.**

HOLDING: The provision of Article 45, Paragraph 2, of the Rules Governing Staff Members of Industrial and

解釋文：工商團體會務工作人員管理辦法第四十五條第二項規定：「前項退休金，應視團體財力，按服務年

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposes only.

Commercial Organizations that "the retirement pension referred to in the preceding paragraph shall be paid, depending on the financial capability of the organization, in a one-off amount equal to two-months salary of the staff member for every full year he was in service of the organization or an amount in pro rata for his service for less than one year; the maximum amount of such retirement pension is limited to an amount equal to his total salary for sixty months and is payable one-off only" is a guiding criteria of retirement pension established by the competent agency as allowable to staff members of such organizations for the purpose of strengthening the personnel structure of commercial organizations and maintaining the public interest. It does not go beyond the scope of power granted by Article 72 of the Commercial Organizations Act; nor does it impose any improper restriction on the property right or freedom of contract of the people to the extent of contradicting the purpose of Article 23 of the Constitution.

資，每滿一年發給二個月薪給之一次退休金，未滿一年部分按比例計算之；發給金額最高以不超過六十個月之薪給總額並以申領一次為限。」係主管機關為健全商業團體之人事組織，以維護公益，就會務工作人員退休金給付標準，所訂定之準則性規定，尚未逾越商業團體法第七十二條之授權範圍，對人民財產權及契約自由之限制亦未過當，與憲法第二十三條規定之意旨尚無牴觸。

Personnel management and financial

關於商業團體會務工作人員之管

operations of commercial organizations have to do with restrictions on the property right and freedom of contract of commercial organizations as well as the protection of the rights and interest of retired employees of such organizations. Because these are matters of importance to the right and obligation of the people, they should more appropriately be prescribed explicitly by law and the competent agency must conduct review and revision of the rules as early as practicable to bring into effect the purpose of safeguarding the people's right as embodied in the Constitution.

理及財務之處理，涉及商業團體財產權及契約自由之限制，且關係退休會務工作人員權益之保障，乃有關人民權利義務之重要事項，為貫徹憲法保護人民權利之意旨，自以法律明文規定為宜，主管機關應儘速通盤檢討修正，併予指明。

REASONING: The people's property rights and freedom of contract are protected by Articles 15 and 22 of the Constitution. Any restriction imposed by the State on such rights and freedom must be prescribed by law and the restriction must be conformable with the principle of proportionality in order to fulfill the purpose of Article 23 of the Constitution. Where the law grants the competent agency the authority to issue orders to supplement the law, the purpose, content

解釋理由書：人民之財產權及契約自由，為憲法第十五條及第二十二條所保障。國家對上開自由權利之限制，應以法律定之，其限制且須符合比例原則，始符憲法第二十三條規定之意旨。以法律授權主管機關發布命令為補充規定者，其授權之目的、內容及範圍固須明確，且命令之內容須未逾越授權範圍，並符合授權之目的，惟法律概括授權發布命令者，其授權是否明確，與命令是否超越授權範圍，不應拘泥於法條所用之文字，而應就該法律本身之立

and scope of the authority so granted must of course be clear and precise, and additionally the content of such orders may not go beyond the scope of the authority or contract the purpose thereof. Where the law grants a general power to issue orders, however, the issues whether the authority granted is clear and precise and whether the order has gone beyond the scope of the authority granted must be judged by taking into account the legislative purpose of the enabling law and the correlated meanings of the provisions as a whole rather than sticking rigidly to the text of the provisions. This has been repeatedly explicated in our previous interpretations.

法目的，及其整體規定之關聯意義為綜合判斷，迭經本院解釋闡明在案。

The criteria on payment of retirement pension to employees of commercial organizations were laid down by the Rules Governing Staff Members of Industrial and Commercial Organizations established by the Ministry of the Interior, the central competent agency charged with the power to supervise over all commercial organizations, on April 25, 1974 and amended on June 4, 1980, when the Commercial Organizations Act had

商業團體之中央主管機關內政部於中華民國六十三年四月二十五日訂定發布，並於六十九年六月四日修正發布之工商團體會務工作人員管理辦法，已有會務工作人員退休金給付標準之規定。當時商業團體法並無授權主管機關訂定管理辦法之規定，而係內政部為保障會務工作人員之退休權益所發布之職權命令。嗣七十一年十二月十五日修正公布之商業團體法第七十二條規定：「商業團體會務工作人員之管理及財務

incorporated in it no provision enabling the competent agency to establish such rules. The Rules were functional orders established by the Ministry of the Interior to protect the interest of retired employees of commercial organizations. Thereafter, the Commercial Organizations Act as amended on December 15, 1982 provided in Article 72 that: "Rules governing personnel management and financial operations of commercial organizations will be established by the central competent agency." Consequently, the Rules were amended by the Ministry of the Interior on June 29, 1990 (hereinafter called "Rules in dispute"), with the result that the part of the Rules in dispute with respect to commercial organizations has now become legally enabled upon addition of Article 72 to the Commercial Organizations Act.

之處理，其辦法由中央主管機關定之。」於增訂後，內政部又於七十九年六月二十九日修正發布上開管理辦法（下稱系爭管理辦法），可知商業團體法第七十二條增訂後，系爭管理辦法有關商業團體之部分已有法律授權依據。

As set forth in Article 1 of the Commercial Organizations Act, the objectives of commercial organizations include promoting domestic and foreign trade, accelerating economic development, harmonizing the relationship of persons of the same

依商業團體法第一條規定，商業團體係以推廣國內外貿易，促進經濟發展，協調同業關係，增進共同利益為宗旨。商業團體之任務，依同法第五條規定，為關於國內外商業之調查、統計及研究、發展事項等共計十三項，概括有

trade, and increasing the common interest of the trade. The functions of commercial organizations are enumerated by Article 5 of the Act to include a total of thirteen categories in connection with the investigation, statistics, research and development of domestic and international commerce in the generalized areas of economy, politics, social conditions and education, showing clearly the strong public welfare characteristics of commercial organizations. In light of the fact that staff of commercial organizations are the persons actually taking charge of the business of the organizations as assigned by the organizations, their faculty and service efficiency concern greatly the effective fulfillment of the functions of the organizations. To ensure the accomplishment of the aims of commercial organizations, Article 72 of the Commercial Organizations Act enables the competent agency to establish rules to govern the personnel management and financial operation of commercial organizations. The purpose of such enabling appears to be proper.

經濟性、政治性、社會性、教育性等四方面之功能，可知商業團體之公益色彩濃厚。而商業團體會務工作人員秉承團體之付託，實際負責會務之推動，其素質及服務效能攸關團體功能是否有效發揮至鉅。為確保商業團體任務之達成，商業團體法第七十二條乃授權由中央主管機關訂定辦法，規範會務工作人員之管理及財務之處理，其授權目的尚屬正當。

While Article 72 of the Commercial

商業團體法第七十二條僅就商業

Organizations Act grants the central competent agency only the general power to establish rules to govern the personnel management and financial operation of commercial organizations, without prescribing specifically whether the substance of personnel management and financial operation includes payment of retirement pension, the protection of the retirement benefits of the staff of such organizations should be deemed to be one of the components of the personnel management and financial operation rules established by the central competent agency by virtue of the power granted under the aforesaid article because the payment of retirement pension is not only a part of the management of the staff of commercial organizations but is also closely related with the financial operation of the organizations. Furthermore, we have noted that when the Commercial Organizations Act was being amended in 1982, the legislative body had in mind the lack of legal basis for the abovementioned criteria established by the Ministry of the Interior on payment of retirement pension to employees of commercial organizations and

團體會務工作人員之管理及財務之處理，概括授權由中央主管機關內政部訂定辦法，至於會務工作人員管理及財務處理之內容，是否包括退休金之給付，固未為具體明確之規定。惟退休金給付事務不僅涉及會務工作人員之管理，與商業團體之財務處理亦有密切關係，是保障會務工作人員退休之權益，應屬該條授權中央主管機關就會務工作人員之管理及財務處理訂定辦法之一環，且考商業團體法於七十一年修正時，立法機關為使商業團體會務工作人員退休權益能獲得保障，以提昇會務工作人員之素質及服務效能，並考量內政部上開會務工作人員退休金給付標準之規定尚無法源依據，為使其取得授權之法源依據，乃決議增訂第七十二條之規定，則有關會務工作人員退休金之給付，自為該條授權規範之事項。

had thus resolved upon the addition of Article 72 to the Act for the purpose of protecting the retirement benefits of the staff of commercial organizations to upgrade the faculty and service efficiency of such organizations and to make such criteria legally enabled. Hence the payment of retirement pension to staff of commercial organizations is a matter within the scope of authority granted by said article.

The Rules at issue provide specifically in Article 45, Paragraphs 1 and 2, with respect to the payment of retirement pension: "The retirement of staff members shall be handled in the manner prescribed below and the retiring staff shall be given a one-off retirement pension: 1. A staff member who has attained the age of sixty-five shall retire; and 2. A staff member who has worked for the organization for 25 years or more or has worked for 15 years or more and attained the age of sixty may apply for retirement;" and "The retirement pension referred to in the preceding paragraph shall be paid, depending on the financial capability of the organization, in a one-off amount equal to two-

系爭管理辦法第四十五條第一、二項規定：「會務工作人員之退休，應依左列規定辦理，並給與一次退休金：一、年滿六十五歲者，限齡退休。二、服務團體滿二十五年，或年滿六十歲且服務團體滿十五年者，得申請退休。」「前項退休金，應視團體財力，按服務年資，每滿一年發給二個月薪給之一次退休金，未滿一年部分按比例計算之；發給金額最高以不超過六十個月之薪給總額並以申領一次為限。」就會務工作人員退休金之給付詳予規定，雖對商業團體財產權及契約自由予以限制，惟該等規定係在保障會務工作人員退休後之生計安養，使其等能安心全力工作，而團體亦因此得以招募優秀之會務工作人員，健全商業團體之人事組織，以達到

months salary of the staff member for every full year he was in service of the organization or an amount in pro rata for his service for less than one year; the maximum amount of such retirement pension is limited to an amount equal to his total salary for sixty months and is payable one-off only." While the provisions impose restraints on the property rights and freedom of contract of commercial organizations, they are properly intended to safeguard the livelihood and maintenance of employees of such organizations after retirement so that the employees may work comfortably and whole-heartedly and that the organizations may thus recruit excellent staff members and strengthen their personnel structure with the aim of upgrading the faculty and service efficiency of the staff to the extent of helping the fulfillment of the missions of commercial organizations. Furthermore, where the criteria on the retirement pension set forth in the employment regulations of a commercial organization are lower than the criteria laid down by Article 45, Paragraph 2, of the Rules at issue, the competent agency, in deciding whether or not to

提昇會務工作人員之素質及服務效能之目的，進而有助於商業團體任務之達成，其規範目的洵屬正當。且若商業團體所訂服務規則之退休金給付標準低於系爭管理辦法第四十五條第二項之標準，主管機關於決定是否准予核備時，自應衡酌團體之財力，以避免商業團體無力負擔會務工作人員退休金給付之情形，而各商業團體於所訂服務規則之退休金給付標準，經主管機關核備後，自得依其所訂標準給付會務工作人員之退休金，是系爭管理辦法第四十五條第二項已顧及商業團體財力之負荷，該條項自屬準則性之規定，其對商業團體財產權與契約自由之限制應非過當，並未逾越必要之程度，與憲法第二十三條及第十五條保障人民財產權之意旨尚無牴觸。

approve such employment regulations, must of course take into account the financial conditions of the organization so as to avoid the situation where the organization is financially incapable of paying the pension, and where the criteria on the retirement pension set forth in the employment regulations of a commercial organization have been approved by the competent agency, the organization must of course pay pension to retired staff members in line with such criteria. Thus, the financial capability of commercial organizations having been taken into consideration by Article 45, Paragraph 2, of the Rules at issue, the Rules and the paragraphs thereof are indeed guideline provisions without imposing unreasonable restraint on the property right and freedom of contract of commercial organizations or going beyond the degree of necessity. The provisions are not contradictory to the purpose of safeguarding the property right of the people as contemplated by Article 23 and Article 15 of the Constitution.

Personnel management and financial operations of commercial organizations

關於商業團體會務工作人員之管理及財務之處理，涉及商業團體財產權

have to do with restrictions on the property right and freedom of contract of commercial organizations as well as the protection of the rights and interest of retired employees of such organizations. Because these are matters of importance to the right and obligation of the people, they should more appropriately be prescribed explicitly by law and the competent agency must conduct review and revision of the rules as early as practicable to bring into effect the purpose of safeguarding the people's right as embodied in the Constitution.

及契約自由之限制，且關係退休會務工作人員權益之保障，乃有關人民權利義務之重要事項，為貫徹憲法保護人民權利之意旨，自以法律明文規定為宜，主管機關應儘速通盤檢討修正，併予指明。

With respect to petitioner's further assertion that the irrevocable final judgment is contrary to Article 15 and Article 23 of the Constitution in applying Article 174-1 of the Administrative Procedure Act, it is found that statement made by the petitioner gives rise to the issue whether or not the court has erred in facts and law in such judgment rather than challenging the constitutionality of Article 174-1 of the Administrative Procedure Act. This part of the petition is found to be non-conformable with the requirement of the

至聲請人另主張確定終局判決適用行政程序法第一百七十四條之一違反憲法第十五條及第二十三條部分，核其所陳係爭執上開確定判決認事用法之當否，並未指摘行政程序法第一百七十四條之一有何牴觸憲法之處，此部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不符，依同條第三項規定，應不受理。

Constitutional Interpretation Procedure Act, Article 5, Paragraph 1, Subparagraph 2, and must therefore be dismissed in accordance with Paragraph 3 of the same article.

Justice Tzu-Yi Lin filed concurring opinion, in which Justice Feng-Zhi Peng joined.

EDITOR'S NOTE:

Summary of facts: A was employed by the Bankers Association of the Republic of China (hereinafter referred to as "BAROC") and retired in 2003. BAROC paid more than NT$1,730,000 (same currency unit *infra*) as A's retirement in accordance with its self-regulated rules. However, A asserted that he is entitled to $3,650,000 in accordance with Articles 45 and 47 of the "Regulations of Industrial and Commercial Organizations' Staff" (hereinafter "Disputed Regulations"), promulgated by the Ministry of Interior. A then brought a case before the Taiwan Taipei District Court demanding more than $1,920,000 from BARCO to make up the difference.

本號解釋林大法官子儀、彭大法官鳳至共同提出協同意見書。

編者註：

事實摘要：緣 A 受僱於中華民國銀行商業同業公會全國聯合會（下稱聯合會），於九十二年間退休，聯合會依其自訂之規則，給付退休金新臺幣（下同）一百七十三萬餘元。惟 A 主張，依內政部訂定之「工商團體會務工作人員管理辦法」（下稱系爭管理辦法）第四十五條及第四十七條規定，應可領退休金三百六十五萬餘元，遂向臺北地方法院訴請聯合會給付不足部分之退休金一百九十二萬餘元。

The Taiwan Taipei District Court and Taiwan High Court respectively denied the case. Upon appeal for the third review, the Supreme Court reversed and remanded to the Taiwan High Court. The Taiwan High Court then ruled that BAROC should pay the discrepancy amount of more than $1,330,000, and the decision was final as it was unappealable.

案經臺灣臺北地方法院、臺灣高等法院分別駁回。經再上訴第三審，最高法院判決廢棄發回臺灣高等法院。嗣臺灣高等法院判命聯合會應給付退休金差額一百三十三萬餘元，該判決因不得上訴第三審而告確定。

BAROC believed that Article 45, Paragraph 2 of the Disputed Regulations concerning the retirement pension standards as applied in the final judgment contradicts the Constitution and filed petition for interpretation.

聯合會認為確定終局判決所適用的系爭管理辦法第四十五條第二項有關會務人員退休金給付標準之規定有違憲疑義，聲請解釋。

J. Y. Interpretation No.644（June 20, 2008）*

ISSUE: Is it constitutional for the Civic Organizations Act to prohibit the establishment of associations that advocate Communism or the partition of national territory ?

RELEVANT LAWS:

Articles 14 and 23 of the Constitution of the Republic of China（中華民國憲法第十四條、第二十三條）; Article 5, Paragraph 5 of the Amendment of the Constitution of the Republic of China（中華民國憲法增修條文第五條第五項）; Articles 2 and 53 of the Civic Organizations Act（人民團體法第二條、第五十三條）; J. Y. Interpretation No. 509（司法院釋字第五０九號解釋）; Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款）.

KEYWORDS:

civic association（人民團體）, Communism（共產主義）, freedom of association（結社自由）, freedom of speech（言論自由）, the partition of national territory（分裂國土）, principle of proportionality（比例原則）. **

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* Translated and edited by Professor Andy Y. Sun, Executive Director, Asia Pacific Legal Institute, a non-profit organization chartered in Washington, D.C., and dedicated to the legal cooperation and exchange between the United States and East Asia. He is also an Associate Professor at the Graduate Institute of Intellectual Property, National Chengchi University, Taipei, Taiwan. Except as indicated otherwise, all notes are added by the translator/editor.

** Contents within frame, not part of the original text, are added for reference purposes only.

HOLDING: Article 2 of the Civic Organizations Act stipulates that: "[t]he organization and activities of a civic association shall not advocate Communism or the partition of national territory." The front portion of the first paragraph of Article 53 of the same Act provides that "no permission shall be granted …… for those applicants/civic associations that violate Article 2." This amounts to allowing the governing authority to conduct a review of the content of a person's political speech to determine whether any statement therein "advocate[s] Communism or the partition of national territory" prior to the establishment of an association, and as the ground for disapproval. This has clearly exceeded the scope of necessity and is not in conformity with the purpose of constitutional protection of people's freedom to associate and freedom of speech. Therefore, within the scope of this Interpretation, [the indicated statutory provisions] are deemed invalid as of the date this Interpretation is issued.

解釋文：人民團體法第二條規定：「人民團體之組織與活動，不得主張共產主義，或主張分裂國土。」同法第五十三條前段關於「申請設立之人民團體有違反第二條……之規定者，不予許可」之規定部分，乃使主管機關於許可設立人民團體以前，得就人民「主張共產主義，或主張分裂國土」之政治上言論之內容而為審查，並作為不予許可設立人民團體之理由，顯已逾越必要之程度，與憲法保障人民結社自由與言論自由之意旨不符，於此範圍內，應自本解釋公布之日起失其效力。

REASONING: Any person who brings forth litigation alleging his/her

解釋理由書：人民於其憲法上所保障之權利，遭受不法侵害，經依法

constitutionally protected rights having been unlawfully infringed or violated may, in accordance with Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedure Act, petition this Yuan to interpret the Constitution on the ground that the applicable laws or regulations relied upon by the court of final judgment contravene the Constitution. The scope of review by this Yuan is not limited to those [laws and/or regulations] specified in the petition, and may extend to the underlining substantive laws or regulations based on which the final judgment should be rendered. The present petition only alleges that Article 2 of the Civic Organizations Act contravenes the Constitution, among other things, whereas Article 2 states, "[t]he organization and activities of a civic association shall not advocate Communism or the partition of national territory[,]." It is a provision that concerns *actus juridicus* (a juristic or legal act), which must be applied in combination with the front portion of the first paragraph of Article 53 of the same Act, "no permission shall be granted …… for those applicants/civic

定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義，依司法院大法官審理案件法第五條第一項第二款規定，聲請本院解釋憲法時，本院審查之對象，非僅以聲請書明指者為限，且包含該確定終局裁判實質上援用為裁判基礎之法律或命令。本件聲請書僅指稱人民團體法第二條規定牴觸憲法云云，惟查人民團體法第二條：「人民團體之組織與活動，不得主張共產主義，或主張分裂國土。」係屬行為要件之規定，而同法第五十三條前段關於「申請設立之人民團體有違反第二條……之規定者，不予許可」之規定部分，始屬法律效果之規定，二者必須合併適用。最高行政法院九十年度判字第三四九號判決維持主管機關以本件聲請人申請設立政治團體，違反人民團體法第二條規定而不予許可之行政處分，實質上已適用前述同法第五十三條前段部分之規定，故應一併審理，合先敘明。

associations that violate Article 2[,]" which concerns the legal effect. Given that the judgment of the Supreme Administrative Court, (90) *pan* No. 349, which upheld the governing administrative agency's decision to deny the petitioners' application for the establishment of a political organization for violation of Article 2 of the Civic Organizations Act, in effect and in substance touches upon the application of the above stated the front portion of the first paragraph of Article 53 of the same Act, it shall be jointly reviewed [by this Interpretation].

The purpose of Article 14 of the Constitution, which grants the freedom of association, is to protect the right of the people to form associations and participate in their activities based upon mutual consent, and to ensure the sustenance of the associations, self-determination regarding their internal constitution and affairs as well as freedom to [conduct] external activities. In addition to the protection of the freedom of people to develop individual characteristics through organized formats, the freedom of

憲法第十四條規定人民有結社之自由，旨在保障人民為特定目的，以共同之意思組成團體並參與其活動之權利，並確保團體之存續、內部組織與事務之自主決定及對外活動之自由等。結社自由除保障人民得以團體之形式發展個人人格外，更有促使具公民意識之人民，組成團體以積極參與經濟、社會及政治等事務之功能。各種不同團體，對於個人、社會或民主憲政制度之意義不同，受法律保障與限制之程度亦有所差異。惟結社自由之各該保障，皆以個人自由選定目的而集結成社之設立自由為

association further encourages those with a sense of citizenry to actively participate in socio-economic and political affairs through the formation of [civic] associations. Depending upon different individual meanings, different social systems or democratic constitutional systems, organizations may be subject to different legal protections and restrictions. Yet each respective protection of the freedom of association is based upon each individual's free will to organize, and the level of restrictions considered the most severe are those designed to control and limit such freedom of association. Therefore, whether any or all such legal restrictions and grounds for approval or disapproval are proportional and in compliance with Article 23 of the Constitution shall be subject to stringent scrutiny to meet the original purpose of having a constitutionally protected freedom of association.

基礎，故其限制之程度，自以設立管制對人民結社自由之限制最為嚴重，因此相關法律之限制是否符合憲法第二十三條之比例原則，應就各項法定許可與不許可設立之理由，嚴格審查，以符憲法保障人民結社自由之本旨。

The Civic Organizations Act categorizes civic associations into occupational, social and political organizations. All of them are not-for-profit in nature with an occupational organization being formed with

人民團體法將人民團體分為職業團體、社會團體及政治團體。職業團體係以協調同業關係，增進共同利益，促進社會經濟建設為目的，由同一行業之單位、團體或同一職業之從業人員組成

work units, institutions or individuals in the same occupation for the purpose of coordinating relationships within that occupation, enhancing mutual benefit, and fostering socio-economic construction (Article 35); a social organization being formed by individuals or organizations for the purpose of promoting cultural, academic, medical-therapeutic, health, religious, philanthropic, gymnastic, benevolent, social services or other public interests (Article 39); and a political organization being formed by nationals with mutual democratic political ideas to promote the development of political will, and the enhancement of political participation (Article 44).

之團體（同法第三十五條）；社會團體係以推展文化、學術、醫療、衛生、宗教、慈善、體育、聯誼、社會服務或其他以公益為目的，由個人或團體組成之團體（同法第三十九條）；政治團體係國民以共同民主政治理念，協助形成國民政治意志，促進國民政治參與為目的而組成之團體（同法第四十四條）；性質上皆屬非營利團體。

Article 2 of the Civic Organizations Act stipulates, "[t]he organization and activities of a civic association shall not advocate Communism or the partition of national territory." The front portion of the first paragraph of Article 53 provides, "no permission shall be granted …… for those applicants/civic associations that violate Article 2." Thus, it is clear that this law may disapprove the establishment

人民團體法第二條規定：「人民團體之組織與活動，不得主張共產主義，或主張分裂國土。」同法第五十三條前段規定：「申請設立之人民團體有違反第二條……之規定者，不予許可」。由此可知該法對於非營利性人民團體之設立，得因其主張共產主義或分裂國土而不予許可。

of a not-for-profit civic association on the ground that it advocates Communism or the partition of national territory.

Freedom of expression encompasses self-fulfillment, exchange of ideas, pursuance of truth, satisfying people's right to know, and the promotion of all kinds of reasonable political and social activities, a mechanism for the normal development of a democratic and diverse society (*See* J. Y. Interpretation No. 509). Any restrictions by law on freedom of expression must meet the principle of proportionality. The use of so-called "advocating Communism or partition of national territory," each constituting a kind of political advocacy (or speech), as grounds for disapproving the establishment of a civic association amounts to bestowing on the governing authority (or agency) the power to review the content of the speech itself, which directly restricts the people's fundamental right of free speech. Article 5, Paragraph 5 of the Amendment of the Constitution of the Republic of China provides, "[a] political party shall be deemed unconstitutional in the event its

言論自由有實現自我、溝通意見、追求真理、滿足人民知的權利，形成公意，促進各種合理的政治及社會活動之功能，乃維持民主多元社會正常發展不可或缺之機制（本院釋字第五０九號解釋參照），其以法律加以限制者，自應符合比例原則之要求。所謂「主張共產主義，或主張分裂國土」原係政治主張之一種，以之為不許可設立人民團體之要件，即係賦予主管機關審查言論本身之職權，直接限制人民言論自由之基本權利。雖然憲法增修條文第五條第五項規定：「政黨之目的或其行為，危害中華民國之存在或自由民主之憲政秩序者為違憲。」惟組織政黨既無須事前許可，須俟政黨成立後發生其目的或行為危害中華民國之存在或自由民主之憲政秩序者，經憲法法庭作成解散之判決後，始得禁止，而以違反人民團體法第二條規定為不許可設立人民團體之要件，係授權主管機關於許可設立人民團體以前，先就言論之內容為實質之審查。關此，若人民團體經許可設立後發見其有此主張，依當時之事實狀態，足

goals or activities endanger the existence or the democratic constitutional order of the Republic of China." Since there is no prerequisite that the organization of a political party should seek prior approval, a political party may be disbanded only by the judgment of the Constitutional Court *after* it has been established and its goals or activities have been deemed to endanger the existence or the democratic constitutional order of the Republic of China. Conversely, disapproval based on Article 2 of the Civic Organizations Act gives the governing authority (or agency) the power to conduct substantive review of the content of such speech *before* an organization is established. As such, if it should discover that an association advocates the above-mentioned activities, and the facts [collected] at the time are sufficient, the governing authority may then revoke (which has been amended to "repeal" as of December 11, 2002) the approval in accordance with the latter portion of the first paragraph of Article 53, as amended and promulgated on January 27, 1989, to achieve the purpose of disbandment. If disapproval is rendered from the outset of

以認定其目的或行為危害中華民國之存在或自由民主之憲政秩序者，主管機關自得依中華民國七十八年一月二十七日修正公布之同法第五十三條後段規定，撤銷（九十一年十二月十一日已修正為「廢止」）其許可，而達禁止之目的；倘於申請設立人民團體之始，僅有此主張即不予許可，則無異僅因主張共產主義或分裂國土，即禁止設立人民團體，顯然逾越憲法第二十三條所定之必要範圍，與憲法保障人民結社自由與言論自由之意旨不符，前開人民團體法第二條及第五十三條前段之規定部分於此範圍內，應自本解釋公布之日起失其效力。

a petition to form a civic organization, it is not different from the prohibition of establishment of a civic association merely on the ground that it advocates Communism or partition of national territory. This has clearly exceeded the scope of necessity under Article 23 of the Constitution, and is not in conformity with the purpose of constitutional protection of people's freedom to associate and freedom of speech. Therefore, Article 2 and the front portion of the first paragraph of Article 53 of the Civic Organizations Act, as indicated above, shall be deemed invalid within the scope of this Interpretation as of the date this Interpretation is issued.

Justice Tzu-Yi Lin filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Yu-Hsiu Hsu filed concurring opinion in part and dissenting opinion in part.

本號解釋林大法官子儀提出協同意見書；許大法官宗力提出協同意見書；許大法官玉秀提出一部協同、一部不同意見書。

EDITOR'S NOTE 1 :

Summary of facts: The Petitioner, acting as representative of the initiators,

編者註 1：

事實摘要：聲請人以發起人代表身分，向臺北市政府社會局申請籌組社

files an application to the Department of Social Welfare, Taipei City Government to organize a civic organization "Taipei City Goa-Seng-Lang Association for Taiwan Independence." The Department deemed the application a political organization for the purpose of "supporting Taiwan Independence through peaceful means" and was inconsistent with Article 2 of Civic Associations Act, thus denied the application.

會團體「臺北市『外省人』臺灣獨立促進會」。該局認為係申請籌組政治團體，而以「支持以和平方式，推動臺灣獨立建國」為宗旨，與人民團體法第二條規定不符，不准其申請。

The Petitioner then sought remedies through the process but to no avail. The Petitioner then argued that Article 2 of the Civic Associations Act, as applied by the Supreme Administrative Court, which prohibits the advocacy of Communism or partition of national territory encroaches upon the freedom of speech under Article 11 of the Constitution and the freedom of association under Article 14 of the Constitution and petitioned for interpretation.

聲請人不服，循序提起救濟，均遭駁回，以最高行政法院判決所適用的人民團體法第二條規定不得主張共產主義，或主張分裂國土，侵害憲法第十一條言論自由、第十四條結社自由，爰聲請解釋。

EDITOR'S NOTE 2:

For almost 60 years, the issue of Taiwan independence (although technically the territory should extend beyond the island itself) has been highly sensitive and controversial. This issue has become

even more sensitive since the government of the Republic of China (ROC) retreated to the island and several other smaller offshore islands in 1949 as a result of its defeat in the civil war with the Chinese Communist regime. To cope with the volatile situation from within and without, the ROC government had first declared the nation had entered a "Period of Mobilization for the Suppression of the Communist Rebellion (動員戡亂時期)." Subsequently, the National Assembly (國民大會, which was effectively dissolved as of April 25, 2000) on April 18, 1948 enacted a set of provisions that temporarily "froze" certain provisions of the Constitution, thereby greatly expanding the authority of the President. Although originally intended to be in effect for only two years before "sunset," these Temporary Provisions during the Period of Mobilization for the Suppression of the Communist Rebellion (動員戡亂時期臨時條款) eventually lasted for almost 43 years in light of the ongoing conflict with the Chinese Communists and was the functional equivalent of constitutional amendments during that period.

A whole host of statutes or special laws (estimated to be around 145) were subsequently enacted by the Legislative Yuan based upon these Temporary Provisions and under the authority of a martial law-type of governing regime. One such statute is the Civic Organizations Act, which outlasted the Temporary Provisions, which were repealed when the ROC formally declared the end of the "Period of Mobilization" on April 30, 1991. Although it now exists under a new constitutional framework, the Act nevertheless has retained some of its original aspects, two of which are Article 2 and Article 53, respectively.

The present petition was filed by Mr. Shih-Meng Chen (陳師孟), a senior government official during the presidency of Chen Shui-Bien (陳水扁, not related), and an active advocate for Taiwan independence. As a member of the Democratic Progressive Party (or DPP), Mr. Shih-Meng Chen strongly opposed the policies of the ruling party at the time, the *Kuomintang* (KMT), or the Nationalist Party.

Ironically, his grandfather, Mr. Bu-lai Chen (陳布雷), was a close confidant of Generalissimo Chiang Kai-shek (蔣中正), the autocratic ruler of the KMT. He and his ancestors are considered as Mainlanders or *Wai-sheng-yen* (外省人, literally means "out-of-province people", a label for those who came to the island in or after 1949). In 1998, before he began his government service, Chen petitioned the Taipei municipal government to establish an association dubbed "Taipei *Wai-sheng-yen* for Taiwan Independence Promotion Council" (「臺北市外省人臺灣獨立促進會」). Although its charter stated the organization "supports the establishment of an independent state through peaceful means," the Taipei municipal government nevertheless denied the application on the ground that the petition violated Article 2 of the Civic Organizations Act. Having exhausted all administrative remedies, Chen petitioned the Administrative Court, but the Supreme Administrative Court affirmed the decision of the Taipei municipal government. The present petition to the Grand Justices of the Judicial Yuan then followed and was accepted.

In its previous practice, the Grand Justices either designated a specified period of time (normally one or two years) before a statutory provision or regulation that had been declared unconstitutional became invalid or did not provide any specified time frame at all in order to allow the legislature time to make revisions before any gap or vacuum may be created (*See*, for example, J. Y. Interpretation Nos. 313, 318, 321, 335, 365-367, 380, 384, 390, 392, 396, 397, 402, 423 (invalid within six months), and 491). Here, however, the effect was *immediate* and this seems to be in accord with the recent trend (*See*, for example, J. Y. Interpretation Nos. 405, 479, 499, 507, and 522). As of July 18, 2008, when the 7th Legislative Yuan completed its first session, no attempt was made to revise the provisions in question. On the other hand, the Ministry of the Interior issued a press release on the same day this Interpretation was made public indicating that it would change its existing policy and practices regarding those individuals whose application was turned down in the past simply

because of the connotation of a name, such as the "Taiwanese Communist Party," "Taiwan Independent State Party," or the like. Once the governing authority (normally the Ministry of the Interior) deems the activities of a political organization to be in violation of Article 2, however, it will file a formal petition to the Constitutional Court to request a judgment to disband that organization.

J. Y. Interpretation No.645（July 11, 2008）*

ISSUE: Is the provision set forth in the Referendum Act unconstitutional in granting the Legislative Yuan the power to propose bill of referendum? Is the provision with respect to the appointment of members of the Referendum Review Committee unconstitutional ?

RELEVANT LAWS:

The Constitution, Articles 2;17; 27, Paragraph 1, Subparagraph 4; 53; 56; 62; 63; 136; and 174, Subparagraph 2（憲法第二條、第十七條、第二十七條第一項第四款、第五十三條、第五十六條、第六十二條、第六十三條、第一百三十六條、第一百七十四條第二款）; Amendments to the Constitution, Article 3, Paragraph 2 (promulgated on July 21, 1997) 憲法增修條文第三條第二項（中華民國八十六年七月二十一日修正公布）; Article 1, Paragraph 1, Subparagraph 4 (promulgated on April 25, 2000); 第一條第二項第一款（八十九年四月二十五日修正公布）; Article 1 and Article 12 (promulgated on June 10, 2005); 第一條及第十二條（九十四年六月十日修正及增訂公布）; J.Y. Interpretations No. 520 and 342（司法院釋字第五二0號解釋、第三四二號解釋）; constitutional Interpretation Procedure Act, Article 5, Paragraph 1, Subparagraph 3（司法院大法官審理案件法第五條第一項第

* Translated by Raymond T. Chu.

** Contents within frame, not part of the original text, are added for reference purposels only.

三款）; Referendum Act, Articles 2, Paragraph 2, Subparagraphs 3 and 4; 10; Paragraphs 2 and 3; 14; Paragraphs 2 and 3; 16, Paragraph 1; 18; 31, Subparagraphs 3 and 4; 33; 34; 35, Paragraph 1; and 55, Paragraph 1（公民投票法第二條第二項第三款及第四款、第十條第二項及第三項、第十四條第二項及第三項、第十六條第一項、第十八條、第三十一條第三款及第四款、第三十三條、第三十四條、第三十五條第一項、第五十五條第一項）; Administrative Procedure Act, Article 114, Paragraph 1, Subparagraph 4（行政程序法第一百十四條第一項第四款）.

KEYWORDS:

Referendum（公民投票；複決）, Referendum Act（公民投票法）, bills of referendum（公民投票案）, Central Election Committee（中央選舉委員會）, representative democracy（代議民主）, Referendum Review Committee（公民投票審議委員會）, caucus（黨團）, check and balance of powers（權力制衡）, separation of powers（權力分立）, power to make decisions on personnel appointment（人事任免命決定權）, rights of election, recall, initiative and referendum（選舉、罷免、創制、複決權）, Legislative Yuan Sitting（立法院院會）, household registration office（戶政機關）, sponsor（提案人）, leading sponsor（領銜提案人）.**

HOLDING: 1. The provision of the Referendum Act, Article 16, Paragraph 1, that: “Where the Legislative

解釋文：一、公民投票法第十六條第一項規定：「立法院對於第二條第二項第三款之事項，認有進行公民投

Yuan considers that it is necessary to hold a referendum with respect to an issue falling under Article 2, Paragraph 2, Subparagraph 3, hereof, it may, upon a resolution adopted at the Yuan Sitting and by a letter stating the subject thereof and the reasons therefore, refer the matter to the Central Election Committee for holding a referendum." is intended to make it possible for the Legislative Yuan to submit to referendum any issue involving critical policy for which direct vote by the people is necessary so that the issue may be decided directly by the people. It is not contrary to the principle of representative democracy under our constitutional system, and is also consistent with the meaning of the Constitution that the sovereignty shall rest with the whole body of the people and that the people shall have the rights of initiative and referendum, and is not contrary to the fundamental principle of separation of powers under the Constitution.

票之必要者，得附具主文、理由書，經立法院院會通過後，交由中央選舉委員會辦理公民投票。」旨在使立法院就重大政策之爭議，而有由人民直接決定之必要者，得交付公民投票，由人民直接決定之，並不違反我國憲政體制為代議民主之原則，亦符合憲法主權在民與人民有創制、複決權之意旨；此一規定於立法院行使憲法所賦予之權限範圍內，且不違反憲法權力分立之基本原則下，與憲法尚無牴觸。

2. The Referendum Act provides in Article 35, Paragraph 1, that: "The Referendum Review Committee under the Executive Yuan shall be composed of 21

二、公民投票法第三十五條第一項規定：「行政院公民投票審議委員會，置委員二十一人，任期三年，由各政黨依立法院各黨團席次比例推荐，送

members, who shall each serve a term of three years. The members shall be recommended by all parties in proportion to the number of seats taken by each party caucus in the Legislative Yuan and appointed by the President upon nomination by the competent agency." Because the provision with respect to the appointment of such members has virtually deprived the Executive Yuan of its power to make decisions on personnel appointment under the Constitution and has obviously transgressed the limit of check and balance of powers, it is clearly contrary to the principles of separation of powers and must be made inoperative not later than one year as of the date of issuance of this Interpretation.

交主管機關提請總統任命之。」關於委員之任命，實質上完全剝奪行政院依憲法應享有之人事任命決定權，顯已逾越憲法上權力相互制衡之界限，自屬牴觸權力分立原則，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。

REASONING: Article 2 of the Constitution provides: "The sovereignty of the Republic of China rests with the whole body of citizens." According to the text of the Constitution, our Constitutional system is designed to be representative democracy. While the Constitution has undergone several amendments, it is provided in Article 53 that the Executive

解釋理由書：憲法第二條規定：「中華民國之主權屬於國民全體。」依憲法本文之設計，我國憲政體制係採代議民主，其後雖歷經多次修憲，惟憲法第五十三條規定行政院為國家最高行政機關，第六十二條、第六十三條規定，立法院為國家最高立法機關，由人民選舉之立法委員組織之，代表人民行使立法權；立法院有議決法律

Yuan is the highest administrative organ of the State as well as in Article 62 and Article 63 that the Legislative Yuan is the highest legislative organ of the State, to be constituted of legislators elected by the people to exercise legislative power on behalf of the people, and that 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 the Constitutional Amendment promulgated on July 21, 1997, Article 3, Paragraph 2, the spirit of the Constitution that the Executive Yuan shall be report to the Legislative Yuan is therein preserved so that the political structure of the representative democracy has gone no material change. The Constitution further provides in Article 17 that "the people shall have the rights of election, recall, initiative and referendum;" and in Article 136 that "the exercise of the rights of initiative and referendum shall be prescribed by law;" showing adequately that the people is allowed by explicit provision of the Constitution to

案、預算案、戒嚴案、大赦案、宣戰案、媾和案、條約案及國家其他重要事項之權。又中華民國八十六年七月二十一日修正公布之憲法增修條文第三條第二項亦維持行政院對立法院負責之精神，是代議民主之政治結構並無本質上之改變。

憲法第十七條另規定：「人民有選舉、罷免、創制及複決之權。」第一百三十六條復規定：「創制、複決兩權之行使，以法律定之。」足見憲法亦明定人民得經由創制、複決權之行使，參與國家意志之形成。在不改變我國憲政體制係採代議民主之前提下，立法機關依上開規定之意旨，制定公民投票法，提供人民對重大政策等直接表達意見之管道，以協助人民行使創制、複決權，與憲法自屬無違。

participate in the formation of the will of the State through the exercise of their rights of initiative and referendum. Where the Legislature enacts the Referendum Act in accordance with the foregoing provisions without changing the premise that our constitutional system is based on the representative democracy, providing the people with a channel to express directly their opinions on important policies and assisting the people in exercising their rights of initiative and referendum, it is certainly not contrary to the Constitution.

Because initiative and referendum are fundamental rights of the people, bills of referendum should in principle be proposed by the people. Nevertheless, the Legislative Yuan, in exercising the legislative power on behalf of the people, has the power to resolve upon important matters of the State (*See* Article 62 and Article 63 of the Constitution) and to take part in the making of decisions on the formation or change of important policies of the State (*See* J. Y. Interpretation No. 520). The provision of the Referendum Act, Article 16, Paragraph 1, that: "Where the Legislative

創制、複決權為人民之基本權利，是公民投票案以由人民提出為原則，惟立法院代表人民行使立法權，對國家重要事項有議決之權（憲法第六十二條、第六十三條參照），對國家重要政策之形成或變更亦有參與決策之權（本院釋字第五二0號解釋參照）。公民投票法第十六條第一項規定：「立法院對於第二條第二項第三款之事項，認有進行公民投票之必要者，得附具主文、理由書，經立法院院會通過後，交由中央選舉委員會辦理公民投票。」同法第三十一條第三款規定有關重大政策案經公民投票通過者，應由權責機關為

Yuan considers that it is necessary to hold a referendum with respect to an issue falling under Article 2, Paragraph 2, Subparagraph 3, hereof, it may, upon a resolution adopted by the Yuan Sitting, and by a letter stating the subject thereof and the reasons therefore, refer the matter to the Central Election Committee for holding a referendum." Article 31, Subparagraph 3, of the same Act requires that the competent authority take necessary actions to materialize the content of the bill involving major government policy passed by referendum. The purpose of the above provisions is to make it possible for the Legislative Yuan, in representing the people in the exercise of the above powers, to submit to referendum controversies involving major policies for which direct vote by the people is necessary so that such issues may be decided directly by the people, provided that it is not against the fundamental principle of separation of powers under the Constitution. It is thus not contrary to the principle of representative democracy under our constitutional system, and is also consistent with the purpose of the Constitution that the sovereignty of the nation

實現該公民投票案內容之必要處置。上開規定旨在使立法院於代表人民行使前述權限之範圍內，且不違反憲法權力分立之基本原則下，就重大政策之爭議，而有由人民直接決定之必要者，得依法交付公民投票，由人民直接決定之，並不違反我國憲政體制為代議民主之原則，亦符合憲法主權在民與人民有創制、複決權之意旨，尚難逕論公民投票法第十六條第一項之規定侵犯行政權，或導致行政、立法兩權失衡之情形。

shall rest with the whole body of the people and that the people shall have the rights of initiative and referendum. It follows that the provision of Article 16, Paragraph 1, of the Referendum Act does not constitute an encroachment upon the executive power or leads to the situation of imbalance between the executive and the legislative powers.

In conclusion, the provision of Article 16, Paragraph 1, of the Referendum Act does not conflict with the Constitution in that it has not gone beyond the scope herein defined.

In order to safeguard the rights of initiative and referendum of the people and to ensure smooth and proper implementation of referendum, the legislative body shall establish comprehensive procedural and substantive regulations with respect to referendum. It shall in particular enact statutes to prescribe clearly and precisely the substantive elements required for the presentation of a bill of referendum and the procedure of holding the vote, and also establish a fair and impartial organization

綜上所述，公民投票法第十六條第一項之規定，於本解釋意旨範圍內，與憲法尚無牴觸。

為保障人民之創制、複決權，使公民投票順利正當進行，立法機關應就公民投票有關之實體與程序規範，予以詳細規定，尤應以法律明確規定有關公民投票提案之實質要件與程序進行，並設置公正、客觀之組織，處理提案之審核，以獲得人民之信賴，而提高參與公民投票之意願。惟立法者為上開立法時，除應本於主權在民原則妥為規範外，亦當遵循權力分立原則，對於行政院應享有之人事決定權，自不得制定法律，逾越憲法上權力相互制衡之界限，

to take charge of the review of such bills so as to win the confidence of the people and to encourage the people to take part in referendum. To make such laws, however, the legislators must, in addition to making appropriate regulations on the principle of sovereignty by the people, adhere to the principle of separation of powers by refraining from making laws that go beyond the border of check and balance of powers to the extent of depriving completely the Executive Yuan of its power to make decisions on personnel management.

而完全予以剝奪。

The Referendum Act provides in Article 34: "The Executive Yuan shall cause to be organized a National Referendum Review Committee, which shall take charge of the review of the following matters: 1. To determine the issue for national referendum, and 2. To determine whether the issue proposed for referendum is a same matter under Article 33 of the Act." Thus, the National Referendum Review Committee is organized internally by the Executive Yuan as the competent authority and is responsible for specific duty and functions. The Referendum Act provides

公民投票法第三十四條規定：「行政院應設全國性公民投票審議委員會，審議下列事項：一、全國性公民投票事項之認定。二、第三十三條公民投票案是否為同一事項之認定。」是全國性公民投票審議委員會係設於主管機關行政院之內，而負有特定之職掌。復按公民投票法第十條第二項規定：「審議委員會應於收到公民投票提案後，十日內完成審核，提案不合規定者，應予駁回。」第三項規定：「前項提案經審核完成符合規定者，審議委員會應於十日內舉行聽證，確定公民投票案之提案內容。」同法第十四條第二項規定：「公

additionally in Article 10, Paragraph 2: "The National Referendum Review Committee shall complete the review of the proposal for referendum within ten days after receipt thereof, and shall reject the proposal if it is found to be non-conformable with legal requirements," and in Paragraph 3 thereof: "If the proposed bill is found upon completion of the review process to be conformable with legal requirements, the Review Committee shall hold a hearing within ten days to identify the content of bill of referendum." The Act further provides in Article 14, Paragraph 2: "In the absence of any of the circumstances enumerated in the preceding paragraph, the bill of referendum shall be referred by the competent authority to the Review Committee for determination, and said Review Committee shall notify the competent authority of the conclusion of its determination within thirty days," and Paragraph 3: "The competent authority shall dismiss the bill of referendum if it is found to be non-conformable with the legal requirements, or request in writing the household registration offices to check up the sponsors of the bill within

民投票案經審查無前項各款情事者，主管機關應將該提案送請各該審議委員會認定，該審議委員會應於三十日內將認定結果通知主管機關。」第三項規定：「公民投票案經前項審議委員會認定不合規定者，主管機關應予駁回；合於規定者應函請戶政機關於十五日內查對提案人。」同法第五十五條第一項規定：「全國性或地方性公民投票案經審議委員會否決者，領銜提案人於收到通知後三十日內，得依行政爭訟程序提起救濟。」準此，設於行政院內之全國性公民投票審議委員會，對全國性公民投票提案成立與否具有實質決定權限，對外則以行政院名義作成行政處分，行政院對於該委員會所為之決定並無審查權，領銜提案人對其決定如有不服，則循訴願及行政訴訟程序謀求救濟。

fifteen days if the bill of referendum is found to have met the legal requirements." It is also provided in Article 55, Paragraph 1, of the same Act: "Where a national or local bill of referendum is denied by the Review Committee, the leading sponsor may file an application for remedy pursuant to the administration proceeding within thirty days after receipt of the notification." Accordingly, the National Referendum Review Committee organized internally by the Executive Yuan is empowered to make actual decision on whether or not a bill of national referendum has been created and to make administrative dispositions externally in the name of the Executive Yuan, whereas Executive Yuan has no power to reexamine the decision made by the Review Committee. If the leading sponsor is dissatisfied with the decision, he may seek remedy through the channel of petition and administration action.

In light of the fact that the National Referendum Review Committee is organized inside the Executive Yuan, it is not an independent agency. Rather, it is an

全國性公民投票審議委員會之組織係置於行政院內，並非獨立之行政機關，而是在行政程序上執行特定職務之組織，屬行政程序法第一百十四條第一

organization for the performance of specific functions in administrative procedure and is thus a “committee participating in the rendering of administrative disposition” under the Administrative Procedure Act, Article 114, Paragraph1, Subparagraph. Its duty is to scrutinize individual proposal of national referendum to determine whether or not the proposal meets the legal requirements and is an issue that may be put to the people’s initiative or referendum, and the Committee plays the role of assisting the people in properly exercising the rights of initiative and referendum, which role is by nature a part of the executive power. Because the executive branch is charged with the duty of law enforcement, and enforcement of law depends on people, the executive branch should be conferred by law with the right to make decisions with respect to the actual personnel structure including staff officers and political appointees. This right of decision-making of the executive branch is a prerequisite that is indispensable for satisfactory performance of the functions of the executive power in a country of democracy that is ruled by law.

項第四款所稱「參與行政處分作成之委員會」；其職務係就個別全國性公民投票案，審議是否符合規定而屬得交由人民創制或複決之事項，具有協助人民正當行使創制複決權之功能，性質上屬行政權。因行政掌法律之執行，執行則有賴人事，是行政權依法就所屬行政機關之具體人事，不分一般事務官或政治任命之政務人員，應享有決定權，為民主法治國家行政權發揮功能所不可或缺之前提要件。該委員會既設於行政院內，並參與行政院作成行政處分之程序，故對該委員會委員之產生，行政院自應享有人事任命決定權。惟有鑑於全國性公民投票審議委員會之功能與一般行政機關須為政策之決定及執行者不同，故其委員之產生並非憲法第五十六條之規範範圍，立法院固非不得參與或以其他方式予以適當之制衡，但其制衡應有界限。

Since said Committee is organized internally inside the Executive Yuan and takes part in the procedure for rendering administrative disposition by the Executive Yuan, the Executive Yuan has undoubtedly the right to make decisions on appointment of members of the Committee. Nevertheless, in light of the fact that the functions of the National Referendum Review Committee are different from those of the ordinary administrative agencies, which is required to make decisions on and to implement policies matters, the appointment of Committee members is not a function within the scope of Article 56 of the Constitution. Hence, while the Legislative Yuan is not prohibited from taking part in the appointment of members or exerting check and balance by other appropriate means, there must be a limit on such check and balance.

The Referendum Act provides in Article 35, Paragraph 1, that: "The Referendum Review Committee under the Executive Yuan shall be composed of 21 members, who shall each serve a term of three years. The members shall be recommended

公民投票法第三十五條第一項規定：「行政院公民投票審議委員會，置委員二十一人，任期三年，由各政黨依立法院各黨團席次比例推荐，送交主管機關提請總統任命之。」關於委員之任命，由政黨依立法院各黨團席次之比例

by all parties in proportion to the number of seats taken by each party caucus in the Legislative Yuan and appointed by the President upon nomination by the competent agency." Because the right to make decisions on personnel appointment is dominated by political parties and caucuses in proportion to their respective number of seats, and the Premier has no say whatsoever to nominate candidates for the posts of members and can only involuntarily accept the nominations and presented to the President for making appointments, the provision has virtually deprived the Executive Yuan of its power of personnel appointment under the Constitution and has obviously transgressed the limit of check and balance of powers. It is of course in conflict with the principles of separation of powers and must be made inoperative not later than one year as of the date of issuance of this Interpretation.

獨占人事任命決定權，使行政院院長對於委員之人選完全無從置喙，僅能被動接受提名與送交總統任命，實質上完全剝奪行政院應享有之人事任命決定權，顯已逾越憲法上權力相互制衡之界限，自屬牴觸權力分立原則，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。

The petitioner further alleges to the effect that the procedure of deliberation by the Legislative Yuan of Article 18 of the Referendum Act involves problems of

聲請意旨又指，公民投票法第十八條於立法院之審議程序，涉及違憲部分，按立法院審議法律案，須在不牴觸憲法之範圍內，依其自行訂定之議事規

unconstitutionality. In making deliberation on a bill of law, the Legislative Yuan must do so pursuant to the rules of procedure established by itself within the scope of the Constitution. The issue of whether or not the process of deliberation of the Legislative Yuan on a bill of law that has been presented to the President for promulgation was made in pursuance of the procedure which the Legislative Yuan must follow in holding its sittings is an internal matter to be answered by itself on the principle of self-regulation of the parliamentary, rather than a matter subject to review by the authority responsible for Constitutional interpretation unless it is in clear conflict with the Constitution. This is the view we have expressed in our J. Y. Interpretation No. 342. Answer to the question whether Article 18 of the Referendum Act is against the Constitution in deliberation made by the Legislative Yuan is not clear and is pending survey. Under the current system, the power of the Constitutional interpretation authority to make survey into facts in such cases is limited, and in light of the essence of our statement above we have therefore decided not

範為之。法律案經立法院移送總統公布者，曾否踐行其議事應遵循之程序，除明顯牴觸憲法者外，乃其內部事項，屬於議會依自律原則應自行認定之範圍，並非釋憲機關審查之對象，業經本院釋字第三四二號解釋在案。公民投票法第十八條於立法院審議之程序，是否違憲，尚非明顯，有待調查，依現行體制，釋憲機關對此種事實之調查受有限制，依本院上開解釋意旨，此部分應不予解釋。

to make interpretation with respect to this part.

With regard to the petitioner's allegation that the provisions of the Referendum Act, Article 2, Paragraph 2, Subparagraph 4; and Article 31, Subparagraph 4; are against the Constitution, Article 27, Paragraph 1, Subparagraph 4; and Article 174, Subparagraph 2; and the Amendments to the Constitution promulgated on April 25, 2000 Article 1, Paragraph 2, Subparagraph 1, there is no longer a need to make interpretation and consequently this part of the petition is dismissed by reason of the explicit provision under the Amendments to the Constitution promulgated on June 10, 2005, Article 1 and Article 12 that popular vote by the people is necessary for a bill of revision of the Constitution, thereby making the issue of unconstitutionality of the Referendum Act, Article 2, Paragraph 2, Subparagraph 4; and Article 31, Subparagraph 4; no longer exists.

至聲請意旨另指公民投票法第二條第二項第四款及第三十一條第四款之規定，有違反憲法第二十七條第一項第四款、第一百七十四條第二款及八十九年四月二十五日修正公布之憲法增修條文第一條第二項第一款規定部分，因九十四年六月十日修正及增訂公布之憲法增修條文第一條、第十二條已明定，憲法修正案應經公民投票複決，故公民投票法第二條第二項第四款及第三十一條第四款之違憲疑義已不復存在，無解釋之必要，應不予受理。

Justice Yu-Hsiu Hsu filed concurring opinion in part and dissenting opinion in

本號解釋許大法官玉秀提出一部協同、一部不同意見書；彭大法官鳳至

part.

Justice Feng-Zhi Peng filed dissenting opinion in part.

提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: The Referendum Act was promulgated on December 31, 2003. [Several] Legislators jointly petitioned that:

Article 2, Paragraph 2, Section 4 and Article 31, Section 4 place the "referendum of constitutional amendments" as an item subject to the national vote.

1. Article 16 authorizes power for the the Legislative Yuan that it may submit bills for referendum by the citizens.

2. Article 35 stipulates that members of the Referendum Review Committee of the Executive Yuan shall be recommended by all political parties having caucus and in *pro rata* with the seats they occupy in the Legislative Yuan.

That the above provisions may contradict the duties of the National Assembly under Article 27, Paragraph 1, Section 4, the Executive Yuan as the highest administrative authority under Article 53,

編者註：

事實摘要：公民投票法於九十二年十二月三十一日公布，立法委員等人連署認為：第二條第二項第四款、第三十一條第四款將「憲法修正案之複決」列為全國性公民投票事項。

1. 第十六條賦予立法院得提案交付公民投票之權力。

2. 第三十五條規定行政院公民投票審議委員會的委員，由各政黨依立法院各黨團席次比例推薦等規定。

上述有牴觸憲法第二十七條第一項第四款國民大會之職權、第五十三條行政院為國家最高行政機關、第一百七十四條第二款修憲程序及憲法增修條文第三條第二項行政院對立法院負責之疑

the procedure of constitutional amendments under Article 174, Section 2 of the Constitution and the responsibility of the Executive Yuan to the Legislative Yuan under Article 3, Paragraph 2 of the Additional Articles of the Constitution, the Petitioners filed the petition for interpretation.

義，爰聲請解釋。

J. Y. Interpretation No.646（September 5, 2008）*

ISSUE: Is Article 22 of the Electronic Games Arcade Management Statute unconstitutional ?

RELEVANT LAWS:

Articles 8, 15 and 23 of the Constitution（憲法第八條、第十五條、第二十三條）； Articles 15 and 22 of the Statute on the Management of Electronic Game Arcades（電子遊戲場業管理條例第十五條、第二十二條）.

KEYWORDS:

Electronic Game Arcade（電子遊戲場）, filing a business registration（辦理營利事業登記）, property right（財產權）, principle of *de minimis non curat lex*（微罪不舉原則）, principle of proportionality（比例原則）.**

HOLDING: Article 22 of the Electronic Game Arcade Management Statute provides: "Anyone who violates Article 15 of this Statute shall be punished no more than one year of imprisonment, detention or fined no less than half of a million or no more than two million five hundred thousand New Taiwan Dollars,

解釋文：電子遊戲場業管理條例（以下簡稱本條例）第二十二條規定：「違反第十五條規定者，處行為人一年以下有期徒刑、拘役或科或併科新臺幣五十萬元以上二百五十萬元以下罰金。」對未辦理營利事業登記而經營電子遊戲場業者，科處刑罰，旨在杜絕業者規避辦理營利事業登記所需之營業分

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purposes only.

or all of the above." The purpose to impose criminal liability on those who operate an electronic arcade without petitioning a business registration is to deter arcade operators from evading official inspections on operation classifications, equipments, or facilities. It helps prevent incidents such as gambling that threaten social peace, public safety and endanger citizens, especially concerning the sound physical and mental development for children and juveniles. Given that the statutory provision in question carries a legitimate purpose and the means taken are also necessary to achieve those objectives, the provision is in compliance with the principle of proportionality set forth in Article 23 of the Constitution, and does not contradict Articles 8 and 15 of the Constitution.

級、營業機具、營業場所等項目之查驗，以事前防止諸如賭博等威脅社會安寧、公共安全與危害國民，特別是兒童及少年身心健全發展之情事，目的洵屬正當，所採取之手段對目的之達成亦屬必要，符合憲法第二十三條比例原則之意旨，與憲法第八條、第十五條規定尚無牴觸。

REASONING: Articles 8 and 15 of the Constitution explicitly provide that citizens' personal liberty and property shall be protected. Any criminal penalty imposed on personal liberty or property is always a reluctant compulsory measure having the characteristic of being the last

解釋理由書：人民身體之自由與財產權應予保障，憲法第八條及第十五條定有明文。如以刑罰予以限制者，係屬不得已之強制措施，具有最後手段之特性，自應受到嚴格之限制。如為保護合乎憲法價值之特定重要法益，且施以刑罰有助於目的之達成，又別無其他

resort, and is subject to strict limitations. If the imposition of criminal penalty is the only necessary and effective means to help protect the specific and important rights guaranteed by the Constitution, provided that the restrictions on fundamental rights by such criminal penalty is proportional to the significance of the rights the law intends to protect and the degree of the culpable act, such imposition is not disallowed (*See* J. Y. Interpretations No. 544 and No. 551). However, in determining whether to impose criminal penalty on an act of violation, it is the legislators who are better suited to take into consideration the various factors such as social environment, criminal phenomena, public mentality and criminology of a specific given time, and reflect them in the designing of the function, structure and decision-making process of the legal system. Moreover, this allows timely modification of legislative direction to meet social changes. Therefore, the judiciary should give proper deference to related legislative findings of facts and forecast as long as they are reasonable and sustainable.

相同有效達成目的而侵害較小之手段可資運用，而刑罰對基本權之限制與其所欲維護法益之重要性及行為對法益危害之程度，亦合乎比例之關係者，並非不得為之（本院釋字第五四四號、第五五一號解釋參照）。惟對違法行為是否採取刑罰制裁，涉及特定時空下之社會環境、犯罪現象、群眾心理與犯罪理論等諸多因素綜合之考量，而在功能、組織與決定程序之設計上，立法者較有能力體察該等背景因素，將其反映於法律制度中，並因應其變化而適時調整立法方向，是立法者對相關立法事實之判斷與預測如合乎事理而具可支持性，司法者應予適度尊重。

Electronic game-play is one of the many personal leisure activities, thus arcades has become a place for modern entertainment and release of stress. Other than industrial structure and economic development, because the content or episode of electronic games can easily attract attention and by their very nature there has to be win or lose in the end, the operation of electronic arcades tends to have adverse psychological effects on children and juveniles. Because children and juveniles are easy to lure away from home and hang around by electronic arcades, they often overstay in the arcades without proper parental guidance and school protection. Inevitably, they neglect their school work and waste money in playing games and likely expose themselves to become potential crime victims or illegal conducts. In addition, because electronic games are easy and cheap to play, electronic arcades also become popular gathering places for the general public, which not only impact public safety and social peace, but also often become places for drug trafficking, sex , gambling and other

電子遊戲為個人休閒活動之一，電子遊戲場乃成為現代人抒解壓力及娛樂之場所。電子遊戲場業之經營，除涉及產業結構與經濟發展外，由於電子遊戲之情節引人而具輸贏結果之特性，易使兒童及少年留連忘返，而兒童及少年長時間暴露於學校與家庭保護之外，難免荒廢學業、虛耗金錢，而有成為潛在之犯罪被害人或涉及非行之虞，又因電子遊戲之操作便利、收費平價，亦吸引一般社會大眾大量進出或留滯，一方面影響公共安全與社區安寧，另一方面往往成為媒介毒品、色情、賭博及衍生其他犯罪之場所，因此電子遊戲場業之經營，亦涉及兒童、少年保護、公共安全及社區安寧等問題。為健全電子遊戲場之秩序，使基於抒壓及娛樂之目的而進入電子遊戲場所之消費者，可分別接觸適當之個人休閒活動，不致因各該場所之疏於管理，而誤涉犯罪或成為明顯之犯罪對象，並同時兼顧公共安全與社區安寧，是我國對電子遊戲場業之管制，由來已久。初期由警政機關主管，一度採取全面禁止之管制措施，中華民國七十九年起，改由教育部負責，同年訂定發布遊藝場業輔導管理規則。由於欠缺法律位階之有效法規，主管機關僅得援

derivative crimes. Therefore, the operations of electronic arcades are also relevant to juvenile protection, public safety and social peace. This nation has a long history of regulating electronic arcades to maintain their order as well as to safeguard the public safety and social peace, so that consumers who enter electronic arcades can release stress and entertain themselves by accessing suitable electronic games for their respective needs and not be mistakenly exposed to or become obvious target of criminal activities due to the lack of arcade management. Initially the governing authority was the Police Department which for a time completely banned electronic arcades. As of 1990, the governing authority was transferred to the Ministry of Education which promulgated the Guidelines for Assisting the Management of Electronic Arcades the same year. However, because there was no effective legislative act on electronic arcades at the time, the governing authority could only invoke [provisions from] the Corporate Act, Commercial License Registration Act, Corporate Tax Act, and other relevant statutes to punish

用公司法、商業登記法、營業稅法及其他相關法規，對包括未經登記即行營業在內之違規行為加以處罰。嗣由於電子遊戲場業之經營對社會治安與善良風俗之影響甚鉅，相關弊案引發社會普遍之關注與疑慮，電子遊戲場業於八十五年間改由經濟部為主管機關，八十九年制定公布電子遊戲場業管理條例，以期透過專法導正經營，並使電子遊戲場業之經營正常化與產業化。本條例施行後，行政院曾函送修正草案至立法院，刪除刑罰規定，惟其後鑑於電子遊戲場業經營之負面影響過大，難以與一般產業同視，為加強管理乃又恢復刑罰之制裁手段。惟兩項修法草案，均未完成立法。

violations, including, among other things, operating an electronic arcade without proper business licenses. Subsequently, in light of the significant adverse impact on the society by the operations of electronic arcades, together with relevant scandals that generated wide-spread public concerns and skepticisms, the Ministry of Economic Affairs in 1996 took over the governing authority. In 2000, the Statute on the Management of Electronic Arcades was enacted in the hope to provide proper guidance on arcades management as well as the normalization and commercialization of the arcades industry. Since the implementation of this Statute, the Executive Yuan has proposed to the Legislative Yuan to repeal the criminal penalty therein. Yet in light of the electronic arcade industry's overwhelming negative impact on the society, which can hardly be equally viewed with any other industries, another bill to reinstate the criminal penalty was proposed to strengthen the management [of arcades]. However, none of the two bills have enacted into law.

Because of the unique nature of

由於電子遊戲場業性質特殊，其

electronic arcades whose operations involve issues concerning social peace, public morals, as well as the citizens' mental and physical well being, electronic games are divided into general and restrictive categories; whereas electronic arcades classified as restrictive may still provide brain-stimulating games, no persons under 18 may be admitted under the Statute. In addition, to effectively enforce the classification measures set forth in the Statute, no electronic arcade may be jointly operated under both general and restrictive licenses (*See* Article 5, Paragraphs 1 and 2 of the Statute). To achieve the objective set forth by the above-indicated managing measures, the manufacturers, importers or software designers of electronic games shall, before [their] manufacturing or importing, petition the central governing authority to review the software and to issue evaluation and classification documents; and, at the time of [manufacture] output or importation, petition to the central governing authority to inspect and issue equipment classification certified labels (*See* Article 6, Paragraph 1 of the Statute). No electronic arcades may

營業涉及社會安寧、善良風俗及國民身心健康等問題，故電子遊戲機之性質與內容，依本條例規定應區分為普通級及限制級，限制級電子遊戲場雖亦可附設益智類電子遊戲機，但未滿十八歲之人仍不得進入遊樂。且為貫徹強制分級之管理措施，普通級與限制級不得在同一場所混合經營，以應實際執行管理之需要（本條例第五條第一項及第二項規定參照）。又為達前開管理目的，故電子遊戲機之製造業、進口人或軟體設計廠商，應於製造或進口前，就其軟體，向中央主管機關申請核發評鑑分類文件；並於出廠或進口時，向中央主管機關申請查驗，合格者，發給機具類別標示證（本條例第六條第一項前段規定參照）；電子遊戲場業者不得陳列、使用未經中央主管機關評鑑分類及公告之電子遊戲機及擅自修改已評鑑分類之電子遊戲機（本條例第七條第一項規定參照）。另由於電子遊戲場業其營業場所之公共安全攸關消費者生命財產安全，故電子遊戲場業之營業場所應符合都市計畫、建築與消防法令之規定（本條例第八條規定參照）。此外，由於電子遊戲場對社會安寧會造成一定之影響，故電子遊戲場業之營業場所應距離對於環境安寧有極高要求之國民中、小學、高

display or use any game machine that has not been inspected and categorized, nor can they alter the classification labels already being inspected and categorized (*See* Article 7, Paragraph 1 of the Statute). Given that the electronic arcades' operating facilities concern the lives, properties, and safety of their consumers, such facilities shall also comply with urban planning/zoning, architecture and fire safety regulations (*See* Article 8 of the Statute). In addition, because electronic arcades necessarily impact social peace, their operating facilities shall maintain a distance of at least 50 meters from elementary, middle, high and vocational schools, as well as hospitals that all have a heightened requirement for environmental peace (*See* Article 9, Paragraph 1 of the Statute).

中、職校、醫院五十公尺以上（本條例第九條第一項規定參照）。

Article 15 of the Statute provides: "No person may engage in the operation of electronic arcade without petition for business license registration in accordance with this Statute." The so-called "petition for business registration" means both "business license certificate" and "business classification certificate" in accordance

本條例第十五條規定：「未依本條例規定辦理營利事業登記者，不得經營電子遊戲場業。」所謂「辦理營利事業登記」係兼指依本條例第十一條規定，向直轄市、縣（市）主管機關申請核發「營利事業登記證」及「營利級別證」，辦理營業級別、機具類別、營業場所管理人及營業場所地址之登記而

with Article 11 of the Statute, which requires the registrations of business classification, business equipment category, manager(s) of business operations, and business venue to the governing authority at the Special Municipality or County/City. Such registrations shall be in compliance with Articles 5, 6, 7, and 8 of the Statute. Suffice it to say that the purpose of having electronic arcades register for business licenses in accordance with Article 15 of this Statute is to safeguard social peace, public safety, and the sound mental and physical health development of citizens (especially children and juveniles) through management and control in advance.

言。而辦理營業級別、機具類別、營業場所管理人及營業場所地址之登記，應符合前述本條例第五條、第六條、第七條及第八條等之規定，足見本條例第十五條要求電子遊戲場業辦理營利事業登記，旨在透過事前管制，以達維護社會安寧、公共安全，並保護國民，特別是兒童及少年身心健全發展之目的。

Article 22 of the Statute provides: "Anyone who violates Article 15 of this Statute shall be punished no more than one year of imprisonment, detention or fined no less than half of a million or no more than two million five hundred thousand New Taiwan Dollars, or all of the above" The purpose of imposing criminal penalty on those who operates an electronic arcade without petitioning a business

本條例第二十二條進而規定：「違反第十五條規定者，處行為人一年以下有期徒刑、拘役或科或併科新臺幣五十萬元以上二百五十萬元以下罰金。」對未辦理營利事業登記而經營電子遊戲場業者，科處刑罰，其立法目的在於藉由重罰杜絕業者規避辦理營利事業登記所需之營業分級、營業機具、營業場所等項目之查驗，以事前防止諸如賭博等威脅社會安寧、公共安全與危害

registration is to deter arcade operators from evading official inspections on operation classifications, equipments, or facilities. It helps prevent incidents such as gambling that threaten social peace, public safety and endanger citizens, especially concerning the sound physical and mental development for children and juveniles. That the legal interests the Statute intends to protect conforms with the important value of the Constitution, the objective of the Statute is deemed appropriate, and the criminal penalty adopted by Article 22 is conducive to achieving the above objective. Although monetary fine may be the less intrusive control measure, in light of the fact that electronic arcades are driven by windfall profits and organized operations, it is insufficient to achieve the same degree of deterrent effect in comparison with criminal penalties that restrict the physical freedom [of individuals]. While the legislators could have discarded the preventive measure of compulsory prior registrations and imposed imprisonment or detention only when consumers suffer from actual damages by gambling and so forth, the legislative objective, as reflected

兒童及少年身心健全發展等情事，其保護之法益符合重要之憲法價值，目的洵屬正當。本條例第二十二條所採刑罰手段，有助於上開目的之達成。雖罰鍰或屬侵害較小之管制方法，惟在暴利之驅使及集團化經營之現實下，徒以罰鍰顯尚不足以達成與限制人身自由之刑罰相同之管制效果。又立法者或可捨棄以刑罰強制事前登記之預防性管制方式，遲至賭博等危害發生時再動用刑罰制裁，惟衡諸立法者藉由本條例第十五條規定所欲達成之管制目的，涉及普遍且廣大之公共利益，尤其就維護兒童及少年身心健全發展而言，一旦危害發生，對於兒童及少年個人與社會，均將造成難以回復之損害，況依內政部警政署提供之數據，自八十五年起至九十六年止，查獲無照營業之電子遊戲場所中有高達九成以上涉嫌賭博行為，另統計九十六年查緝之電子遊戲場賭博案件中，有照營業涉嫌賭博行為者，尚不及一成，而高達九成係無照營業者所犯，顯見未辦理營利事業登記與賭博等犯罪行為間確有高度關聯，故立法者為尋求對法益較周延之保護，毋待危害發生，就無照營業行為，發動刑罰制裁，應可認係在合乎事理而具有可支持性之事實基礎上所為合理之決定。是系爭刑罰手段具有必要

from Article 15 of the Statute and in light of the broad-based public interest, especially to protect the sound mental and physical development of children and juveniles, is to prevent such irreparable harm from taking place, be it to children, juveniles or the society as a whole. After all, based on the statistics of the National Police Agency of the Ministry of the Interior, between 1996 and 2007, up to 90% of police-raided unlicensed electronic arcades were engaged in illegal gambling activities. Another statistic shows that of all the gambling cases involving electronic arcades in 2007, no more than 10% were operated with licenses while more than 90% were operated without licenses. Apparently there is a probable casual connection between unlicensed electronic arcade operations and criminal activities such as illegal gambling. Therefore, in achieving the quest for more extensive protection before any harm is done, the legislators sought to impose criminal penalties on unlicensed electronic arcade operations. This decision can be viewed as both factually based and rationally rendered. The disputed

性，可資肯定。

criminal penalty measures are deemed necessary and should hereby be affirmed.

Finally, while Article 22 of the Statute may result in an electronic arcade operator who has not otherwise petitioned for a business license nevertheless incur criminal penalty even without engaging in any illegal gambling or other criminal activities, the disputed statutory provision does provide the judiciary with considerable discretion to impose different degrees of penalties based on the culpability of the crime. This, in combination with the principle of *de minimis non curat lex* laid out in Article 253 of the Criminal Procedural Law, the "suspension of prosecution" provision set forth in Article 253, Paragraph 1 of the Criminal Procedural Law, the "commutation of sentence" provision under Article 59 of the Criminal Law, and the "probation of sentences" provision under Article 74 of the Criminal Law, should be sufficient to avoid undue hardship in imposing criminal penalty. Although existing legal regime that regulates other entertainment industries similar to electronic arcade business only impose

末查依本條例第二十二條規定科處刑罰，雖可能造成未辦理營利事業登記而經營電子遊戲場業之人，即使其經營未涉及賭博或其他違法情事，亦遭刑事制裁，惟因系爭規定之法定刑已賦予法院針對行為人犯罪情節之輕重，施以不同程度處罰之裁量空間，再配合刑事訴訟法第二百五十三條微罪不舉、第二百五十三條之一緩起訴、刑法第五十九條刑之酌減及第七十四條緩刑等規定，應足以避免過苛之刑罰。又現行法對其他與電子遊戲場業性質類似之娛樂事業之管制，就未辦理營利事業登記而營業者雖有僅處行政罰者，然對行政法上義務之違反，並非謂某法律一旦採行政罰，其他法律即不問相關背景事實有無不同，均不得採刑事罰。且實務上屢發現業者為規避營利事業登記之申請及其附隨之諸多管制，不再於固定地點開設電子遊戲場，而藉由散見各處之小型便利超商或一般獨資、合夥商號作為掩護，設置機檯經營賭博，相較於其他娛樂事業，電子遊戲場業此種化整為零之經營方式，顯已增加管制之難度，並相對提升對法益之危害程度，相關機關因

administrative penalties on those who operate without petitioning for a business license, it does not mean that once a certain law imposes administrative penalty, no other laws may impose criminal penalties regardless of differences in the background facts. Also, instead of setting up a fixed location for operation, electronic arcade operators in practice are often found to use small-scale convenient stores, sole-proprietorship or partnership businesses spreading over all places as a cover to set up equipment for gambling and to avoid petitioning for business license and many restrictions that associate with it. In comparison with other entertainment businesses, this piecemeal operation strategy adopted by electronic arcade operators has apparently increased the difficulties on enforcement and relatively heightened detriment to the legal interests. Therefore, the decision of the related governing authorities to impose heavier criminal penalty has a rational basis and should be sustained. It can hardly be rushed to conclude that such limitations on fundamental rights in the disputed statutory provision is not proportional and

此決定採較重之刑事罰制裁，其判斷亦屬合乎事理，應可支持，尚難驟認系爭規定對基本權之限制，與所保護法益之重要性及行為對法益危害之程度，顯失均衡，而有違比例關係。

out of balance with the significance of legal interests intended to be protected and the level of detriment caused by the [illegal] act.

In sum, the criminal penalty provision concerning those who operate an electronic arcade without business license and registration under Article 22 of the Statute is in compliance with the principle of proportionality set forth under Article 23 of the Constitution, and does not contradict Articles 8 and 15 of the Constitution.

綜上，本條例第二十二條有關未辦理營利事業登記而經營電子遊戲場業者科處刑罰之規定，符合憲法第二十三條比例原則之意旨，與憲法第八條、第十五條規定尚無牴觸。

Justice Yu-Hsiu Hsu filed dissenting opinion.

Justice Tzu-Yi Lin filed dissenting opinion, in which Justice Chen-Shan Li joined.

本號解釋許大法官玉秀提出不同意見書；林大法官子儀、李大法官震山共同提出不同意見書。

EDITOR'S NOTE:

Summary of facts: This Petition was filed by a judge. In reviewing two cases involving the violation of the Electronic Game Arcade Management Statue (hereinafter referred to as "the Statue"), the two defendants were proprietors of a

編者註：

事實摘要：本件聲請係由法官所提出。聲請人對所審理的二件違反電子遊戲場業管理條例（以下稱本條例）案件，被告等分係超商及冷飲店負責人，均未依本條例第十五條規定辦理「電子遊戲場業」營利事業登記，逕於超商及

convenient store and beverage business, respectively. Both installed electronic arcade equipment in their stores and ran the business without undertaking electronic arcade business registration in accordance with Article 15 of the Statue. After being discovered by random police inspections, the machines and the coins therein were seized and the defendants were indicted by the prosecutor.

冷飲店內擺設電子遊戲機，經營電子遊戲場業。嗣為警察臨檢查獲，查扣機台及機台內之硬幣，並經檢察官起訴。

Article 22 of the Statue stipulates: Violator of Article 15 shall be penalized with no more than one year of imprisonment, detention, or with a fine, or concurrently with a fine of no less than NT$ 500,000 and no more than NT$2,500,000.

本條例第二十二條規定：違反第十五條規定者，處行為人一年以下有期徒刑、拘役或科或併科新臺幣五十萬元以上二百五十萬元以下罰金。

While the Petitioner believed that the defendants in the above two cases did committee the crimes under Articles 15 and 22 of the Statue, Article 22, however, is suspicious of having contradicted the Constitution, thus filed the petition for interpretation.

聲請人審理結果，認為上開二案之被告等固涉有違反本條例第十五條、第二十二條之罪嫌，然因本條例第二十二條規定有違憲疑義，爰聲請解釋。

J. Y. Interpretation No.647（October 9, 2008）*

ISSUE: Does the provision of Article 20 of the Estate and Gift Tax Law limiting the application of tax exemption only to gifts between husband and wife constitute a violation of the principle of equality guaranteed by Article 7 of the Constitution ?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 19 of the Constitution（憲法第十九條）; Article 20, paragraph 1, subparagraph 6 of the Estate and Gift Tax Law（遺產及贈與稅法第二十條第一項第六款）; J.Y. Interpretation No.565 and No.635（司法院釋字第五六五號及第六三五號解釋）.

KEYWORDS:

inter-spousal gift（配偶間相互贈與）, gift tax exemption（免徵贈與稅）, legal marriage（法律上婚姻關係）, monogamous marriage（一夫一妻之婚姻制度）, discrimination（差別待遇）, principle of equality（平等原則）.**

HOLDING: Article 20, paragraph 1, subparagraph 6, of the Estate and Gift Tax Law providing that property given as a gift by and between husband and wife does not count in the total gift amount is a

解釋文：遺產及贈與稅法第二十條第一項第六款規定，配偶相互贈與之財產不計入贈與總額，乃係對有法律上婚姻關係之配偶間相互贈與，免徵贈與稅之規定。至因欠缺婚姻之法定要件，

* Translated by Prof. Huai-Ching Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

provision of tax exemption for mutual gifts between persons having a legal marriage. Companions of opposite-sex who, due to deficiency in meeting legal requirements, have not formed a legal marriage are not entitled to the same tax treatment. Since the above-mentioned provision is designed to preserve legally formed marital relation, the purpose is legitimate and the method used is helpful to maintaining marriage institution, it cannot be said to have violated the principle of equality guaranteed by Article 7 of the Constitution.

而未成立法律上婚姻關係之異性伴侶未能享有相同之待遇，係因首揭規定為維護法律上婚姻關係之考量，目的正當，手段並有助於婚姻制度之維護，自難認與憲法第七條之平等原則有違。

REASONING: The principle of equality declared by Article 7 of the Constitution is not an absolute, mechanic equality in form. In stead, it is designed to guarantee equality in substance for the people in their the legal standing. Article 19 of the Constitution provides that the people shall have the duty to pay tax according to the law. However, if the law makes an exception or a special provision to lessen or to relieve certain persons from tax burden when specified conditions are met, and the discrimination has a

解釋理由書：憲法第七條揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等。人民有依法律納稅之義務，憲法第十九條定有明文。法律如設例外或特別規定，在一定條件下減輕或免除人民租稅之負擔，而其差別待遇具有正當理由，即與平等原則無違（本院釋字第五六五號、第六三五號解釋參照）。

legitimate cause, it does not violate the principle of equality (*See* J.Y. Interpretation No. 565 and No. 635).

Article 20, paragraph1, subparagraph 6, of the Estate and Gift Tax Law providing that property given as a gift by and between husband and wife does not count in the total gift amount is a provision of tax exemption for mutual gifts between persons having a legal marriage. Becuse the classification is based on the existence of a legally formed marital relation, the gift tax exemption is a discriminatory tax treatment. In view of the fact that gift tax collection involves redistribution of the nation's financial resources, and is closely related to the promotion of public interests and the implementation of national policy, the Legislature does have more discretion in shaping the content of this subject matter. Therefore, if the provision at issue has a legitimate purpose, and the criteria for classification and the discriminatory method used also bear a rational relation to this purpose, it is consistent with the principle of equality.

遺產及贈與稅法第二十條第一項第六款規定，配偶相互贈與之財產不計入贈與總額，乃係對有法律上婚姻關係之配偶間相互贈與，免徵贈與稅之規定，雖以法律上婚姻關係存在與否為分類標準，惟因屬免徵贈與稅之差別待遇，且考量贈與稅之課徵，涉及國家財政資源之分配，與公共利益之維護及國家政策之推動緊密相關，立法機關就其內容之形成本即享有較大之裁量空間，是倘系爭規定所追求之目的正當，且分類標準與差別待遇之手段與目的間具有合理關聯，即符合平等原則之要求。

The disputed provision for tax exemption for transfer of property rights between husband and wife is a policy that the Legislature has deliberately made in light of the difficulty in distinctively separating the commingled spousal properties necessary for the livelihood of the family. The law is designed to preserve the marriage institution, and the purpose is a legitimate one. Where a married person who conjugated with a third party outside the wedlock, even with a subjective intent to live together with such third party like a married couple and the objective fact of having cohabited and shared the livelihood for a long time, he/she has violated the monogamous marriage and jeopardize the economic interests of his/her spouse. Therefore, the provision at issue is not an arbitrary statute enacted by the Legislature. Since it has a rational relation to the maintenance of marriage institution, it does not contradict the equality principle of Article 7 of the Constitution.

查系爭規定就配偶間財產權之移轉免徵贈與稅，係立法者考量夫妻共同生活，在共同家計下彼此財產難以清楚劃分等現實情況，基於對婚姻制度之保護所訂定，目的洵屬正當。復查有配偶之人於婚姻關係外與第三人之結合，即使主觀上具有如婚姻之共同生活意思，客觀上亦有長期共同生活與共同家計之事實，但既已違背一夫一妻之婚姻制度，甚或影響配偶之經濟利益，則系爭規定之差別待遇，自非立法者之恣意，因與維護婚姻制度目的之達成有合理關聯，故與憲法第七條之平等權保障並無牴觸。

Although those unmarried companions of opposite sex with a subjective intent to live together like a married couple

至於無配偶之人相互間主觀上具有如婚姻之共同生活意思，客觀上亦有共同生活事實之異性伴侶，雖不具法律

and the objective fact of cohabitation do not have a matrimonial relation in law, the relationship between them is very much similar to the relationship of legally married husband and wife, and the provision at issue, which does not provide for gift tax exemption for mutual gifts between such companions, would seem susceptible to a doubt of violating the principle of equality provided that there is in addition a fact of longtime sharing of the livelihood between such couples. However, the Legislature has prescribed registration and monogamy requirements as conditions for the validity of a marriage. The purpose is to strengthen the effect of public notice, to preserve ethics and social order, and to promote public interest. This is constitutionally legitimate. Although the provision at issue exempts gift tax only for legally married couples, yet this is for consideration of preserving marriage institution. The purpose is legitimate and the method used is helpful to maintaining marriage institution. It cannot be said that the act has contradicted the principle of equality. As for those cohabited companions with similarity to a legal marriage,

上婚姻關係，但既與法律上婚姻關係之配偶極為相似，如亦有長期共同家計之事實，則系爭規定未就二人相互間之贈與免徵贈與稅，即不免有違反平等權保障之疑慮。惟查立法機關就婚姻關係之有效成立，訂定登記、一夫一妻等要件，旨在強化婚姻之公示效果，並維持倫理關係、社會秩序以及增進公共利益，有其憲法上之正當性。基此，系爭規定固僅就具法律上婚姻關係之配偶，其相互間之贈與免徵贈與稅，惟係為維護法律上婚姻關係之考量，目的正當，手段並有助於婚姻制度之維護，自難認與平等原則有違。至鑒於上開伴侶與具法律上婚姻關係之配偶間之相似性，立法機關自得本於憲法保障人民基本權利之意旨，斟酌社會之變遷及文化之發展等情，在無損於婚姻制度或其他相關公益之前提下，分別情形給予適度之法律保障，併此指明。

the Legislature may, taking into considerations the constitutional protection of fundamental rights of the people as well as changes in the social condition and cultural development, give them adequate legal protection to the extent not disparaging marriage institution and other public interests. It is so pointed out apropos.

EDITOR'S NOTE:

Summary of facts: The Petitioner transferred all of his securities to A, his co-habitant. However, no payment was made from A's bank account as consideration during the same period. The Taipei National Tax Administration, Ministry of Finance, determined that such transfer constitutes gift and imposed fines in additional to levied gift tax. The Petitioner contested filed for reexamination, appeal, and administrative litigation.

The Supreme Administrative Court held that since there was no marital relationship between the parties, the transfer was neither a mutual gift between couples under Article 20 of the Estate and Gift Tax Act nor a gift within the second-degree

編者註：

事實摘要：聲請人將其所有股票，移轉予同居人 A，惟同時期 A 之銀行帳戶未有支付聲請人相對款項之情形。財政部臺北市國稅局認為聲請人上開移轉應屬贈與，除補徵贈與稅外並處罰鍰，聲請人不服，循序提起復查、訴願、行政訴訟。

最高行政法院判決，以渠等既無婚姻關係，即非遺產及贈與稅法第二十條所稱配偶間相互贈與或同法第五條第六款所定二親等以內親屬之贈與，駁回聲請人之上訴。

kinship under Article 5, Section 6 of the same Act. The Petitioner's appeal was denied.

The Petitioner thus argued that Article 20, Paragraph 1, Section 6 of the Estate and Gift Tax Act, which does not provide equal treatment between *de facto* and *de jure* married spouses and as applied by the Supreme Administrative Court in its decision, contradicts the principle of equality under Article 7, the principle of statutory taxation under Article 19 of the Constitution, and also encroaches on the Petitioner's property right under Article 15 of the Constitution, and filed the petition for interpretation.

聲請人因而主張上開最高行政法院判決，所適用之遺產及贈與稅法第二十條第一項第六款，未賦予事實上夫妻與法律上配偶相同之待遇，有牴觸憲法第七條平等原則及第十九條租稅法律主義之疑義，並侵害聲請人憲法第十五條所保障之財產權，聲請解釋。

J. Y. Interpretation No.648（October 24, 2008）*

ISSUE: Is Article 15, Paragraph 1, of the Rules Governing Import and Export Goods Inspection in contravention of the Constitution ?

RELEVANT LAWS:

Articles 7 and 15 of the Constitution（憲法第七條與第十五條）; Articles 4 and 37 of the Customs Smuggling Control Act（海關緝私條例第四條與第三十七條）; Article 3, Paragraph 1; Article 4; Article 16, Paragraph 1; Article 17, Paragraphs 5 and 6; and Article 23, Paragraph1, of the Customs Act（關稅法第三條第一項、第四條、第十六條第一項、第十七條第五項與第六項、第二十三條第一項）; Article 23, Paragraph 2, of the Customs Act (as amended and renumbered on May 5, 2004 from Article 19, Paragraph 2. of the Customs Act, as amended on October 31, 2001)（關稅法第二十三條第一項與第二項）（中華民國九十年十月三十一日修正公布之關稅法為第十九條第二項，嗣於九十三年五月五日修正公布為第二十三條第二項）; Article 15, Paragraph 1, of the Rules Governing Imported and Exported Goods Inspection（進出口貨物查驗準則第十五條第一項）; Article 7, Paragraph 1, of the Administrative Sanction Act（行政罰法第七條第一項）.

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* Translated by Professor Chun-Jen Chen.

** Contents within frame, not part of the original text, are added for reference purposes only.

KEYWORDS:

customs duty（關稅）, Customs Office（海關）, import（進口）, importer（進口人）, inspection（查驗）, declaration（申報）, consignor/shipper（發貨人）, over shipment（溢裝）, mis-loaded and mis-shipped（誤裝錯運）, competent agency（主管機關）, administrative sanction（行政罰）, international trade（國際貿易）, international trade customs（國際貿易習慣）, relevance（關聯性）, in contravention of（牴觸）, differential treatment（差別待遇）, principle of equality（平等原則）.**

HOLDING: The first sentence of Article 15, Paragraph 1, of the Rules Governing Import and Export Goods Inspection prescribes that, "Unless the importer satisfies the burden of proof to show that in the case of over-shipment of goods or the goods landed are different from those declared or are mixed with other undeclared articles, the mistake is due to the fact that there are two or more shipments made by the one and the same shipper who has mistakenly loaded and shipped the goods and such fact is verified to be true by the Customs Office, and the shipments may be consolidated and exempted

解釋文：進出口貨物查驗準則第十五條第一項前段規定：「進口貨物如有溢裝，或實到貨物與原申報不符，或夾雜其他物品進口情事，除係出於同一發貨人發貨兩批以上，互相誤裝錯運，經舉證證明，並經海關查明屬實者，准予併案處理，免予議處外，應依海關緝私條例有關規定論處。」限定同一發貨人發貨兩批以上之互相誤裝錯運，其進口人始得併案處理免予議處，至於不同發貨人發貨兩批以上之互相誤裝錯運，其進口人應依海關緝私條例有關規定論處，尚未違背憲法第七條平等原則。

from administrative sanctions, the importer shall be subject to punishment under the Customs Smuggling Control Act." Hence, the consolidation and the exemption are available only to the importer who can prove that the mistaken shipments take place due to one and the same consignor who has mis-loaded and mis-shipped two or more batches of goods. When the mistaken shipments take place due to different consignors who have mis-loaded and mis-shipped two or more batches of goods, the importer shall be subject to the punishment under the Customs Smuggling Control Act. The foregoing regulation is not in contravention of the constitutional mandate of the principle of equality under Article 7 of the Constitution.

REASONING: One who imports goods from abroad shall comply with the Customs Act and relevant rules promulgated *thereunder* and shall file a declaration with the Customs Office, which shall levy the customs duty in accordance with the Customs Import Tariff. (*See* Article 4 of the Customs Smuggling Control Act,

解釋理由書：自國外進口貨物者，其報運貨物進口，須依關稅法及有關法令規定，向海關申報，由海關依海關進口稅則課徵關稅（海關緝私條例第四條，關稅法第三條第一項、第四條、第十六條第一項參照）。為確保進口人對於進口貨物之相關事項為誠實申報，以貫徹有關法令之執行，關稅法第二十

Article 3, Paragraph 1; Article 4; and Article 16, Paragraph 1, of the Customs Act.) In order to ensure the importers' honest declarations of imported goods for thorough implementation of relevant laws and regulations, Article 23, Paragraph 1, of the Customs Act stipulates that the Customs Office has the discretional power, either voluntarily or upon importer's petition, to conduct an inspection of imported goods or to exempt them from inspection. Before the Customs Office conducts an inspection or examination, an importer may file a petition for correction pursuant to Article 17, Paragraphs 5 and 6, of the Customs Act when he discovers that the goods actually arrived are inconsistent with his original customs declaration. However, after the Customs Office conducts an inspection or examination and discovers that there is a false declaration on the name, quantity, or weight of the shipped goods, or there is any act of evasion of customs control or other illegal activities, the importer may be held liable for punishment under Article 37 of the Customs Smuggling Control Act.

三條第一項乃規定，海關對於進口貨物，得依職權或申請，施以查驗或免驗。在海關查驗或稽核前，進口人如發現實到貨物與原申報不符者，進口人得依關稅法第十七條第五、六項規定申請更正。而海關查驗或稽核後，發現有虛報所運貨物之名稱、數量或重量，或有其他違法行為或涉及逃避管制者，海關緝私條例第三十七條亦定有處罰之規定。

In order to accomplish the goal of preventing evasion of customs duies and at the same time to ensure speedy and convenient customs clearance, the legislative branch may of course authorize the administrative branch to determine on issues of how the Customs Office shall conduct all kinds of inspections and what measures it shall adopt by making reference to the international trade customs, the practices of the Customs Office and the techniques of implementation. Article 19, Paragraph 2, of the Customs Act, as amended on October 31, 2001 (subsequently renumbered and amended as Article 23, Paragraph 2, on May 5, 2004), authorized the Ministry of Finance to issue rules governing customs inspection the method of sampling for and the time and location of inspection of import and export goods as well as the names and categories of goods exempt from inspection. Under this statutory authorization, the Ministry of Finance renamed and revised on December 30, 2001 the "Rules Governing Import and Export Goods Inspection and Sampling" as the "Rules Governing Import and

海關究應如何執行各項查驗及採行何種措施，以達成防堵逃漏關稅兼顧進出口便捷通關之目的，立法機關自得授權行政機關參酌國際貿易慣例、海關作業實務與執行技術而決定。有關海關對於進口、出口貨物查驗、取樣之方式、時間、地點及免驗品目範圍，中華民國九十年十月三十一日修正公布之關稅法第十九條第二項（嗣於九十三年五月五日修正公布為第二十三條第二項）授權由財政部定之。財政部基此授權，於九十年十二月三十日修正「進出口貨物查驗及取樣準則」為「進出口貨物查驗準則」時，除規定查驗免驗之相關事項外，另於該準則第十五條第一項前段規定：「進口貨物如有溢裝，或實到貨物與原申報不符，或夾雜其他物品進口情事，除係出於同一發貨人發貨兩批以上，互相誤裝錯運，經舉證證明，並經海關查明屬實者，准予併案處理，免予議處外，應依海關緝私條例有關規定論處。」（下稱系爭規定）此一有關查驗方式、時間之規定，尚在關稅法第二十三條第一項授權範圍之內，係就進口貨物之相關事項如有申報不實，依海關緝私條例有關規定論處，並就同一發貨人發貨兩批以上，單純因發貨人誤裝錯運致實到貨物與原申報不符之情形，使進

Export Goods Inspection", which sets forth not only matters relating to inspection and exemption from inspection but also prescribes by the first sentence of Article 15, Paragraph 1. that, "Unless the importer satisfies the burden of proof to show that in the case of over-shipment of goods or the goods landed are different from those declared or are mixed with other undeclared articles, the mistake is due to the fact that there are two or more shipments made by the one and the same shipper who has mistakenly loaded and shipped the goods and such fact is verified to be true by the Customs Office, and the shipments may be consolidated and exempted from administrative sanctions, the importer shall be subject to punishment under the Customs Smuggling Control Act." (*hereinafter* the "Provision at Issue") The "Provision at Issue" with respect to the method and time of inspection is within the scope of the statutory authorization under Article 23, Paragraph 1, of the Customs Act. It clarifies the imposition of punishment under Article 37, Paragraph 1, Sub-paragraph 1, of the Customs Smuggling Control Act in case of

口人得以藉由併案處理更正報單，而更正上開不符之情形，因與處罰之構成要件不合，自得免受海關緝私條例第三十七條第一項第一款規定之處罰。

false customs declaration and makes it clear that, in the case of inconsistency between the goods actually arrived and the original customs declaration simply due to the reason that one and the same consignor has mis-loaded and mis-shipped two or more batches of goods, the importer may consolidate the mistaken shipments into one case and file a petition for correction without being subject to punishment underArticle 37, Paragraph 1, Sub-paragraph 1, of the Customs Smuggling Control Act because the circumstance does not meet the constituent elements required for imposition of punishment.

Article 7 of the Constitution guarantees that all people shall be treated equally under law. It does not mean an absolute and rigid equality in form, but a protection of all people's equality one in substance under law. The administrative branch may in the areas of finance, taxation and economics and within the scope of the statutory authorization, promulgates rules and regulation to adopt measures of differential treatments when certain conditions are

憲法第七條規定，人民在法律上一律平等，其內涵並非指絕對、機械之形式上平等，乃係保障人民在法律上地位之實質平等。行政機關在財稅經濟領域方面，於法律授權範圍內，以法規命令於一定條件下採取差別待遇措施，如其規定目的正當，且所採取分類標準及差別待遇之手段與目的之達成，具有合理之關聯性，其選擇即非恣意，而與平等原則無違。系爭規定乃主管機關鑑於貨物進口通商實務上，國際貿易事務繁

met. If its regulatory purpose is legitimate and the means and classification standards employed are reasonably related with the end to be accomplished, the differential treatments will not be viewed as arbitrary and hence are not in contravention of the principle of equality. In light of the complexity of international trade affairs in customs clearance practice which renders mistakes unavoidable, the competent agency establishes the "Provision at Issue" to exempt the importer who is unaware of the inconsistency between the goods actually arrived and the custom declaration due to one and single foreign consignor who has mistakenly loaded and shipped two or more batches of goods, from administrative sanctions, and to allow such importer to consolidate the mistaken shipments into one case and to file a petition for correction pursuant to Article 17, Paragraph 5 of the Customs Act. Besides ensuring that the importers will declare honestly to the Customs Office the imported goods in order to prevent them from evading customs duties, the "Provision at Issue" is proper in establishing a concrete guideline to make the customs

瑣，錯失難免，在發生國外同一發貨人發貨兩批以上互相誤裝錯運，而進口人就此並不知悉之情形下，使進口人未報備或依關稅法第十七條第五項規定申請更正，即可准予併案更正報單免予議處。此一規定除確保進口人對於進口貨物之相關事項為誠實申報，以防止逃漏關稅外，並建立海關明確之處理準則，使進口人之通關程序便捷，其目的洵屬正當。

clearance procedure speedy and convenient for importers.

In importing and exporting practices, it is not only possible that mis-loading and mis-shipment may take place where one and the same overseas consignor ships two or more batches of goods, but also possible that mis-loading and mis-shipment may happen where different consignors ship two or more batches of goods. While it is true that the "Provision at Issue" creates differential treatments of consolidation and exemption for importers in the case of two or more batches of goods mis-loaded and mis-shipped by one consignor or two or more consignors, the mistaken shipments made by two or more consignors can possibly happen only if each individual consignor, the container terminal, the carrier, and all Customs Offices of the exporting countries have failed to discover the mistake. The reason that the competent agency chooses to adopt the provision of differential treatments is based on its belief that the mis-shipments and inconsistency between goods imported and the goods declared is

在進出口實務上，除國外同一發貨人發貨兩批以上，可能發生互相誤裝錯運外，不同發貨人發貨兩批以上，亦非無可能發生互相誤裝錯運情形。系爭規定固形成同一發貨人與不同發貨人發貨兩批以上之互相誤裝錯運，其進口人得否併案處理之差別待遇。惟不同發貨人之此種錯誤，須各該發貨人與其後之貨櫃場、運送人以及出口國之海關均未發現錯誤，始可能發生。主管機關考量貨物互相誤裝錯運，致進口貨物與申報不符，以同一發貨人發貨兩批以上較有可能，且海關查證較為容易、經濟，而不同發貨人發貨兩批以上，發生之機率甚微，且查證較為困難、複雜，如放寬併案處理，將造成查緝管制上之漏洞與困擾。主管機關基於長期海關實務經驗之累積，及海關查證作業上之成本與技術考量，乃選擇為系爭差別待遇之規定，其手段與目的之達成有合理之關聯性，其選擇並非恣意，與憲法第七條之規定尚屬無違，亦與財產權之限制無涉。

more likely to take place and much easier and more economical for the Customs Office to inspect and identify when one and single consignor has shipped two or more batches of goods.than different shipments made by two or more consignors, which cases are relatively rare and much more difficult and complicated to identify, and are, if the competent agency relax the restriction on consolidation, likely to create loopholes and confusions for the Customs Office in the smuggling control measures. Based upon its longtime accumulation of experience in customs practices and taking into account the costs and technical difficulties in customs examination procedure, the the decision of the competent agency to adopt provisions of differential treatments is not an arbitrary choice in that the means employed are reasonably related with the end to be accomplished. Accordingly, the "Provision at Issue" is not in contravention of Article 7 of the Constitution and has nothing to do with the restriction on people's property rights.

To impose the punishment under 至於海關緝私條例第三十七條第

Article 37, Paragraph1, of the Customs Smuggling Control Act, it is required that the person punished acts intentionally or negligently (*See* Article 7, Paragraph 1, of the Administrative Penalty Act) The "Provision at Issue" does not preclude the prequisite that the person subject to punishment must have acted intentionally or negligently, in the circumstance where there are mistakes of shipments owing to mis-loading and mis-shipment of two or more batches of goods by different consignors. It goes without saying that the importer should not be held liable to punishment if he/she did not act intentionally or negligently.

一項處罰之規定，仍應以受處罰人有故意或過失為必要（行政罰法第七條第一項規定參照），系爭規定並未排除不同發貨人發貨兩批以上互相誤裝錯運時，受處罰人應有故意過失之責任要件，故如進口人並無故意過失者，應不予處罰，自不待言。

Justice Chen-Shan Li filed dissenting opinion.

本號解釋李大法官震山提出不同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioner commissioned a customs service company to declare to the Customs Bureau a shipment of music instrument bags manufactured in Mainland China. The Customs later discovered that the items being shipped were actually bath towels and

編者註：

事實摘要：聲請人委託報關公司向關稅局申報進口大陸產製之樂器袋乙批，經關稅局發現實際來貨為浴巾，認聲請人涉嫌虛報進口貨物名稱，逃漏進口稅款情事，依海關緝私條例第三十七條第一項、加值型及非加值型營業稅法第四十一條、第五十一條第七款之規

determined that the Petitioner is suspected of making false declaration of imported items to evade the import tariff. A fine of more than NT$5,000,000 was imposed in accordance with Article 37, Paragraph 1 of the Customs Anti-Smuggling Act, Article 41 and Article 51, Section 7 of the Value-added and Non-value-added Business Tax Act. The Petitioner sought administrative remedies but the case was finally denied.

定，處罰鍰計新臺幣五百餘萬元。聲請人不服，提起行政救濟，經駁回確定。

The Petitioner argued that Article 15, Paragraph 1 of the General Rules Governing the Inspections of Import and Export Goods, which limits the exemption [of tax liability] only to the situation of erroneous containing or shipping with each other involving the dispatching of two or more shipments by the same cosigner, whereas mistakes by different cosigners for two or more shipments, even verified to be true by the Customs, are still subject to the penalty under the Customs Smuggling Act, violates the principle of fairness and justice, as well as the protection of property rights under Article 15 of the Constitution, and filed petition for interpretation.

聲請人認上開裁判所適用之進出口貨物查驗準則第十五條第一項規定，限同一發貨人發貨兩批以上，互相誤裝錯運，經舉證證明，並經海關查明屬實者，始免予議處。倘不同發貨人發貨兩批以上，誤裝錯運情形，雖經海關查明屬實，仍應依海關緝私條例有關規定論處，有違公平、正義原則，並違反憲法第十五條人民財產權應予保障之規定，聲請解釋。

J. Y. Interpretation No.649（October 31, 2008）*

ISSUE: Is it constitutional for the Physically and Mentally Disabled Citizens Protection Act to restrict the practice of massage business to vision-impaired individuals only ?

RELEVANT LAWS:

Articles 7, 15. 23, and 155 of the Constitution（憲法第七條、第十五條、第二十三條及第一百五十五條）; Article 37 of the Physically and Mentally Disabled Citizens Protection Act (renamed and amended as Article 46 of the Physically and Mentally Disabled Citizens' Rights Protection Act)（身心障礙者保護法第三十七條，依現行規定改名為身心障礙者權益保障法，並改列第四十六條）、Article 4 of the Regulations Governing the Qualifications and Management of Vision-Impaired Engaged in Massage Occupation (repealed, currently Article 4, Section 1 of the current regulations Governing the Qualifications and Management of Vision Functionally-Impaired Engaged in Massage and Physical Therapy Massage Occupation)（視覺障礙者從事按摩業資格認定及管理辦法第四條（已廢除）、現為視覺功能障礙者從事按摩或理療

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** Contents within frame, not part of the original text,are added for reference purposes only.

按摩資格認定及管理辦法第四條第一款）.

KEYWORDS:

doctrine of proportionality（比例原則）, especially critical public interest（特別重要之公共利益）, massage（按摩）, objective-means substantial nexus（目的—手段實質關連性）, right of employment（工作權）, right of equal protection（平等權）, vision-impaired（視障者）. **

HOLDING: The front portion of the first paragraph of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that "those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business." (The name of the Act was changed to Physically and Mentally Disabled Citizens' Rights Protection Act on July 11, 2007, and the above quoted "those who are not vision-impaired as defined by this Act" has been amended to "those whose vision is not functionally impaired" and reassigned as the first Paragraph of Article 46, with the same regulatory meaning.) Such provision

解釋文：中華民國九十年十一月二十一日修正公布之身心障礙者保護法第三十七條第一項前段規定：「非本法所稱視覺障礙者，不得從事按摩業。」(九十六年七月十一日該法名稱修正為身心障礙者權益保障法，上開規定之「非本法所稱視覺障礙者」，經修正為「非視覺功能障礙者」，並移列為第四十六條第一項前段，規定意旨相同) 與憲法第七條平等權、第十五條工作權及第二十三條比例原則之規定不符，應自本解釋公布之日起至遲於屆滿三年時失其效力。

does not conform to the right of equal protection as stipulated in Article 7, right of employment as stipulated in Article 15, and the doctrine of proportionality as stipulated in Article 23 of the Constitution, and shall be invalid no later than three years since the issuance of this Interpretation.

REASONING: The front portion of the first paragraph of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that "those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business." (The name of the Act was changed to Physically and Mentally Disabled Citizens' Rights Protection Act on July 11, 2007, and the above quoted "those who are not vision-impaired as defined by this Act" has been amended to "those whose vision is not functionally impaired" and reassigned as the first Paragraph of Article 46, with the same regulatory meaning.) As a preferential treatment to protect the right to work for

解釋理由書：九十年十一月二十一日修正公布之身心障礙者保護法第三十七條第一項前段規定：「非本法所稱視覺障礙者，不得從事按摩業。」（下稱系爭規定，九十六年七月十一日該法名稱修正為身心障礙者權益保障法，系爭規定之「非本法所稱視覺障礙者」，經修正為「非視覺功能障礙者」，並移列為第四十六條第一項前段，規定意旨相同）係以保障視覺障礙者（下稱視障者）工作權為目的所採職業保留之優惠性差別待遇，亦係對非視障者工作權中之選擇職業自由所為之職業禁止，自應合於憲法第七條平等權、第十五條工作權及第二十三條比例原則之規定。

vision-impaired individuals, and, conversely, a prohibition against non-vision impaired individuals with regard to the freedom to choose their occupation, this provision must conform the right of equal protection as stipulated in Article 7, right of employment as stipulated in Article 15, and the doctrine of proportionality as stipulated in Article 23 of the Constitution.

Vision impairment is a physical condition beyond any human control. The disputed statutory provision, which based its discriminatory treatment on such a category over who can engage in massage business, has a profound impact on the majority of population who are not vision-impaired. While the legislators have taken into consideration the limited occupation and career options available to the vision-impaired in light of many obstacles they need to overcome, such as their growth, movement, learning and education, as well as the vulnerability of their social status, together with the reality that vision-impaired individuals have traditionally been dependent upon massage business

查視障非屬人力所得控制之生理狀態，系爭規定之差別待遇係以視障與否為分類標準，使多數非視障者均不得從事按摩業，影響甚鉅。基於我國視障者在成長、行動、學習、受教育等方面之諸多障礙，可供選擇之工作及職業種類較少，其弱勢之結構性地位不易改變，立法者乃衡酌視障者以按摩業為生由來已久之實際情況，且認為視障狀態適合於從事按摩，制定保護視障者權益之規定，本應予以尊重，惟仍須該規定所追求之目的為重要公共利益，所採禁止非視障者從事按摩業之手段，須對非視障者之權利並未造成過度限制，且有助於視障者工作權之維護，而與目的間有實質關聯者，方符合平等權之保障。按憲法基本權利規定本即特別著重弱勢

for their livelihood, such legislation, in order to achieve an important public interest and comply with the right of equal protection, should nevertheless adopt a measure not to be excessively restrictive to the rights of those who are not vision-impaired, and to ensure that the protective measure for the vision-impaired have a substantial nexus with the objectives it intends to accomplish. The Constitution provisions concerning fundamental rights have emphatically focused on the protection of socially disadvantaged. Article 155 of the Constitution states, " …… [t]o the aged and the infirm who are unable to earn a living, and to victims of unusual calamities, the State shall provide appropriate assistance and relief." Article 10, Paragraph 7 of the Additional Articles of the Constitution states, "[t]he State shall guarantee availability of insurance, medical care, obstacle-free environments, education and training, as well as support and assistance in everyday life for physically and mentally handicapped persons, and shall also assist them to attain independence and to develop [their] potentials. ……" These provisions have

者之保障，憲法第一百五十五條後段規定：「人民之老弱殘廢，無力生活，及受非常災害者，國家應予以適當之扶助與救濟。」以及憲法增修條文第十條第七項規定：「國家對於身心障礙者之保險與就醫、無障礙環境之建構、教育訓練與就業輔導及生活維護與救助，應予保障，並扶助其自立與發展。」顯已揭櫫扶助弱勢之原則。職是，國家保障視障者工作權確實具備重要公共利益，其優惠性差別待遇之目的合乎憲法相關規定之意旨。

clearly demonstrated the principle for assisting the disadvantaged. As a result, there is a significant public interest in protecting the vision-impaired right to work, and the objectives for preferential or discriminatory treatment are justified under the relevant provisions of the Constitution.

When the Handicapped Welfare Act was enacted and promulgated in 1980, there were few career options available for vision-impaired individuals. The prohibition against non-vision impaired to engage in massage business was beneficial for the vision-impaired willing to engage in such business, and the reality was that a high percentage of vision-impaired have chosen massage business as their livelihood. However, the nature of massage and the skill required for those intend to engage in the massage business is not limited to vision-impaired only. With the expansion of market for massage career and service consumption, the disputed provision has become excessively restrictive to non-vision impaired individuals, which include other physically or

六十九年殘障福利法制定施行之時，視障者得選擇之職業種類較少，禁止非視障者從事按摩業之規定，對有意選擇按摩為業之視障者確有助益，事實上視障就業者亦以相當高之比率選擇以按摩為業。惟按摩業依其工作性質與所需技能，原非僅視障者方能從事，隨著社會發展，按摩業就業與消費市場擴大，系爭規定對欲從事按摩業之非視障者造成過度限制。而同屬身心障礙之非視障者亦在禁止之列，並未如視障者享有職業保留之優惠。在視障者知識能力日漸提升，得選擇之職業種類日益增加下，系爭規定易使主管機關忽略視障者所具稟賦非僅侷限於從事按摩業，以致系爭規定施行近三十年而職業選擇多元之今日，仍未能大幅改善視障者之經社地位，目的與手段間難謂具備實質關聯性，從而有違憲法第七條保障平等權之

mentally disabled but are not vision-impaired who do not otherwise enjoy the preference on occupation reservation. With the knowledge and capability of [many] vision-impaired enhanced gradually, and the selectable occupation categories increased by the day, the statutory provision in question tends to make the governing authority overlook the fact that the talents of vision-impaired are not limited to massage business alone. Consequently, after nearly thirty years of the statute's promulgation and in light of the multiple availabilities of various occupations, the social-economic condition of vision-impaired has yet to see any significant improvement. Since there is hardly a substantial nexus between the objectives and the means, [the provision] contradicts the meaning and purpose of Article 7 of the Constitution on the right of equal protection.

意旨。

The right of citizens' employment must be protected under Article 15 of the Constitution, the Judicial Interpretations No. 404, 510, 584, 612, 634 and 637 further illustrate the freedom to engage in

又按憲法第十五條規定人民之工作權應予保障，人民從事工作並有選擇職業之自由，業經本院釋字第四０四號、第五一０號、第五八四號、第六一二號、第六三四號與第六三七號解釋在

employment and to choose occupation. The Constitution has set forth different permission standards, based upon difference of contents, on restrictions over freedom of employment. The legislators, in pursuance of general public interest, may impose proper restrictions on the methods, time and location that an occupation may be carried out. Yet on the freedom to choose an occupation, if [the restrictions] concern the subjective condition needed, which means professional capability or license to perform the specific occupation, and such capability or [license] status can be gained through training and fostering, such as knowledge, degree or physical capability, no restrictions may be permitted without justification of important public interest. The objective condition needed for people to choose an occupation means those restrictions on the pursuance of an occupation that cannot be achieved by individual efforts, such as monopoly of certain sectors. Such restrictions may be justified only with showing of especially critical public interest. Without regard to under which condition the restrictions were imposed, the means adopted must

案。對職業自由之限制，因其內容之差異，在憲法上有寬嚴不同之容許標準。關於從事工作之方法、時間、地點等執行職業自由，立法者為追求一般公共利益，非不得予以適當之限制。至人民選擇職業之自由，如屬應具備之主觀條件，乃指從事特定職業之個人本身所應具備之專業能力或資格，且該等能力或資格可經由訓練培養而獲得者，例如知識、學位、體能等，立法者欲對此加以限制，須有重要公共利益存在。而人民選擇職業應具備之客觀條件，係指對從事特定職業之條件限制，非個人努力所可達成，例如行業獨占制度，則應以保護特別重要之公共利益始得為之。且不論何種情形之限制，所採之手段均須與比例原則無違。

not violate the principle of proportionality.

The disputed provision that prohibits non-vision impaired to engage in massage business amounts to restrictions on the objective conditions concerning the freedom to choose occupation. Since that provision was designed to protect the employment opportunity for vision-impaired, taking into consideration of the purpose of the last paragraph of Article 155 of the Constitution and Article 10, Paragraph 7 of the Additional Articles of the Constitution, it concerns an especially critical public interest, and the objective [of the statutory provision] is proper. Yet in light of the social development, expansion of the need for massage occupation, provided that the hand skills required for massage business are quite broad, including, among other things, "effleuraging, kneading, chiropractics, pounding, stroking, hand arcuation, movement and other special hand skill." (*See* Article 4 of the Regulations Governing the Qualifications and Management of Vision-Impaired Engaged in Massage Occupation, repealed

查系爭規定禁止非視障者從事按摩業，係屬對非視障者選擇職業自由之客觀條件限制。該規定旨在保障視障者之就業機會，徵諸憲法第一百五十五條後段及增修條文第十條第七項之意旨，自屬特別重要之公共利益，目的洵屬正當。惟鑑於社會之發展，按摩業之需求市場範圍擴大，而依規定，按摩業之手技甚為廣泛，包括「輕擦、揉捏、指壓、叩打、震顫、曲手、運動及其他特殊手技。」（九十七年三月五日廢止之視覺障礙者從事按摩業資格認定及管理辦法第四條、現行視覺功能障礙者從事按摩或理療按摩資格認定及管理辦法第四條第一款規定參照），系爭規定對非視障者從事按摩業之禁止，其範圍尚非明確，導致執行標準不一，使得非視障者從事類似相關工作及行業觸法之可能性大增，此有各級行政法院諸多裁判可稽。且按摩業並非僅得由視障者從事，有意從事按摩業者受相當之訓練並經檢定合格應即有就業之資格，將按摩業僅允准視障者從事，使有意投身專業按摩工作之非視障者須轉行或失業，未能形成多元競爭環境裨益消費者選擇，與所

on March 5, 2008, Article 4, Section 1 of the current regulations Governing the Qualifications and Management of Vision Functionally-Impaired Engaged in Massage and Physical Therapy Massage Occupation.) The prohibition in the disputed provision against the non-vision impaired does not have a clearly defined scope, and has resulted in inconsistent enforcement standards; thereby greatly increase the possibility of violations by non-vision impaired engaged in similar work or business. This can be seen by many cases pending before different levels of the Administrative Courts. Given that anyone interested in massage business should have been eligible to engage in the occupation after receiving corresponding training and qualification review, by only permitting the vision-impaired to be able to conduct such business has resulted in non-vision impaired transfer to other occupation or lose their jobs, and a multi-facet competitive environment for consumers to choose not being able to form. This is not in parity with the interest to protect the right of employment for the vision-impaired.

欲保障視障者工作權而生之就業利益相較，顯不相當。故系爭規定對於非視障者職業選擇自由之限制，實與憲法第二十三條比例原則不符，而牴觸憲法第十五條工作權之保障。

Consequently, the restriction of the disputed provision is not in conformity with principle of proportionality under Article 23 of the Constitution, and contravenes the protection over the right of employment stipulated in Article 15 of the Constitution.

It is an especially important public interest to protect the right of employment for the vision-impaired, and the governing authority shall adopt multiple, concrete measures to provide training and guidance for occupations deemed suitable for the vision-impaired, retain appropriate employment opportunities. In addition, [the governing authority] should provide adequate management on massage occupation and related matters, take into consideration the interests of both vision-impaired and non-vision impaired, the consumers and the suppliers, as well as the balance between the protection of disadvantaged and market mechanism, so that the employment opportunities for the vision-impaired and other physically or mentally disabled [individuals] can be enhanced, the objectives of the Constitution to assist the

保障視障者之工作權，為特別重要之公共利益，應由主管機關就適合視障者從事之職業予以訓練輔導、保留適當之就業機會等促進就業之多元手段採行具體措施，並應對按摩業及相關事務為妥善之管理，兼顧視障與非視障者、消費與供給者之權益，且注意弱勢保障與市場機制之均衡，以有效促進視障者及其他身心障礙者之就業機會，踐履憲法扶助弱勢自立發展之意旨、促進實質平等之原則與精神。此等措施均須縝密之規劃與執行，故系爭規定應自本解釋公布之日起至遲於屆滿三年時失其效力。

disadvantaged in independent development can be fulfilled, and the principle and spirit of substantive equality enhanced. Since all of these measures require delicate planning and execution, the disputed provision shall be invalid no later than three years since the issuance of this Interpretation.

EDITOR'S NOTE:

Summary of facts: One of the Petitioners, A, operated a barbershop and recruited the other two Petitioners, B and C, not visually-impaired to engage in massage services in the shop. The police discovered the activities and submitted relevant information to the Department of Social Welfare, Taipei City Government.

The Department deemed the Petitioners in violation of the front portion of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, which stipulates: "No person who are not visually-impaired as defined by this Act may engage in the practice of massage business." The Petitioners were then fined in the amount of NT$40,000,

編者註：

事實摘要：聲請人之一A經營理髮店，僱用另二聲請人B及C均非視障者，於營業場所內從事按摩服務，為警查獲，並將相關資料函送臺北市政府社會局處理。

案經該局認係違反行為時之身心障礙者保護法第三十七條第一項前段規定：「非本法所稱視覺障礙者，不得從事按摩業。」並依同法第六十五條第一項與第二項規定分別處以新臺幣四萬元、一萬元及二萬元罰鍰。聲請人等不服，分別提起行政爭訟，均經駁回。

NT$10,000, and NT$20,000, respectively, in accordance with Article 65, Paragraphs 1 and 2 of the same Act. The Petitioners brought their respective administrative actions, but were all eventually denied.

The Petitioners argued that the front portion of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act is suspected of encroaching upon an individuals' right of equality and the right to work, and filed the petition for interpretation.

聲請人等認身心障礙者保護法第三十七條第一項前段規定：「非本法所稱視覺障礙者，不得從事按摩業。」有侵害人民平等權及工作權之疑義，爰聲請解釋。

J. Y. Interpretation No.650（October 31, 2008）*

ISSUE: Is Article 36-1 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises that levies tax on interests actually not earned unconstitutional ?

RELEVANT LAWS:

Articles 19 of the Constitution（憲法第十九條）; Articles 24 and 80 of the Income Tax Act (Internal Revenue Code)（所得稅法第二十四條、第八十條）、Ar ticle 150 of the Administrative Procedure Act（行政程序法第一五０條）、Article 36-1 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises（營利事業所得稅查核准則第三十六條之一）、J. Y. Interpretation Nos. 443, 620, 622, and 640（司法院釋字第四四三號、第六二０號、第六二二號及第六四０號解釋）.

KEYWORDS:

clear and specific authorization（明確授權）, gross income（收入總額）, income tax（所得稅）, *nullum capitagium sine lege*（租稅法律主義）, Ministry of Finance（財政部）,

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** Contents within frame, not part of the original text, are added for reference purposes only.

presumption and calculation（設算）, profit-seeking enterprise（營利事業）, tax collection authority（稽徵機關）. **

HOLDING: Article 36-1, Paragraph 2 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises, as amended and promulgated on January 13, 1992, stipulates that, by lending its capital to shareholders or other persons, a company which does not otherwise charge interest or undercharge interest in the [loan] agreement shall nevertheless report interest income and subject to tax levy based upon the prime lending rate applicable by the Bank of Taiwan as of January 1 of that year. The tax collection authority summarily levies taxes over interest income based on this rule on company loans to its shareholders or other persons. Since such regulation lacks clear and specific authorization from the Income Tax Act, increases the tax obligation which does not legally exist for tax payers, and contradicts the meaning and purpose of Article 19 of the Constitution, it shall be invalid as of the date this Interpretation is

解釋文：財政部於中華民國八十一年一月十三日修正發布之營利事業所得稅查核準則第三十六條之一第二項規定，公司之資金貸與股東或任何他人未收取利息，或約定之利息偏低者，應按當年一月一日所適用臺灣銀行之基本放款利率計算利息收入課稅。稽徵機關據此得就公司資金貸與股東或他人而未收取利息等情形，逕予設算利息收入，課徵營利事業所得稅。上開規定欠缺所得稅法之明確授權，增加納稅義務人法律所無之租稅義務，與憲法第十九條規定之意旨不符，應自本解釋公布之日起失其效力。

issued.

REASONING: Article 19 of the Constitution states, the people shall have the duty to pay taxes in accordance with the law. It means that the State must impose tax duty or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taken into consideration such conditions as the subject, subject matter, tax base or tax rates. In the event the law authorizes the tax collection authority to promulgate supplemental regulations, such authorization must be clear and specific; the tax collection authority may promulgate other necessary regulations only for matters that concern technical details or secondary issues in the enforcement of the law (*See* J. Y. Interpretation Nos. 443, 620, 622, and 640).[1]

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等租稅構成要件，以法律或法律明確授權之命令定之；如以法律授權主管機關發布命令為補充規定時，其授權應符合具體明確之原則；若僅屬執行法律之細節性、技術性次要事項，始得由主管機關發布命令為必要之規範，迭經本院解釋在案（本院釋字第四四三號、第六二０號、第六二二號、第六四０號解釋參照）。

Article 24, Paragraph 1 of the Income Tax Act (Internal Revenue Code), as

六十六年一月三十日修正公布之所得稅法第二十四條第一項規定：「營

[1] The tax authority is the National Tax Administration within the Ministry of Finance.

amended on January 30, 1977, states: "The amount of income of a profit-seeking enterprise shall be the net income, *i.e.*, the gross annual income after deduction of all costs, expenses, losses and taxes." While "gross income" naturally includes interests earned, in the situation where a company loans its capital to its shareholder or other individuals without agreeing on the interests, the fact that the tax collection authority nevertheless presumes and calculates interests not actually earned involves the subject matter of the tax being assessed and must be regulated by law or regulation having clear and specific authorization of the law in order to comply with the principle of *nullum capitagium sine lege* (no taxation without legal authority).

利事業所得之計算，以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額。」所謂「收入總額」，固包括利息收入在內，惟稽徵機關如就公司資金貸與股東或他人而未約定利息等情形，設算實際上並未收取之利息，因已涉及人民繳納稅捐之客體，應以法律或由法律明確授權之命令加以訂定，方符租稅法律主義之要求。

Article 36-1, Paragraph 2 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises, as amended and promulgated on January 13, 1992, stipulates: "Shareholders, members of the board, supervisors of a company who receive funds on behalf of the company and do not pay back in kind or appropriate

財政部八十一年一月十三日修正發布之營利事業所得稅查核準則第三十六條之一規定：「公司組織之股東、董事、監察人代收公司款項，不於相當期間照繳或挪用公司款項，應按當年一月一日所適用臺灣銀行之基本放款利率計算利息收入課稅。公司之資金貸與股東或任何他人未收取利息，或約定之利息

such company funds are subject to tax levy on the interests earned in accordance with the prime lending rate applicable by the Bank of Taiwan as of January 1 of that year. A company which does not otherwise charge interest or undercharge interest in the [loan] agreement shall nevertheless report interest income and shall apply *mutatis mutantis* the regulation stipulated in the previous paragraph." The tax collection authority summarily levies taxes over interest income based on this rule on company loans to its shareholders or other persons. Yet such regulation lacks clear and specific authorization from the Income Tax Act (Internal Revenue Code); its presumptive calculation as provided in Article 36-1, Paragraph 2 also lacks legal basis. Although this rule has been in practice for some time and may be beneficial to the enrichment of national treasury, the reduction of levying costs, or even the prevention of tax evasion, it nevertheless expands or presumes interests not actually earned, which involves taxable subject matter, and does not concern technical details or secondary issues by the levying authority in its enforcement of the Income

偏低者，比照前項規定辦理。」稽徵機關依本條第二項規定得就公司資金貸與股東或他人而未收取利息等情形，逕予設算利息收入，據以課徵營利事業所得稅。惟上開查核準則之訂定，並無所得稅法之明確授權；其第三十六條之一第二項擬制設算利息收入之規定，亦欠缺法律之依據，縱於實務上施行已久，或有助於增加國家財政收入、減少稽徵成本，甚或有防杜租稅規避之效果，惟此一規定擴張或擬制實際上並未收取之利息，涉及租稅客體之範圍，並非稽徵機關執行所得稅法之技術性或細節性事項，顯已逾越所得稅法之規定，增加納稅義務人法律所無之租稅義務，與憲法第十九條規定之意旨不符，應自本解釋公布之日起失其效力。

Tax Act, thus the regulation clearly exceeds the scope of the Income Tax Act, increases the tax obligation which does not legally exist for tax payers, contradicts the meaning and purpose of Article 19 of the Constitution, and shall be invalid as of the date this Interpretation is issued.

A new Paragraph 5 was added to Article 80 of the Income Tax Act when it was amended on January 15, 2003: "The measure governing how the tax collection authority conducts an assessment of an income tax return by paper reviewing, auditing or any other method of investigation, as well as the criteria tax collection how the aforesaid authority audits the items affecting the amounts of income, tax payable and tax credits of an income tax return, shall be prescribed by the Ministry of Finance." This expressly authorizes the Ministry of Finance the power to promulgate [tax return] review and audit measures. However, in accordance with the illustrations contained in the Executive Yuan's memorandum to the Legislative Yuan requesting for review and approval of the amendments to the Income

所得稅法九十二年一月十五日修正公布時，於第八十條增訂第五項：「稽徵機關對所得稅案件進行書面審核、查帳審核與其他調查方式之辦法，及對影響所得額、應納稅額及稅額扣抵計算項目之查核準則，由財政部定之。」明文授權財政部訂定查核準則。惟依行政院函請立法院審議之所得稅法修正草案說明，增訂第八十條第五項係「考量稽徵機關對於所得稅案件進行調查、審核時，宜有一致之規範，財政部目前訂有營利事業所得稅結算申報書查審要點、營利事業所得稅結算申報書面審核案件抽查辦法及營利事業所得稅查核準則等規定，惟尚乏法律授權依據，為達課稅公平之目標，並為適應快速變遷之工商社會，該等要點、辦法及準則之內容，勢須經常配合修正，為維持其機動性，宜以法規命令之方式為之，又對綜合所得稅案件亦有訂定相關規定之

Tax Act, the addition of Article 80, Paragraph 5 is "to ensure that the tax collection authority should have a set of unified regulations in conducting its investigations and reviews. Although the Ministry of Finance has currently promulgated Directions for the Review of Profit-Seeking Enterprises Income Tax Returns, Regulations Governing the Random Auditing of Paper-Review Cases over Profit-Seeking Enterprises Income Tax Returns, and Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises, among other rules, they nevertheless lack legal authorization. In order to achieve the objective of tax fairness, and to cope with the rapidly changing industrial society, such Directions, Regulations and Guidelines must inevitably subject to constant amendments and, therefore, should be better suited in the form of legally authorized administrative regulations to maintain their flexibility. It is also necessary to promulgate related regulations on omnibus income tax cases. As a result, based on the present and future need to conduct audits and reviews over income tax cases, and in accordance with Article

必要，爰基於目前及未來對所得稅案件進行調查、審核之需要，依行政程序法第一百五十條第二項規定，增訂第五項授權財政部就稽徵機關對所得稅案件進行調查及對影響所得額、應納稅額及稅額扣抵計畫項目之查核訂定相關辦法及準則，俾資遵循。」可知所得稅法第八十條第五項之增訂，雖已賦予訂定營利事業所得稅查核準則之法源依據，其範圍包括「對影響所得額、應納稅額及稅額扣抵計算項目」之查核，惟該項規定之目的，僅為授權稽徵機關調查及審核所得稅申報是否真實，以促進納稅義務人之誠實申報，並未明確授權財政部發布命令對營利事業逕予設算利息收入。是營利事業所得稅查核準則第三十六條之一第二項有關設算利息收入之規定，並未因所得稅法第八十條第五項之增訂，而取得明確之授權依據，與租稅法律主義之要求仍有未符，併此指明。

150, Paragraph 2 of the Administrative Procedure Act,[2] Paragraph 5 is added to authorize the Ministry of Finance to promulgate related regulations and guidelines for tax collection authority to follow in conducting its investigations and in auditing items affecting the amounts of income, tax payable and tax credits of an income tax return." It is clear that while Article 80, Paragraph 5 now provides the legal authority to promulgate Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises, its scope entails the audit of "items affecting the amounts of income, tax payable and tax credits." Yet the purpose of this provision is to only authorize the tax collection authority to audit and review the accuracy of income tax returns, so as to promote honest filing among tax payers. It has not expressly and specifically authorized the Ministry of Finance to promulgate

[2] Article 150 of the Administrative Procedure Act states: "A legally authorized Regulation, as stipulated in this law, means a Regulation, having authorization of the law, promulgated by an administrative agency carrying legal effect over general matters and unspecified majority of the people. The contents of a legally authorized regulation shall specify the basis of its legal authorization, and shall not exceed the scope of its legal authorization and the spirit of the legislation."

regulations that summarily presume and calculate interest income. Therefore, it needs to be pointed out that Article 36-1, Paragraph 2 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises concerning the presumption and calculation of interest income has not gained a clear and specific legal authorization [even] in light of the addition of Article 80, Paragraph 5, and is still not in conformity with the requirement of *nullum capitagium sine lege*.

EDITOR'S NOTE:

Summary of facts: The Petitioner, a shareholder of Company A, signed a contract for sale of real property with Company A in January 1994 and paid the contract price. Both parties mutually agreed to rescind the contract on March 10 of the same year. Company A issued a check to return the contract payment. However, the Petitioner did not cash the check prior to its expiration. On the other hand, the Petitioner separately sold his shares to Company B. The check issued by Company B for the payment was not cashed before expiration, either.

編者註：

事實摘要：聲請人為 A 公司之股東，於 83 年 1 月間與 A 公司簽訂不動產買賣契約，並支付合約款。同年 3 月 10 日，雙方合意解除契約。A 公司簽發支票，返還合約款，但屆期未兌現。此外，聲請人另出售股票給 B 公司，B 公司以支票支付之帳款，屆期亦未兌現。

When processing the 1997 Corporate Income Tax filings, the Taipei National Tax Administration, Ministry of Finance calculated that the Petitioner should have collectable interests for the above two uncollected payments and levied tax in accordance with Article 36-1, Paragraph 2 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises, amended and promulgated on January 13, 1992. The Petitioner sought administrative remedy, but was finally denied.

財政部臺北市國稅局在辦理「八十六年度營利事業所得稅結算申報作業」時，就上述兩筆未收款項，依據財政部八十一年一月十三日修正發布之營利事業所得稅查核準則第三十六條之一第二項規定，設算聲請人應有利息收入，補徵其稅額。聲請人不服，提起行政救濟，經駁回確定。

The Petitioner believed that, as applied in the final decision, Article 36-1, Paragraph 2 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprise, which provides that the levying authority may summarily include interest income in the calculation and levying of tax on uncollected capital loan to others with no interest, is not duly authorized by the Income Tax Act and contradicts the principle of taxation by statutory authorization under Article 19 of the Constitution, and filed petition for interpretation.

聲請人認上開確定判決所適用之營利事業所得稅查核準則第三十六條之一第二項規定公司之資金貸予他人未收取利息，稽徵機關得逕予設算利息收入，予以課稅，欠缺所得稅法之授權，違反憲法第十九條租稅法律主義之規定，聲請解釋。

J. Y. Interpretation No.651（November 14, 2008）*

ISSUE: Is Article 8, Paragraph 1 of the Regulation Governing Military Type Item Import Duty Exemption, as amended in 2001, unconstitutional ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; J.Y. Interpretation Nos. 506, 650（司法院釋字第五０六號，第六五０號解釋）; Government Procurement Act（政府採購法）; Article 49 of the Customs Act（關稅法第四十九條）; Commodity Tax Act（貨物稅條例）; Value-Added and Non-Value-Added Business Tax Act（加值型及非加值型營業稅法）; Article 8 of the Regulation Governing Military Type Item Import Duty Exemption（軍用物品進口免稅辦法第八條）.

KEYWORDS:

Principle of Taxation by Law（租稅法律主義）, Delegation of Law（法律授權）, Principle of Clarity and Definiteness（具體明確原則）, Military Organ（軍事機關）, Agency In-charge（主管機關）, Tax Collection Authority（稽徵機關）, Ministry of Finance（財政部）, Military Type Item（軍用物品）, Invite for Bid（招標）, Deduction or Exemption of Customs Duties（關稅減免）. **

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* Translated by Ching P. Shih.

** Contents within frame, not part of the original text, are added for reference purposes only.

HOLDING: Article 8, Paragraph 1 of the Regulation Governing Military Type Item Import Duty Exemption, as amended and promulgated on December 30, 2001, provides: "At the time when a military organ handles an invitation for bid under the Government Procurement Act, the bidding document filed for the military item imported by the merchant who wins the bid shall state in writing that, according to the provisions of the Customs Act, the Commodity Tax Act, the Value-Added and Non-Valued-Added Business Tax Act, and this Regulation, the item may apply for the exemption of duty. The posted winning bid price shall not include the exempted duty." This is a supplementary provision made by the Ministry of Finance with the delegation authorized by Article 44, Paragraph 3 of the Customs Act, as amended and promulgated on October 31, 2001.(As of May 5, 2004, this provision is revised and renumbered as Article 49, Paragraph 3.) It does not exceed the extent of delegation of law and is in conformity with the Principle of Taxing by Law under Article 19 of the Constitution.

解釋文：中華民國九十年十二月三十日修正發布之軍用物品進口免稅辦法第八條第一項規定：「軍事機關依政府採購法辦理招標，由得標廠商進口之軍品，招標文件上應書明得依關稅法、貨物稅條例、加值型及非加值型營業稅法及本辦法規定申請免稅。得標價格應不含免徵之稅款。」係財政部依九十年十月三十一日修正公布之關稅法第四十四條第三項（嗣於九十三年五月五日修正移列為第四十九條第三項）授權所為之補充規定，並未逾越授權範圍，與憲法第十九條租稅法律主義尚無牴觸。

REASONING: Article 19 of the Constitution states the people shall have the duty to pay taxes under law. It means that when the state imposes an obligation to pay tax or confers preference for tax deduction or exemption on people, the essential elements such as taxing bodies, taxed subjects, tax bases, tax rates, etc., shall be prescribed by law or regulation clearly authorized by law. In the event a law authorizes an agency in-charge to promulgate regulation as supplementary or specific provisions, its authorization must be in conformity with the principle of clarity and definiteness; furthermore, the concern of whether a regulation is consistent with the meaning and purpose of authorization by law shall not be confined within the text employed in the provisions. It shall be determined based on the legislative purpose of the law itself and the relevant meanings on the totality of the provisions as a whole. This ruling has been repeatedly illustrated in J.Y. Interpretations Nos. 506 and 650 in the official file.

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等構成要件，以法律或法律明確授權之命令定之。如以法律授權主管機關發布命令為補充或具體化規定時，其授權應符合具體明確之原則；至命令是否符合法律授權之意旨，則不應拘泥於法條所用之文字，而應以法律本身之立法目的及其整體規定之關聯意義為綜合判斷，迭經本院釋字第五０六號及第六五０號解釋闡示在案。

Article 44, Paragraph 1, Subparagraph

九十年十月三十一日修正公布之

4 of the Customs Act amended and promulgated on October 31, 2001 (as of May 5, 2004, this provision is revised and renumbered as Article 49, Paragraph 1, Subparagraph 4) provides that military weaponries, equipments, vehicles, vessels, aircrafts, and their accessories imported by military organs or armed forces, and materials exclusively served for military purposes are exempted from duties. Paragraph 3 of the same Article also authorizes the Ministry of Finance to make regulations concerning matters on the scope, catalog, quantity, and quota of the exemption of duty applied to the item prescribed above. According to this authorization, the Ministry of Finance revised and promulgated the Regulation Governing Military Type Item Import Duty Exemption on December 30, 2001. Among other things, Article 8, Paragraph 1 provides: "At the time when the military organ handles an invitation for bid under the Government Procurement Act, the bidding document filed for the military item imported by the merchant who wins the bid shall state in writing that, according to the provisions of the Customs Act, the

關稅法第四十四條第一項第四款（嗣於九十三年五月五日修正移列為第四十九條第一項第四款）規定，軍事機關、部隊進口之軍用武器、裝備、車輛、艦艇、航空器與其附屬品，及專供軍用之物資，免稅。同條第三項並授權財政部就上開物品之免稅範圍、品目、數量及限額之事項訂定辦法。依據此項授權，財政部於九十年十二月三十日修正發布軍用物品進口免稅辦法，其中第八條第一項規定：「軍事機關依政府採購法辦理招標，由得標廠商進口之軍品，招標文件上應書明得依關稅法、貨物稅條例、加值型及非加值型營業稅法及本辦法規定申請免稅。得標價格應不含免徵之稅款。」據此，軍事機關依政府採購法辦理招標進口軍品欲享受免稅優惠者，應於招標文件上書明得依關稅法等規定申請免稅及得標價格不含免徵之稅款等事項。

Commodity Tax Act, the Value-Added and Non-Valued-Added Business Tax Act, and this Regulation, the item may apply for the exemption of duty. The posted winning bid price shall not include the exempted duty." Accordingly, at the time when the military organ handles an invitation for bid to import military type item under the Government Procurement Act, those who desire to enjoy the preferential treatment for the exemption of duty shall state in writing on the bidding document such matters as the item may apply for the exemption of duty according to the provisions of the Customs Act, etc., the posted winning bid price does not include the exempted duty, and so forth.

While importing military type item may undoubtedly enjoy the preference for the exemption of duty under the law, the questions of whether the declared military articles belong to the military type item prescribed in Article 44, Paragraph 1, Subparagraph 4 of the Customs Act and whether the actually imported item and the declared catalog, quantity of the importing articles involve any discrepancy,

按進口軍用物品固可依法享有免稅之優惠，惟申報之軍用物品究否屬於關稅法第四十四條第一項第四款之軍用物品，以及實際進口之物品與申報進口之品目、數量有無誤差、浮報或不實，尚待主管機關為補充或具體化之規定，進口地海關始得據以審核。上開關稅法第四十四條第三項乃授權財政部訂定免稅範圍，並就相關事項訂定辦法，俾有效執行前開軍用物品進口免徵關稅之規

overstatement, or falsity are still in need of the supplementary and specific regulations made by the agency in-charge, so that the customs at importing port may thus exanimate and verify. Article 44, Paragraph 3 of the Customs Act mentioned above, therefore, authorizes the Ministry of Finance to stipulate the scope of the exemption of duty and make regulations concerning related matters, so as to effectively implement the above-stated provisions governing the import of military type item and the exemption of customs duties, and to encourage the tax collection authority to levy duties by law and prevent any unlawful evasion of taxes and duties. The provision of Article 8, Paragraph 1 of the Regulation Governing Duty Exemption mentioned above facilitates the disclosure of the matter of whether the importing military type item has applied for the exemption of duty in accordance with the law, so that all merchants who anticipate in the bidding may be capable of obtaining necessary information to decide the price for competitive bidding. This provision is beneficial to the fairness of the bidding invitation process and also

定，促使稽徵機關依法徵稅及防杜違法逃漏稅捐。前述免稅辦法第八條第一項之規定，使進口軍用物品是否依法申請免稅之情事公開揭露，參與投標廠商均能獲悉資訊，據以決定競標價格。此一規定有利於招標作業之公平，兼為嗣後進口通關審查免稅作業時之審核依據，以促進通關程序之便捷，屬執行關稅法所必要之規範，就前開關稅法第四十四條第一項第四款、第三項之立法目的及整體規定之關聯意義為綜合判斷，並未逾越授權範圍，與憲法第十九條租稅法律主義尚無牴觸。

as a basis of the examination and verification for future customs imports and the reviewing practice of the exemption of duty, so as to enhance the convenience and swiftness of the customs clearance process. This provision is necessary for the implementation of the Customs Act. Taking into consideration the legislative purposes of Article 44, Paragraph 1, Subparagraph 4, and Paragraph 3 of the Customs Act mentioned above and the relevant meanings of the entire provisions, the provision does not exceed the extent of delegation of law, and has not contradicted the Principle of Taxing by Law under Article 19 of the Constitution.

EDITOR'S NOTE:

Summary of facts: The Maintenance and Repair Service of the Combined Logistics Command, Ministry of National Defense (hereinafter "Combined Logistics Command") procured civilian trucks from Petitioner Company A for military uses, and in 2003 applied to the Keelung Customs Bureau for special tariff exemption for military goods. However, because the application did not conform with the

編者註：

事實摘要：國防部聯合後勤司令部保修署（下稱聯勤保修署）向聲請人A公司採購民用型大貨車供軍用，並於九十二年間向財政部基隆關稅局申請軍用物品專案免稅。但因申請文件不符合免稅辦法第八條規定，經該局否准免稅。

requirements of Article 8 of the tariff exemption regulations, the Customs denied the application.

The Combined Logistics Command then notified the Petitioner that the tariff exemption application was denied. The Petitioner again issued a letter of inquiry with the application and the Customs responded negatively. The Petitioner brought administrative actions but was finally denied.

嗣聯勤保修署通知聲請人本件免稅申請案業經否准，聲請人再以申請書函詢基隆關稅局，經該局函覆予以否准。聲請人對此不服，提起行政爭訟，經駁回確定。

The Petitioner argued that the disputed Article 8, Paragraph 1 of the Regulation Governing the Exemption of Duty for Imported Military Goods, as applied in the Supreme Administrative Court decision, which requires the bidding document for procurement shall clearly indicate that it is exemptible of duties and the bidding price does not include tax or duty, is suspected of violating the principle of taxation by statutory authorization and filed petition for interpretation.

聲請人認最高行政法院判決，所適用系爭軍用物品進口免稅辦法第八條第一項規定招標應書明得免稅及得標價不含稅，增加即關稅法所無之限制等，有違反憲法第十九條租稅法律主義等疑義，聲請解釋。

J. Y. Interpretation No.652（December 5, 2008）*

ISSUE: Does "reasonable period of time" stated in J.Y. Interpretation No. 516 have an upper limit ?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; J. Y. Interpretation Nos. 110, 400, 425 and 516（司法院釋字第第一一０號、第四００號、第四二五號、第五一六號解釋）; J. Y. Yuan-Tze No. 274（司法院院字第二七０四號解釋）; Articles 154, 165, 233 and 247 the Land Act（土地法第一百五十四條、第一百六十五條、第二百三十三條、第二百四十七條）; Articles 20, 22 and 30 of the Eminent Domain Act（土地徵收條例第二十條、第二十二條、第三十條）; Articles 15 and 46 of the Equalization of Land Rights Act（平均地權條例第十五條、第四十六條）; Article 117 of the Administrative Procedure Act（行政程序法第一百十七條）.

KEYWORDS:

reasonable period of time（相當之期限）, people's property rights（人民之財產權）, Eminent Domain（土地徵收）, compensation（補償費）, fair compensation（合理補償）, original compensation disposition（原補償處分）, incorrect land value criteria（地價標準認定錯誤）, difference of the compensation amount（補償費差額）, Committee on Land

* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

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Values and Normal Land Values of the Special Municipality or County/City（直轄市或縣（市）政府地價及標準地價評議委員會）.**

HOLDING: Article 15 of the Constitution provides that the people's property rights shall be protected. Although the State may expropriate the people's property pursuant to the law when it is necessary for the purpose of public use or other public interests, fair compensation shall be promptly given. If and when the original compensatory disposition becomes final and binding due to the lapse of statutory remedial period, and the compensation is paid in full, any subsequent discovery of errors by the Special Municipality or County (City) concerning the land value criteria upon which the original compensatory disposition is based that result in the shortfall of the original compensation and render the original disposition unlawful, such competent authorities shall withdraw the original compensation disposition *ex officio*, render a lawful compensatory disposition, and notify the

解釋文：憲法第十五條規定，人民之財產權應予保障，故國家因公用或其他公益目的之必要，雖得依法徵收人民之財產，但應給予合理之補償，且應儘速發給。倘原補償處分已因法定救濟期間經過而確定，且補償費業經依法發給完竣，嗣後直轄市或縣（市）政府始發現其據以作成原補償處分之地價標準認定錯誤，原發給之補償費短少，致原補償處分違法者，自應於相當期限內依職權撤銷該已確定之補償處分，另為適法之補償處分，並通知需用土地人繳交補償費差額轉發原土地所有權人。逾期未發給補償費差額者，原徵收土地核准案即應失其效力，本院釋字第五一六號解釋應予補充。

land-use petitioner to pay the discrepancies to the original landowner. The original expropriation shall become invalid in the event the discrepancies remained unpaid after a certain period of time. J. Y. Interpretation No. 516 shall accordingly be supplemented.

REASONING: Article 15 of the Constitution provides that the people's property rights shall be protected. Although the State may expropriate the people's property pursuant to the law when it is necessary for the purpose of public use or other public interests, fair compensation shall be given. This compensation is due to the expropriation of property. For owners of expropriated property, this is a special sacrifice for the sake of public interests, and the State shall compensate the loss with respect to the deprivation of property or the constraints on rights. Therefore, in light of the purpose of the Constitution to protect the property rights of the people, the compensation must be fair and prompt, as several interpretations rendered by the Judicial Yuan have so dictated (*See* Interpretation Nos. 400, 425

解釋理由書：憲法第十五條規定，人民之財產權應予保障，故國家因公用或其他公益目的之必要，雖得依法徵收人民之財產，但應給予合理之補償。此項補償乃因財產之徵收，對被徵收財產之所有權人而言，係為公共利益所受之特別犧牲，國家自應予以補償，以填補其財產權被剝奪或其權能受限制之損失。故補償不僅需相當，更應儘速發給，方符憲法保障人民財產權之意旨，迭經本院解釋在案（本院釋字第四００號、第四二五號、第五一六號解釋參照）。

and 516).

Land price and other compensation due to expropriation shall be paid no later than fifteen days after the period of public notice is expired, and in case the compensatory amount is adjusted after being re-evaluated or as the result of an administrative grievance proceeding, the discrepancies shall be paid within three (3) months since the date the result is determined (*See* the first sentence of Article 233 of the Land Act, the first sentence of Article 20, Paragraph 1 and Article 22, Paragraph 4 of the Eminent Domain Act). J. Y. Interpretation No. 516 also held: "Article 233 of the Land Act clearly stipulates that land price and other compensation from expropriation of land shall be paid no later than 'fifteen days since the expiration of public notice.' Although this statutory period may be extended because of the governing authority's submission for re-evaluation in light of objection on the amount of compensation, the governing authority shall nevertheless immediately notify the person in need of land use once the compensatory amount is determined,

按徵收土地應補償之地價及其他補償費，應於公告期滿後十五日內發給之，如徵收補償價額經復議或行政救濟結果有變動者，其應補償價額差額，應於其結果確定之日起三個月內發給之（土地法第二百三十三條前段、土地徵收條例第二十條第一項前段、第二十二條第四項參照）。本院釋字第五一六號解釋亦謂：「土地法第二百三十三條明定，徵收土地補償之地價及其他補償費，應於『公告期滿後十五日內』發給。此項法定期間，雖或因對徵收補償有異議，由該管地政機關提交評定或評議而得展延，然補償費額經評定或評議後，主管地政機關仍應即行通知需用土地人，並限期繳交轉發土地所有權人，其期限亦不得超過土地法上述規定之十五日（本院院字第二七0四號、釋字第一一0號解釋參照）。倘若應增加補償之數額過於龐大，應動支預備金，或有其他特殊情事，致未能於十五日內發給者，仍應於評定或評議結果確定之日起於相當之期限內儘速發給之，否則徵收土地核准案，即應失其效力。」均係基於貫徹憲法保障人民財產權之意旨及財產權之程序保障功能，就徵收補償發給

and impose the period within which payment shall be made and remitted to the landowner. Such period shall not exceed fifteen days as provided in the above-stated Land Act (*See* Yuan-Tze No. 2704 and Interpretation No. 110). In the event the amount of discrepancies is exceedingly large that requires the expenditure of reserved fund, or there are other special circumstances that render the payment within fifteen days impossible, payment shall nevertheless be promptly made within a reasonable period of time since the date re-evaluation is determined or the eminent domain shall be deemed invalid." These strict requirements on compensatory payment period over expropriation are to uphold the constitutional objective of protecting people's property rights and the function of procedural safeguards on such protection.

期限而為之嚴格要求。

While J. Y. Interpretation No. 516 deals with payment period after the objection proceeding on expropriation compensation, in light of the constitutional requirement for adequate and efficient compensatory payment, however, it is

本院釋字第五一六號解釋之上開內容，雖係就徵收補償異議程序後補償費發給期限所為之闡釋，惟關於補償費應相當並儘速發給之憲法要求，對於原補償處分因法定救濟期間經過而確定後，始發現錯誤而應發給補償費差額之

applicable *mutatis mutantis* to situations where error is discovered after the original compensatory disposition becomes final for the lapse of statutory period and the discrepancies must be paid. As a result, if the Special Municipality or County (City) should discover that the land value that serves as the basis of its disposition is erroneous only after that disposition has become final and the shortfall amount has been paid, thereby rendering such disposition unlawful, in accordance with the first sentence of Article 117 of the Administrative Procedure Act, the Special Municipality or County (City) may indeed at its discretion decide whether to rescind the original disposition and enter a lawful one instead with disbursement for the discrepancies. However, given that there is objectively a shortfall concerning the original compensation already, the *status quo*, therefore, constitutes a serious violation of the constitutional requirement for adequate compensation. Consequently, to uphold the constitutional requirement that adequate and efficient compensation be provided, the Special Municipality or County (City) has no room to exercise its

情形，亦應有其適用。是倘原補償處分已確定，且補償費業經發給完竣，嗣後直轄市或縣（市）政府始發現其據以作成原補償處分之地價標準認定錯誤，原發給之補償費較之依法應發給之補償費短少，而致原補償處分違法者，依行政程序法第一百十七條前段之規定，直轄市或縣（市）政府固得依職權決定是否撤銷原補償處分、另為適法之處分並發給補償費差額。惟因原發給之補償費客觀上既有所短少，已有違補償應相當之憲法要求，而呈現嚴重之違法狀態，故於此情形，為貫徹補償應相當及應儘速發給之憲法要求，直轄市或縣（市）政府應無不為撤銷之裁量餘地；亦即應於相當期限內，依職權撤銷該已確定之違法補償處分，另為適法之補償處分，並通知需用土地人繳交補償費差額轉發原土地所有權人。逾期未發給補償費差額者，原徵收土地核准案即失其效力，方符憲法保障人民財產權之意旨，本院釋字第五一六號解釋應予補充。

decision not to rescind; *i.e.*, to undo the final but unlawful disposition as a matter of authority, issued another lawful disposition, notify the land-use applicant to pay the discrepancies and transfer that payment to the land owner within a reasonable period of time If the discrepancies are not paid after the period is expired, the approved expropriation shall immediately be deemed invalid. J. Y. Interpretation No. 516 is hereby supplemented to conform with the Constitution objective in protecting the property rights of the people.

The so-called reasonable period of time indicated above shall be clearly stipulated by legislative act based on the constitutional requirement for prompt compensatory payment. Before such legislation comes into being, the reasonable period of time shall be determined, based on the principle of promptness and on case-by-case basis, by factors such as the amount of the compensatory discrepancies, the appropriation of the budget and reserve fund, and the reasonable expectation of time the land-use applicant needs for

上述所謂相當期限，應由立法機關本於儘速發給之憲法要求，以法律加以明定。於法律有明文規定前，鑑於前述原補償處分確定後始發現錯誤而應發給補償費差額之情形，原非需用土地人所得預見，亦無從責其預先籌措經費，以繳交補償費之差額，如適用土地法、土地徵收條例等上開法律規定，要求直轄市、縣（市）政府於十五日或三個月內通知需用土地人繳交補償費差額，並轉發原土地所有權人完竣，事實上或法律上（如預算法相關限制等）輒有困難而無可期待，故有關相當期限之認定，

fund-raising. This is because the land-use applicant cannot possibly foresee circumstances where errors are discovered after the original disposition becomes final with compensatory discrepancies incurred, nor can the applicant be obligated to arrange such discrepancy payment in advance. Should the above stated provisions of the Land Act or Eminent Domain Act be applied [strictly] so that the Special Municipality or County (City) must notify the land-use applicant as well as complete the payment and transfer of compensatory discrepancies within fifteen days or three months, hardship is often created both in reality and in law (such as the relevant limitation by the Budget Act). Nevertheless, to avoid the situation where the Special Municipality or County (City) continuously delay payment of the compensatory discrepancies, thereby infringing upon the rights of the original landowner, and taken into consideration the aforementioned factors, the maximum of this reasonable period of time shall be no more than two years.

應本於儘速發給之原則，就個案視發給補償費差額之多寡、預算與預備金之編列及動支情形、可合理期待需用土地人籌措財源之時間等因素而定。然為避免直轄市或縣（市）政府遲未發給補償費差額，致原土地所有權人之權益受損，參酌前揭因素，此一相當期限最長不得超過二年。

Prior to the legislative enactment of a

關於上開相當期限之起算日，因

clear stipulation, the starting date of the above-stated reasonable period of time shall be the date the re-evaluation decision of the Committee on Land Price and Land Values Standards of the Special Municipality or County (City) becomes final. This is because the unlawfulness of the original compensation disposition is caused by the erroneous land value criteria based on which the Special Municipality or County (City) renders the original compensation disposition, and the Special Municipality or County (City) shall submit to the Committee on Land Values and Normal Land Values for re-evaluation (*See* Articles 154, 165 and 247 of the Land Act, Articles 22 and 30 of the Eminent Domain Act and Articles 15 and 46 of the Equalization of Land Rights Act). If the unlawfulness of the original compensation disposition is resulted from errors in the original publicly announced current land value, the reasonable period of time shall start from the date the public notice of the corrected land value by the Committee on Land Values and Normal Land Values becomes final.

原補償處分之違法係直轄市或縣（市）政府據以作成原補償處分之地價標準認定錯誤所致，直轄市或縣（市）政府應提交地價及標準地價評議委員會重行評議或評定，以資更正（土地法第一百五十四條、第一百六十五條及第二百四十七條、土地徵收條例第二十二條及第三十條、平均地權條例第十五條及第四十六條等規定參照），故於法律有明文規定前，上開相當期限應自該管直轄市或縣（市）政府地價及標準地價評議委員會重行評議或評定結果確定之日起算。其中原補償處分之違法如係因原公告土地現值錯誤所致，而有所更正，則應自該管直轄市或縣（市）政府經地價及標準地價評議委員會評議更正公告土地現值之公告確定之日起算。

Justice Ching-You Tsay filed concurring opinion in part.

Justice Pai-Hsiu Yeh filed concurring opinion in part.

本號解釋蔡大法官清遊提出部分協同意見書；葉大法官百修提出部分協同意見書。

EDITOR'S NOTE:

Summary of facts: The Petitioners believed the compensation for the expropriation of their jointly owned land during the publicly announced expropriation period in 1990 was too low and requested an increase of the compensation standard. However, the request was denied by the county government. The Petitioners appealed and the original disposition was reversed. Then the Land Value Standard Appraisal Committee (the "Committee") resolved to maintain the original compensation standard in 1993. The Petitioner did not object, and the compensation for expropriation was final.

編者註：

事實摘要：聲請人等就共有之系爭土地，於七十九年間公告徵收期間內，認補償金額過低，要求提高補償費標準，為縣政府否准。聲請人等提起訴願，訴願決定，撤銷原處分。嗣經標準地價評議委員會於八十二年間評議仍維持原補償標準，聲請人等未予爭執，徵收補償處分遂告確定。

In 2002, the Petitioner applied to redeem the disputed land at the expropriation price as the expropriating agency did not use the land within the required timeframe. Upon reexamining the inspected and reported value of the disputed land,

聲請人等於九十一年間以需地機關未依期限使用系爭土地，申請照徵收價額收回土地。經重新檢討系爭土地徵收當時查報之地價，發現確有錯誤，即提請標準地價評議委員會評議，將系爭土地公告土地現值由每平方公尺一百二

errors were discovered and the case was submitted to the Committee for appraisal, which corrected the value of the disputed land from NT$120 per square meter to NT$1,670 per square meter. The county government announced the result.

十元更正為一千六百七十元，並經縣政府公告。

Subsequently, due to fund raising needs, the county government delayed notifying the Petitioners to collect the difference in compensation until 2004. The Petitioners refused to accept on the ground that the disbursement was not made within a [reasonable] period of time.

嗣縣政府因籌措經費，延至九十三年開始通知聲請人等領取補發之差額補償費。聲請人等以縣政府未於相當期間內發放，拒絕領取。

The Petitioners requested to affirm that no legal relationship exists from the expropriation of the disputed land. Both the administrative appeal and litigation were denied. The Petitioners then filed petition for supplemental interpretation on whether there is a maximum cap on the "reasonable period of time" stated in J.Y. Interpretation No. 516.

聲請人等請求確認系爭土地徵收之法律關係不存在，經訴願、行政訴訟均遭駁回。聲請人等以釋字第五一六號解釋徵收補償費發給之「相當之期限」有無上限等為由，聲請補充解釋釋字第五一六號解釋。

J. Y. Interpretation No.653（December 26, 2008）*

ISSUE: Whether article 6 of the Detention Act and article 14 of its Enforcement Rules denying a detainee opportunity to litigate in court for judicial remedies are unconstitutional ?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 23 of the Constitution（憲法第二十三條）; Article 6, paragraph 1 and paragraph 2 of the Detention Act（羈押法第六條第一項及第二項）; Article 14, paragraph 1 of the Enforcement Rules for the Detention Act（羈押法施行細則第十四條第一項）; J. Y.Interpretations No. 160, No. 243, No. 266, No. 298, No. 323, No. 378, No. 382, No.392, No. 393, No. 396, No.418, No. 430, No. 442, No. 448, No. 462, No. 466, No. 512, No. 574, No. 629, and No. 639（司法院釋字第一六0號，第二四三號，第二六六號，第二九八號，第三二三號，第三七八號，第三八二號，第三九二號，第三九三號，第三九六號，第四一八號，第四三0號，第四四二號，第四四八號，第四六二號，四六六號，五一二號，五七四號，六二九號，及第六三九號解釋）.

KEYWORDS:

Detention（羈押）, detainee（受羈押被告）, bodily freedom（身體自由）, penal power（刑罰權）, the principle of

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* Translated by Prof. Huai-Ching Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

presumption of innocence（無罪推定原則）, complaint（申訴制度）, the rights of litigation（訴訟權）, detention house（看守所）, special power relationship（特別權力關係）.**

HOLDING: Article 6 of the Detention Act and article 14, paragraph 1, of the Enforcement Rules for the same Act denying a detainee opportunity to litigate in court for judicial remedies is contradictory to the intent of article 16 of the Constitution guaranteeing people the right of instituting legal proceedings. The government shall study and revise the Detention Act and relevant regulations within two years from the date of publication of this Interpretation to provide the detainee a timely, effective remedy in accordance with the intention of this Interpretation.

解釋文：羈押法第六條及同法施行細則第十四條第一項之規定，不許受羈押被告向法院提起訴訟請求救濟之部分，與憲法第十六條保障人民訴訟權之意旨有違，相關機關至遲應於本解釋公布之日起二年內，依本解釋意旨，檢討修正羈押法及相關法規，就受羈押被告及時有效救濟之訴訟制度，訂定適當之規範。

REASONING: Article 16 of the Constitution guaranteeing people the right of instituting legal proceedings means that a person shall have right to litigate in court for legal remedies when his personal right is infringed (in reference to Interpretations No.418 of this Court). Based on the

解釋理由書：憲法第十六條保障人民訴訟權，係指人民於其權利遭受侵害時，有請求法院救濟之權利（本院釋字第四一八號解釋參照）。基於有權利即有救濟之原則，人民權利遭受侵害時，必須給予向法院提起訴訟，請求依正當法律程序公平審判，以獲及時有效

principle - where there is a right, there is a remedy, when a person's right is infringed, the state shall provide such a person an opportunity to institute legal proceedings in court, to request a fair trial by due process of law, and to obtain timely and effective remedies. This is the core substance safeguarded by the right of action (in reference to Interpretations No. 396 and No. 574 of this Court), which shall not be deprived of by reason of the status of a detainee (in reference to Interpretations No. 243, No. 266, No. 298, No. 323, No. 382, No. 430, No. 462 of this Court). When weighing factors such as type and nature of cases, policy and purposes of litigation, effective distribution of judicial resources, for enacting laws to impose limitation on the tier of courts for appeal, procedures, and relevant requirements to be followed in seeking remedy through lawsuit or authorizing a government agency to issue administrative orders for the same purpose, the Legislature should do in compliance with the requirements of article 23 of the Constitution so as not to contradict the intent contemplated by the Constitution in guaranteeing people's

救濟之機會，此乃訴訟權保障之核心內容（本院釋字第三九六號、第五七四號解釋參照），不得因身分之不同而予以剝奪（本院釋字第二四三號、第二六六號、第二九八號、第三二三號、第三八二號、第四三０號、第四六二號解釋參照）。立法機關衡量訴訟案件之種類、性質、訴訟政策目的及司法資源之有效配置等因素，而就訴訟救濟應循之審級、程序及相關要件，以法律或法律授權主管機關訂定命令限制者，應符合憲法第二十三條規定，方與憲法保障人民訴訟權之意旨無違（本院釋字第一六０號、第三七八號、第三九三號、第四一八號、第四四二號、第四四八號、第四六六號、第五一二號、第五七四號、第六二九號、第六三九號解釋參照）。

right to sue. (in reference to Interpretations No. 160, No. 378, No. 393, No. 418, No. 442, No. 448, No. 466, No. 512, No. 574, No. 629, No. 639).

Detention is a compulsory sanction imposing restriction on personal freedom of criminal defendants and putting them in custody at a specific place. The purpose of this preservative procedure is to ensure smooth continuance of legal proceedings and to realize the State's penal power. Detaining a criminal defendant and restricting his personal freedom to the extent that he is isolated from his family, society, and occupational life constitutes not only serious psychological impact, but also detrimental effect to the detainee on his personal rights of reputation and credibility. It is a maximum sanction against personal freedom. Therefore, it should be done prudently as the last resort of preservative proceeding. Unless the court is convinced that all legal requirements have been met, and that it is necessary to do so, detention shall not be taken lightly (in reference to Interpretation No. 392). After a criminal defendant is taken

羈押係拘束刑事被告身體自由，並將其收押於一定處所之強制處分，此一保全程序旨在確保訴訟程序順利進行，使國家刑罰權得以實現。羈押刑事被告，限制其人身自由，將使其與家庭、社會及職業生活隔離，非特予其心理上造成嚴重打擊，對其名譽、信用等人格權之影響亦甚重大，係干預人身自由最大之強制處分，自僅能以之為保全程序之最後手段，允宜慎重從事，其非確已具備法定要件且認有必要者，當不可率然為之（本院釋字第三九二號解釋參照）。刑事被告受羈押後，為達成羈押之目的及維持羈押處所秩序之必要，其人身自由及因人身自由受限制而影響之其他憲法所保障之權利，固然因而依法受有限制，惟於此範圍之外，基於無罪推定原則，受羈押被告之憲法權利之保障與一般人民所得享有者，原則上並無不同。是執行羈押機關對受羈押被告所為之決定，如涉及限制其憲法所保障之權利者，仍須符合憲法第二十三條之規定。受羈押被告如認執行羈押機關對

into detention, the detainee's personal freedom as well as any constitutional rights based on his personal freedom may be restricted to the extent necessary for achieving the purposes of detention and maintaining order at the place of detention. However, beyond the scope of this restriction, based on the principle of presumption of innocence, the detainee's constitutional protection is basically no difference from others. Therefore, if any decision made on a detainee by the detaining authority involves constitutionally protected rights, it must conform to Article 23 of the Constitution. If the detainee believes that the adverse decision made by the detaining authority has exceeded the scope necessary for achieving the purpose of detention or for maintaining order at the place of detention, thereby unlawfully jeopardizing his constitutionally protected rights, he shall be permitted to bring an action in court for remedies so that the intention of Article 16 of the Constitution guaranteeing people right of instituting legal proceedings will not be violated.

其所為之不利決定，逾越達成羈押目的或維持羈押處所秩序之必要範圍，不法侵害其憲法所保障之權利者，自應許其向法院提起訴訟請求救濟，始無違於憲法第十六條規定保障人民訴訟權之意旨。

Article 6, paragraph 1, of the Detention

羈押法第六條第一項規定：「刑

Act prescribes: “A criminal defendant who is being treated inappropriately in the detention house may complain to a judge, prosecutor, or inspector”. Paragraph 2 of the same article prescribes: “The judge, prosecutor, or inspector receiving such a complaint shall report to the Chief Judge of the court or the Chief Prosecutor immediately”. Article 14, paragraph1, of the Enforcement Rules for the same Act also prescribes: “A complaint brought by a defendant who disagrees with the disciplinary action taken by the detention house shall be dealt with in pursuance of the provisions set forth below: 1. A defendant who disagrees with the disciplinary action taken by the detention house may submit an oral or written complaint within ten days of the disciplinary action. An oral complaint shall be entered in a book of complaints by the officer in charge of the detention house, with details of fact noted in the book. A written complaint shall state the name of the complainant, crime of which he is suspected, and the crime charged, fact and date of the disciplinary action, reason for contention with the disciplinary action, and it must be

事被告對於看守所之處遇有不當者，得申訴於法官、檢察官或視察人員。」第二項規定：「法官、檢察官或視察人員接受前項申訴，應即報告法院院長或檢察長。」同法施行細則第十四條第一項並規定：「被告不服看守所處分之申訴事件，依左列規定處理之：一、被告不服看守所之處分，應於處分後十日內個別以言詞或書面提出申訴。其以言詞申訴者，由看守所主管人員將申訴事實詳記於申訴簿。以文書申訴者，應敘明姓名、犯罪嫌疑、罪名、原處分事實及日期、不服處分之理由，並簽名、蓋章或按指印，記明申訴之年月日。二、匿名申訴不予受理。三、原處分所長對於被告之申訴認為有理由者，應撤銷原處分，另為適當之處理。認為無理由者，應即轉報監督機關。四、監督機關對於被告之申訴認為有理由者，得命停止、撤銷或變更原處分，無理由者應告知之。五、視察人員接受申訴事件，得為必要之調查，並應將調查結果報告其所屬機關處理。調查時除視察人員認為必要者外，看守所人員不得在場。六、看守所對於申訴之被告，不得歧視或藉故予以懲罰。七、監督機關對於被告申訴事件有最後決定之權。」上開規定均係立法機關與主管機關就受羈押被告不服

signed, sealed, or fingerprinted, with the date of complaining. 2. An anonymous complaint shall not be entertained. 3. The officer taking the original disciplinary action shall cancel it and take another appropriate action if he finds the complaint well-grounded. If the officer finds the complaint is not supported by a good cause, he shall report it to his supervisory authority. 4. If the supervisory authority finds defendant's complaint is supported by a good cause, the supervisory authority may order suspension, revocation, or change of the original disciplinary action. If the supervisory authority finds no good cause exist, it shall notify the defendant accordingly. 5. An inspector who has received a complaint may conduct necessary investigation and report the results to the authority which he works for. Except it is deemed necessary by the inspector, no officers of detention house shall be present at the scene of investigation. 6. The detention house shll not exercise discrimination or punish a defendant for his bringing a complaint. 7. The supervisory authority shall have the final say in the case of a defendant's complaint."

看守所處遇或處分事件所設之申訴制度。該申訴制度使執行羈押機關有自我省察、檢討改正其所為決定之機會，並提供受羈押被告及時之權利救濟，其設計固屬立法形成之自由，惟仍不得因此剝奪受羈押被告向法院提起訴訟請求救濟之權利。

The abovementioned provisions constitute a system of complaint designed by the Legislature and the competent administrative agency to cope with cases of complaint brought by a detainee who disagrees with the treatment or disciplinary action taken by a detention house. The system provides the detaining authority an opportunity of self-reflection and review of its actions for the purpose of correction and also provides a timely remedy for the detainee. Although the scheme of design was within the scope of legislative power, yet it may not deprive a defendant of the right to institute legal proceedings in court for remedies.

Article 6 of the Detention Act was enacted in 1946. Subsequent revisions had been made only to change the titles of the officers handling complaints. While article 14, paragraph 1, of the Enforcement Rules for the Detention Act was established in 1976, subsequent revisions thereof had made no change to the text of said article. In view of the circumstances surrounding original legislation, it was thought that the detainee and detention

按羈押法第六條係制定於中華民國三十五年，其後僅對受理申訴人員之職稱予以修正。而羈押法施行細則第十四條第一項則訂定於六十五年，其後並未因施行細則之歷次修正而有所變動。考其立法之初所處時空背景，係認受羈押被告與看守所之關係屬特別權力關係，如對看守所之處遇或處分有所不服，僅能經由申訴機制尋求救濟，並無得向法院提起訴訟請求司法審判救濟之權利。司法實務亦基於此種理解，歷來

house were in a special power relationship. If a detainee disagreed with the treatment applied or disciplinary action taken by the detention house, institution of a complaint would be his sole remedy. The detainee did not enjoy a right to institute legal proceedings in court for judicial remedies. Based on such a general understanding, the legal profession always thought that a detainee disagreeing with the treatment applied or disciplinary action taken by the detention house could only resort to the filing of a complaint in accordance with the abovementioned provisions, with no further right to file a suit with the court for remedies. However, the nature of complaint is to provide a means for internal review and correction of the agency. It is not tantamount to judicial trial by filing with the court an action for remedies, and certainly can not be deemed to replace totally the judicial system under which the detainee may apply to the court for remedy. Therefore, the abovementioned provisions disallowing detainees to litigate in courts is contradictory to the intent of Article 16 of the Constitution guaranteeing people the right of instituting

均認羈押被告就不服看守所處分事件，僅得依上開規定提起申訴，不得再向法院提起訴訟請求救濟。惟申訴在性質上屬機關內部自我審查糾正之途徑，與得向法院請求救濟之訴訟審判並不相當，自不得完全取代向法院請求救濟之訴訟制度。是上開規定不許受羈押被告向法院提起訴訟請求救濟之部分，與憲法第十六條規定保障人民訴訟權之意旨有違。

legal proceedings in court.

Whether a detainee who disagrees with the treatment or disciplinary action of detention house and is entitled to institute legal proceedings for jucidical remedy should opt for a criminal procedure, an administrative procedure, or a special procedure, he will have to take into consideration many factors such as the nature of the matter in dispute and its relation with the criminal action in which he is involved, the length of the period of detention, timely and effective protection of his rights, the organization and personnel assignment of the court. The design of the procedures and system in relation with such factors require a certain period of time before a sound planning can be made. However, to protect the detainee's right of action, the government should review and revise the Detention Act and its related laws and regulations and should establish appropriate rules to provide detainees a timely and effective remedy in accordance with the essence of this Interpretation, no later than two years from the date of publication of this Interpretation.

受羈押被告不服看守所之處遇或處分，得向法院提起訴訟請求救濟者，究應採行刑事訴訟、行政訴訟或特別訴訟程序，所須考慮因素甚多，諸如爭議事件之性質及與所涉刑事訴訟程序之關聯、羈押期間之短暫性、及時有效之權利保護、法院組織及人員之配置等，其相關程序及制度之設計，均須一定期間妥為規畫。惟為保障受羈押被告之訴訟權，相關機關仍應至遲於本解釋公布之日起二年內，依本解釋意旨，檢討修正羈押法及相關法規，就受羈押被告及時有效救濟之訴訟制度，訂定適當之規範。

It is hereby pointed out incidentally that, although the system of complaint provided in Article 6 of the Detention Act and Article 14, paragraph 1, of the Enforcement Rules for the same Act does is functional, the provisions regarding its nature, organization, procedure, and connections between each other, etc. are not clear. When reviewing and revising the abovementioned judicial remedy system, the government should also look into issues regarding soundness of the system of complaint, relationship between complaint and the institution of judicial remedy, etc.

羈押法第六條及同法施行細則第十四條第一項規定之申訴制度雖有其功能，惟其性質、組織、程序及其相互間之關聯等，規定尚非明確；相關機關於檢討訂定上開訴訟救濟制度時，宜就申訴制度之健全化、申訴與提起訴訟救濟之關係等事宜，一併檢討修正之，併此指明。

Justice Tzong-Li Hsu filed concurring opinion.

Justice Yu-Hsiu Hsu filed concurring opinion.

Justice Chen-Shan Li filed concurring opinion in part.

Justice Sea-Yau Lin filed dissenting opinion in part, in which Justice Chun-Sheng Chen joined.

Justice Chun-Sheng Chen filed dissenting opinion in part.

本號解釋許大法官宗力提出協同意見書；許大法官玉秀提出協同意見書；李大法官震山提出部分協同意見書；林大法官錫堯、陳大法官春生共同提出部分不同意見書；陳大法官春生提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: Petitioner A was convicted of attempted murder and detained at the Tainan Detention Center. Petitioner A later violated the rules of the detention center and was placed in isolation with 24-hour audio and video surveillance. The Petitioner complained to the Detention Center in accordance with Article 14, Paragraph 1 of the Implementing Regulations of the Detention Act. The center's superintendent ruled the complaint groundless and transmitted to the supervisory authority and the complaint assessment task force (the "Task Force") for further consideration in accordance with the regulations. The Task Force also deemed the complaint groundless and notified the Petitioner in writing. The Petitioner o immediately raised objection.

The Petitioner also argued in the complaint that the above disposition of the detention center violates Article 315-1 of the Criminal Code, Articles 3 and 24 of the Communication Protection and Monitoring Act, and Article 76 of the Prison Act. The Petitioner then appealed and

編者註：

事實摘要：聲請人A因涉殺人未遂案件，經裁定羈押於臺南看守所內，嗣因違反所規，遭所方施以隔離處分，所方並於其所居舍房內進行二十四小時錄音、錄影。聲請人不服上述處分，依羈押法施行細則第十四條第一項規定向所方提出申訴，經該所所長批示申訴無理由，依規定轉報監督機關及提交所方申訴評議小組研議。該小組亦認其申訴無理由並函知聲請人，聲請人隨即提出異議。

聲請人於申訴之時，並以臺南看守所上開處分違反刑法第三百十五條之一、通訊保障監察法第三條、第二十四條及監獄行刑法第七十六條等規定，提起訴願、行政訴訟，均遭駁回。

brought administrative litigation but was denied throughout.

The Petitioner then argued that Article 6 of the Detention Act and Article 14, Paragraph 1 of the Implementing Regulations of the Detention Act, as applied by the Supreme Administrative Court disallowing detainee to seek remedy by appealing to court, may contradict the right to litigate guaranteed by Article 16 of the Constitution and filed petition for interpretation.

聲請人乃以最高行政法院所適用之羈押法第六條及羈押法施行細則第十四條第一項規定，不許受羈押被告向法院請求訴訟救濟，有牴觸憲法第十六條訴訟權保障之疑義，聲請解釋。

J. Y. Interpretation No.654（January 23, 2009）*

ISSUE: Are Article 23, Paragraph 3, and Article 28 of the Detention Act constitutional ?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; Article 23, Paragraphs 3, and Article 28 of the Detention Act（羈押法第二十三條第三項、第二十八條）.

KEYWORDS:

Detention Act（羈押法）, principle of proportionality（比例原則）, rights to litigate（訴訟權）, rights to defend（防禦權）.**

HOLDING: Article 23, Paragraph 3 of the Detention Act provides that when a counsel visits an accused in custody, the visitation shall be under surveillance pursuant to Paragraph 2 of the same Article. Subjecting visitation to surveillance and audio-recording without considering whether such surveillance achieve the purpose of detention or is necessary in maintaining the order of the detention facility violates the

解釋文：羈押法第二十三條第三項規定，律師接見受羈押被告時，有同條第二項應監視之適用，不問是否為達成羈押目的或維持押所秩序之必要，亦予以監聽、錄音，違反憲法第二十三條比例原則之規定，不符憲法保障訴訟權之意旨；同法第二十八條之規定，使依同法第二十三條第三項對受羈押被告與辯護人接見時監聽、錄音所獲得之資訊，得以作為偵查或審判上認定被告本

* Translated by Li-Chih Lin, Esq., J.D.

** Contents within frame, not part of the original text, are added for reference purposes only.

principle of proportionality under Article 23 of the Constitution and is inconsistent with the meaning and purpose of the Constitution to protect the right to litigate. Article 28 of the same Act provides that information obtained through surveillance and audio-recording during visitation in accordance with Article 23, Paragraph 3 may be admitted into evidence against the accused during investigation or on trial impinges upon the exercise of the right to defend by the accused and contradicts the right to litigate stipulated under Article 16 of the Constitution. The aforementioned Article 23, Paragraphs 3, and Article 28 of the Detention Act not in conformity with this judicial interpretation shall be ineffective as of May 1st, 2009.

案犯罪事實之證據，在此範圍內妨害被告防禦權之行使，牴觸憲法第十六條保障訴訟權之規定。前開羈押法第二十三條第三項及第二十八條規定，與本解釋意旨不符部分，均應自中華民國九十八年五月一日起失其效力。

Article 1, Paragraph 2 of the Organization Principles of Detention Facilities provides that: “Matters concerning the detention of an accused are subject to the supervision of the district court and its prosecutory office in the same venue.” This is an internal administrative supervision within an agency, not an authorization to carry out surveillance or audio-recording.

看守所組織通則第一條第二項規定：「關於看守所羈押被告事項，並受所在地地方法院及其檢察署之督導。」屬機關內部之行政督導，非屬執行監聽、錄音之授權規定，不生是否違憲之問題。

Thus it does not incur any issue of constitutionality.

The petitioner's motion for temporary disposition under Article 23, Paragraph 3, and Article 28 of the Detention Act is hereby dismissed for lack of sufficient grounds to receive protection.

聲請人就上開羈押法第二十三條第三項及第二十八條所為暫時處分之聲請，欠缺權利保護要件，應予駁回。

REASONING: Article 16 of the Constitution provides people with the right to litigate. Its purpose is to safeguard the people's right to a fair trial so that a criminal defendant is entitled to full right to defend under due process of law, which includes, among other things, the selection of an entrusted counsel. The right to defend cannot be functional until a criminal defendant receives concrete and effective protection by exercising the right to counsel assistance. Consequently, the essence for counsel to assist the criminal defendant in exercising the right to defend lies in their free and unrestricted communications, and is subject to constitutional protection. While exercising the aforementioned right of free and unrestricted communications may, under certain

解釋理由書：憲法第十六條規定人民有訴訟權，旨在確保人民有受公平審判之權利，依正當法律程序之要求，刑事被告應享有充分之防禦權，包括選任信賴之辯護人，俾受公平審判之保障。而刑事被告受其辯護人協助之權利，須使其獲得確實有效之保護，始能發揮防禦權之功能。從而，刑事被告與辯護人能在不受干預下充分自由溝通，為辯護人協助被告行使防禦權之重要內涵，應受憲法之保障。上開自由溝通權利之行使雖非不得以法律加以限制，惟須合乎憲法第二十三條比例原則之規定，並應具體明確，方符憲法保障防禦權之本旨，而與憲法第十六條保障訴訟權之規定無違。

circumstances, be limited by law, such limitations must comply with the principle of proportionality under Article 23 of the Constitution and must be concrete and precise in accordance with the meaning and purpose of the Constitution so that it is not contradictory to Article 16 of the Constitution.

While the physical freedom or other constitutional rights of a detainee are limited by law because of the detention, under the doctrine of presumption of innocence, the detainee nevertheless enjoys, in principle, other constitutional rights outside of the scope [of such limitations] as an ordinary person (*See* J. Y. Interpretation No. 653). Isolated from outside world, the only means for a detainee to engage in free and unrestricted communications so as to safeguard the right to defend is through counsel's visitation. Article 23, Paragraph 3 of the Detention Act provides that Paragraph 2 on "under surveillance" shall apply in the event the counsel visits a detainee. Taking into consideration the meaning and purpose of Detention Act and its Implementation

受羈押之被告，其人身自由及因人身自由受限制而影響之其他憲法所保障之權利，固然因而依法受有限制，惟於此範圍之外，基於無罪推定原則，受羈押被告之憲法權利之保障與一般人民所得享有者，原則上並無不同（本院釋字第六五三號解釋理由書參照）。受羈押被告因與外界隔離，唯有透過與辯護人接見時，在不受干預下充分自由溝通，始能確保其防禦權之行使。羈押法第二十三條第三項規定，律師接見受羈押被告時，亦有同條第二項應監視之適用。該項所稱「監視」，從羈押法及同法施行細則之規範意旨、整體法律制度體系觀察可知，並非僅止於看守所人員在場監看，尚包括監聽、記錄、錄音等行為在內。且於現行實務運作下，受羈押被告與辯護人接見時，看守所依據上開規定予以監聽、錄音。是上開規定使

Rules as well as the totality of the legal system, the term “surveillance” entails not only on-site monitoring by the detention facility personnel, but also eavesdropping, recordation and audio-recording, among other acts. Under current practices, counsel visitation is routinely monitored and recorded pursuant to the aforementioned statutory provisions. These provisions, which allow a detention facility to conduct surveillance and audio-recording without considering whether it achieves the purpose of detention or is necessary in maintaining the order of the detention facility, has hindered the exercise of the right to defend and exceeded the scope of necessity, thus violates the principle of proportionality under Article 23 of the Constitution and is inconsistent with the meaning and purpose of the Constitution to protect the right to litigate. However, for the need to maintain order in the detention facility, the mere visual monitoring without probing into the contents does not contradict the meaning and purpose of the Constitution concerning the protection of the right to litigate.

看守所得不問是否為達成羈押目的或維持押所秩序之必要，予以監聽、錄音，對受羈押被告與辯護人充分自由溝通權利予以限制，致妨礙其防禦權之行使，已逾越必要程度，違反憲法第二十三條比例原則之規定，不符憲法保障訴訟權之意旨。惟為維持押所秩序之必要，於受羈押被告與其辯護人接見時，如僅予以監看而不與聞，則與憲法保障訴訟權之意旨尚無不符。

Article 28 of the Detention Act provides: "Any statement, demeanor, or contents of correspondence sent or received by the defendant suitable for references during investigation or on trial, shall be submitted to the prosecutor or the district court." It enables the information obtained by surveillance and audio-recording during visitation pursuant to Article 23, Paragraph 3 be admitted into evidence against the accused during investigation or on trial, thus impinges upon the exercise of the right to defend by the accused and contradicts the right to litigate stipulated in the Constitution Balancing the protection over the right to litigate and the necessary adjustment of the related [governing] agencies, the aforementioned Article 23, Paragraphs 3, and Article 28 of the Detention Act not in conformity with this judicial interpretation shall be ineffective as of May 1st, 2009. Any law that limits the right to exercise free and unrestricted communications between a criminal defendant and counsel must be stipulated in concrete and precise manner and is subject to the determination of the court together with relevant judicial remedies,

羈押法第二十八條規定：「被告在所之言語、行狀、發受書信之內容，可供偵查或審判上之參考者，應呈報檢察官或法院。」使依同法第二十三條第三項對受羈押被告與辯護人接見時監聽、錄音所獲得之資訊，得以作為偵查或審判上認定被告本案犯罪事實之證據，在此範圍內妨害被告防禦權之行使，牴觸憲法保障訴訟權之規定。前開羈押法第二十三條第三項及第二十八條規定，與本解釋意旨不符部分，均應自九十八年五月一日起失其效力，俾兼顧訴訟權之保障與相關機關之調整因應。如法律就受羈押被告與辯護人自由溝通權利予以限制者，應規定由法院決定並有相應之司法救濟途徑，其相關程序及制度之設計，諸如限制之必要性、方式、期間及急迫情形之處置等，應依本解釋意旨，為具體明確之規範，相關法律規定亦應依本解釋意旨檢討修正，併此指明。

related procedures and the design of mechanism being provided, such as the necessity, manner, time and disposition under urgent circumstances to restrict in accordance with the meaning and purpose of this judicial interpretation. All relevant laws shall also be reviewed and revised based on this judicial interpretation.

Article 1, Paragraph 2 of the Organization Principles of Detention Facilities provides that: "Matters concerning the detention of the accused are subject to the supervision of the district court and its prosecutory office in the same venue." The facilities are those where detention are taking place, and their staff are responsible only for the actual enforcement of detention. The enforcement of detention is under the command of the prosecutor during an investigation, but under the supervision of the presiding judge or other associate judges on the case (*See* Article 103 of the Criminal Procedural Law). The Organization Principles of Detention Facilities [only] governs the organizational structure, internal units having matters under its [respective] jurisdiction, personnel and

看守所組織通則第一條第二項規定：「關於看守所羈押被告事項，並受所在地地方法院及其檢察署之督導。」乃係指看守所為執行羈押之場所，看守所之職員僅實際上負責羈押之執行。其執行羈押於偵查中仍依檢察官之指揮，審判中則依審判長或受命法官之指揮（刑事訴訟法第一百零三條參照）。而看守所組織通則係有關負責執行羈押之看守所組織編制、內部單位掌理事項、人員編制與執掌等事項之組織法，其第一條第二項僅在說明法院或檢察官併具指揮執行羈押之法律地位，純屬機關內部之行政督導，非屬執行監聽、錄音之授權規定，不生是否違憲之問題。

responsibilities; Article 1, Paragraph 2 merely states that the district court or prosecutor also has concurrent authorities to supervise the enforcement the detention, which is strictly internal supervisions within the administrative agency, not stipulation on the authorization of eavesdropping or audio-recording, and, therefore, does not incur any issue on its constitutionality.

The petitioner of this case was suspicious of committing the crime under Article 4, Paragraph 1, Section 5 of the Anti-Corruption Statute and was charged by the prosecutor at the Taiwan Banchiao Prosecutory Office on November 3rd, 2008. The petitioner was arraigned on November 6th, 2008, and was released on bail by the Taiwan Banchiao District Court. He now moves for temporary disposition in accordance with the aforementioned Article 23, Paragraph 3, and Article 28 of the Detention Act. Since this motion is inconsistent with the meaning and purpose of J. Y. Interpretations No. 585 and 599, and, therefore, lacks sufficient ground to receive protection. The motion is denied.

本件聲請人因涉嫌違反貪污治罪條例第四條第一項第五款之罪，業經臺灣板橋地方法院檢察署檢察官於九十七年十一月三日提起公訴，並於同月六日移審後，已由臺灣板橋地方法院法官於同日諭知交保候傳。聲請人聲請宣告定暫時狀態之暫時處分，核與本院釋字第五八五號及第五九九號解釋意旨不符，顯然欠缺權利保護要件。故聲請人就上開羈押法第二十三條第三項、第二十八條所為暫時處分之聲請，應予駁回。

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chen-Shan Li filed concurring opinion.

Justice Yu-Hsiu Hsu filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

本號解釋葉大法官百修提出協同意見書；李大法官震山提出協同意見書；許大法官玉秀提出協同意見書；許大法官宗力提出協同意見書；陳大法官新民提出協同意見書。

EDITOR'S NOTE:

Summary of facts: The petitioner was taken into custody for criminal offenses he allegedly committed. He was not allowed to see anyone or communicate with anyone by letters. The prosecutor issued an order to record the entire counsel's visitation of the petitioner. During the visitation, officers of the detention house monitored and recorded the conversation between the petitioner and his counsel.

編者註：

事實摘要：聲請人因案被裁定羈押，並禁止接見、通信。檢察官於聲請人與辯護人（律師）接見時，命令全程錄音。辯護人於接見聲請人時，交談內容皆由看守所人員全程監聽、錄音。

The petitioner challenged the constitutionality of Article 23, Paragraph 3 (the counsel's visitation of the accused shall be

聲請人認為羈押法第二十三條第三項律師接見被告時，監視規定、第二十八條規定被告在所內言行、書信之呈

under surveillance), and Article 28 of the Detention Act (the information obtained by monitoring and audio-recording during visitation is allowed to be used as evidence against the accused in investigation or trial) and Article 1, Paragraph 2 of the General Principles of the Organization of Detention House (matters regarding the detention of the accused are supervised by the district court and the prosecution office in the same jurisdiction of the detention house). The petitioner now moves for judicial interpretation.

報及看守所組織通則第一條第二項規定法院、檢察署督導有違憲疑義，聲請解釋。

J. Y. Interpretation No.655（February 20, 2009）*

ISSUE: Is Article 2, Paragraph 2 of the Certified Public Bookkeepers Act, as amended on July 11, 2007, in violation of the Constitution ?

RELEVANT LAWS:

J. Y. Interpretation No.453（司法院釋字第四五三號解釋）; Article 86 of the Constitution（憲法第八十六條）; Article 2 of the Professionals and Technicians Examinations Act（專門職業及技術人員考試法第二條）; Article 2, Paragraph 2 of the Business Accounting Act（商業會計法第二條第二項）; Articles 2, 13, Paragraph 1 and 35 of the Certified Public Bookkeepers Act（記帳士法第二條、第十三條第一項及第三十五條）.

KEYWORDS:

Professionals and technicians（專門職業及技術人員）, taxpayer（納稅義務人）, property right（財產權利）, tax duty（租稅義務）, public interests（公共利益）.**

HOLDING: Certified public bookkeepers are professionals. Their qualification for practice shall be obtained through examinations administered by the

解釋文：記帳士係專門職業人員，依憲法第八十六條第二款規定，其執業資格應經考試院依法考選之。記帳士法第二條第二項之規定，使未經考試

* Translated by Chun-Yih Cheng and Pei-Chen Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

Examination Yuan in accordances with Article 86, Section 2 of the Constitution. Article 2, Paragraph 2 of the Certified Public Bookkeepers Act, which enables bookkeeping and tax filing agents not otherwise qualified through examinations administered by the Examination Yuan to obtain the same qualification as certified public bookkeepers, contradicts the meaning and purpose of the above-stated provision of the Constitution and shall be invalid as of the date this Interpretation is issued.

院依法考試及格之記帳及報稅代理業務人取得與經依法考選為記帳士者相同之資格，有違上開憲法規定之意旨，應自本解釋公布之日起失其效力。

REASONING: Article 86, Section 2 of the Constitution provides that qualification for practice in specialized professions and as technicians shall be determined through examinations administered by the Examination Yuan. Based upon the above provision, members of the specialized professions are qualified only by passing examinations administered by the Examination Yuan. Article 2 of the Professionals and Technicians Examinations Act also expressly stipulates, "Professionals and Technicians hereof refer to those who can practice in a certain

解釋理由書：憲法第八十六條第二款規定，專門職業及技術人員執業資格，應經考試院依法考選之。基於上開規定，專門職業人員須經考試院依法辦理考選始取得執業資格。專門職業及技術人員考試法第二條亦明定：「本法所稱專門職業及技術人員，係指依法規應經考試及格領有證書始能執業之人員；其考試種類，由考試院定之。」又處理商業會計事務之人員，依商業會計法第二條第二項規定，指從事商業會計事項之辨認、衡量、記載、分類、彙總，及據以編製財務報表之人員，必須具備一定之會計專業知識與經驗，始能

profession only after passing examinations and are bestowed with certificates in accordance with the laws and regulations; the classification of examinations shall be determined by the Examination Yuan." Moreover, in accordance with Article 2, Paragraph 2 of the Business Accounting Act, persons in charge of business accounting affairs mean those who are engaged in the identification, measurement, recordation, classification, compilation, and preparation of financial statements accordingly. They must possess certain level of professional knowledge and experiences in accounting to be charged with such responsibility. Thus, they are a kind of professionals as illustrated in J. Y. Interpretation No. 453.

辦理，係屬專門職業人員之一種，業經本院釋字第四五三號解釋闡釋在案。

Article 2 of the Certified Public Bookkeepers Act, promulgated on June 2, 2004 (as amended on July 11, 2007 to be renumbered as Paragraph 1 in light of the addition of paragraph 2), provides that, "Nationals of the Republic of China who pass the certified public bookkeeper examination and bestowed with the qualification certificates in accordance with this Act

中華民國九十三年六月二日公布施行之記帳士法第二條（嗣於九十六年七月十一日修正，因增訂第二項而改列為同條第一項）規定：「中華民國國民經記帳士考試及格，並依本法領有記帳士證書者，得充任記帳士。」其第十三條第一項復規定：「記帳士得在登錄區域內，執行下列業務：一、受委任辦理營業、變更、註銷、停業、復業及其他

may serve as certified public bookkeepers.” Article 13, Paragraph 1 further stipulates that, “Certified public bookkeepers may, in their registered districts, engage in the practice of the following businesses: 1. Act as agents for the registration and recordation of business operation, alteration, cancellation, suspension, resumption and others matters; 2. Act as agents for tax filing and applications; 3. Provide tax consulting services; 4. Act as agents for business accounting matters; 5. Other services related to bookkeeping and tax filing as approved by the governing authority.” Accordingly, the statutory scope for certified public bookkeepers to practise entails to act as agents for business accounting matters, business registration, tax filing, tax consultation, and other services related to bookkeeping and tax filing as approved by the governing authority, which is obviously broader than the scope of business accounting matters stipulated in Article 2, Paragraph 2 of the Business Accounting Act, and has a greater bearing on not only an individual taxpayer’s property rights and tax duties but also the public interests of national tax revenues and the

登記事項。二、受委任辦理各項稅捐稽徵案件之申報及申請事項。三、受理稅務諮詢事項。四、受委任辦理商業會計事務。五、其他經主管機關核可辦理與記帳及報稅事務有關之事項。」據此，記帳士之法定執行業務範圍，包括受委任辦理商業會計事務、營業登記、稅捐申報、稅務諮詢及其他經主管機關核可辦理與記帳及報稅事務有關之事項等業務，顯較商業會計法第二條第二項所規定之商業會計事務之範圍為廣，影響層面更深，不僅涉及個別納稅義務人之財產權利及租稅義務，更影響國家財稅徵收及工商管理之公共利益，是記帳士要屬專門職業人員之一種，依上開憲法規定，應經依法考選始能執業，方符憲法第八十六條第二款之意旨。

management of industry and commerce. Therefore, certified public bookkeepers are a kind of specialized professionals who must be licensed to practice through examinations so as to comply with the meaning and purpose of Article 86, Section 2 of the Constitution.

On July 11, 2007, the Certified Public Bookkeepers Act was amended by adding Article 2, Paragraph 2: "Anyone issued a practice registration certificate as a bookkeeping and tax filing agent may convert that certificate to Certified Public Bookkeeper certificate and serve as a certified public bookkeeper in accordance with Article 35 hereof." (hereinafter "disputed provision") Further, Article 35, Paragraph 1 of that Act provides: "Those who have engaged in bookkeeping and tax filing agent business for at least three years before the implementation of this Act and have duly reported business income, may register to continue such practice as of the date this Act is implemented, provided, however, at least 24 hours of related professional training shall be accrued each year." Therefore, the disputed provision

記帳士法於九十六年七月十一日修正，增訂第二條第二項規定：「依本法第三十五條規定領有記帳及報稅代理業務人登錄執業證明書者，得換領記帳士證書，並充任記帳士。」（下稱系爭規定）而該法第三十五條第一項係規定：「本法施行前已從事記帳及報稅代理業務滿三年，且均有報繳該項執行業務所得，自本法施行之日起，得登錄繼續執業。但每年至少應完成二十四小時以上之相關專業訓練。」則系爭規定使未經考試及格之記帳及報稅代理業務人得逕以登錄換照之方式，取得與經依法考選為記帳士者相同之資格。惟未經考試及格之記帳及報稅代理業務人，其專業知識未經依法考試認定，卻同以記帳士之資格、名義執行業務，不惟消費者無從辨識其差異，致難以確保其權益，且對於經考試及格取得記帳士資格者，亦欠公允，顯與憲法第八十六條第二款

entitles bookkeeping and tax filing agents not otherwise qualified through examinations as certified public bookkeepers to summarily acquire, by converting certificates, the same status as certified public bookkeepers licensed through examinations. However, with those bookkeeping and tax filing agents not licensed through examinations practice in the same name and status as certified public bookkeepers, without their professional knowledge being examined, may not only result in consumers having difficulties to distinguish their differences and to safeguard their interests, but also being unfair to certified public bookkeepers licensed through examinations. Hence, the disputed provision obviously contradicts the meaning and purpose of Article 86, Section 2 of the Constitution and shall become null and void as of the date this Interpretation is issued.

規定意旨不符，應自本解釋公布之日起失其效力。

Although Article 35 of the Certified Public Bookkeepers Act is related to the disputed provision, it is not the subject matter for this Interpretation and should be reviewed separately concerning its

記帳士法第三十五條雖與系爭規定相關，惟並非本件聲請解釋之客體，且與系爭規定是否合憲之審查得分別為之。上開第三十五條關於已從事記帳及報稅代理業務者，得登錄繼續執業之規

constitutionality. It should be pointed out that, the said Article 35 concerning those who have already engaged in bookkeeping and tax filing agent business may continue to practice as such is not within the scope of this Interpretation.

定，不在本件解釋之範圍，併此指明。

Justice Chen-Shan Li filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Yu-Hsiu Hsu filed dissenting opinion.

Justice Shin-Min Chen filed dissenting opinion.

Justice Tzu-Yi Lin filed concurring opinion in part.

本號解釋李大法官震山提出協同意見書；葉大法官百修提出協同意見書；許大法官玉秀提出不同意見書；陳大法官新民提出不同意見書；林大法官子儀提出部分協同意見書。

EDITOR'S NOTE:

Summary of facts: On its Third Reading on June 15, 2007, the Legislative Yuan passed the addition of Article 2, Paragraph 2 of the Certified Public Bookkeepers Act, which stipulates: "A person who has registered and received the certificate to operate as a bookkeeper and tax return filing agent in accordance with Article 35 may exchange for the certificate of public

編者註：

事實摘要：立法院於九十六年六月十五日三讀通過增訂記帳士法第二條第二項條文：「依本法第三十五條規定領有記帳及報稅代理業務人登錄執業證明書者，得換領記帳士證書，並充任記帳士。」並於同年七月十一日經總統令修正公布。

bookkeeper and practice as such." The amendment was promulgated by the President on July 11 of the same year.

Article 35, Paragraph 1 of the Certified Public Bookkeepers Act stipulates: "Any person who has practiced as a bookkeeper and operated as a tax return filing agent for three (3) years or above prior to the effective date of this Act, and has reported income generated from such practice, may register to continue the practice, provided, however, that, he/she shall complete at least twenty four (24) hours of related professional training every year."

記帳士法第三十五條第一項規定：「本法施行前已從事記帳及報稅代理業務滿三年，且均有報繳該項執行業務所得，自本法施行之日起，得登錄繼續執業。但每年至少應完成二十四小時以上之相關專業訓練。」

Pursuant to J.Y. Interpretation No. 453, the Examination Yuan believed that the certified public bookkeepers have been categorized as a kind of professional occupation whose qualifications to practice should be determined by and through examination in accordance with Article 86, Subparagraph 2 of the Constitution.

考試院認為記帳士前經司法院釋字第四五三號解釋係屬專門職業之一種，依憲法第八十六條第二款規定，其執業資格應依法考選之。

The above-indicated amendment, however, permitted the Ministry of

前開修正條文卻允許記帳及報稅代理業務人不經記帳士考試及格，而由

Finance to summarily issue certificates to bookkeeping and tax filing agents without having to pass the examination, thus may contradict the Constitution and the constitutional interpretation. Petition was filed for interpretation.

財政部逕予發給記帳士證書，有牴觸憲法及憲法解釋之疑義，聲請解釋。

J. Y. Interpretation No.656（April 3, 2009）*

ISSUE: Is the provision of the latter part of Article 195, Paragraph 1 of the Civil Code that authorizes a court to take proper disposition to restore reputation constitutional ?

RELEVANT LAWS:

Articles 11 , 22, and 23 of the Constitution（憲法第十一條、第二十二條、第二十三條）; J. Y. Interpretation Nos. 399, 486, 509, 577, 587, and 603（司法院釋字第三九九號、第四八六號、第五０九號、第五七七號、第五八七號、第六０三號解釋）; Article 195, Paragraph 1 of the Civil Code（民法第一百九十五條第一項）; Article 5, Paragraph1, Section 2 and Paragraph 3 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第一項第二款及第三項）.

KEYWORDS:

right of reputation（名譽權）, proper measure（適當處分）, court order to make apologies on newspapers（判命登報道歉）, freedom to withhold expression（不表意自由）, right to self-determination（自主決定權）, human dignity（人性尊嚴）, forced expression（強制表意）, public apology（公開道歉）, restoration of reputation（回復名譽）, Principle of Proportionality（比例原則）, self-humiliation（自我羞

* Translated by Professor Dr. Amy Huey-Ling Shee.

** Contents within frame, not part of the original text, are added for reference purposes only.

辱）.**

HOLDING: The latter part of Article 195, Paragraph 1 of the Civil Code stipulates, "(t)hose whose reputation is injured may further petition for proper disposition to restore that reputation." In the event such proper disposition for the restoration of reputation entails a judgment that orders a public apology but does not involve self-humiliation or degradation of humanity, it does not violate the Principle of Proportionality and does not contradict the freedom to withhold expression protected under Article 23 of the Constitution.

解釋文：民法第一百九十五條第一項後段規定：「其名譽被侵害者，並得請求回復名譽之適當處分。」所謂回復名譽之適當處分，如屬以判決命加害人公開道歉，而未涉及加害人自我羞辱等損及人性尊嚴之情事者，即未違背憲法第二十三條比例原則，而不牴觸憲法對不表意自由之保障。

REASONING: The right to reputation, necessary in the realization of human dignity, aims to maintain and protect the individual sovereignty and moral integrity. It is guaranteed under Article 22 of the Constitution (*See* J. Y. Interpretation Nos. 399, 486, 587 and 603). Article 195, Paragraph 1 of the Civil Code stipulates: "For any unlawful offense against the

解釋理由書：名譽權旨在維護個人主體性及人格之完整，為實現人性尊嚴所必要，受憲法第二十二條所保障（本院釋字第三九九號、第四八六號、第五八七號及第六０三號解釋參照）。民法第一百九十五條第一項規定：「不法侵害他人之身體、健康、名譽、自由、信用、隱私、貞操，或不法侵害其他人格法益而情節重大者，被害人雖非

body, health, reputation, freedom, credibility, privacy, chastity of an individual, or aggravated unlawful infringement on other moral legal interests, the injured individual may petition for proper monetary compensation. Those whose reputation is injured may further petition for proper disposition to restore that reputation." Based on the latter part of this provision (hereinafter "the disputed provision"), an individual whose reputation is injured may petition the court, in addition to monetary compensation, to render proper disposition to restore his/her reputation, taken into consideration the substantive circumstances of each case With regard to the means for restoring the reputation, numerous civil trial practices have used the publication of apologies on the newspaper as the proper disposition to restore reputation, and incorporate [this method] into judicial precedents.

財產上之損害，亦得請求賠償相當之金額。其名譽被侵害者，並得請求回復名譽之適當處分。」其後段之規定（下稱系爭規定），即在使名譽被侵害者除金錢賠償外，尚得請求法院於裁判中權衡個案具體情形，藉適當處分以回復其名譽。至於回復名譽之方法，民事審判實務上不乏以判命登報道歉作為回復名譽之適當處分，且著有判決先例。

In accordance with the meaning and purpose of J. Y. Interpretation No. 577, people's freedom of speech under Article 11 of the Constitution protects not only the active freedom of expression, but also

憲法第十一條保障人民之言論自由，依本院釋字第五七七號解釋意旨，除保障積極之表意自由外，尚保障消極之不表意自由。系爭規定既包含以判決命加害人登報道歉，即涉及憲法第十一

the passive freedom to withhold expression. Given that the disputed provision entails a court-imposed public apology on the newspaper, it necessarily touches upon the freedom to withhold expression under Article 11 of the Constitution. While the State may impose limitations on the freedom to withhold expression in accordance with law, given that there may be a wide variety of causes to withhold, the inner beliefs and values that concern morality, ethics, justice, conscience, and faith are essential to the spiritual activities and self-determination of individuals, and are indispensable for to maintain and protect the individual sovereignty and moral integrity. (*See* Judicial Interpretation No.603). Hence, in the case where it is necessary to limit the offender' s freedom to withhold expression so that the reputation of the injured party may be restored, [the court] should carefully weigh in the severity of the unlawful infringement on the moral interest against the contents of the imposed expression before rendering a proper decision so as to comply with the Principle of Proportionality under Article 23 of the Constitution.

條言論自由所保障之不表意自由。國家對不表意自由，雖非不得依法限制之，惟因不表意之理由多端，其涉及道德、倫理、正義、良心、信仰等內心之信念與價值者，攸關人民內在精神活動及自主決定權，乃個人主體性維護及人格自由完整發展所不可或缺，亦與維護人性尊嚴關係密切（本院釋字第六０三號解釋參照）。故於侵害名譽事件，若為回復受害人之名譽，有限制加害人不表意自由之必要，自應就不法侵害人格法益情節之輕重與強制表意之內容等，審慎斟酌而為適當之決定，以符合憲法第二十三條所定之比例原則。

The purpose of the disputed provision is to maintain the reputation and to protect the moral rights of the injured party. In light of the fact that individual cases concerning the injury of reputation vary and monetary damages may not necessarily be sufficient to compensate or restore [the injured] reputation, it is a justifiable objective to authorize the court to render proper disposition. That the court orders the offender to make a public apology as what it deems to be a proper disposition does not exceed the scope of necessity, if the court should find such measures as having the offender bore all expenses for the publication of a clarification statement, a note on the injured party's judicial vindication, or the contents of the court judgment, in whole or in part, are still not sufficient to warrant the restoration of the injured party's reputation; provided that the court has weighed in the severity of damage to the reputation, the identity of both parties, and the offender's economic status. However, if an order for public apology induces self-humiliation to the point that human

查系爭規定旨在維護被害人名譽，以保障被害人之人格權。鑒於名譽權遭侵害之個案情狀不一，金錢賠償未必能填補或回復，因而授權法院決定適當處分，目的洵屬正當。而法院在原告聲明之範圍內，權衡侵害名譽情節之輕重、當事人身分及加害人之經濟狀況等情形，認為諸如在合理範圍內由加害人負擔費用刊載澄清事實之聲明、登載被害人判決勝訴之啟事或將判決書全部或一部登報等手段，仍不足以回復被害人之名譽者，法院以判決命加害人公開道歉，作為回復名譽之適當處分，尚未逾越必要之程度。惟如要求加害人公開道歉，涉及加害人自我羞辱等損及人性尊嚴之情事者，即屬逾越回復名譽之必要程度，而過度限制人民之不表意自由。依據上開解釋意旨，系爭規定即與憲法維護人性尊嚴與尊重人格自由發展之意旨無違。

dignity is disparaged, it then has exceeded the scope of necessity to restore the reputation and excessively limit the people's freedom to withhold expression. In accordance with the interpretation above, the disputed provision does not contradict the meaning and purpose of the Constitution to preserve human dignity and respect the free development of morality.

Finally, with regard to the rest of the petition for judicial interpretation concerning the front portion of Article 184, Paragraph 1 of the Civil Code, the front portion of Article 195, Paragraph 1 of the Civil Code, (19) Shan-Zhi No. 2746 (1930), and (90) Tai-Shan-Zhi No. 646 (2001) judicial precedents of the Supreme Court, it concerns whether the court has correctly applied the law but does not involve whether the law being applied is objectively unconstitutional. As to the Supreme Court judicial precedent of (62) Tai-Shan-Zhi No. 2806 (1973), it was not applied in the final judgment; and the civil judgment by the same court in (51) Tai-Shan-Zhi No. 223 is not the statute or administrative regulation referred to in

末就聲請人其餘聲請解釋部分，關於民法第一百八十四條第一項前段、第一百九十五條第一項前段、最高法院十九年上字第二七四六號、九十年台上字第六四六號判例等，係爭執法院適用法令見解當否之問題，尚不生確定終局判決所適用之法令於客觀上有何牴觸憲法之處。至最高法院六十二年台上字第二八０六號判例，並未為確定終局判決所適用；而同院五十一年度台上字第二二三號民事判決，並非司法院大法官審理案件法第五條第一項第二款所稱之法律或命令；是均不得以之作為聲請解釋之客體。而有關聲請補充解釋部分，查本院釋字第五０九號解釋係就刑法第三百十條所為之解釋，有關侵權行為損害賠償部分，不在該號解釋範圍，自不生就此聲請補充解釋之問題。是上開部分

Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedure Act; consequently, none of them qualifies as the subject matter for judicial interpretation. As to the petition for supplemental interpretation, given that J. Y. Interpretation No. 509 deals [only] with Article 310 of the Criminal Code, yet civil tort liability is not within the scope of that Interpretation, no issue for supplemental interpretation is derived. As a result, this part of the petition does not comply with Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedure Act, and is dismissed in accordance Article 3 of the same Act.

之聲請，均核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，應不受理，併此敘明。

Justice Chen-Shan Li filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion in part.

Justice Shin-Min Chen filed concurring opinion in part and dissenting opinion in part.

Justice Tzu-Yi Lin filed dissenting opinion in part.

本號解釋李大法官震山提出協同意見書；陳大法官春生提出協同意見書；許大法官宗力提出部分協同意見書；陳大法官新民提出部分協同、部分不同意見書；林大法官子儀提出部分不同意見書；徐大法官璧湖、池大法官啟明共同提出部分不同意見書；許大法官玉秀提出部分不同意見書。

Justice Pi-Hu Hsu filed dissenting opinion in part, in which Justice Chi-Ming Chih joined.

Justice Yu-Hsiu Hsu filed dissenting opinion in part

EDITOR'S NOTE:

Summary of facts: The petitioner was sued to restore the reputation of an individual on the ground of a false published report injured the reputation of that individual.

The court eventually ordered the petitioner and other interested parties to publish a "declaration of apology," together with the full text of the court judgment and opinions on the China Times, United Daily, Liberty Times and Commercial Times for one day.

The petitioner and other interested parties considered the applicable statutory provision, Article 195 of the Civil Code regarding damages for the infringement of personal reputation and other related statutory provisions and regulations questionable in terms of constitutionality, thus

編者註：

事實摘要：聲請人因刊登之報導，被認該報導不實，損害個人名譽，遭提起民事訴訟，請求回復其名譽。

本案經判決，命聲請人等人連帶將「道歉聲明」及該判決主文暨理由刊登於中國時報、聯合報、自由時報、工商時報各一天。

渠等認為確定終局判決所適用民法第一百九十五條侵害名譽損害賠償規定及相關法令有違憲之疑義，聲請解釋及補充解釋。

filed for the present petition and for judicial interpretation and supplementary interpretation.

J. Y. Interpretation No.657（April 3, 2009）*

ISSUE: Are Article 82, Paragraph 3 of the Enforcement Rules of the Income Tax Act and Article 108-1 of the Guidelines for the Audit of Income Taxes on Profit-seeking-enterprises constitutional ?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條); J.Y. Interpretation Nos. 443, 620, 622, 640, and 650（司法院釋字第四四三號、第六二０號、第六二二號、第六四０號、第六五０號解釋); Articles 22 paragraph 1, 24 paragraph1 of (amended on January 30, 1977), 80 paragraph 5, and 121 of the Income Tax Act (as amended on January 29, 1963)(所得稅法第二十二條第一項、第二十四條第一項（六十六年一月三十日修正公布）、第八十條第五項、第一百二十一條（五十二年一月二十九日修正公布）); Article 82 paragraph III of the Enforcement Rules of the Income Tax Act（所得稅法施行細則第八十二條第三項）; Article 108-1 of the Guidelines for the Audit of Income Taxes on Profit-Seeking-Enterprises（營利事業所得稅查核準則第一百零八條之一）.

KEYWORDS:

Principle of taxation by law（租稅法律主義）, clear and

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* Translated and edited by Lawrence L. C. Lee, Associate Professor, Department of Economic and Finance Law, Asia University, Taichung, Taiwan.

** Contents within frame, not part of the original text, are added for reference purposes only.

specific authorization（明確授權）, legislative delegation（立法授權）, profit-seeking enterprise（營利事業）, annual income（年度所得）, tax payable（應納稅額）, accrual basis（權責發生制）, principle of revenue-cost-expenses matching（收入與成本費用配合原則）, account payables（應付未付費用）.**

HOLDING: Article 82, Paragraph 3 of the Enforcement Rules of the Income Tax Act (Internal Revenue Code) states: "[T]he unpaid expenses or losses on a profit-seeking enterprise's account payables that have exceeded two years shall be converted and listed as other revenues until payments are actually made, which shall be listed as non-operating expenditures." Article 108-1 of the Guidelines for the Audit of Income Taxes on Profit-Seeking Enterprises stipulates: "[T]he unpaid expenses or losses on a profit-seeking enterprise's business account payables that remain unpaid for more than two years shall be converted and listed as "other revenues" until payments are actually made, which shall be listed as non-operating expenditures upon

解釋文：所得稅法施行細則第八十二條第三項規定：「營利事業帳載應付未付之費用或損失，逾二年而尚未給付者，應轉列其他收入科目，俟實際給付時，再以營業外支出列帳。」營利事業所得稅查核準則第一百零八條之一規定：「營利事業機構帳載應付未付之費用或損失，逾二年而尚未給付者，應轉列『其他收入』科目，俟實際給付時再以營業外支出列帳。」上開規定關於營利事業應將帳載逾二年仍未給付之應付費用轉列其他收入，增加營利事業當年度之所得及應納稅額，顯非執行法律之細節性或技術性事項，且逾越所得稅法之授權，違反憲法第十九條租稅法律主義，應自本解釋公布之日起至遲於一年內失其效力。

actual payment." That profit-seeking enterprises shall convert and list unpaid expenses or losses having exceeded two years from account payables to [the heading of] other revenues under the above-stated regulations so that the income and taxable revenue of that enterprise is increased for the year is obviously not a detailed or technical enforcement issue, and has usurped the authorization of the Income Tax Act, thereby violating the principle of taxation by law under Article 19 of the Constitution. The [provisions in question] should be invalidated no more than one year since the issuance of this Interpretation.

REASONING: Article 19 of the Constitution imposes the duty of the people to pay taxes in accordance with the law. It means that the State must impose tax duty or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taken into consideration such conditions as the subject, subject matter, tax base or tax rates. In the event the law authorizes the tax

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等租稅構成要件，以法律或法律明確授權之命令定之；如以法律授權主管機關發布命令為補充規定時，其授權應符合具體明確之原則；若僅屬執行法律之細節性、技術性次要事項，始得由主管機關發布命令為必要之規範，迭經本院解釋在案（本院釋字

collection authority to promulgate supplemental regulations, such authorization must be clear and specific; the tax collection authority may promulgate other necessary regulations only for matters that concern technical details or secondary issues in the enforcement of the law (*See* J.Y. Interpretation Nos. 443, 620, 622, 640, and 650).

第四四三號、第六二０號、第六二二號、第六四０號、第六五０號解釋參照）。

The front portion of Article 22, Paragraph 1 of the Income Tax Act states: "[T]he accounting of an entity organized as a company shall adopt accrual method." Article 24, Paragraph 1 of the Income Tax Act, as amended January 30, 1977, states: "The amount of income of a profit-seeking enterprise shall be the net income, *i.e.*, the gross annual income after deduction of all costs, expenses, losses and taxes." This is to clearly stipulate by statute the accounting basis upon which the method of calculating net income from the principle of revenue-cost-expenses matching shall be adopted for profit-seeking enterprises organized as companies. It does not provide that unpaid expenses or losses on a profit-seeking enterprise's

所得稅法第二十二條第一項前段規定：「會計基礎，凡屬公司組織者，應採用權責發生制」，中華民國六十六年一月三十日修正公布之同法第二十四條第一項規定：「營利事業所得之計算，以其本年度收入總額減除各項成本費用、損失及稅捐後之純益額為所得額。」係就公司組織之營利事業，應採用之會計基礎及收入與成本費用配合原則之所得額計算方式，以法律明定之，並未規定營利事業帳載應付未付之費用，倘經過一定期間未為給付，不問債務是否消滅，即一律應轉列營利事業之其他收入，而費用轉列收入涉及所得稅稅基之構成要件，應有租稅法律主義之適用。

account payables having exceeded two years shall be converted and listed as other revenues, regardless of whether the liabilities are distinguished. Moreover, given that the conversion of expenses to income involves the structural basis of income tax, the principle of taxation by law shall be applied.

"[T]he unpaid expenses or losses on a profit-seeking enterprise's account payables that have exceeded two years shall be converted and listed as other revenues until payments are actually made, which shall be listed as non-operating expenditures." Article 108-1 of the Guidelines for the Audit of Income Taxes on Profit-seeking Enterprises stipulates: "[T]he unpaid expenses or losses on a profit-seeking enterprise's business account payables that remain unpaid for more than two years shall be converted and listed as "other revenues" until payments are actually made, which shall be listed as non-operating expenditures upon actual payment." That profit-seeking enterprises shall convert and list unpaid expenses or losses having exceeded two years from

所得稅法施行細則第八十二條第三項規定：「營利事業帳載應付未付之費用或損失，逾二年而尚未給付者，應轉列其他收入科目，俟實際給付時，再以營業外支出列帳。」營利事業所得稅查核準則第一百零八條之一規定：「營利事業機構帳載應付未付之費用或損失，逾二年而尚未給付者，應轉列『其他收入』科目，俟實際給付時再以營業外支出列帳。」上開規定關於營利事業應將帳載逾二年仍未給付之應付費用轉列其他收入，非但增加營利事業當年度之所得及應納稅額，且可能帶來一時不能克服之財務困難，影響該企業之經營，顯非執行法律之細節性或技術性事項；況以行政命令增加二年之期間限制，就利息而言，與民法關於消滅時效之規定亦有不符。雖上開法規分別經五十二年一月二十九日修正公布之所得稅

account payables to [the heading of] other revenues under the above-stated regulations so that not only the income and taxable revenue of that enterprise is increased for the year but [such increase] is likely to cause tentative financial burden difficult to overcome, thereby affecting the operations of the enterprises, which obviously is not a detailed or technical enforcement issue. Furthermore, as far as interests are concerned, the limitation of a two-year period imposed by way of administrative regulations does not conform with the statute of limitations under the Civil Code. Although the above-cited provisions were authorized by Articles 121 of the [old] Income Tax Act (as amended on January 29, 1963) and Article 80 paragraph 5 of the [current] Income Tax Act, respectively, those provisions only authorize the governing agency to promulgate enforcement rules to the Income Tax Act and Guidelines [for the Audit of Income Taxes on Profit-Seeking-Enterprises], but do not give the Ministry of Finance clear and specific authorization to issue administrative regulations which summarily convert unpaid account payables to other

法第一百二十一條，及所得稅法第八十條第五項之授權，惟該等規定僅賦予主管機關訂定施行細則及查核準則之依據，均未明確授權財政部發布命令，將營利事業應付未付之費用逕行轉列為其他收入，致增加營利事業法律所無之租稅義務（本院釋字第六五０號解釋參照），已逾越所得稅法之授權，違反憲法第十九條租稅法律主義，應自本解釋公布之日起至遲於一年內失其效力。

revenues, thereby increasing the tax obligation on profit-seeking enterprises not otherwise found in the statutes (*See* J.Y. Interpretation No. 650). Such usurping of authorization under the Income Tax Act violates the principle of taxation by law under Article 19 of the Constitution, and the [provisions in question] should be invalidated no more than one year since the issuance of this Interpretation..

EDITOR'S NOTE:

Summary of facts: After Petitioner A, a company, filed its annual corporate income tax returns, the National Tax Administration found that A still has certain interest payments that remain unpaid for more than two years. Based on Article 82 of the Income Tax Act Enforcement Rules and Article 108-1 of the Guidelines for the Audit of Income Taxes on Profit-Seeking-Enterprises, the National Tax Administration summarily convert those unpaid interests under the heading as "other revenues," and levy tax accordingly.

Petitioner B, another company, also

編者註：

事實摘要：聲請人 A 公司於年度營利事業所得稅結算申報時，經國稅局初查，以其有逾二年尚未給付之應付利息，乃依所得稅法施行細則第八十二條第三項及營利事業所得稅查核準則第一百零八條之一應付未付費用之處理規定，將該應付利息調整轉列其他收入科目。

聲請人 B 公司辦理營利事業所得稅

filed its annual corporate income return. Its appointed accountant simply converted B's long-term and unpaid liability interest to other revenue and subject to further tax liability.

結算申報，其簽證會計師就其應付長期借款利息已逾二年尚未給付部分，自行依法調整轉列收入，後經國稅局核定在案。

Both petitioners claim that the above-cited two provisions violate their property rights guaranteed under the Constitution and exceeded the principle of taxation by law.

兩位聲請人均主張系爭規定侵害其憲法保障之財產權，逾越租稅法律主義等，聲請解釋。

J. Y. Interpretation No.658（April 10, 2009）*

ISSUE: Is Article 13, Paragraph 2 of the Enforcement Rules of Public Functionaries Retirement Act unconstitutional ?

RELEVANT LAWS:

Article 13, Paragraph 2 of the Enforcement Rules of Public Functionaries Retirement Act（公務人員退休法施行細則第13條第2項）; Article 6, Paragraphs 2 and 3, Article 16-1, Paragraphs 1 of the Public Functionaries Retirement Act（公務人員退休法第六條第二、三項及第十六條之一第一項）.

KEYWORDS:

public servant, public functionaries（公務人員）, pension benefits（退休（職、伍）給與）, seniority（工作年資）, retirement seniority（退休年資）, computation of retirement seniority （退休年資採計）, principle of statutory reservation（法律保留原則）, reemployed civil servants（再任公務人員）, second retirement（重行退休）.**

HOLDING: Article 13, Paragraph 2 of the Enforcement Rules of Public Functionaries Retirement Act provides that the base amount or [salary] percentage to be used as pension radix concerning those

解釋文：公務人員退休法施行細則第十三條第二項有關已領退休（職、伍）給與或資遣給與者再任公務人員，其退休金基數或百分比連同以前退休（職、伍）金基數或百分比或資遣給與

* Translated by Chin-Chin Cheng, J.D.

** Contents within frame, not part of the original text, are added for reference purposes only.

reemployed as public servants after first retired or being laid off shall be capped at no more than the maximum standard provided under Articles 6 and 16-1, Paragraph 1 of the Public Functionaries Retirement Act when the calculation is to combine with the base amount or percentage from the previous retirement or layoff. Such restriction lacks specific authorization by the law. The content of the provision is not to merely enforce the detailed and technical issues of the Public Functionaries Retirement Act. Rather it regulates such matters as the calculation and the ceiling of seniority for individuals reemployed as public servants, reserved [exclusively] to be dealt with by law. It further imposes restrictions on the reemployed public servants' right to petition for pension not otherwise found in [any] law, and is, therefore, contradictory to the principle of statutory reservation under Article 23 of the Constitution and shall become ineffective in two years since the date of this Interpretation is issued.

合併計算，以不超過公務人員退休法第六條及第十六條之一第一項所定最高標準為限之規定，欠缺法律具體明確授權；且其規定內容，並非僅係執行公務人員退休法之細節性、技術性事項，而係就再任公務人員退休年資採計及其採計上限等屬法律保留之事項為規定，進而對再任公務人員之退休金請求權增加法律所無之限制，與憲法第二十三條法律保留原則有違，應自本解釋公布之日起至遲於屆滿二年時失其效力。

REASONING: Article 18 of the Constitution provides that citizens shall

解釋理由書：憲法第十八條規定人民有服公職之權利，旨在保障人民

have the right to engage in public services. Its purpose is to ensure citizens who engage in public service in accordance with the law the right to protect [their job] status, along with the entitlement of salary and pension derived from such services. The State is obligated to provide remuneration and pension to its civil servants to support their livelihood (*See* J. Y. Interpretation Nos. 575 and 605). Given that the seniority for retirement benefit is the basis to calculate the pension amount, for matters such as the start date of the seniority, the categories that may or may not be counted towards that seniority, how computation is to be made, the computation of seniority for individuals reemployed as civil servants after retirement, and the maximum seniority that may be counted, among other things, are the State's concrete realization to fulfill its obligation to look after its employees, and can have significant, substantive impact on the content of civil servants' claim for pension benefits. Furthermore, given that the scope of the relevant regulations is quite extensive, which can have a far-reaching impact on financial policies, the issues

有依法令從事公務，暨由此衍生享有之身分保障、俸給與退休金請求等權利。國家則對公務人員有給予俸給、退休金等維持其生活之義務（本院釋字第五七五號、第六０五號解釋參照）。又公務人員退休年資之多寡，係計算其退休金數額之基礎，故公務人員退休年資之起算日、得計入與不得計入之任職年資種類、如何採計、退休後再任公務人員年資採計及其採計上限等有關退休年資採計事項，為國家對公務人員實現照顧義務之具體展現，對於公務人員退休金請求權之內容有重大影響；且其有關規定之適用範圍甚廣，財政影響深遠，應係實現公務人員服公職權利與涉及公共利益之重要事項，而屬法律保留之事項，自須以法律明定之（本院釋字第四四三號、第六一四號解釋參照）。上開應以法律規定之退休年資採計事項，若立法機關以法律授權行政機關發布命令為補充規定時，其授權之目的、內容、範圍應明確。若僅屬執行法律之細節性、技術性次要事項，始得由主管機關發布命令為必要之規範，惟其內容不得牴觸母法或對公務人員之權利增加法律所無之限制（本院釋字第五六八號、第六五０號、第六五七號解釋參照）。

being addressed [by regulations] are critical matters concerning the realization of rights bestowed to public employees and public interests, and should be governed by the principle of statutory reservation, and must be stipulated only by law (*See* to J. Y. Interpretation Nos. 443 and 614). In the event the legislature authorizes the executive agency to promulgate supplemental regulations for the aforementioned matters concerning the calculation of pension and sonority, the purpose, content and scope of such authorization must be specific. For matters that are secondary, such as technical details on the enforcement of the statute, the governing agency may promulgate necessary regulations, but may not contradict the [governing] law or impose restrictions on the right of the public servants not otherwise found in the law (*See* J. Y. Interpretation Nos. 568, No.650 and No. 657).

The front portion of Article 6, Paragraph 2 of the Public Functionaries Retirement Act provides that "[t]he radix of one-time pension shall be the double amount of base salary for the equivalent

按公務人員退休法第六條第二項前段規定：「一次退休金，以退休生效日在職同等級人員之本俸加一倍為基數，每任職一年給與一個半基數，最高三十五年給與五十三個基數。」同條第

level employees as of the effective day of retirement, with one and a half units being added to each year of services, and with maximum of no more than fifty-three units for thirty-five years of services." The front portion of Article 6, Paragraph 3 further provides that "[t]he radix of monthly pension shall be the double amount of base salary of the equivalent level employees, with two percent of the radix provided for each year of services and with maximum of no more than seventy percent for thirty-five years of services." The legislative purpose is to regulate the basis to calculate pension radix, and to limit the maximum units to no more than thirty-five years. However, these provisions do not explicitly regulate what type of employment seniority should be counted, and whether the seniority of reemployment as civil servants after retirement may be combined with the previous seniority. Article 16-1, Paragraph 1 of the same Act stipulates, "for civil servants having accrued seniority before and after the amendment to this Act becomes effective, their seniority calculation shall be combined; provided, however, that the

三項前段規定：「月退休金，以在職同等級人員之本俸加一倍為基數，每任職一年，照基數百分之二給與，最高三十五年，給與百分之七十為限。」其立法意旨係為規定退休金計算基數之依據，並受三十五年最高退休金基數之限制，惟未明確規定對於何種任職年資應予採計、公務人員退休後再任公務人員之再任年資是否併計等事項。該法第十六條之一第一項規定：「公務人員在本法修正施行前後均有任職年資者，應前後合併計算。但本法修正施行前之任職年資，仍依原法最高採計三十年。本法修正施行後之任職年資，可連同累計，最高採計三十五年。有關前後年資之取捨，應採較有利於當事人之方式行之。」其立法意旨係因配合該法第八條有關公務人員退休金制度之變革，為解決公務人員於新制施行前後均有任職年資，其年資如何計算之新舊法適用問題，乃規定其修法前後年資應合併計算，亦未明確規定公務人員重行退休年資應否與以前退休年資合併計算。是上開公務人員退休法第六條第二項前段、第三項前段及第十六條之一第一項所定年資是否包括退休後再任公務人員重行退休年資合併計算之規定，法條文義尚非明確，且無從依公務人員退休法整體

maximum seniority before the effective day of the amendment shall be no more than thirty years in accordance with the original Act, and the seniority of civil services after the implementation of the amendment can be combined to the maximum of no more than thirty-five years. Seniority shall be determined with methods more favorable to the petitioner." The legislative purpose is to coordinate with the pension system reform for public servants under Article 8 of the Act. While [the amended statute] allows the combined calculation of seniority before and after it becomes effective to tackle the issue of cross-over seniority accumulation, it did not specifically provide whether the seniority acquired from the previous retirement may be combined with the seniority from later retirement. Thus, the statute is vague on whether the scope of afore-cited Article 6, Paragraphs 2 and 3, as well as Article 16-1, Paragraph 1 of the Public Functionaries Retirement Act covers the situation where reemployed public servants may combine seniority with what was accumulated from previous retirement. Moreover, it cannot

解釋，推知立法者有意授權主管機關就再任公務人員重行退休年資是否合併計算之事項，以命令為補充規定。

be interpreted, based upon the Public Functionaries Retirement Act as a whole, to infer that the legislators intend to authorize the governing agency to promulgate supplemental regulations on this issue.

In addition, Article 13 of the Public Functionaries Retirement Act, as amended on November 2, 1959, provides: "Any individual who retires in accordance with this Act, reemployed as a civil servant, and should have already received a one-time, lump-sum pension, shall refund all such pension to the National Treasury. If such pension is monthly installment, the seniority from previous services shall not be counted toward the second retirement." This provision was amended on January 24, 1979: "Any individual who retires in accordance with this Act is not required to refund pension already received in the event of reemployment as a civil servant. Seniority from previous employment shall not be counted toward the second retirement." It has not been amended since. Thus, in the situation where individuals reemployed as public servants after first

再按中華民國四十八年十一月二日修正公布之公務人員退休法第十三條規定：「依本法退休者，如再任公務人員，其曾領一次退休金者，應將所領退休金繳回國庫，其領月退休金者，於重行退休時，其過去服務年資概不計算。」該條規定於六十八年一月二十四日修正為：「依本法退休者，如再任公務人員時，無庸繳回已領之退休金，其退休前之任職年資，於重行退休時不予計算。」迄今未修正。依其規定，於公務人員依法退休後再任公務人員之情形，係採取分段方式計算任職年資，於重行退休計算退休年資時，退休前之任職年資不予計算在內。

retired in accordance with the Public Functionaries Retirement Act, their seniority is calculated on compartmental basis and does not counted toward the seniority from the reemployment before [the second] retirement.

The Enforcement Rules of Public Functionaries Retirement Act is promulgated under the general authorization of Article 17 of the Public Functionaries Retirement Act. Article 13, Paragraphs 1 of the Act stipulates: "For individuals who have already received pension benefits or severance pay and are reemployed or transferred as civil servants, the seniority towards the second retirement shall be counted from the month of the reemployment or transfer." Paragraphs 2 states: "For individuals indicated in the previous paragraph retired the second time, the combined calculation of pension or severance payment radix or percentage with the previous radix or percentage shall not exceed the maximum amount set forth under Article 6 and Article 16, Paragraph 1 of the Act. No additional payment shall be made if pension or severance pay from

查公務人員退休法施行細則係依據公務人員退休法第十七條概括授權所訂定，其第十三條第一項規定：「已領退休（職、伍）給與或資遣給與者再任或轉任公務人員，其重行退休之年資，應自再任或轉任之月起，另行計算。」第二項規定：「前項人員重行退休時，其退休金基數或百分比連同以前退休（職、伍）金基數或百分比或資遣給與合併計算，以不超過本法第六條及第十六條之一第一項所定最高標準為限，其以前退休（職、伍）或資遣已達最高限額者，不再增給，未達最高限額者，補足其差額。」上開第二項規定，係將退休（職、伍）或資遣前之任職年資與再任年資合併計算，並使合併計算之年資受最高退休年資三十年或三十五年之限制，其意旨固在維持年資採計之公平，惟公務人員退休法第十三條僅係規定退休前之任職年資與再任年資應分別計算，且公務人員退休法第六條第二項前

previous retirement has already reached the maximum; if not, such payment shall not exceed the maximum." That the second paragraph combines the seniority of services before the retirement with services before the second retirement and subject the combining result to the maximum limit of no more than thirty or thirty-five years is to maintain fairness of seniority computation. However, Article 13 of the Public Functionaries Retirement Act only regulates that seniority of the previous employment and reemployment shall be counted separately. In addition, none of Article 6, Paragraphs 2 and 3, as well as Article 16-1, Paragraphs 1 of the Public Functionaries Retirement Act can be served as the statutory authorization for Article 13, Paragraph 2 of the Enforcement Rules. Therefore, Article 13, Paragraph 2 of the Enforcement Rules lacks explicit statutory authorization. Furthermore, the content of the provision is not to merely enforce the detailed and technical issues of the Public Functionaries Retirement Act. Rather it regulates such matters as the calculation and the ceiling of seniority for individuals reemployed as public servants, reserved

段、第三項前段及第十六條之一第一項均不能作為施行細則第十三條第二項之法律依據。是上開施行細則第二項規定欠缺法律具體明確授權；且其規定內容，並非僅係執行公務人員退休法之細節性及技術性事項，而係就再任公務人員退休年資採計及其採計上限等屬法律保留之事項為規定，進而對再任公務人員之退休金請求權增加法律所無之限制，自與憲法第二十三條法律保留原則有違。

[exclusively] to be dealt with by law. It further imposes restrictions on the reemployed public servants' right to petition for pension not otherwise found in [any] law, and is, therefore, contradictory to the principle of statutory reservation under Article 23 of the Constitution.

To look after retired public servants, and to balance reasonable treatment between present and retired public servants, many factors must be taken into consideration in constructing the system of second retirement for reemployed public servants such as the categories and scope of seniority computation, whether previous seniority should be combined with or counted separately from reemployment, how to avoid the imbalance of pension benefits between reemployed and non-reemployed public servants with the same seniority, whether it is necessary to set the maximum seniority ceiling in light of fairness of retirement benefits and national fiscal policy considerations, among other things. All these require a significant amount of time for planning and be regulated based on statute or administrative

為實踐照顧退休公務人員之目的，平衡現職公務人員與退休公務人員間之合理待遇，有關退休後再任公務人員之重行退休制度，其建構所須考量之因素甚多，諸如任職年資採計項目與範圍、再任公務人員前之任職年資是否合併或分段採計、如何避免造成相同年資等條件之再任公務人員與非再任公務人員之退休給與有失衡之情形、是否基於整體公務人員退休權益之公平與國家財政等因素之考量而有限制最高退休年資之必要等，均須相當期間妥為規畫，並以法律或法律具體明確授權之法規命令詳為規定。相關機關至遲應於本解釋公布之日起二年內，依本解釋意旨，檢討修正公務人員退休法及相關法規，訂定適當之規範。屆期未完成修法者，上開施行細則第十三條第二項失其效力。

regulation having explicit and specific statutory authorization. The related agencies shall review and amend the Public Functionaries Retirement Act and other relevant regulations, and promulgate appropriate regulations in accordance with the meaning and purpose of this Interpretation no later than two years since the date this Interpretation is issued. Article 13, Paragraph 2 of the Enforcement Rules of Public Functionaries Retirement Act shall become ineffective at that time in the event no amendment is made.

Justice Pai-Hsiu Yeh filed dissenting opinion, in which Justice Pi-Hu Hsu joined

本號解釋葉大法官百修、徐大法官璧湖共同提出不同意見書。

EDITOR'S NOTE:

Summary of facts: In the end of 1988, petitioner retired and received pension benefits which was based on sixteen years of seniority working as a technician at Chung- Shan Institute of Science and Technology. Petitioner was later reemployed as a technician by the Atomic Energy Council, Executive Yuan. In January 2005, petitioner retired the second time.

編者註：

事實摘要：聲請人原係中科院技術員，於七十七年底按十六年之依退休年資獲發退職金。其後再任職行政院原子能委員會技術員，於九十四年一月間經銓敘部依其選擇採計退休撫卹新制施行前、後年資，核定年資為九年及十年。聲請人不服提起行政訴訟，經法院作成確定終局判決。

The Minister of Civil Service assessed petitioner's seniority in accordance with the new system of "Pension and Indemnity". Based on petitioner's option in light of the newly adopted system, the Ministry of Civil Services assessed his service seniority at being nine years before the promulgation of the new system, and ten years after the promulgation of the new system. Petitioner brought an administrative action challenging such decision, but was denied in the final judgment.

Petitioner then brought the present petition for interpretation, asserting that Article 13, Paragraph 2 of the Enforcement Rules of Public Functionaries Retirement Act, which sets forth a seniority ceiling for reemployed public servants at thirty-five years when combining with the previous seniority before retirement, contradicts the purpose of Article 13 of the Public Functionaries Retirement Act, and has gone beyond the authorization of law, therefore, violates the "principle of equality" guaranteed by Article 7 of the Constitution and the right to serve in public service guaranteed by Article 18 of the Constitution.

聲請人不服，認為確定終局裁判所適用之公務人員退休法施行細則第十三條第二項對再任公務人員重行退休時，以合併其前次退休年資並限制其最高年資三十五年之規定，與公務人員退休法第十三條意旨不符，逾越法律授權範圍，有牴觸憲法第七條平等原則及第十八條人民服公職權利之疑義，聲請解釋。

J. Y. Interpretation No.659（May 1, 2009）*

ISSUE: Is Article 32, Paragraph 1 of the Private School Act, as amended on June 18, 1997, unconstitutional ?

RELEVANT LAWS:

Articles 11,15, 23, 162 of the Constitution（憲法第十一條、第十五條、第二十三條及第一百六十二條）; Article 32, Paragraph 1 of the Private School Act（私立學校法第三十二條第一項）; Articles 3 and 4 of "Regulations Governing the Selection and Assembly of Private School Consultative Committee Members"（「私立學校諮詢委員會委員遴聘及集會辦法」第三條及第四條）.

KEYWORDS:

Principle of proportionality（比例原則）, principle of clarity and definiteness of the law（明確性原則）, right to work（工作權）, suspension from office（停職）, removal of directors from office（解除董事之職務）.**

HOLDING: Article 32, Paragraph 1 of the Private School Act, as amended and promulgated on June 18, 1997, provides: "if a board of directors cannot con

解釋文：中華民國八十六年六月十八日修正公布之私立學校法第三十二條第一項規定：「董事會因發生糾紛，致無法召開會議或有違反教育法令情事

* Translated by Wei-Feng Huang

** Contents within frame, not part of the original text, are added for reference purposes only.

vene its meeting(s) as a result of dispute, or is in violation of education laws and regulations, the government agency in charge of the education (hereinafter referred to as the "Authority") may order the school to take steps to improve the situation by a specified date and shall the board fail to comply, the Authority may then remove all of the board members from office. Nevertheless, in the event severe circumstances and urgent situation arise, the Authority may, after consulting the Private School Consultative Committee (the "Committee") to obtain a resolution from the Committee, forthwith remove all of the board members from office or suspend all of their powers for two to six months with the possibility to extend if necessary." With respect to the paragraph "if a board of directors cannot convene its meeting(s) as a result of dispute, or is in violation of education laws and regulations", while its literal meaning and legislative purpose may not be incomprehensible to those directors who are subject to the law, it can be scrutinized and defined through judicial review, and there should be no violation of the principle

者，主管教育行政機關得限期命其整頓改善；逾期不為整頓改善或整頓改善無效果時，得解除全體董事之職務。但其情節重大且情勢急迫時，主管教育行政機關得經私立學校諮詢委員會決議解除全體董事之職務或停止其職務二個月至六個月，必要時得延長之。」關於董事會因發生糾紛，致無法召開會議或有違反教育法令情事部分，其意義依法條文義及立法目的，非受規範之董事難以理解，並可經由司法審查加以確認，與法律明確性原則尚無違背。上開但書規定，旨在維護私立學校之健全發展，保障學生之受教權利及教職員之工作權益等重要公益，目的洵屬正當，所採取之限制手段，乃為達成目的所必要，並未牴觸憲法第二十三條之比例原則，與憲法保障人民工作權之意旨尚無違背。

of clarity and definiteness of the law.

The proviso stipulated in the Article is aimed to maintain the sound development of private schools, and to protect students' right to education as well as faculty and working staff's right to work, among other important interests. Such objectives are justified and the restrictive means taken are necessary to accomplish the goals and, therefore not inconsistent with the principle of proportionality under Article 23 of the Constitution, nor in conflict with the people's right to work guaranteed by the Constitution.

REASONING: Freedom to choose an occupation is indispensible for the people to enrich the content of their lives and to freely develop their characters and it will not be any different whether the nature of occupation is for public welfare or personal interest or for profits seeking or non-profits seeking, all of which are falling within the purview of the right to work guaranteed by Article 15 of the Constitution. Nevertheless, to improve public welfare and to the extent

解釋理由書：職業自由為人民充實生活內涵及自由發展人格所必要，不因職業之性質為公益或私益、營利或非營利而有異，均屬憲法第十五條工作權保障之範疇。惟國家為增進公共利益，於符合憲法第二十三條規定之限度內，得以法律或經法律明確授權之命令，對職業自由予以限制。

in compliance with the requirements prescribed by Article 23 of the Constitution, the State may, by statute or by statutory mandated administrative ordinances, limit the freedom to choose an occupation.

The Private School Act, as amended and promulgated on June 18, 1997 (hereinafter referred to the "Old Act"), regulates that the position of directors shall be non-paid, provided that stipends may be paid for meeting attendance and transportation and that directors shall serve for a term of three years, and may serve consecutive terms if re-elected (*See* Article 34 and the first Paragraph of Article 23). The scope of authorities of the board of directors shall include: 1. the appointment and discharge of directors, and the election and discharge of the chairman of the board; 2. the appointment and discharge of the principal; 3. the review and approval of status reports, planning and crucial regulations of school; 4. fundraising; 5. the review and approval of budgets and annual account settlements; 6. the management of funds; 7. the supervision of financial affairs; and 8. all other authority

八十六年六月十八日修正公布之私立學校法（下稱舊私立學校法）規定，私立學校之董事為無給職，但得酌支出席費及交通費；董事每屆任期為三年，連選得連任（第三十四條、第二十三條第一項參照）。董事會之職權包括：「一、董事之選聘及解聘；董事長之推選及解職。二、校長之選聘及解聘。三、校務報告、校務計畫及重要規章之審核。四、經費之籌措。五、預算及決算之審核。六、基金之管理。七、財務之監督。八、本法所定其他有關董事會之職權。」（第二十二條參照）準此，私立學校董事執行私立學校法上開職務之工作，屬職業自由之範疇，自應受憲法工作權之保障。

granted to the board of directors by this Law (*See* Article 22). Consequently, the directors' exercising their authorities pursuant to the Private School Act shall fall within the purview of freedom to choose an occupation and, shall therefore be guaranteed the right to work under the Constitution.

With a high degree of public interest and welfare, education is State's long-term project and its effect is far-reaching. Article 162 of the Constitution provides that all public and private educational and cultural institutions in the nation shall be subject to State supervision in accordance with the law. The Old Act was thus enacted to realize the meaning and purpose of this Constitution provision. Article 32, Paragraph 1 of the Old Act provides that: "if a board of directors cannot convene its meeting(s) as a result of a dispute, or is in violation of education laws and regulations, the Authority may order the school to take steps to improve the situation by a specified date and shall the board fail to comply, the Authority may then remove all of the board members

教育乃國家百年大計，影響深遠，具高度之公共性及強烈之公益性。憲法第一百六十二條規定，全國公私立之教育文化機關，依法律受國家監督。舊私立學校法即係為實現上開憲法意旨所制定之法律。舊私立學校法第三十二條第一項規定：「董事會因發生糾紛，致無法召開會議或有違反教育法令情事者，主管教育行政機關得限期命其整頓改善；逾期不為整頓改善或整頓改善無效果時，得解除全體董事之職務。但其情節重大且情勢急迫時，主管教育行政機關得經私立學校諮詢委員會決議解除全體董事之職務或停止其職務二個月至六個月，必要時得延長之。」（下稱系爭規定）其中關於解除全體董事之職務，係對於選擇職業自由所為之主觀條件限制（本院釋字第六三七號、第六四九號解釋參照），國家欲加以限制，必

from office. Nevertheless, in the event severe circumstances and urgent situation arise, the Authority may, after consulting the Private School Consultative Committee to obtain a resolution, forthwith remove all of the board members from office or suspend all of their powers for two to six months with the possibility to extend if necessary" (hereinafter referred to as the "disputed provision"). Removing all of the directors from office is a restriction on their subjective condition concerning the freedom to choose an occupation (*See* J.Y. Interpretations Nos. 637 and 649). The State, wishing to do so, must be for the purpose of pursuing an important public interest and the means taken shall be substantially related to attainment of its purpose. The disputed provision stipulates that if a board meeting can not be convened due to a dispute, or if the board has violated education laws and regulations, the Authority is then authorized to timely intervene to maintain the sound development of private schools, and to protect students' rights to education as well as faculty and working staff's rights to work, among other important

須基於追求重要公益目的，且所採手段與目的之達成須有實質關聯。系爭規定於董事會因發生糾紛致無法召開會議，或有違反教育法令情事，或其情節重大且情勢急迫時，授權主管教育行政機關及時介入監督，旨在維護私立學校之健全發展，保障學生之受教權利及教職員之工作權益等重要公益，符合上開憲法基本國策之規範意旨，其目的洵屬正當。

interests. It is in line with the meaning and purpose of Constitution's fundamental national policy and is thus justified and appropriate.

Pursuant to this Yuan's past Interpretations, the concepts used in a statute are not inconsistent with the principle of clarity and definiteness of the law if their meanings, through the statute's text and legislative purpose, are not incomprehensible to those who are subject to the statute, and may also be scrutinized and defined through judicial review (*See* Interpretations 432, 491, 602 and 632). With respect to board meetings that can not be convened as stipulated in the disputed provision, it is sufficient so long as it is the result of a dispute, regardless of whether the dispute is attributable to any individual board member's fault. Given that the board shall convene at least once every semester to be called by the chairman of the board, or to convene within 10 days after the chairman receives a written request of more than 1/3 of the incumbent directors that states the purpose and reasons of the meeting (*See* Paragraph 1,

依本院歷來解釋，法律規定所使用之概念，其意義依法條文義及立法目的，如非受規範者難以理解，並可經由司法審查加以確認，即與法律明確性原則無違（本院釋字第四三二號、第四九一號、第六０二號及第六三六號解釋參照）。系爭規定關於董事會因發生糾紛致無法召開會議，乃以董事會因糾紛導致無法召開會議為已足，並不問其糾紛之發生是否可歸責於個別董事會成員。而董事會議每學期至少舉行一次；董事會議由董事長召集，或經現任董事三分之一以上，以書面提出會議目的及召集理由，請求召集董事會議時，董事長須自受請求之日起十日內召集之（舊私立學校法第二十七條第一項、第二項前段、第三項前段參照）；董事會之決議，應有過半數董事之出席；但重要事項之決議，應有三分之二以上董事之出席（第二十九條第二項參照）。故所謂無法召開會議，乃指無法依舊私立學校法上開規定召開會議而言。關於董事會違反教育法令情事部分，以各該教育法

first part of Paragraph 2 and first part of Paragraph 3 of Article 27 of the Old Act) and that a board resolution requires a quorum of more than 1/2 of the directors, or more than 2/3 of the directors for material matters (*See* Article 29, Paragraph 2), the so-called "cannot convene its meetings" refers to the above-cited provisions under the Old Act.

With regard to the part that concerns whether the board of directors violates education laws and regulations, it is premised on the fact that the relevant education laws and regulations are clear and definite in text, that their scope can be ascertained and their contents are not incomprehensible to the directors who are subject to the law.

Furthermore, it cannot be the legislative intent of the disputed provision to assume that a board of directors is deemed to have violated education laws and regulations and is still considered necessary that it should first have a dispute; otherwise even when the board unanimously passes an illegal resolution that damages

令明確存在為前提，其範圍應屬可得確定，對於此一規定之內涵，並無受規範之董事難以理解之處。又苟認董事會有違反教育法令情事，須以董事會發生糾紛為必要，則在董事會成員全體一致決議造成董事會有違反教育法令情事，致學生及教師權益受損之情形下，主管機關卻無法加以監督命其改善，自非系爭規定立法之本意。是私立學校董事會如有「董事會因發生糾紛，致無法召開會議」或「董事會有違反教育法令情事」之一者，即合主管教育行政機關行使其監督權之要件，系爭規定依法條文義及立法目的，非受規範之董事難以理解，且為其所得預見，並可經由司法審查加以確認，與法律明確性原則尚無違背。

the rights of students and faculty, the Authority would still lack the authority to supervise private schools and have them take remedy measures.

Consequently, the Authority can exercise its supervision power so long as the board of directors of private schools either "cannot convene its board meeting(s) as a result of a dispute" or "has violated education regulations". If the disputed provision, through its text and legislative purpose, is not incomprehensible to the directors who are subject to the disputed provision and can be foreseeable by them, and may also be scrutinized and defined through judicial review, it is not in conflict with the principle of clarity and definiteness of the law.

In view of the discrepancy in the nature of occupation, the Constitution allows different degrees of restrictions on the freedom to choose an occupation. The proviso contained in the disputed provision empowers the Authority a right to remove all of the directors' power from office or suspend them from office for

對職業自由之限制，因其內容之差異，在憲法上有寬嚴不同之容許標準。系爭規定但書，使教育主管行政機關得解除全體董事之職務或停止其職務二個月至六個月，必要時得延長之，固係對董事會成員之董事職業自由加以限制。惟董事會作為私立學校法人之重要組織，其職權之行使影響私立學校之運

two to four months with the possibility to extend if necessary. The proviso of the disputed provision indeed imposes a restriction on the directors' freedom to choose an occupation.

Yet as an important organization of private schools, the board of directors in exercising its powers would greatly impact on the operations of private schools. Consequently, if a board meeting cannot be convened due to a dispute or has violated education regulations, and if the circumstances and situation are considered serious and urgent, the legislators have thus empowered the Authority a right to take emergency measures to secure the sound operations of private schools. The measures to be taken are not limited to the removal of all of the directors' power from office but can include the option to suspend all of the directors' power from office. Furthermore, the Authority has established the Committee and pursuant to Article 5 of the Old Act and Article 3, Paragraph 1, as well as Article 4, first part of Paragraph 2, of "Regulations Governing the Selection and Assembly of Private

作甚大。董事會既因發生糾紛致無法召開會議，或有違反教育法令情事，而其情節重大且情勢急迫，為確保學校之健全經營，立法者乃賦予主管教育行政機關緊急處置之權力。而處置之方式，並非以解除全體董事職務為唯一方式，尚包括停止全體董事職務可供選擇。且在程序上，主管教育行政機關設有私立學校諮詢委員會，依舊私立學校法第五條規定及教育部八十七年三月十八日訂定發布之「私立學校諮詢委員會委員遴聘及集會辦法」第三條第一項及第四條第二項前段之規定，係由學者專家、私立學校代表、社會人士及有關機關代表組成，須經全體委員二分之一以上出席，出席委員二分之一以上同意，始得作成決議，主管教育行政機關解除或停止全體董事之職務前，須先經由私立學校諮詢委員會之決議，方得為之。而私立學校諮詢委員會係由不同屬性之代表組成，共同作成決定，應具客觀性，主管教育行政機關在作成延長停止職務期限之決定前，既先經由上開諮詢委員會之決議，其決定顯非主觀而無憑據。故縱系爭規定但書就必要時延長停止職務之期限及次數未予規範，其對董事職業自由所為之限制尚非過當，與目的之達成具有實質關聯性，乃為保護重要公益所

School Consultative Committee Members", promulgated by the Ministry of Education on March 18, 1998, the Committee comprises of scholars, experts, representatives from private schools, communities and other relevant institutions. Resolutions of the Committee cannot be passed unless they are approved by a majority of the Committee members present, who represent 1/2 or more of the total Committee members. Furthermore, the Authority cannot remove or suspend all of directors' power from office unless it has first obtained a resolution from the Committee. Given the Committee is composed of representatives of different characters, its joint resolutions should be objective. The Authority apparently does not make capricious and groundless determinations to extend the duration of suspension now that such determination must first go through the resolution of the above-mentioned Committee. Consequently, even if the proviso of the disputed provision does not set the limitation for the extension terms and times, the restriction on the directors' freedom to choose an occupation is not excessive, is

必要，並未牴觸憲法第二十三條之比例原則，與憲法保障人民工作權之意旨尚無違背。

substantially related to the attainment of the object, and is necessary to protect an important public interest. As such, it is not inconsistent with the principle of proportionality under Article 23 of the Constitution, nor is it in conflict with the people's right to work guaranteed by the Constitution.

Justice Ching-You Tsay filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion.

本號解釋蔡大法官清遊提出協同意見書；陳大法官新民提出協同意見書；葉大法官百修提出協同意見書；陳大法官春生提出協同意見書。

EDITOR'S NOTE:

Summary of facts: The petitioner was a director of a private college and given the college went into financial difficulties, the Ministry of Education suspended the petitioner from office for four months pursuant to Article 32, Paragraph 1 of the Private School Act. After expiry of the initial term, the Ministry extended the suspension for another three-month.

編者註：

事實摘要：聲請人原為私立技術學院第五屆董事，該校於民國八十九年間因董事長挪用公款爆發財務危機，經教育部依私立學校法第三十二條第一項規定，予聲請人停職 4 個月之處分，期滿後，復延長停職處分 3 個月。嗣教育部以聲請人所屬之董事會成員，無法就學校財務狀況之改善計畫達成共識，解除該屆全體董事之職務。

The Ministry eventually removed all of the board members from office after the board of the college was unable to reach a consensus as to how to improve the college's financial condition. On appeal, a final judgment was entered by the court in favor of the Ministry.

The petitioner submits a petition to Judicial Yuan for an interpretation of the Constitution, claiming that the final judgment erred in applying then applicable Article 32, Paragraph 1 of the Private School Act to suspend the power and duties of the board members in the situation where the board failed to convene a meeting as a result of a dispute occurred within the board and is in conflict with Article 11 of the Constitution (the right of freedom of speech), Article 15 of the Constitution (the right to work), Article 23 of the Constitution (restriction on the fundamental rights of the People) and Article 162 of the Constitution (supervision power over education institutions).

聲請人認為確定終局判決，所適用之行為時私立學校法第三十二條第一項規定董事會因發生糾紛，致無法召開會議，停職處分，有牴觸憲法第十一條講學自由、第十五條工作權、第二十三條人民基本權限制及第一百六十二條教育機關監督之疑義，聲請解釋。

J. Y. Interpretation No.660（May 22, 2009）*

ISSUE: Is the Ministry of Finance Memorandum unconstitutional in construing that it is not permissible to deduct input tax from output tax by providing certification for input tax only after the investigation confirms that the sales amount is not reported or under-reported?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; J. Y. Interpretation Nos. 635, 625, 622, 607（司法院釋字第六三五號、第六二五號、第六二二號、第六0七號解釋）; Article 15, Paragraph 1, Article 19, Paragraph 1, Section 1, Article 33, Article 35, Paragraph 1, Article 43, Paragraph 1, Section 4, Article 51, Section 3 of the Value-added and Non-value-added Business Tax Act（加值型及非加值型營業稅法第十五條第一項、第十九條第一項第一款、第三十三條、第三十五條第一項、第四十三條第一項第四款、第五十一條第三款）; Article 29, Article 38, Paragraph 1, Section 3, 4, Article 52, Paragraph 2, Section 1 of the Enforcement Rules for the Value-added and Non-value-added Business Tax Act（加值型及非加值型營業稅法施行細則第二十九條、第三十八條第一項第一款、第三款、第四款、第五十二條第二項第一款）; The Ministry of Finance Memorandum Tai Tsai Shui

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* Translated by Vincent C. Kuan.

** Contents within frame, not part of the original text, are added for reference purposes only.

No.890457254 of October 19, 2000（財政部八十九年十月十九日台財稅字第八九0四五七二五四號函）.

KEYWORDS:

Principle of taxation by law（租稅法律主義）, the Value-added and Non-value-added Business Tax Act（加值型及非加值型營業稅法）, non-reported or under-reported sales amount（短報或漏報銷售額）, input tax（進項稅額）, tax filing obligation（申報義務）.**

HOLDING: The Ministry of Finance Memorandum *Tai-Tsai-Shui* No. 890457254 of October 19, 2000 on interpreting the means to determine unreported taxable income under Article 51, Section 3 of the Value-added and Non-value-added Business Tax Act, as promulgated by Article 52, Paragraph 2, Section 1 of the Enforcement Rules for the Value-added and Non-value-added Business Tax Act, states that for taxpayers who underreported or misreported sales amount but provided valid value-added tax input certification only after being investigated and discovered, no output tax amount may be deducted by the tax levying agency in calculating the tax shortage. It is in compliance

解釋文：財政部中華民國八十九年十月十九日台財稅字第八九0四五七二五四號函，就加值型及非加值型營業稅法施行細則第五十二條第二項第一款有關如何認定同法第五十一條第三款漏稅額之規定，釋示納稅義務人短報或漏報銷售額，於經查獲後始提出合法進項稅額憑證者，稽徵機關於計算其漏稅額時不宜准其扣抵銷項稅額部分，符合該法第三十五條第一項、第四十三條第一項第四款及第五十一條第三款之立法意旨，與憲法第十九條之租稅法律主義尚無牴觸。

with the legislative purpose of Article 35, Paragraph 1, Article 43, Paragraph 1, Section 4 and Article 51, Section 3 of the Act, and does not contradict the principle of taxation by law under Article 19 of the Constitution.

REASONING: Article 19 of the Constitution imposes the duty of the people to pay taxes in accordance with the law. It means that the State must impose tax duty or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taking into consideration such conditions as the subject, subject matter, tax base or tax rates.. In the event any doubt should derive from the application of the statutory provisions within the scope of its authority, the governing agency, as a matter of exercising such legal authority, provides interpretations on the relevant provisions. It is not against the principle of taxation by law insofar as such interpretation is provided in accordance with the general principle of the legal interpretation and in compliance with the relevant principles embodied in

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等租稅構成要件，以法律定之。惟主管機關於職權範圍內適用之法律條文發生疑義者，本於法定職權就相關規定予以闡釋，如係秉持一般法律解釋方法，且符合相關憲法原則，即與租稅法律主義無違（本院釋字第六０七號、第六二二號、第六二五號、第六三五號解釋參照）。

the Constitution. (*See* J. Y. Interpretations Nos. 607, 622, 625 and 635).

Article 51, Section 3 of the Value-added and Non-value-added Business Tax Act (hereinafter Business Tax Act) provides that a taxpayer who "underreports or misreports sales amount," is subject to the payment of back tax, a fine equivalent to one to ten times the tax shortage amount, and suspension of business. "Tax shortage amount" means, in accordance with Article 52, Paragraph 2, Section 1 of the Enforcement Rules for the Business Tax Act, "the additional tax amount, as determined by the governing tax levying agency based on all the investigation documents, that needs to be paid." As the governing agency, the Ministry of Finance issued Memorandum Tai-Tsai-Shui No. 890457254 on October 19, 2000 (hereinafter the Memo) to interpret how to determine the tax shortage for "non-reported or underreported sales amount." Illustration 3 of the Memo states: "In accordance with Article 35, Paragraph 1 of the Business Tax Act, regardless of whether any sales amount is accrued, a business operator must file

加值型及非加值型營業稅法（下稱營業稅法）第五十一條第三款規定，納稅義務人有「短報或漏報銷售額者」，除追繳稅款外，按所漏稅額處一倍至十倍罰鍰，並得停止其營業。所謂漏稅額，依同法施行細則第五十二條第二項第一款規定係「以經主管稽徵機關依查得之資料，核定應補徵之應納稅額為漏稅額。」主管機關財政部就如何認定「短報或漏報銷售額」之漏稅額，作成八十九年十月十九日台財稅字第八九〇四五七二五四號函（下稱系爭函）說明三謂：「又依營業稅法第三十五條第一項規定，營業人不論有無銷售額，應按期填具申報書，檢附退抵稅款及其他有關文件，向主管稽徵機關申報銷售額、應納或溢付營業稅額。準此，營業人之進項稅額准予扣抵或退還，應以已申報者為前提，故營業人違反營業稅法第五十一條第一款至第四款及第六款，據以處罰之案件，營業人如於經查獲後始提出合法進項憑證者，稽徵機關於計算其漏稅額時尚不宜准其扣抵銷項稅額。」依此函釋，准予扣抵之進項稅額，以納稅義務人已依同法第三十五條

periodic tax returns to the governing tax levying agency concerning its sales amount, tax owed, or overpayment, with tax deduction and other related documents attached. As such, the deductible or refundable input valued-added taxes of the business operator are premised on the fact that they are reported. Therefore, in the event that a business operator should be held in violation of Articles 51, Sections 1 to 4 and Section 6 of the Business Tax Act and subject to penalties accordingly, but provide valid input certificate only after being investigated and discovered, no output tax amount may be deducted by the tax levying agency in calculating the tax shortage." Based on this Memorandum, the deductible amount for input tax is limited to what the taxpayer has reported in accordance with Article 35, Paragraph 1 of the same Act. If the taxpayer provides valid certification for input tax payment only after being investigated and the shortfall or evasion of tax payment is discovered, the input value-added tax may no longer be deductible under Article 15, Paragraph 1, which provides: "The amount of business tax payable or

第一項規定申報者為限，納稅義務人於查獲短報或漏報銷售額後始提出之合法進項稅額憑證，不得依同法第十五條第一項規定：「營業人當期銷項稅額，扣減進項稅額後之餘額，為當期應納或溢付營業稅額。」作為扣抵之依據，而應依所查得之銷項資料及已申報之進項稅額計算應納稅額。

overpaid by a business operator shall be the output tax in a given tax period subtracted from the input tax in the same period." Instead, the taxpayer shall pay tax calculated by the audited documentary evidences for output and reported input tax.

The "input tax amount" that may be deductible from the output tax in the same period under Article 15, Paragraph 1 of the Business Tax Act is premised on the condition that the registered business operator has obtained the valid certification on formality compliance stipulated under Article 33 of the Business Tax Act and has attached that certification with the filing for deduction to the governing tax levying agency within the given period based on which the business tax owed or overpaid in the same period is calculated. (*See* Article 19, Paragraph 1, Section 1, Article 35, Paragraph 1, and Article 43, Paragraph 1, Section 4 of the same Act as well as Article 38, Paragraph 1, Sections 1, 3, and 4 of its Enforcement Rules). Should the business operator fail to accurately file sales return in accordance with Article 35,

營業稅法第十五條第一項規定當期銷項稅額得扣減之「進項稅額」，以依法登記之營業人須取得同法第三十三條所列之合法要式憑證，且於申報期限內檢附向主管稽徵機關申報扣減，而據以計算當期應納或溢付營業稅額為前提要件（同法第十九條第一項第一款、第三十五條第一項、第四十三條第一項第四款、同法施行細則第三十八條第一項第一、三、四款等規定參照）。營業人若未依上開第三十五條第一項規定據實申報銷售額，致有短報、漏報銷售額之情形，即得適用同法第四十三條第一項第四款規定，依照查得之資料（包含已申報之進項稅額憑證）核定該期銷售額及應納稅額，故申報加值型營業稅，限營業人已經申報進項稅額憑證之進項稅額，始能與當期銷項稅額扣抵，以結算當期應納或溢付之營業稅額。主管稽徵機關得依照「查得之資料」，核定其銷

Paragraph 1 stated above, thereby resulting in underreporting or misreporting of sales amount, Article 43, Paragraph 1, Section 4 of the same Act is applicable in that the sales amount and tax for the same period is determined by the investigated data (including the reported input tax certification). Hence, the filing of added-value business tax return is limited to those business operators who have already submitted input value-added certification, so that the reported amount can be deducted from the output valued-added tax for the same period in determining the tax payment or overpayment. That the governing tax levying agency may determine the sales amount and tax payment according to "investigated data" and preclude the certified input tax not yet filed for the same period is to carry out the purpose of Article 35, Paragraph 1 of the same Act that business operators should voluntarily file tax return for the same period. In addition, Article 51, Section 3 of the Business Tax Act stipulates that a taxpayer who underreports or misreports sales amount is subject to the payment of back tax, a fine equivalent to one to ten

售額及應納稅額時，將當期迄未申報之進項稅額憑證予以排除，係為貫徹同法第三十五條第一項規定由營業人當期自動申報繳納之意旨。又營業稅法第五十一條第三款規定，納稅義務人短報或漏報銷售額者，除追繳稅款外，按所漏稅額處一倍至十倍罰鍰，並得停止其營業，此漏稅額之認定方式，依同法施行細則第五十二條第二項第一款規定，亦以經主管稽徵機關依「查得之資料」，核定應補徵之應納稅額為漏稅額，尚不許營業人於查獲後始提出合法進項稅額憑證，而主張扣抵銷項稅額。至當期未申報扣抵之進項稅額憑證，依同法施行細則第二十九條規定：「本法第四章第一節規定計算稅額之營業人，其進項稅額憑證，未於當期申報者，得延至次期申報扣抵。次期仍未申報者，應於申報扣抵當期敘明理由。」尚能延期於他期申報扣抵，故不發生重複課稅之問題。

times the tax shortage amount, and suspension of business. The means to determine underreported tax, under Article 52, Paragraph 2, Section 1 of the Enforcement Rules, is also based on "investigated data" by the governing tax levying agency for the additional tax to be levied, which does not permit business operators to claim deduction against output tax by providing valid certification only after being investigated and discovered. With regard to the input tax certification not reported for the given tax period, there is no concern over repeated taxation given that it can be deferred to be reported in another tax period in accordance with Article 29 of the Enforcement Rules, which provides, "For business operators stipulated in Chapter 4, Section 1 who do not file input tax certification for the given tax period, the filing can be deferred to the next period to claim deduction. If the business operator should again fail to file input certification in the next period, a detailed explanation shall be provided along with the return filed for that given period."

In reviewing the disputed Memorandum concerning underreporting or misreporting of sales amount under Article 51, Section 3 of the Business Tax Act, the governing tax levying agency shall not permit the deduction of input tax should valid input tax certification be provided only after the underreporting or misreporting is investigated and discovered . Such is the natural interpretation when jointly applying Article 15, Paragraph 1; Article 35, Paragraph 1; Article 43, Paragraph 1, Section 4; Article 51, Section 3 of the Business Tax Act, as well as Articles 29, 38, Paragraph 1, Sections 1, 3, and 4, Article 52, Paragraph 2, Section 1 of the Enforcement Rules for the Act. It does not contradict the meaning and purpose of the aforementioned articles and is consistent with the general principles of legal interpretation. Furthermore, given that it does not impose any additional limitations other than as prescribed by the laws or regulations authorized by laws, it does not violate the principle of taxation by law under Article 19 of the Constitution.

系爭函關於營業稅法第五十一條第三款納稅義務人短報或漏報銷售額者，於經查獲後始提出合法進項稅額憑證者，稽徵機關於計算其漏稅額時不宜准其扣抵銷項稅額部分，觀其旨趣，乃係綜合適用營業稅法第十五條第一項、第三十五條第一項、第四十三條第一項第四款、第五十一條第三款及同法施行細則第二十九條、第三十八條第一項第一款、第三款、第四款、第五十二條第二項第一款所為之當然解釋，與上述法律規定之內涵及目的無違，符合一般法律之解釋方法，尤未增加法律或法律授權訂定之命令所無之限制，於租稅法律主義尚無違背。

Justice Sea-Yau Lin filed concurring opinion.

Justice Yu-Hsiu Hsu filed dissenting opinion.

Justice Mao-Zong Huang filed dissenting opinion.

本號解釋林大法官錫堯提出協同意見書；許大法官玉秀提出不同意見書；黃大法官茂榮提出不同意見書。

EDITOR'S NOTE:

Summary of facts: The applicant revoked nine invoices to support input tax by mistake so as to result in under-reported sale amount and input amount. The Ministry of Finance issued a Memorandum to affirm that the applicant had under-reported sale amount and input amount so that it was not permissible to deduct output tax by calculating the under-reported tax. The business entity was fined one time the amount of tax so evaded. The court had issued final judgment for this case.

編者註：

事實摘要：聲請人因誤將九筆進項發票申報為作廢，漏報銷貨銷售額六百多萬餘元（銷項稅額二十三萬餘元）及進貨金額四百多萬餘元（進項稅額二十一萬餘元），財政部認其短報或漏報銷售額，按所漏稅額處一倍罰鍰。

The applicant held the view that the final judgment was rendered by referring to a Memorandum made by the Ministry of Finance, which violated Article 15 of the Value-added and Non-value-added Business Tax Act regarding the calculation of the taxable and overpaid tax amount in

聲請人認為財政部之釋示，牴觸加值型及非加值型營業稅法第十五條當期應納或溢付營業稅額之計算規定、第五十一條第三款漏稅處罰規定，以及憲法第十九條租稅法律主義之疑義，聲請解釋。

the same period, Article 51, Paragraph 3 of the same Act regarding the penalty for under-reported tax, as well as the principle of taxation by law under Article 19 of the Constitution.

J. Y. Interpretation No.661（June 12, 2009）*

ISSUE: Does MOF's said Instruction which stated that the public transportation subsidies received by government/privately-owned public transportation businesses for compensating losses in running remote routes are subject to business tax, violate the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 1, 3, 14, 16 of the Business Tax Act（as amended and promulgated on November 15, 1985. The name was subsequently changed its name to the Value-Added and Non-Value-Added Business Tax Act and was promulgated on July 9, 2001.）（營業稅法【七十四年十一月十五日修正公布；九十年七月九日修正公布名稱為加值型及非加值型營業稅法】第一條、第三條第二項、第十四條、第十六條第一項）; Article 1 of the Value-Added and Non-Value-Added Business Tax Act（加值型及非加值型營業稅法第一條）; Article 12 of the Regulations for Subsidies on Public Transportation（The Regulations for Subsidies on Public Transportation was promulgated on February 4, 1998 and is now abolished.）（大眾運輸補貼辦法（八十七年二月四日發布；已廢止）第十二條; the Ministry of Finance Correspondence Instruction Tai-Tsai-

* Translated by Li-Chih Lin, Esq., J.D.

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Shui-Zhi No. 861892311 issued on April 19, 2007（財政部八十六年四月十九日台財稅字第八六一八九二三一一號函）; Article 5 Paragraph 1, Section 2 and Paragraph 3 of the Constitutional Interpretation Procedure Act （司法院大法官審理案件法第五條第一項第二款及第三項）.

KEYWORDS:

tax object（租稅客體）, sales income（銷售收入）, public transportation subsidies（營運補貼）.**

HOLDING: Illustration 2 of the Ministry of Finance Memorandum Tai-Tsai Shui No. 861892311 provides, among other things, that "vehicle and vessel transportation operators maintain their businesses by charging fees for passenger transportation services. The subsidy income they received from the government is based on the frequencies and mileage rendered for servicing remote routes and to cover losses due to insufficient usage. It is derived from providing transportation services and by nature the fare for passenger tickets, …… and is subject to business tax accordingly." It has exceeded Article 1 and Article 3, Paragraph 2 of the Business Tax Act, as amended and promulgated on

解釋文：財政部中華民國八十六年四月十九日台財稅字第八六一八九二三一一號函說明二釋稱：「汽車及船舶客運業係以旅客運輸服務收取代價為業，其因行駛偏遠或服務性路線，致營運量不足發生虧損，所領受政府按行車（船）次數及里（浬）程計算核發之補貼收入，係基於提供運輸勞務而產生，核屬具有客票收入之性質，……應依法報繳營業稅。」逾越七十四年十一月十五日修正公布之營業稅法第一條及第三條第二項前段之規定，對受領偏遠路線營運虧損補貼之汽車及船舶客運業者，課以法律上所未規定之營業稅義務，與憲法第十九條規定之意旨不符，應不予適用。

November 15, 1985, by levying business tax duties not otherwise provided under the statute on vehicle and vessel transportation providers running remote routing services at a loss and receiving subsidies, is not in compliance with the meaning and purpose of Article 19 of the Constitution and shall no longer be applicable.

REASONING: Article 19 of the Constitution imposes the duty of the people to pay taxes in accordance with the law. It means that the State must impose tax duty or provide preferential tax deduction or exemption treatment to its people based on laws or regulations having clear authorization of a given law, taken into consideration such conditions as the subject, subject matter, tax base or tax rates. Various J. Y. Interpretations have consistently held as such.

Article 1 of the Business Tax Act, as amended and promulgated on November 15, 1985 (the old Business Tax Act), provided: "The sale of goods or services and import of goods within the territory of the Republic of China is subject to the levy of

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務，係指國家課人民以繳納稅捐之義務或給予人民減免稅捐之優惠時，應就租稅主體、租稅客體、稅基、稅率等租稅構成要件，以法律或法律明確授權之命令定之，迭經本院解釋在案。

七十四年十一月十五日修正公布之營業稅法（下稱舊營業稅法）第一條規定：「在中華民國境內銷售貨物或勞務及進口貨物，均應依本法規定課徵營業稅。」（嗣該法於九十年七月九日修正公布名稱為加值型及非加值型營業稅

value-added or non-value-added business tax in accordance with this Act." (The name of Business Tax Act is subsequently changed to Value-Added and Non-Value-Added Business Tax Act, as promulgated on July 9, 2001. Article 1 of the Business Tax Act was amended: "The sale of goods or services and import of goods within the territory of the Republic of China is subject to the levy of value-added or non-value-added business tax in accordance with this Act.") The front portion of Article 3, Paragraph 2 of the same Act provides: "Sale of services means the supply of services to others or the supply of goods for the use and benefit of others in exchange for the obtainment of a compensation." As such, as far as sale of services is concerned, the so-called sales income means the compensation obtained in exchange for the supply of services to others or the supply of goods for the use and benefit of others.

法，該條亦修正為：「在中華民國境內銷售貨物或勞務及進口貨物，均應依本法規定課徵加值型或非加值型之營業稅。」）同法第三條第二項前段規定：「提供勞務予他人，或提供貨物與他人使用、收益，以取得代價者，為銷售勞務。」準此，所謂銷售收入，就銷售勞務而言，係指營業人提供勞務予他人，或提供貨物與他人使用、收益，所取得之代價。

Illustration 2 of the Ministry of Finance Memorandum Tai-Tsai-Shui No. 861892311 provides, among other things, that "vehicle and vessel transportation

財政部八十六年四月十九日台財稅字第八六一八九二三一一號函說明二釋稱：「汽車及船舶客運業係以旅客運輸服務收取代價為業，其因行駛偏遠或

operators maintain their businesses by charging fees for passenger transportation services. The subsidy income they received from the government is based on the frequencies and mileage rendered for servicing remote routes and to cover losses due to insufficient usage. It is derived from providing transportation services and by nature the fare for passenger tickets, …… and is subject to business tax accordingly." This Memorandum interprets the above-stated subsidy income as the compensation from the sale of services, and is subject to business tax levy. However, in accordance with Article 12, Paragraph 1 of the Regulations on Public Transportation Subsidies, promulgated on February 4, 1998 (now abolished), "the formula for the calculation of maximum subsidies in the basic operations of existing routes is as follows: the maximum subsidies in the basic operations of existing routes = (reasonable operating costs per vehicle km/per vessel nautical mile – actual operating revenue per vehicle km/per vessel nautical mile) × (number of sorties) × (mileage of route/sea path)." Paragraph 4 of the same provision

服務性路線，致營運量不足發生虧損，所領受政府按行車（船）次數及里（浬）程計算核發之補貼收入，係基於提供運輸勞務而產生，核屬具有客票收入之性質，……應依法報繳營業稅。」此一函釋將上述補貼收入，認係銷售勞務之代價，應依法報繳營業稅。惟依交通部八十七年二月四日發布之大眾運輸補貼辦法（已廢止）第十二條第一項規定：「現有路（航）線別基本營運補貼之最高金額計算公式如下：現有路（航）線別基本營運補貼之最高金額＝（每車公里或每船浬合理營運成本－每車公里或每船浬實際營運收入）×（班或航次數）×（路或航線里、浬程）」；同條第四項並規定，該公式中之合理營運成本不得包括利潤。是依該公式核給之補貼，係交通主管機關為促進大眾運輸發展之公共利益，對行駛偏遠或服務性路線之交通事業，彌補其客票收入不敷營運成本之虧損，所為之行政給付。依上開規定受補助之交通事業，並無舊營業稅法第三條第二項前段所定銷售勞務予交通主管機關之情事。是交通事業所領取之補助款，並非舊營業稅法第十六條第一項前段所稱應計入同法第十四條銷售額之代價，從而亦不屬於同法第一條規定之課稅範圍。

provides that the reasonable operating costs in the formula shall not include profits. Thus the subsidies approved under this formula is an administrative payment by the governing transportation authority to promote the development of mass transportation and to offset the losses resulted from passenger tickets income shortfalls to the operating costs. Those transportation businesses which receive subsidies did not provide sale of services to the transportation authority as regulated under Article 3, Paragraph 2 of the old Business Tax Act. Thus the subsidies the transportation businesses received are not compensations for sales of services to be counted under Article 14 of the old Business Tax Act, as stipulated by the front portion of Article 16, Paragraph 1 of the same act. It follows that [the subsidies] do not fall within the scope of tax levy under Article 1 of the same Act.

This memorandum Interpretation has exceeded Article 1 and the front portion of Article 3, Paragraph 2 of the Business Tax Act by levying business tax duties not otherwise provided under the statute on

系爭函釋逾越舊營業稅法第一條及第三條第二項前段之規定，對受領偏遠或服務性路線營運虧損補貼之汽車及船舶客運業者，就該補貼收入，課以法律上未規定之營業稅納稅義務，與憲法

vehicle and vessel transportation providers running remote routing services at a loss and receiving subsidies, is not in compliance with the meaning and purpose of Article 19 of the Constitution, and shall no longer be applicable.

第十九條規定之意旨不符，應不予適用。

With regard to the petitioner's claim that the Supreme Administrative Court (97) Cai Zhi No. 4643 Ruling applied the Memorandum Interpretation and shall be the basis for constitution interpretation, given that the above-stated ruling was a procedural dismissal for failure to legally state the ground on the petitioner's motion to rehear the Supreme Administrative Court (97) Cai Zhi No. 21 Judgment, and did not apply the disputed Memorandum, that part of the petition fails to comply with Article 5, Paragraph 1, Section 2 of the Constitutional Interpretation Procedure Act, and shall be dismissed in accordance with Paragraph 3 of the same provision.

至於聲請人指稱最高行政法院九十七年度裁字第四六四三號裁定適用系爭函釋並據以聲請解釋憲法部分，查前揭裁定係以聲請人對同院九十七年度判字第二一號判決提起再審而未合法表明再審理由，於程序上予以駁回，並未適用系爭函釋，是該部分聲請核與司法院大法官審理案件法第五條第一項第二款規定不符，依同條第三項規定，應不受理，併此指明。

Justice Pai-Hsiu Yeh filed dissenting opinion.

Justice Shin-Min Chen filed concurring

本號解釋葉大法官百修提出不同意見書；陳大法官新民提出協同及部分不同意見書。

opinion and dissenting opinion in part.

EDITOR'S NOTE:

Summary of facts: Petitioner is a transportation company and a recipient of more than NT$82 millions subsidies between 1997 and 2001 for providing services to remote areas but did not report tax duties on those subsidies.

The internal revenue agency, in pursuance of Illustration 2 of the Ministry of Finance Memorandum Tai-Tsai-Shui No. 861892311, rendered its decision that the subsidies are passenger tickets income, that the petitioner has evaded tax payments, and should, therefore, be subject to a 5% of business tax for such subsidies in the past 5 years, and an additional treble penalty to that amount.

The petitioner disagreed and challenged the decision through administrative adjudication. The Supreme Administrative Court eventually upheld the agency decision. The petitioner then submitted the present petition alleging that the Memorandum interpretation violates the legislative

編者註：

事實摘要：聲請人為汽車客運公司，領受行駛偏遠路線虧損補貼款，而未就該款項報繳營業稅。

稅捐稽徵機關依財政部八十六年四月十九日台財稅字第八六一八九二三一一一號函說明二，認屬客票收入之性質，應報繳營業稅，對聲請人補徵營業稅，並處以漏稅罰。

聲請人認確定終局裁判所適用之系爭函釋，將汽車及船舶客運業者所受領之偏遠路線營運虧損補貼款項論為銷售收入，與營業稅法第一條、第三條及第十六條銷售勞務，應依法課徵營業稅之規範意旨不符，有牴觸憲法第十九條依法律納稅之疑義，聲請解釋。

meaning and purpose of Articles 1, 3, and 16 of the Business Tax Act and, contradicts Article 19 of the Constitution.

J. Y. Interpretation No.662（June 19, 2009）*

ISSUE: Does Article 41, Paragraph 2 of the Penal Code, which stipulates that for several offenses each carries a sentence convertible to fines, if the merged executable sentence should exceed six months, then the final sentence may not be converted to fines, violate the Constitution ?

RELEVANT LAWS:

Articles 8, 23, 78 and 171 of the Constitution（憲法第八條、第二十三條、第七十八條、第一百七十一條）; Nos. 185 and 366 of the Judicial Interpretations （司法院釋字第一八五號、第三六六號解釋）; Article 41 of the Penal Code (promulgated on January 1, 1935, effective on July 1, 1935)（刑法第四十一條【二十四年一月一日公布，二十四年七月一日施行】）; Article 41, Paragraphs 1 and 2, of the Penal Code 5 (promulgated on January 10, 2001)（刑法第四十一條第一項、第二項【九十年一月十日修正公布】）; Article 41, Paragraph 2 of the current Penal Code（promulgated on February 2, 2005, effective on July 1, 2005）（現行刑法第四十一條第一項、第二項【九十四年二月二日修正公布，九十五年七月一日施行】）; Article 41, Paragraph 8 of the current Penal Code（promulgated on January 21, 2009, effective on September 1, 2009）（現行刑法第四十一條第一項、第

* Translated by Li-Chih Lin, Esq., J.D.

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二項【九十四年二月二日修正公布，九十五年七月一日施行】）; Articles 51, 53 and 54 of the current Penal Code（現行刑法第五十一條、第五十三條、第五十四條）; Article 5, Paragraph 1, Section 2 and Paragraph 3 of the Grand Justices Adjudication Act（司法院大法官審理案件法第五條第一項第二款及第三項）.

KEYWORDS:

fine conversion（易科罰金）, merger of sentences for multiple offenses（數罪併罰）, short-term imprisonment sentence（短期自由刑）, separation of powers（權力分立）, pronounced sentence（宣告刑）, executable sentence（執行刑）.**

HOLDING: Article 41, Paragraph 2 of the current Penal Code, amended and promulgated as of February 2, 2005, which precludes the application of Paragraph 1 of the same provision on sentences convertible into fines in the event the merger of executable sentences for several offenses that exceeds six months of imprisonment, even with each sentence that may be convertible into fines, violates Article 23 of the Constitution and J. Y. Interpretation No. 366, and shall be invalid on the issuance date this Interpretation.

解釋文：中華民國九十四年二月二日修正公布之現行刑法第四十一條第二項，關於數罪併罰，數宣告刑均得易科罰金，而定應執行之刑逾六個月者，排除適用同條第一項得易科罰金之規定部分，與憲法第二十三條規定有違，並與本院釋字第三六六號解釋意旨不符，應自本解釋公布之日起失其效力。

With regard to the part that concerns temporary disposition in accordance with Article 41, Paragraph 2 of the Penal Code, as requested by the two petitioners, there is no need to provide further review in light of this Interpretation. In addition, with regard to the constitutional interpretation filed by one of the petitioners concerning Article 53 of the Penal Code, given that this part of the petition is dismissed, the related temporary disposition is no longer pendent and shall also be dismissed.

本件二聲請人就刑法第四十一條第二項所為暫時處分之聲請部分，因本案業經作成解釋，已無審酌必要；又其中一聲請人關於刑法第五十三條之釋憲聲請部分，既應不受理，則該部分暫時處分之聲請亦失所附麗，均應予駁回。

REASONING: Article 78 of the Constitution specifies that the Judicial Yuan has the power to interpret the Constitution and to unify the interpretation of laws and regulations. Article 171 of the Constitution clearly provides that the law shall be invalid if it violates the Constitution, and that the Judicial Yuan shall issue constitutional interpretations where there are disputes on the constitutionality of the law. Thus regardless whether they are for the purpose of clarifying the true meanings of the Constitution, resolving disputes in the application of the Constitution,

解釋理由書：司法院解釋憲法，並有統一解釋法律及命令之權，憲法第七十八條定有明文。法律與憲法牴觸者無效，法律與憲法有無牴觸發生疑義時，由司法院解釋之，憲法第一百七十一條規定甚明。是司法院大法官就憲法所為之解釋，不問其係闡明憲法之真義、解決適用憲法之爭議、抑或審查法律是否違憲，均有拘束全國各機關及人民之效力，業經本院釋字第一八五號解釋在案。立法院基於民主正當性之立法責任，為符合變遷中社會實際需求，得制定或修正法律，乃立法形成之範圍及其固有權限。立法院行使立法權時，雖

or reviewing the constitutionality of a law, the constitutional interpretations rendered by the Grand Justices of the Judicial Yuan have binding authority to all [government and private] agencies and the people nation-wide, as stated by J. Y. Interpretation No. 185. The Legislative Yuan, based upon the legislative responsibility under the democratic legitimacy as well as within the scope of legislative formation and its inherited authority, may enact or amend laws to meet the realistic needs of the changing society. While the Legislative Yuan has broad discretion and freedom in exercising this authority, based on the principles of separation of powers and compliance to the Constitution, the legislation shall not violate the Constitution and the constitutional interpretations rendered by the Judicial Yuan.

有相當廣泛之自由形成空間，惟基於權力分立與立法權受憲法拘束之原理，自不得逾越憲法規定及司法院所為之憲法解釋。

Article 41 of the Penal Code, promulgated on January 1, 1935 and took effect on July 1, 1935, stipulated: “For a committed criminal offence whose maximum primary sentence is three-year imprisonment or less, with the pronounced sentence being no more than six months of

二十四年一月一日制定公布，同年七月一日施行之刑法第四十一條：「犯最重本刑為三年以下有期徒刑以下之刑之罪，而受六月以下有期徒刑或拘役之宣告，因身體、教育、職業或家庭之關係，執行顯有困難者，得以一元以上三元以下折算一日，易科罰金」之規

imprisonment or detention and the enforcement of such sentence is clearly difficult in light of physical condition, education, occupation or family conditions, [the sentence] may be converted to fines at the rate of 1 to 3 dollars per day." For those who have committed multiple offences prior to the final judgment, and with the pronounced sentence of each offence not exceeding six month imprisonment that could have been converted to fine respectively under that provision, once the combined, executable penalty exceeds six month [imprisonment] in accordance with Article 51, it results in the original pronounced sentence not being eligible for fine conversion, and creates unnecessary restriction to the people's right of freedom. J. Y. Interpretation No. 366 has already provided that the above-stated Article 41 of the Penal Code concerning the limitation of fine conversion to no more than six month imprisonment does not fully comply with Article 23 of the Constitution. Subsequently, Paragraph 1, Article 41 of the Penal Code, as amended and promulgated on January 10, 2001, provides: "For a committed criminal offence

定，對於裁判確定前犯數罪，分別宣告之有期徒刑均未逾六個月，依該條之規定各得易科罰金者，因依同法第五十一條併合處罰定其應執行之刑逾六個月，致其原宣告刑不得易科罰金時，將造成對人民自由權利之不必要限制。對於前述因併合處罰所定執行刑逾六個月之情形，上開刑法第四十一條關於易科罰金以六個月以下有期徒刑為限之規定部分，與憲法第二十三條規定未盡相符，業經本院釋字第三六六號解釋在案。嗣於九十年一月十日修正公布之刑法第四十一條第一項規定：「犯最重本刑為五年以下有期徒刑以下之刑之罪，而受六個月以下有期徒刑或拘役之宣告，因身體、教育、職業、家庭之關係或其他正當事由，執行顯有困難者，得以一元以上三元以下折算一日，易科罰金。但確因不執行所宣告之刑，難收矯正之效，或難以維持法秩序者，不在此限」。另增訂第二項：「併合處罰之數罪，均有前項情形，其應執行之刑逾六月者，亦同」之規定，即已符合本院釋字第三六六號解釋之意旨。然又於九十四年二月二日公布，九十五年七月一日施行之刑法第四十一條第二項修正為：「前項規定於數罪併罰，其應執行之刑未逾六月者，亦適用之。」（九十八年一月二十

whose maximum primary sentence is five-year imprisonment or less, with the pronounced sentence being no more than six months of imprisonment or detention and the enforcement of such sentence is clearly difficult in light of physical condition, education, occupation, family or other reasonable conditions, [the sentence] may be converted to fines at the rate of 1 to 3 dollars per day; except, with affirmation, that the reformation of the offense or maintaining the order of law can hardly be achieved without the execution of the pronounced sentence." A Paragraph 2 was added: "The same [rule] applies where merger of penalty on multiple offenses which all have the circumstances in the preceding Paragraph, and the executable sentence exceeds six months." This provision has complied with the meaning and purpose of J. Y. Interpretation No. 366. However, Paragraph 2, Article 41 of the Penal Code was further amended on February 2, 2005 and took effect on July 1, 2007: "The preceding Paragraph regarding joinder of penalties on multiple offences shall apply in the event the executable sentence is less than six months."

一日公布，定於同年九月一日施行之刑法修正為第四十一條第八項）致使各得易科罰金之數罪，因併合處罰定其應執行之刑逾有期徒刑六個月時，不得再依同條第一項之規定易科罰金，而應受自由刑之執行。

(This provision is reassigned as Paragraph 8, Article 41 of the Penal Code, as promulgated on January 21, 2009 and effective on September 1, 2009). As a result, for several offenses with each of which is eligible for fine conversion but the merger of executable sentence exceeding six months, Paragraph 1 of the same provision is no longer applicable and the penalty of imprisonment shall be enforced.

Personal liberty shall be protected is expressly stipulated in Article 8 of the Constitution. To restrict one's liberty by imprisonment is the last resort for crime deterrence. The State does not need to resort to more severe punishment if lighter means should accomplish the same effect, which is the fundamental purpose of Article 23 of the Constitution. The system of fine conversion that levy a fine, when certain legal requirements are met, over an original imprisonment sentence seeks to prevent the lingering flaws from short-term imprisonment sentences and to alleviate the severity of punishment. The purpose of merger of penalties rule on multiple offenses under Article 51, Subsection 5 of

按人民身體之自由應予保障，為憲法第八條所明定，以徒刑拘束人民身體之自由，乃遏止不法行為之不得已手段，對於不法行為之遏止，如以較輕之處罰手段即可達成效果，則國家即無須動用較為嚴厲之處罰手段，此為憲法第二十三條規定之本旨。易科罰金制度將原屬自由刑之刑期，在符合法定要件下，更易為罰金刑之執行，旨在防止短期自由刑之流弊，並藉以緩和自由刑之嚴厲性。刑法第五十一條第五款數罪併罰之規定，目的在於將各罪及其宣告刑合併斟酌，予以適度評價，而決定所犯數罪最終具體實現之刑罰，以符罪責相當之要求。依該款規定，分別宣告之各刑均為有期徒刑時，於各刑中之最長期以上，各刑合併之刑期以下，定其刑

the Penal Code is to provide proper evaluation with the combined consideration of each individual crime and its pronounced sentence so as to determine the final criminal sentence for the multiple offences committed, so that the requirement of corresponding liabilities with culpabilities can be met. In accordance with the stipulation of that Subsection, when the individually pronounced sentences are all imprisonment, the final sentence shall be no less than the longest individual sentence and no more than the combined sentences of all offences, which originally did not mean to put the defendant in a more disadvantaged position. However, for several offenses each having an individual sentence that may be subject to fine conversion, yet the combined executable sentence exceeds six months and may no longer be converted into fines, the opportunity for fine conversion is lost and the enforcement would have to be imprisonment. This mounts to an even more unfavorable result to a convicted offense, and contradicts the original meaning of a joint sentence for multiple offenses, as illustrated in J. Y. Interpretation No. 366.

期，原無使受刑之宣告者，處於更不利之地位之意。惟對各得易科罰金之數罪，由於併合處罰定其應執行刑之結果逾六個月，而不得易科罰金時，將使原有得易科罰金之機會喪失，非受自由刑之執行不可，無異係對已定罪之行為，更為不利之評價，已逾越數罪併罰制度之本意，業經本院釋字第三六六號解釋予以闡明。

The legislative reason for Article 41, Paragraph 2 of the current Penal Code considers that if fine conversion should nevertheless be permitted in the event the executable sentence exceeds six months while each of the several pronounced sentences may still be subject to fine conversion, it is susceptible to the encouragement of committing criminal offences. While this does carry a legitimate purpose, if, however, the judge should believe that it is necessary to subject the criminal offender to imprisonment, whether a single crime or multiple offences, he/she can certainly declare, as a matter of law, a sentence that exceeds six-month imprisonment so that it may not be converted to fines; on the other hand, if a prosecutor should determine that the effect of reformation can hardly be achieved or legal order shall be difficult to maintain without carrying out the pronounced sentence, and that it is inappropriate to engage in fine conversion, the prosecutor may also disallow fine conversion in accordance with the proviso under Article 41, Paragraph 1 of the Penal Code. Thus, even though fine conversion is allowed when the combined

現行刑法第四十一條第二項之立法理由，認數宣告刑均得易科罰金，而定應執行之刑逾有期徒刑六個月時，如仍准易科罰金，恐有鼓勵犯罪之嫌，目的固屬正當。惟若法官認為犯罪者，不論所犯為一罪或數罪，確有受自由刑執行之必要，自可依法宣告逾六個月之有期徒刑而不得易科罰金；另檢察官如認定確因不執行所宣告之刑，難收矯正之效，或難以維持法秩序，而不宜易科罰金時，依刑法第四十一條第一項但書之規定，亦可不准易科罰金。是數罪併罰定應執行刑逾有期徒刑六個月，縱使准予易科罰金，並不當然導致鼓勵犯罪之結果，如一律不許易科罰金，實屬對人民身體自由之過度限制。是現行刑法第四十一條第二項，關於數罪併罰，數宣告刑均得易科罰金，而定應執行之刑逾六個月者，排除適用同條第一項得易科罰金之規定部分，與憲法第二十三條規定有違，並與本院釋字第三六六號解釋意旨不符，應自本解釋公布之日起失其效力。

executable sentence for multiple criminal offences exceeds six months, it does not amount to the result of encouraging criminal offences. But if fine conversion is disallowed in all cases, it is in fact an over-restriction to personal liberty. Thus, Article 41, Paragraph 2 of the Penal Code, which precludes the application of Paragraph 1 of the same provision on sentences convertible into fines in the event the merger of executable sentences for several offenses that exceeds six months of imprisonment, even with each sentence that may be convertible into fines, violates Article 23 of the Constitution and J. Y. Interpretation No. 366, and shall be invalid on the issuance date this Interpretation.

Separately, on one of the petitioners' claim that Article 53 of the Penal Code, which stipulates the merger of [several] executable sentences, violates the principle of double jeopardy principle, and the request for a constitutional interpretation, it is an argument over the appropriateness of the court's finding of facts and application of law based on one's subjective perception without objectively specifying

另查聲請人之一認刑法第五十三條合併定應執行刑之規定，違反一事不二罰原則，聲請解釋憲法部分，乃以個人主觀見解爭執法院認事用法之當否，並未具體指摘該條規定客觀上究有何牴觸憲法之處；又該聲請人就刑法第五十四條聲請解釋憲法部分，查其所據以聲請解釋之確定終局裁定，並未適用該條規定，均核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條

where does that provision contradict the Constitution. Furthermore, on the part of the petition that requests for a constitutional interpretation over Article 54 of the Penal Code, the final judgment upon which this petition is based did not apply that provision. Thus, none of them comply with Article 5, Paragraph 1, Section 2 of the Grand Justices Adjudication Act and shall be dismissed in accordance with Paragraph 3 of the same provision.

第三項規定，應不受理。

On the part of the petition filed by both petitioners that concerns temporary disposition under Article 41, Paragraph 2 of the Penal Code, it is no longer necessary to be reviewed in light of the Interpretation issued in this case. In addition, since the part of the petition, filed by one of the petitioners, that concerns the request for a constitutional interpretation on Article 53 of the Penal Code is dismissed, the petition with regard to temporary disposition shall also be dismissed now that it is no longer attached to the [original] claim.

本件二聲請人就刑法第四十一條第二項所為暫時處分之聲請部分，因本案業經作成解釋，已無審酌必要；又其中一聲請人關於刑法第五十三條之釋憲聲請部分，既應不受理，則該部分暫時處分之聲請亦失所附麗，均應予駁回。

Justice Chi-Ming Chih filed concurring

本號解釋池大法官啟明提出協同

opinion.

Justice Yu-Hsiu Hsu filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Tzu-Yi Lin filed concurring opinion, in which Justice Tzong-Li Hsu joined.

Justice Shin-Min Chen filed dissenting opinion.

意見書；許大法官玉秀提出協同意見書；黃大法官茂榮提出協同意見書；林大法官子儀、許大法官宗力共同提出協同意見書；陳大法官新民提出不同意見書。

EDITOR'S NOTE:

Summary of facts: One of the petitioners is the 18th Criminal Division of the Taiwan High Court. The petitioner received an interlocutory appeal in which the appellant committed several offences against public safety and was finally sentenced three and six months imprisonment, respectively, and eligible for fine conversion all in the amount of NT$ 1,000 per day.

編者註：

事實摘要：一、聲請人臺灣高等法院刑事第十八庭受理抗告事件，抗告人因犯公共危險罪，分別經原審法院各判處有期徒刑三月、六月，如易科罰金均以新臺幣一千元折算一日確定在案。

Subsequently, the court ruled that the executable sentence should be eight months imprisonment and that no standard for fine conversion was provided in accordance with Article 41, Paragraph 2 of the

嗣法院裁定定應執行刑為有期徒刑八月，並依刑法第四十一條第二項，數宣告刑均得易科罰金，而定應執行之刑逾六個月者，不得易科罰金之規定，未諭知易科罰金之折算標準。聲請人於

Penal Code, which stipulates that for several offenses each carries a sentence subject to fine conversion, no such conversion is eligible if the executable sentence should exceed six months. The petitioner alleged during trial that the above statutory provision in the Penal Code violates the principle of proportionality under Article 23 of the Constitution, and requested for an interpretation.

審理時認上開刑法規定，有牴觸憲法第二十三條比例原則之疑義，聲請解釋。

The other three petitioners all committed multiple offences and were sentenced to less than six months imprisonment for the respective individual crime, all eligible for fine conversion. However, after the executable sentences were adjudicated, all exceeded six months and were not ruled to be eligible for fine conversion in accordance with the above-stipulated provision.

二、另三位聲請人，均因多件犯罪分別經法院判決六月以下有期徒刑，均准予易科罰金確定，惟經定應執行刑後，均超過六個月，法院依刑法上開規定，均未諭知易科罰金。

The three petitioners alleged that the statutory provision applied in their final judgment violated Articles 8 (personal liberty), 22 (protection of fundamental rights), and 23 (principle of proportionality) of the Constitution and J. Y. Interpretation

三位聲請人認確定終局裁定所適用之刑法上開規定，有牴觸憲法第八條人身自由、第二十二條基本權保障、第二十三條比例原則及司法院釋字第三六六號解釋之疑義，聲請解釋。

No. 366, and petitioned for an interpretation.

J. Y. Interpretation No.663 (July 10, 2009)*

ISSUE: Is the stipulation that the legal effect of the service of process to any individual joint owner will be applied to all joint owners as though all have been timely served under Article 19, Paragraph 3 of the Tax Levy Act in contravention of the Constitution?

RELEVANT LAWS:

Articles 15 and 16 of the Constitution（憲法第十五條與第十六條）; J.Y. Interpretations No. 459, 610 and 639（司法院釋字第四五九號、六一0號與六三九號解釋）; Article 19, Paragraph 3, and Article 35, Paragraph 1, of the Tax Levy Act（稅捐稽徵法第十九條第三項與第三十五條第一項）; Article 36 of the Administrative Procedure Act（行政程序法第三十六條）.

KEYWORDS:

right to institute administrative appeals（訴願權）, right to institute legal proceedings（訴訟權）, due process of law（正當法律程序）, assessment（核定）, tax（稅捐）, administrative act（處分）, joint owners（公同共有人）, service of process（送達）.**

HOLDING: Article 19, Paragraph 3, of the Tax Levy Act stipulates that for

解釋文：稅捐稽徵法第十九條第三項規定，為稽徵稅捐所發之各種文

* Translated by Professor Chun-Jen Chen.

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all kinds of notifications issued for the purpose of tax collection, "the legal effect of the service of process to any individual joint owner will be applied to all joint owners as though all have been timely served." When applied to the administrative act of tax assessment, the quoted stipulation will produce the legal effect that a service of process to any individual joint owner will be deemed as services of process to all joint owners. It is inconsistent with the constitutional mandate of due process of law and infringes the constitutional rights of the joint owners who are never actually served both to institute administrative appeals and to institute legal proceedings, and is hence in contravention of Article 16 of the Constitution. Therefore, the quoted stipulation shall be inapplicable no later than two years after we hand down this interpretation.

書，「對公同共有人中之一人為送達者，其效力及於全體。」此一規定，關於稅捐稽徵機關對公同共有人所為核定稅捐之處分，以對公同共有人中之一人為送達，即對全體公同共有人發生送達效力之部分，不符憲法正當法律程序之要求，致侵害未受送達之公同共有人之訴願、訴訟權，與憲法第十六條之意旨有違，應自本解釋公布日起，至遲於屆滿二年時，失其效力。

REASONING: People's property rights, right to institute administrative appeals, and right to institute legal proceedings are constitutional guarantees under Articles 15 and 16 of the Constitution. The service of process of the notification

解釋理由書：人民之財產權、訴願及訴訟權，為憲法第十五條及第十六條所保障。核定稅捐通知書之送達，不僅涉及人民財產權之限制，亦攸關人民得否知悉其內容，並對其不服而提起行政爭訟之權利。人民之權利遭受公權

of tax assessment not only involves the limitation of people's property right, but also closely relates to the fact whether people can be aware of the content of the notification and to people's ability to institute administrative proceedings to redress their grievance. Article 16 of the Constitution guarantees that when people's rights are infringed by the administrative acts, the grieving one will have the right to institute administrative appeals or administrative proceedings under the administrative procedure stipulated by the government to seek for appropriate remedies. The implementation of this constitutional guarantee and the scope of this procedural fundamental right to institute legal proceedings are reserved to the legislative branch to enact relevant procedural laws pursuant to the due process of law. In order to determine whether the relevant procedural laws enacted by the legislative branch are the products of the due process of law, in addition to take into account the constitutional guarantees and fundamental rights involved, we will take into account following factors, both respectively and as a whole, which are the

力侵害時，根據憲法第十六條規定，有權循國家依法所設之程序，提起訴願或行政訴訟，俾其權利獲得適當之救濟。此程序性基本權之具體內容，應由立法機關制定合乎正當法律程序之相關法律，始得實現。而相關程序規範是否正當，除考量憲法有無特別規定及所涉基本權之種類外，尚須視案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為認定（本院釋字第四五九號、第六一０號、第六三九號解釋參照）。

subject matters involved, the scope and degree of the infringement of fundamental rights, the public interests sought, the availability of alternative procedures and the cost of alternatives. (*See* J.Y. Interpretations No. 459, 610 and 639.)

Article 19, Paragraph 3, of the Tax Levy Act stipulates that for all kinds of notifications issued for the purpose of tax collection, "the legal effect of the service of process to any individual joint owner will be applied to all joint owners as though all have been timely served." (*hereinafter* the "stipulation at issue") Pursuant to the "stipulation at issue", the pertinent tax authority may fulfill the legal requirement of a due service of process by having the notification of tax assessment to joint owners delivered to any given individual joint owner and hence produces the legal effect of the service of process to all joint owners regardless whether in the first place the pertinent tax authority fulfills its duty to check if there are joint owners and to serve those joint owners whose addresses are unknown by posting or publishing the notification. The legislative

稅捐稽徵法第十九條第三項規定，為稽徵稅捐所發之各種文書，「對公同共有人中之一人為送達者，其效力及於全體。」（下稱「系爭規定」）依系爭規定，稅捐稽徵機關對公同共有人所為核定稅捐之處分，無論是否已盡查明有無其他公同共有人之義務，並對不能查明其所在之公同共有人為公示送達，而皆以對已查得之公同共有人中之一人為送達，即對全體公同共有人發生送達之效力。考其立法意旨，乃係認為公同共有財產如祭祀公業等，其共有人為數甚夥且常分散各地，個別送達或有困難，其未設管理人者，更難為送達（立法院公報第六十五卷第七十九期第四十八、四十九頁參照），足見該項立法之目的旨在減少稽徵成本、提升行政效率等公共利益。

history of the "stipulation at issue" shows that the legislative intent is to try to accommodate the practical difficulty of serving individual joint owners of large and disbursed properties such as ancestral estates in joint ownership whose owners are often large in number and have scattered residences. It is especially true to those ancestral estates in joint ownership that have no designated managers. (*See* the Legislative Yuan Gazette, Volume 65, Issue 79, Page 48-49.) It is clear that the "stipulation at issue" was enacted with a view to enhance public interests such as to reduce the cost of tax collection and to promote administrative efficiency.

However, under the due process requirement of administrative procedure in a rule of law state, the pertinent tax authority shall voluntarily investigate relevant evidence to find out the facts in any given case and to discover the right one who is subject to a specific administrative act. (*See* Article 36 of the Administrative Procedure Act.) Further, the pertinent tax authority shall employ a due service of process or other appropriate means to

惟基於法治國家正當行政程序之要求，稅捐稽徵機關應依職權調查證據，以探求個案事實及查明處分相對人，並據以作成行政處分（行政程序法第三十六條參照），且應以送達或其他適當方法，使已查得之行政處分相對人知悉或可得知悉該項行政處分，俾得據以提起行政爭訟。而稅捐稽徵法第三十五條第一項規定，納稅義務人不服核定稅捐之處分時，若該處分載有應納稅額或應補徵稅額，應於繳款書送達後，繳

enable the one who is subject to an administrative act to be aware of or to have the opportunity to be aware of the specific administrative act, and therefore to enable she to institute administrative proceedings accordingly. Furthermore, Article 35, Paragraph 1, of the Tax Levy Act prescribes that any taxpayer who disagrees with the administrative act of tax assessment shall file a petition of review within thirty days after the second day of the end of the expiration period when the notification of tax assessment comes with a specified amount of tax payable or of additional tax payable; the disagreeing taxpayer shall file a petition of review within thirty days after the service of process when the notification of tax assessment comes with no specified amount of tax payable or of additional tax payable. Accordingly, pursuant to the "stipulation at issue", since the legal effect of a service of process to any given individual joint owner applies to all joint owners, the statutory period for filing a petition of review to all joint owners shall begin to toll when there is a service of process to any individual joint owner. However,

納期間屆滿翌日起算三十日內，申請復查；若該處分未載應納稅額或應補稅額者，則納稅義務人應於核定稅額通知書送達後三十日內，申請復查。準此，未受送達之公同共有人，依系爭規定，核定稅捐之處分應於他公同共有人受送達時，對其發生送達之效力，故其得申請復查之期間，亦應以他公同共有人受送達時起算。然因受送達之公同共有人未必通知其他公同共有人，致其他未受送達之公同共有人未必能知悉有核課處分之存在，並據以申請復查，且因該期間屬不變期間，一旦逾期該公同共有人即難以提起行政爭訟，是系爭規定嚴重侵害未受送達公同共有人之訴願、訴訟權。

since the service of process is delivered to an individual joint owner only, and since the joint owner served may not inform other joint owners, the other joint owners may not be aware of the notification of tax assessment and will not be able to file a petition of review timely. Besides, the statutory period for filing a petition of review is as a matter of law a statutory peremptory period and no taxpayer may file such a petition when the period ends. Thus, the "stipulation at issue" severely infringes the rights of joint owners who are not served to institute administrative appeals and to institute legal proceedings.

Even if it is the case that there are joint owners who shall be served yet whose residences are unknown, the pertinent tax authority may still be able to post or to publish the notification of tax assessment, or to employ other means that will not generate excessive administrative cost and will have the content of the notification easily known to other joint owners in order to accomplish the statutory purpose of requiring a due service of process. Therefore, the "stipulation at

縱使考量上開應受送達之已查得之處分相對人中，或有應受送達之處所不明等情形，稅捐稽徵機關不得已時，仍非不能採用公示送達，或其他不致產生過高行政成本，而有利於相對人知悉處分內容之送達方法，以達成送達核定稅捐通知書之目的，故系爭規定剝奪該等相對人應受送達之程序，對人民訴願、訴訟權之限制，已逾必要之程度。

issue" deprives of other joint owners' right to be duly served and imposed limitation on people's right to institute administrative appeals and right to institute legal proceedings way beyond the degree of necessity.

To sum up, to the extent of the above mentioned rationales, the "stipulation at issue" is a procedural law which is both unreasonable and unjust, and is inconsistent with the constitutional mandate of due process of law, and is in contravention of the constitutional guarantees of people's right to institute administrative appeals and people's right to institute legal proceedings under Article 16 of the Constitution. To take into account that fact that when the pertinent tax authority has the notification of tax assessment delivered to every known joint owner, the calculation of tax overdue charges may be affected as the dates of the services of process may be different and the tolls and expiration dates of the statutory period of filing petitions of review may also be different, and to take into account that fact that after considerable investigations the

綜上考量，系爭規定於上開解釋意旨之範圍內，實非合理、正當之程序規範，不符憲法正當法律程序之要求，而與憲法第十六條保障人民訴願、訴訟權之意旨有違。鑑於對每一已查得相對人為送達，核定稅捐處分之確定日期，將因不同納稅義務人受送達之日而有異，可能影響滯納金之計算；且於祭祀公業或其他因繼承等原因發生之公同共有，或因設立時間久遠，派下員人數眾多，或因繼承人不明，致稅捐稽徵機關縱已進行相當之調查程序，仍無法或顯難查得其他公同共有人之情形，如何在符合正當法律程序原則之前提下，以其他適當方法取代個別送達，因須綜合考量人民之行政爭訟權利、稽徵成本、行政效率等因素，尚需相當時間妥為規劃，系爭規定於本解釋意旨範圍內，應自本解釋公布日起，至遲於屆滿二年時，失其效力。

pertinent tax authority may still be unable to or may confront apparent difficulty to locate every joint owner of ancestral estates in joint ownership or other joint-owned properties owing to inheritance because of the elapse of time, because of the large number of descendents, or because of the inheritors who are unknown, it will take up considerable time to design how to employ other appropriate means to serve every individual joint owners and at the same time to satisfy the premise of due process of law and to evaluate the factors such as people's right to institute administrative proceedings, the cost of tax collection, and administrative efficiency. The "stipulation at issue" shall be inapplicable no later than two years after we hand down this interpretation.

Justice Mao-Zong Huang filed concurring opinion.

本號解釋黃大法官茂榮提出協同意見書。

EDITOR'S NOTE:

Summary of facts: I. Petitioner A together with four others, who are not parties of the present case, are heirs of B. After the death of B, the Taipei National Tax

編者註：

事實摘要：一、聲請人A與案外四人為B之繼承人。於B死亡後，財政部臺北市國稅局以繼承人其未依規定申報遺產稅，依查得資料核定遺產稅額，並以

Administration, Ministry of Finance discovered that the heirs of B failed to file an inheritance tax return, so after assessing the amount of inheritance tax payable based on the information investigated it mailed the notification of inheritance tax due to the residence of one of the five heirs. A receipt of confirmed delivery was signed and returned. The notification indicated that the period of paying the inheritance tax due under the specified amount was from May 11, 2004 to July 10, 2004.

上開五位繼承人為納稅義務人，將遺產稅繳款書郵寄至納稅義務人之一的戶籍地，並經其簽收。該繳款書之繳納期間為民國九十三年五月十一日至九十三年七月十日。

II. The petitioner claimed that she was not aware of the above mentioned notification of inheritance tax due until May 4, 2006. She then consecutively filed a petition of review, instituted an administrative appeal, and brought an administrative suit; all of those administrative actions were rejected for the same reason that, "Since the notification at issue was legally delivered to one inheritor-taxpayer, the legal effect of the service of process shall apply to all inheritor-taxpayers. The petitioner's administrative action was brought exceeding the statutory peremptory

二、聲請人主張其至九十五年五月四日始知有上開繳款書存在，乃依序申請復查，提起訴願、行政訴訟，皆遭以「上開繳款書既依稅捐稽徵法第十九條第三項規定，合法送達一人，其送達之效力已及於全體納稅義務人，聲請人逾越提起救濟之不變期間」為由駁回確定，聲請人認稅捐稽徵法第十九條第三項規定違憲，聲請解釋。

period." The petitioner then brought the current action to seek for our interpretation claiming that Article 19, Paragraph 3, of the Tax Levy Act is in contravention of the Constitution.

J. Y. Interpretation No.664（July 31, 2009）*

ISSUE: Do the provisions in the Juvenile Proceeding Act that authorize detention and rehabilitation of juveniles who frequently skive or run away from home violate the Constitution ?

RELEVANT LAWS:

Article 8, Paragraph 1 and Articles 22, 23 and 156 of the Constitution（憲法第八條第一項、第二十二條、第二十三條、第一百五十六條）; J.Y. Interpretation Nos. 371, 572, 587, 590, 603 and 656（司法院釋字第三七一號、第五七二號、第五八七號、第五九０號、第六０三號、第六五六號解釋）; Articles 1, 2, 3, 26, 26-2, 27, 40, 41, 42, 53 and 56 of the Juvenile Proceeding Act（少年事件處理法第一條、第二條、第三條、第二十六條、第二十六條之二、第二十七條、第四十條、第四十一條、第四十二條、第五十三條、第五十六條）; Articles 2, 3, 14, 20, and 25 to 36 of the General Principles for the Installation and Implementation of Juvenile Detention Houses（少年觀護所設置及實施通則第二條、第三條、第十四條、第二十條、第二十五條至第三十六條）; Articles 2, 4, 6, 38 to 44, and 47 to 49 of the Statute on Juvenile Correction Schools（少年輔育院條例第二條、第四條、第六條、第三十八條至第四十四條、第四十七條至第四十九條）; Articles 1, 3, 4, 19, 20, 23, 69 to 74, 77 and

* Translated by Nigel N. T. Li.

** Contents within frame, not part of the original text, are added for reference purposes only.

78 of the General Principles for the Installation and Implementation of Juvenile Correction Houses（少年矯正學校設置及教育實施通則第一條、第三條、第四條、第十九條、第二十條、第二十三條、第六十九條至第七十四條、第七十七條、第七十八條）.

KEYWORDS:

Juvenile offence（少年事件）, human dignity（人性尊嚴）, personality rights（人格權）, best interests（最佳利益）, personal freedom（人身自由）, detention（拘禁）, principle of proportionality（比例原則）, juvenile delinquency（虞犯）, skipping classes（逃學）, running away from home（逃家）, consignment of juveniles to their statutory guardians（責付）, detention（收容）, juvenile detention house（少年觀護所）, protective punishment（保護處分）, rehabilitation（感化教育）, welfare agency（福利機構）.**

HOLDING: Article 3, Section 2 Sub-section 3 of the Juvenile Proceeding Act provides that if a juvenile who frequently skives or runs away from home, and judging by his/her character and living environment is likely to violate the Penal Code, the juvenile court shall hear the case in accordance with the Act. As a protective system established to ensure the healthy growth of young people, this

解釋文：少年事件處理法第三條第二款第三目規定，經常逃學或逃家之少年，依其性格及環境，而有觸犯刑罰法律之虞者，由少年法院依該法處理之，係為維護虞犯少年健全自我成長所設之保護制度，尚難逕認其為違憲；惟該規定仍有涵蓋過廣與不明確之嫌，應儘速檢討改進。又少年事件處理法第二十六條第二款及第四十二條第一項第四款規定，就限制經常逃學或逃家虞犯少

provision cannot summarily be held unconstitutional; yet it appears overly broad or vague, and should be promptly reviewed and improved. Furthermore, the parts that restrict the personal freedom of a juvenile who frequently skives or runs away from home and is likely to commit a crime under Article 26, Section 2 and Article 24, Paragraph 1, Section 4 of the Juvenile Proceeding Act are not in conformity with the principle of proportionality under Article 23 of the Constitution, or consistent with the protection of juvenile personality rights under Article 22 of the Constitution, and shall become void no later than one month after the issuance of this Interpretation.

年人身自由部分，不符憲法第二十三條之比例原則，亦與憲法第二十二條保障少年人格權之意旨有違，應自本解釋公布之日起，至遲於屆滿一個月時，失其效力。

REASONING: In the adjudication of a case, if the judge of any court should form a reasonable belief that the applicable law raises questions of its constitutionality that will clearly affect the outcome of the case, the judge may take the questions as a matter of prerequisite issue, stay the ongoing proceedings, and petition for an interpretation from the Grand Justices, submitting concrete and

解釋理由書：法官於審理案件時，對於應適用之法律，依其合理之確信，認為有牴觸憲法之疑義，顯然於該案件之裁判結果有影響者，各級法院得以之為先決問題，裁定停止訴訟程序，並提出客觀上形成確信法律為違憲之具體理由，聲請本院大法官解釋，本院釋字第三七一號、第五七二號、第五九0號解釋闡釋甚明。本院審查之對象，非僅以聲請書明指者為限，且包含案件審

specific rationales that objectively led to the belief that the law is unconstitutional. This principle is clearly delineated in J.Y. Interpretation Nos. 371, 572, and 590. The scope of review is not merely limited to what is specifically identified in the petition; it entails the review of statutes which must be cited as the basis of adjudication and which have a material connection with the statutes in question. While the case was being adjudicated, the petitioner suspected Article 3, Paragraph 2, Section 3 of the Juvenile Proceeding Act, the applicable statute, of being unconstitutional and filed the present petition, which is in compliance with the petition-filing requirements and should be accepted. Given that both Article 26, Section 2, which provides that the juvenile court may rule that a juvenile be taken into a juvenile detention house when necessary, and Article 42, Paragraph 1, Section 4, which authorizes the juvenile court to rule that a juvenile undergo rehabilitation education in a rehabilitative institution, are provisions concerning the subsequent disposition once the petitioner has filed for the juvenile proceeding in

理須援引為裁判基礎之法律，並與聲請人聲請釋憲之法律具有重要關聯者在內。本件聲請人於審理案件時，認其所應適用之少年事件處理法第三條第二款第三目規定有違憲疑義，聲請本院解釋，符合聲請解釋之要件，應予受理。又同法第二十六條第二款規定，少年法院認有必要時得以裁定命少年收容於少年觀護所，第四十二條第一項第四款規定少年法院得以裁定令少年入感化教育處所施以感化教育，均為聲請人依同法第三條第二款第三目規定而進行少年事件處理程序時，所須適用之後續處置規定，與第三條第二款第三目規定有重要關聯，均得為本院審查之對象，應一併納入解釋範圍，合先敘明。

accordance with Article 3, Paragraph 2, Section 3, they shall be subject to the scope of this constitutional interpretation review.

The right of personality is indispensible in guarding the individuality and free development of character, closely related to the safeguarding of human dignity, and is therefore protected by Article 22 of the Constitution. To protect the physical and mental health of children and juveniles, and to foster the healthy development of their character, the state bears the obligation to provide special care (*See* Article 156 of the Constitution). Necessary measures in the best interests of the children and juveniles must be adopted while taking into consideration the care that has been given to them by their families and the state of our society and economy (*See* J.Y. Interpretation Nos. 587, 603, and 656). While the legislators should set the appropriate and substantive content of the state's protection over children and juveniles after considering such factors as the level of socioeconomic development, education, social welfare policies, and the reasonable distribution of societal resources, among

人格權乃維護個人主體性及人格自由發展所不可或缺，亦與維護人性尊嚴關係密切，是人格權應受憲法第二十二條保障。為保護兒童及少年之身心健康及人格健全成長，國家負有特別保護之義務（憲法第一百五十六條規定參照），應基於兒童及少年之最佳利益，依家庭對子女保護教養之情況，社會及經濟之進展，採取必要之措施，始符憲法保障兒童及少年人格權之要求（本院釋字第五八七號、第六０三號及第六五六號解釋參照）。國家對兒童及少年人格權之保護，固宜由立法者衡酌社經發展程度、教育與社會福利政策、社會資源之合理調配等因素，妥為規劃以決定兒童少年保護制度之具體內涵。惟立法形成之自由，仍不得違反憲法保障兒童及少年相關規範之意旨。

others, the exercise of this legislative liberty shall nevertheless not violate the meanings and purpose of the relevant provisions concerning the protection of children and juveniles under the Constitution.

The Juvenile Proceeding Act was enacted for "the healthy growth, adjustment of living environment, and correction of character" of adolescents between the ages of 12 and 18 (*See* Articles 1 and 2 of the Act). Article 3, Section 2, Subsection 3 provides that for a juvenile who frequently skives or runs away from home, and judging by his/her character and environment is likely to violate the Penal Code, the juvenile court shall hear the case in accordance with the Act. That this provision places both juveniles who frequently skive or run away from home but have not violated the Penal Code and those who have under the judicial review of the Juvenile Court is a protective measure the legislature established after taking into consideration all relevant factors, and can hardly be deemed unconstitutional *per se*. However, if certain provisions therein should restrict the rights of the juvenile

少年事件處理法係立法者為保障十二歲以上十八歲未滿之少年「健全之自我成長，調整其成長環境，並矯治其性格」所制定之法律（同法第一條、第二條參照）。該法第三條第二款第三目規定，少年經常逃學或逃家，依其性格及環境，而有觸犯刑罰法律之虞者，由少年法院依該法處理之。上開規定將經常逃學、逃家但未犯罪之虞犯少年，與觸犯刑罰法律行為之少年同受少年保護事件之司法審理，係立法者綜合相關因素，為維護虞犯少年健全自我成長所設之保護制度，尚難逕認其即屬違憲。惟如其中涉及限制少年憲法所保障權利之規定者，仍應分別情形審查其合憲性。

guaranteed by the Constitution, their constitutionality shall be individually reviewed.

Article 26 of the Act states: "The juvenile courts may make the following judicial rulings when necessary: (1) place the juvenile in the custody of a legal guardian, parent(s), next of kin, the current counselor, or other suitable agency, organization, or individual, and may assign the juvenile to a juvenile ombudsman for appropriate counseling before the matter is concluded; or (2) place the juvenile in a juvenile detention house, provided that it is necessary and the custody or counseling under (1) is impossible or clearly inappropriate." Article 26-2, Paragraph 1 further states, "Neither the investigation nor the trial shall last more than two months while the juvenile is under the custody of a juvenile detention house; however, the juvenile court may, when necessary, extend the time limit for either the investigation or the trial for no more than one month and no more than once before the expiration of the custodial term." As a result, a juvenile court may, when necessary, place a juvenile

按少年事件處理法第二十六條規定：「少年法院於必要時，對於少年得以裁定為左列之處置：一、責付於少年之法定代理人、家長、最近親屬、現在保護少年之人或其他適當之機關、團體或個人，並得在事件終結前，交付少年調查官為適當之輔導。二、命收容於少年觀護所。但以不能責付或以責付為顯不適當，而需收容者為限。」且同法第二十六條之二第一項復規定：「少年觀護所收容少年之期間，調查或審理中均不得逾二月。但有繼續收容之必要者，得於期間未滿前，由少年法院裁定延長之；延長收容期間不得逾一月，以一次為限。」是少年法院於調查或審理程序中，於必要時，得裁定令經常逃學或逃家之虞犯少年收容於少年觀護所，且收容期間最長可達六個月。查少年觀護所隸屬於高等法院檢察署，其任務在執行少年保護事件少年之收容，以協助調查收容少年之品性、經歷、身心狀況、教育程度、家庭情形、社會環境及其他必要事項，供處理之參考。就其組織、人員選任及管理措施（如處遇及賞罰）等相關規範（少年觀護所設置及實施通則

who frequently skives or runs away from home in the custody of a detention house for a maximum of six months during the investigation or court proceeding. Juvenile detention houses are affiliated with and under the High Court Prosecutorial Office with the mission to take custody of juveniles and assist the investigations of their moral character, experiences, mental and physical health, education level, family status, social environment and other necessary factors for the reference of the courts. By the provisions concerning the organization, personnel selection, and management procedures (such as those concerning treatment, awards and penalties), and other such factors (*See* Articles 2, 3, 14, 20, and 25 to 36 of the General Principles for the Installation and Implementation of Juvenile Detention Houses), juvenile detention houses are the agencies enforcing the judicial custody measures.

第二條、第三條、第十四條、第二十條、第二十五條至第三十六條等規定參照）以觀，核屬司法收容措施之執行機構。

Article 42, Paragraph 1, Section 4 of the Juvenile Proceeding Act provides that the juvenile court may order the juvenile to undergo rehabilitative education at a rehabilitative institution by a protective

另經少年法院審理結果，除認有少年事件處理法第二十七條之情形，而為移送有管轄權之法院檢察署檢察官之裁定（同法第四十條規定參照），或認為事件不應或不宜付保護處分者，應裁

disposition, unless the juvenile court determines that Article 27 of the same Act is applicable, and orders the transfer of the juvenile to a prosecutor of the court having jurisdiction (*See* Article 40), or the juvenile court decides that the matter should not be subject to or suited for protective dispositions (*See* Article 41). By the stipulations of Articles 53 and 56 of the same Act, rehabilitative education shall be no less than six months and no more than three years. Rehabilitative education is carried out by various agencies such as juvenile reform and correctional schools and under the auspices and supervision of the Ministry of Justice; the objectives missions are to correct the juveniles' bad habits so that they repent and turn over a new leaf, to teach life skills, and to provide remedial education, among other things. From the regulations governing the personnel selection, management measures, as well as the measures on rendering awards and penalties at the juvenile reform and correctional schools (*See* Articles 2, 4, 6, 38 to 44, and 47 to 49 of the Statute on Juvenile Correction Schools; Articles 1, 3, 4, 19, 20, 23, 69 to

定諭知不付保護處分之處置（同法第四十一條規定參照）外，依同法第四十二條第一項第四款規定，少年法院得令少年入感化教育處所施以感化教育之保護處分。依同法第五十三條及第五十六條規定，感化教育之執行，其期間為逾六個月至三年。按少年感化教育係由少年輔育院及少年矯正學校等機構執行，受法務部指導、監督，其任務在於矯正少年不良習性，使其悔過自新，並授予生活技能及實施補習教育等。又揆諸少年輔育院及少年矯正學校之人員選任、管理措施及獎懲規定（少年輔育院條例第二條、第四條、第六條、第三十八條至第四十四條、第四十七條至第四十九條、少年矯正學校設置及教育實施通則第一條、第三條、第四條、第十九條、第二十條、第二十三條、第六十九條至第七十四條、第七十七條、第七十八條規定參照）等，少年感化教育實屬司法矯治性質甚明。

74, 77, and 78 of the General Principles for the Installation and Implementation of Juvenile Correction Schools), it is quite clear that juvenile rehabilitative education is to facilitate judicial correction.

In accordance with Article 26, Section 2 and Article 42, Paragraph 1, Section 4 of the Juvenile Proceeding Act, allowing courts to subject juveniles who frequently skive or run away from home but have not otherwise violated the Penal Code to judicial enforcement agencies or rehabilitative education for judicial correction does not serve the juveniles' best interests. Moreover, both provisions, which impose custodial disposition or rehabilitative education, involve confining the personal freedom of a juvenile susceptible to criminal activities to a certain locale for a certain period of time, which constitutes "detention" under Article 8 of the Constitution and significantly impacts personal freedom. Whether such restriction conforms with Article 23 of the Constitution is subject to strict scrutiny. While Article 26 of the Act, which aims to provide temporary protective measures

依上開第二十六條第二款及第四十二條第一項第四款規定，使經常逃學或逃家而未觸犯刑罰法律之虞犯少年，收容於司法執行機構或受司法矯治之感化教育，與保護少年最佳利益之意旨已有未符。而上開規定對經常逃學或逃家之虞犯少年施以收容處置或感化教育處分，均涉及對虞犯少年於一定期間內拘束其人身自由於一定之處所，而屬憲法第八條第一項所規定之「拘禁」，對人身自由影響甚鉅，其限制是否符合憲法第二十三條規定，應採嚴格標準予以審查。查上開第二十六條之規定，旨在對少年為暫時保護措施，避免少年之安全遭受危害，並使法官得對少年進行觀察，以利其調查及審理之進行，目的洵屬正當。同條第二款雖明定收容處置須為不能責付或責付顯不適當者之最後手段，惟縱須對不能責付或責付顯不適當之經常逃學逃家少年為拘束人身自由之強制處置，亦尚有其他可資選擇之手段，如命交付安置於適當之福利或教養

for juveniles from physical harm and facilitate court observation in the investigations and trial proceedings, has an appropriate objective, Section 2 of the article expressly provides that detention is the last resort when custody is impossible or clearly inappropriate. Yet even if compulsory disposition is necessary, there are nevertheless alternative measures that can be employed, such as assigning the juvenile to the care of an appropriate welfare or education agency, so that the imposition of the restriction on personal freedom never exceeds the purpose of safeguarding the juvenile's personal safety and facilitating the judge's investigation and adjudication, and the necessary education and counseling and related welfare measures can further be provided to foster the sound mental and physical growth of the juvenile. With regard to protective disposition under Article 42, Paragraph 1, it aims to correct the deviant behavior of the juvenile and to ensure the juvenile's healthy development; thus, the provision has an appropriate objective, yet the goal of having a juvenile who frequently skives or runs away from home learn and socialize can

機構，使少年人身自由之拘束，維持在保護少年人身安全，並使法官調查審理得以進行之必要範圍內，實更能提供少年必要之教育輔導及相關福利措施，以維少年之身心健全發展。上開第四十二條第一項規定之保護處分，旨在導正少年之偏差行為，以維護少年健全成長，其目的固屬正當；惟就經常逃學或逃家之虞犯少年而言，如須予以適當之輔導教育，交付安置於適當之福利或教養機構，使其享有一般之學習及家庭環境，即能達成保護經常逃學或逃家少年學習或社會化之目的。是少年事件處理法第二十六條第二款及第四十二條第一項第四款規定，就限制經常逃學或逃家虞犯少年人身自由部分，不符憲法第二十三條之比例原則，亦與憲法第二十二條保障少年人格權，國家應以其最佳利益採取必要保護措施，使其身心健全發展之意旨有違，應自本解釋公布之日起，至遲於屆滿一個月時，失其效力。

be achieved through proper education and counseling and placement in a regular learning and family environment through a proper welfare or fostering agency. Therefore, with regard to the parts that restrict the personal freedom of a juvenile who frequently skives or runs away from home under Article 26, Section 2 and Article 42, Paragraph 1, Section 4, they are not in conformity with the principle of proportionality under Article 23 of the Constitution, or consistent with the meanings and purpose of protecting the juvenile's personality rights and the State's obligation to take necessary protective measures in the juvenile's best interests for the sound physical and mental developments of the juvenile. These provisions shall become void within one month of the issuance of this Interpretation.

For juveniles who frequently skive or run away from home and have already been placed in detention houses or correctional facilities, the juvenile court judges having jurisdiction shall promptly resolve their cases in accordance with the meaning and purpose this Interpretation and

至本解釋公布前，已依上開規定對經常逃學或逃家之虞犯少年以裁定命收容於少年觀護所或令入感化教育者，該管少年法院法官應參酌本解釋意旨，自本解釋公布之日起一個月內儘速處理；其中關於感化教育部分，準用少年事件處理法第四十二條第一項第一款至

within one month of its issuance. Where correctional education is concerned, cases may be properly disposed of by applying, *mutatis mutandis*, Article 42, Paragraph 1, Sections 1 to 3 of the Juvenile Proceeding Act.

第三款之規定，另為適當之處分。

In addition, the regulations concerning frequently skiving or running away from home under Article 3, Section 2, Sub-section 3 of the Juvenile Proceeding Act are likely to cause the definition of skiving and running away to be overly broad. The cause of school skiving or running away from home may not always be attributable to the juveniles, and similar behavior that does not pose a threat to society would also be subject to the jurisdiction and disposition of juvenile courts in accordance with Sub-section 3. Furthermore, exactly what substantive acts, character or environmental conditions constitutes "likely to violate the Penal Code judging by the character and environment" is not all that clear and not appropriately prescribed, which should be reviewed and revised promptly.

又同法第三條第二款第三目關於「經常逃學或逃家」之規定，易致認定範圍過廣之虞，且逃學或逃家之原因非盡可歸責於少年，或雖有該等行為但未具社會危險性，均須依該目規定由少年法院處理；至「依其性格及環境，而有觸犯刑罰法律之虞」，所指涉之具體行為、性格或環境條件為何，亦有未盡明確之處；規定尚非允當，宜儘速檢討修正之。

With regard to the petitioner's request for an interpretation of Article 3, Section 2, Sub-sections 1, 2, 4, 5, and 7, it is denied as they pertain to other situations that constitute likely criminal offenses by the juvenile, so they are not within the scope of this review. Furthermore, they are not regulations that will clearly impact the ruling on the subject case. The request is for an interpretation that is contrary to J.Y. Interpretation Nos. 371, 572, and 590 and is thus denied.

至聲請人併請解釋少年事件處理法第三條第二款第一目、第二目、第四目、第五目及第七目規定，係構成少年虞犯事件之其他情形，並非本件原因事件應予適用且非顯對裁定結果有所影響之規定，與本院釋字第三七一號、第五七二號、第五九0號解釋意旨不符，應不受理，併此指明。

Justice Mao-Zong Huang filed concurring opinion.

Justice Shin-Min Chen filed concurring opinion in part and dissenting opinion in part.

Justice Yu-Hsiu Hsu filed dissenting opinion in part.

本號解釋黃大法官茂榮提出協同意見書；陳大法官新民提出部分協同及部分不同意見書；許大法官玉秀提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts: A junior high school student repeatedly ditched classes and frequented Internet cafes, temple fairs, and electronic arcades, befriending juvenile delinquents. His family was unable to impose any control or discipline

編者註：

事實摘要：某國中因學生經常曠課，流連於不良場所，家庭無力管教，校方為導正其偏差行為，並避免影響其他同學，依少年事件處理法第 18 條第 2 項規定，請求臺灣高雄少年法院調查審理。

over him. To correct the deviant behavior and to shield other students from any negative influence, in accordance with Article 18, Paragraph 2 of the Juvenile Proceeding Act the school authority requested the Kaohsiung Juvenile Court to investigate the case.

The presiding judge of the case, Judge He Ming-huan of the Kaohsiung Juvenile Court, reasonably believed that the statute applicable to this matter, Article 3, Section 2, Sub-section 3 of the Juvenile Proceeding Act, might be unconstitutional, and stayed the proceedings. Judge He then filed a petition for an interpretation from the Grand Justices in accordance with J.Y. Interpretation Nos. 371, 572 and 590. The petitioner also believed that Sub-sections 1, 2, 4, 5 and 7 of the same provision are also unconstitutional, and are critically related to the same regulatory objective as Sub-section 3, and petitioned for their interpretation as well.

聲請人為審理該事件之法官，依其合理確信，認為上開事件所應適用之少年事件處理法第三條第二款第三目規定有違憲情形，依釋字第三七一號、第五七二號、第五九0號解釋意旨，裁定停止訴訟程序，聲請釋憲。聲請人並認同條款之第一目、第二目、第四目、第五目、第七目等規定，亦同有違憲情形，與前開第三目規定具相同規範目的而有重要關聯，聲請併予解釋。

J. Y. Interpretation No.665（October 16, 2009）*

ISSUE: I. Is the Case Assignment Directions of the Taiwan Taipei District Court stipulating an integration of correlated cases in contravention of the Constitution ?

II. Is the criterion of the statutory detention of defendants in felony cases pursuant to the Code of Criminal Procedure in contravention of the Constitution ?

III. Is the prosecutor's right to appeal by filing a motion to set aside the court's ruling of ceasing the detention a defendant during a criminal trial in contravention of the Constitution ?

RELEVANT LAWS:

Articles 8, 16, 23 and 80 of the Constitution（憲法第八條、第十六條、第二十三條與第八十條）; J.Y. Interpretation Nos. 392, 442, 512, 574, 585, 599, 653 and 654（司法院釋字第三九二號、第四四二號、第五一二號、第五七四號、第五八五號、第五九九號、六五三號與六五四號解釋）; Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act（大法官案件審理法第五條第一項第二款）; Articles 5, 13, 15, 78, 79 and 81 of the Court Organic Act（法院組織法第五條、第十三條、第十五條、第七十八條、第七十九條與第八十一條）; Articles 3, 6, 7,

* Translated by Professor Chun-Jen Chen.

** Contents within frame, not part of the original text, are added for reference purposes only.

101, Paragraph 1, 101-2, 110, Paragraph 1, 114, 403, Paragraph 1, and 404 of the Code of Criminal Procedure（刑事訴訟法第三條、第六條、第七條、第一百０一條第一項、第一百０一條之二、第一百一十條第一項、第一百十四條、第四百０三條第一項與第四百０四條）; Articles 10 and 43 of the Case Assignment Directions of the Criminal Divisions of the Taiwan Taipei District Court（臺灣臺北地方法院刑事庭分案要點第十點與第四十三點）; Article 4, Paragraph 2 of the Regulation of the Departmental Affairs of District Court and Its Regional Branches（地方法院及其分院處務規程第四條第二項）.

KEYWORDS:

felony（重罪）, detain（羈押）, motion to set aside a court ruling（抗告）, right of appeal（抗告權）, right to institute legal proceedings（訴訟權）, case integration（併案）, case assignment（分案）, correlated cases（相牽連案件）, principle of proportionality（比例原則）, due process of law（正當法律程序）, assessment（核定）right of instituting administrative appeals（訴願權）, due process of law（正當法律程序）, principle of lawful designation of judges（法定法官原則）, recusal（迴避）, preservation proceeding（保全程序）, presumption of innocence（無罪推定）.**

HOLDING:

I. Articles 10 and 43 of the Case Assignment Directions of Criminal Divisions

解釋文：

一、臺灣臺北地方法院刑事庭分案要點第十點及第四十三點規定，與憲

of the Taiwan Taipei District Court is not in contravention of the constitutional guarantee of people's right to institute legal proceedings.

法第十六條保障人民訴訟權之意旨，尚無違背。

II. Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure stipulates that the courts may order to detain a defendant in a criminal trial when he/she is the major suspect of the crimes specified, and there is a reasonable ground to believe that the he/she may escape, may destroy, fabricate or falsify evidence, or may conspire with accomplices or witnesses, and when it becomes apparent to the courts that there will be difficulties with respect to the prosecution, the trial process, or the enforcement of the final judgment without such detention. To the extent of its statutory language, Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure falls under the constitutional mandate of the principle of proportionality under Article 23 of the Constitution and is not in contravention of the constitutional guarantees of people's personal freedom and of people's right to institute legal proceedings

二、刑事訴訟法第一百零一條第一項第三款規定，於被告犯該款規定之罪，犯罪嫌疑重大，且有相當理由認為有逃亡、湮滅、偽造、變造證據或勾串共犯或證人之虞，非予羈押，顯難進行追訴、審判或執行者，得羈押之。於此範圍內，該條款規定符合憲法第二十三條之比例原則，與憲法第八條保障人民身體自由及第十六條保障人民訴訟權之意旨，尚無牴觸。

under Articles 8 and 16 of the Constitution respectively.

III. Article 403, Paragraph 1 of the Code of Criminal Procedure, for the relevant part of empowering a prosecutor to appeal on the trial court's ruling of ceasing the detention of a defendant, is not in contravention of the constitutional guarantee of people's right to institute legal proceedings under Article 16 of the Constitution.

IV. As a result, it is moot and unnecessary to review the petition to stay the trial of the Criminal Case Gin-Tzu-Chung-Su-Tze No. 1 (2008) and to reassign the case pursuant to the result of the case assignment decided on December 12, 2008. The petition for a mandamus (or writ of *habeas corpus*) to issue a court temporary order to release the Petitioner is in contravention of the J.Y. Interpretation Nos. 585 and 599, and is hereby denied.

REASONING:

I. The Stipulations under Articles 10 and 43 of the Case Assignment Directions

三、刑事訴訟法第四百零三條第一項關於檢察官對於審判中法院所為停止羈押之裁定得提起抗告之規定部分，與憲法第十六條保障人民訴訟權之意旨，並無不符。

四、本件關於聲請命臺灣臺北地方法院停止審理九十七年度金矚重訴字第一號刑事案件，改依該法院中華民國九十七年十二月十二日之分案結果進行審理之暫時處分部分，已無審酌必要；關於聲請命該法院立即停止羈押聲請人之暫時處分部分，核與本院釋字第五八五號及第五九九號解釋意旨不符，均應予駁回。

解釋理由書：

一、臺灣臺北地方法院刑事庭分案要點第十點及第四十三點規定

of Criminal Divisions of the Taiwan Taipei District Court

Article 16 of the Constitution guarantees people's right to institute legal proceedings. The core content of this constitution guarantee is to enable the people to seek for a fair trail from the courts in accordance with due process of law in order to redress their grievances when their rights or interests are infringed. To ensure a fair trail, Article 80 of the Constitution also mandates that judges shall be above partisanship, shall, in accordance with law, hold trials independently, and shall be free from any interference.

憲法第十六條規定保障人民之訴訟權，其核心內容在於人民之權益遭受侵害時，得請求法院依正當法律程序公平審判，以獲得及時有效之救濟。為確保人民得受公平之審判，憲法第八十條並規定，法官須超出黨派以外，依據法律獨立審判，不受任何干涉。

The court's case assignment procedure through which a judge is assigned on a given case is closely related to the realization of judicial fairness and trial independence. In order to preserve the judge's fair and independent adjudication and to enhance the operational efficiency of judicial power, as long as judges are objectively, fairly, and reasonably assigned pursuant to a predefined, abstract and generally applicable method, and when such a method is fair enough to

法院經由案件分配作業，決定案件之承辦法官，與司法公正及審判獨立之落實，具有密切關係。為維護法官之公平獨立審判，並增進審判權有效率運作，法院案件之分配，如依事先訂定之一般抽象規範，將案件客觀公平合理分配於法官，足以摒除恣意或其他不當干涉案件分配作業者，即與保障人民訴訟權之憲法意旨，並無不符。法官就受理之案件，負有合法、公正、妥速處理之職責，而各法院之組織規模、案件負擔、法官人數等情況各異，且案件分配

preclude arbitrary assignments and other inappropriate interferences, the court's case assignment procedure is not in contravention of the constitutional guarantee of people's right to institute legal proceedings. A judge carries a duty to conduct the assigned case in a fair, legitimate, and speedy manner. Given that different courts have difference in organizational scale, case loads, and the number of judges, provided that the case assignment procedure relates a judge's duty of independent adjudication and fair burden of workloads, without contravening to the statutes as well as regulations and administrative rules promulgated by the Judicial Yuan (*See* Articles 78 and 79 of the Court Organic Act), the courts may, to the reasonable and necessary extent, naturally promulgate supplemental rules on matters concerning case assignment taking into account their respective practical needs to prevent arbitrary, capricious or other inappropriate interferences and to enhance the operational efficiency of judicial power.

涉及法官之獨立審判職責及工作之公平負荷，於不牴觸法律、司法院訂定之法規命令及行政規則（法院組織法第七十八條、第七十九條參照）時，法院就受理案件分配之事務，自得於合理及必要之範圍內，訂定補充規範，俾符合各法院受理案件現實狀況之需求，以避免恣意及其他不當之干預，並提升審判運作之效率。

Among major rule of law countries

世界主要法治國家中，德意志聯

around the world, the constitutional law of the Federal Republic of Germany is noteworthy. Article 101, Paragraph 1 of the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) expressly provides that, "Extraordinary courts (*Ausnahmegerichte*) shall not be allowed, and no one may be removed from the jurisdiction of his lawful judge." Academically, this is the so called principle of a lawful designation of judges (*gesetzlicher Richter*) under the constitutional law. It entails the constitutional mandates that cases shall be assigned by pre-defined abstract and general guidelines, and are not subject to the arbitrary control of any particular judge so as to interfere the adjudication. However, this principle does not preclude the assignment of cases by regulations or rules promulgated by a legally organized judicial panel (*Präsidium*, including the Chief Judge of the court and judges' representatives). (*See* Article 21-5, Paragraph 1 of the German Organic Law of Courts.) While other rule of law countries, such as the United Kingdom, the United States of America, France, the Nederland and

邦共和國基本法第一百零一條第一項雖明文規定，非常法院不得設置；任何人受法律所定法官審理之權利，不得剝奪—此即為學理所稱之法定法官原則，其內容包括應以事先一般抽象之規範明定案件分配，不得恣意操控由特定法官承辦，以干預審判；惟該原則並不排除以命令或依法組成（含院長及法官代表）之法官會議（Präsidium）訂定規範為案件分配之規定（德國法院組織法第二十一條之五第一項參照）。其他如英國、美國、法國、荷蘭、丹麥等國，不論為成文或不成文憲法，均無法定法官原則之規定。惟法院案件之分配不容恣意操控，應為法治國家所依循之憲法原則。我國憲法基於訴訟權保障及法官依法獨立審判，亦有相同之意旨，已如前述。

Denmark, whether with a written or unwritten constitution, contain no provision pertinent to the principle of lawful designation of judges. Nevertheless, without a doubt the principle that case assignment of the courts shall not be subject to arbitrary manipulation shall be the constitution principle adhered to by a rule of law country. As stated above, based upon the constitutional guarantees of people's right to institute legal proceedings and the constitutional mandate of judges' lawful, independent adjudications, our Constitution also embraces the same meaning and purpose.

Once a case is assigned to a certain judge, it is unavoidable in courts' trial practices that the case may be reassigned to or be integrated with another case and transferred to a different judge due to relocation, promotion, resignation, retirement, or other causes of the originally designated judge. Article 7 of the Code of Criminal Procedure stipulates that, "Cases are deemed to be correlated if one of the following circumstances exists: (i) one person commits several offenses; (ii)

訴訟案件分配特定法官後，因承辦法官調職、升遷、辭職、退休或其他因案件性質等情形，而改分或合併由其他法官承辦，乃法院審判實務上所不可避免。按刑事訴訟法第七條規定：「有左列情形之一者，為相牽連之案件：一、 一人犯數罪者。二、數人共犯一罪或數罪者。三、數人同時在同一處所各別犯罪者。四、犯與本罪有關係之藏匿人犯、湮滅證據、偽證、贓物各罪者。」第六條規定：「數同級法院管轄之案件相牽連者，得合併由其中一法院

several persons jointly commit one or several offenses; (iii) several persons separately commit offenses at the same time and at the same place; or (iv) the commission of concealment of offenders, destruction of evidence, perjury, or receipt of stolen property related to the primary offense." Article 6 of the Code of Criminal Procedure stipulates that, "In the event that several cases are correlated and are subject to the jurisdiction of several courts at the same level, they may be integrated and subject to the jurisdiction of one court. (Paragraph 1) Under the circumstance in the preceding paragraph, if several cases are already pending in several courts, by consent and ruling of each respective courts, each case may be transferred to one of the courts to be integrated and tried together. If there should be disagreements, it shall be decided by the ruling of the court of common appellate level. (Paragraph 2) For correlated cases subject to the jurisdictions of several courts at different levels, they may be integrated and subject to the jurisdiction of the highest one among those courts. For cases already pending at lower courts, the

管轄。（第一項）前項情形，如各案件已繫屬於數法院者，經各該法院之同意，得以裁定將其案件移送於一法院合併審判之。有不同意者，由共同之直接上級法院裁定之。（第二項）不同級法院管轄之案件相牽連者，得合併由其上級法院管轄。已繫屬於下級法院者，其上級法院得以裁定命其移送上級法院合併審判。但第七條第三款之情形，不在此限。（第三項）」上開第六條規定相牽連刑事案件分別繫屬於有管轄權之不同法院時，得合併由其中一法院管轄，旨在避免重複調查事證之勞費及裁判之歧異，符合訴訟經濟及裁判一致性之要求。且合併之後，仍須適用相同之法律規範審理，如有迴避之事由者，並得依法聲請法官迴避，自不妨礙當事人訴訟權之行使。惟相牽連之數刑事案件分別繫屬於同一法院之不同法官時，是否以及如何進行合併審理，相關法令對此雖未設明文規定，因屬法院內部事務之分配，且與刑事訴訟法第六條所定者，均同屬相牽連案件之處理，而有合併審理之必要，故如類推適用上開規定之意旨，以事先一般抽象之規範，將不同法官承辦之相牽連刑事案件改分由其中之一法官合併審理，自與首開憲法意旨無違。

court at the higher level may, with the issuance of a ruling, orders the integration and has it transferred to that court for review, provided, however, that this provision does not apply to the cases specified in Article 7, Item 3. (Paragraph 3)" The underpinning rationale of Article 6 of the Code of Criminal Procedure which allows an integration of correlated cases from different jurisdictions into one is to avoid the waste of repetitive investigations and discoveries of evidence as well as the diversity and conflicts of court opinions so as to meet the demand of litigation economy and consistency of judgments. Since the integrated litigation still applies the statutes and rules, and since the defendant may also file a motion for a judge's recusal on certain statutory grounds, such integration does not infringe the defendants' right to institute legal proceedings. Although the relevant statutes and regulations are silent with respect to whether and how to integrate correlated criminal cases pending before different judges of the same court may be integrated, since these questions fall under the power of allocating internal affairs of the courts,

and is deemed to be the disposition of correlated cases stipulated in Article 6 of the Code of Criminal Procedure thus necessary for integrated review, by applying the above stated regulations, *mutatis mutantis*, with pre-defined general and abstract rules. The integration and reassignment of correlated cases from several judges to one among them does not contravene the meaning and purpose of the Constitution.

Article 79, Paragraph 1, of the Court Organic Act stipulates that, "Prior to the end of each fiscal year, Chief Judges, Division Chef Judges, and judges of courts and branch courts at each respective level shall respectively convene conferences to pre-assign the allocation of judicial affairs and acting sequence for the next fiscal year in accordance with this Act, the Regulation for Departmental Affairs, and other laws and regulations." The Regulation for Departmental Affairs of the Courts at each level and their branches is promulgated by the Judicial Yuan under the statutory authorization of Article 78 of the Court Organic Act. The Case Assignment Directions of Criminal Divisions of the

法院組織法第七十九條第一項規定：「各級法院及分院於每年度終結前，由院長、庭長、法官舉行會議，按照本法、處務規程及其他法令規定，預定次年度司法事務之分配及代理次序。」各級法院及分院之處務規程係由法院組織法第七十八條授權司法院定之。臺灣臺北地方法院刑事庭分案要點（下稱系爭分案要點）乃本於上開法院組織法規定之意旨，並經臺灣臺北地方法院法官會議授權，由該法院刑事庭庭務會議決議，事先就該法院受理刑事案件之分案、併案、折抵、改分、停分等相關分配事務，所為一般抽象之補充規範。系爭分案要點第十點規定：「刑事訴訟法第七條所定相牽連案件，業已分由數法官辦理而有合併審理之必要者，

Taiwan Taipei District Court (*hereinafter* referred to as the DIRECTIONS AT ISSUE) were promulgated by the resolution of the meeting of divisional affairs of the court's criminal divisions pursuant to the Court Organic Act and under the authorization of the meeting of judges of Taiwan Taipei District Court. The DIRECTIONS AT ISSUE are generally applicable, abstract and supplementary regulation to regulate in advance the affairs of assignments, integrations, deductions, reassignments and suspensions of assignments of criminal cases before the court. Article 10 of the DIRECTIONS AT ISSUE stipulates that, "For correlated cases under Article 7 of the Code of Criminal Procedure necessary for integrated review but have already been assigned to several judges, the respective judges shall consult to one another and jointly submit an integration request for the approval of the Chief Judge of the court. When there is a difficulty to reach an agreement of integration, the presiding judge of the case brought most latterly may submit a signed, written request to the Reviewing Unit of the court for resolution." Although the

由各受理法官協商併辦並簽請院長核准；不能協商時，由後案承辦法官簽請審核小組議決之。」其中「有合併審理之必要」一詞，雖屬不確定法律概念，惟其意義非難以理解，且是否有由同一法官合併審理之必要，係以有無節省重複調查事證之勞費及避免裁判上相互歧異為判斷基準。而併案與否，係由前後案件之承辦法官視有無合併審理之必要而主動協商決定，由法官兼任之院長（法院組織法第十三條參照）就各承辦法官之共同決定，審查是否為相牽連案件，以及有無合併審理之必要，決定是否核准。倘院長准予併案，即依照各受理法官協商結果併辦；倘否准併案，則係維持由各受理法官繼續各自承辦案件，故此併案程序之設計尚不影響審判公平與法官對於個案之判斷，並無恣意變更承辦法官或以其他不當方式干涉案件分配作業之可能。復查該分案要點第四十三點規定：「本要點所稱審核小組，由刑事庭各庭長（含代庭長）組成，並以刑一庭庭長為召集人。（第一項）庭長（含代庭長）不能出席者，應指派該庭法官代理之，惟有利害關係之法官應迴避。（第二項）審核小組會議之決議，應以過半數成員之出席及出席成員過半數意見定之；可否同數時，取

term “necessary for integrated review” is an uncertain legal concept in nature, its meanings is not difficult to understand. Whether or not there is a need of integration shall be determined by showing that there is a need to void the waste of labors and costs in repeated investigations of facts and evidence, and to avoid the difference and conflicts among judgments of the court. Those presiding judges may voluntarily negotiate with one another and decide on whether there is a need of integration and enter into an agreement of integration. The Chief Judge of the court, who is also a judge (*See* Article 13 of the Court Organic Act.), may review the request of the agreement of integration and may decide on whether those criminal cases are related, whether there is a need of integration, and whether the agreement of integration should be approved. If the Chief Judge approves the agreement of integration, those criminal cases will then be integrated in accordance with the agreement; if the Chief Judge disapproves the agreement of integration, those criminal cases will remain in the hands of those assigned judges. Therefore, this design

決於召集人。（第三項）」審核小組係經刑事庭全體法官之授權，由兼庭長之法官（法院組織法第十五條第一項參照）組成，代表全體刑事庭法官行使此等權限。前述各受理法官協商併辦不成時，僅後案承辦法官有權自行簽請審核小組議決併案爭議，審核小組並不能主動決定併案及其承辦法官，且以合議制方式作成決定，此一程序要求，得以避免恣意變更承辦法官。是綜觀該分案要點第十點後段及第四十三點之規定，難謂有違反明確性之要求，亦不致違反公平審判與審判獨立之憲法意旨。

of case assignment and case integration will not influence the fairness of trials and the judgment of a judge in a given criminal case and will not give rise to the possibility of arbitrary manipulation of the presiding judge of any given criminal case or the possibility of the use of any inappropriate way to unjustly interfere with process of case assignments. Besides, Article 43 of the DIRECTIONS AT ISSUE stipulates that, "The Reviewing Unit under the Directions shall consist of all Division Chief Judges of all criminal divisions and shall be presided by the Division Chief Judge of the First Criminal Division. (Paragraph 1) When any Division Chief Judge (including her delegate) of any criminal division fails to attend the meeting of the Reviewing Unit, she shall appoint a judge of the same criminal division to attend. However, if the judge appointed has a conflict of interests, she shall recuse herself. (Paragraph 2) The resolution of the Reviewing Unit shall be made by the majority vote with the quorum of majority members. When there is a deadlock, the chairman of the meeting may cast her vote to break the deadlock.

(Paragraph 3)" The Reviewing Unit is formed under the authorization of all judges of all criminal divisions and consists of Division Chief Judges, who are also judges (*See* Article 15 of the Court Organic Act.), and exercise the power on behalf of all judges of all criminal divisions. When those presiding judges of related criminal cases fail to reach an agreement of integration, only the presiding judge of the case brought most latterly has the authority to file *pro se* a signed, written request to the Reviewing Unit for resolution. The Reviewing Unit has no power whatsoever on its own to order case integration and to assign the case integrated to any given judge; the resolution of the Reviewing Unit is made by a majority vote. Both of these procedural limitations will be able to prevent from arbitrary alternation of the presiding judge in any given criminal case. Thus, taken the latter paragraph of Article 10 and Article 43 of the DIRECTIONS AT ISSUE together, it will be difficult to conclude that the procedure of case assignment and case integration runs afoul of the requirement of legal certainty, and hence the

procedure is not in contravention of the constitutional mandates for fair trials and judicial independence.

In sum, Articles 10 and 43 of the DIRECTIONS AT ISSUE were promulgated under the statutory authorization of Articles 78 and 79, Paragraph 1 of the Court Organic Act and under the authorization of the meeting of judges of the Taiwan Taipei District Court. The DIRECTIONS AT ISSUE are reasonable and necessary supplementary regulations to lay out a procedure promulgated by the meeting of divisional affairs of all criminal divisions of the court to stipulate in advance a generally applicable, abstract rule on whether or not there is a need of integration and how to and whether to integrate related criminal cases. Accordingly, the DIRECTIONS AT ISSUE are not in contravention of the constitutional guarantee of people's right to institute legal proceedings under Article 16 of the Constitution and of the constitutional mandate that judges shall, in accordance with law, hold trials independently and shall be free from any interference under

綜上，系爭分案要點第十點及第四十三點係依法院組織法第七十八條、第七十九條第一項之規定及臺灣臺北地方法院法官會議之授權，由該法院刑事庭庭務會議，就相牽連案件有無合併審理必要之併案事務，事先所訂定之一般抽象規範，依其規定併案與否之程序，足以摒除恣意或其他不當干涉案件分配作業之情形，屬合理及必要之補充規範，故與憲法第十六條保障人民訴訟權及第八十條法官依據法律獨立審判之意旨，尚無違背。

Article 80 of the Constitution.

II. The Stipulations under Article 101, Paragraph 1, Subparagraphs 1-3 of the Code of Criminal Procedure

The first half of Article 8, Paragraph 1 of the Constitution states that, "Personal freedom shall be guaranteed to the people." As a means of evidence preservation in the criminal proceeding, the detention of defendants is exercised to ensure the smooth process of the criminal trials so that the state's panel authority can be realized. However, the nature of a detention is to limit the personal physical freedom of a defendant in a criminal case to a designated place and is a mandatory action which interferes the personal freedom of a criminal defendant to the largest extent and isolates her from her family, the society and her professional life. The detention of a criminal defendant not only will create a serious psychological impact upon her, but will largely affect her rights of personality such as reputation, credit, and so forth as well. Accordingly, the detention of a criminal defendant shall be as the last resort and shall not be taken

二、刑事訴訟法第一百零一條第一項第三款規定

憲法第八條第一項前段規定：「人民身體之自由應予保障。」羈押作為刑事保全程序時，旨在確保刑事訴訟程序順利進行，使國家刑罰權得以實現。惟羈押係拘束刑事被告身體自由，並將之收押於一定處所，乃干預身體自由最大之強制處分，使刑事被告與家庭、社會及職業生活隔離，非特予其心理上造成嚴重打擊，對其名譽、信用等人格權之影響甚為重大，自僅能以之為保全程序之最後手段，允宜慎重從事（本院釋字第三九二號、第六五三號、第六五四號解釋參照）。是法律規定羈押刑事被告之要件，須基於維持刑事司法權之有效行使之重大公益要求，並符合比例原則，方得為之。

lightly. (*See* J.Y. Interpretations No. 392, 653 and 654.) Thus, as one of the statutory elements of the detention of a criminal defendant, it is required by law that the detention of a criminal defendant shall be ordered only when the detention is consistent with the major public interest of maintaining the effective exercise of the state's power of criminal justice and is consistent with the principle of proportionality.

Article 101, Paragraph 1, of the Code of Criminal Procedure prescribes that, "A defendant may be detained after she has been examined by a judge and the judge deem her as a major suspect of a criminal offense, and due to the existence of one of the following circumstances it is apparent that there will be difficulties in the prosecution, the trial process, or the execution of the final judgment unless the detention of the defendant is ordered: (i) She has absconded, or there are facts sufficient to justify an apprehension that she may abscond; (ii) There are facts sufficient to justify an apprehension that she may destroy, forge, or alter evidence, or conspire

刑事訴訟法第一百零一條第一項規定：「被告經法官訊問後，認為犯罪嫌疑重大，而有左列情形之一，非予羈押，顯難進行追訴、審判或執行者，得羈押之：一、逃亡或有事實足認為有逃亡之虞者。二、有事實足認為有湮滅、偽造、變造證據或勾串共犯或證人之虞者。三、所犯為死刑、無期徒刑或最輕本刑為五年以上有期徒刑之罪者。」該項規定羈押之目的應以保全刑事追訴、審判或執行程序為限。故被告所犯縱為該項第三款之重罪，如無逃亡或滅證導致顯難進行追訴、審判或執行之危險，尚欠缺羈押之必要要件。亦即單以犯重罪作為羈押之要件，可能背離羈押作為保全程序的性質，其對刑事被告武器平

with accomplices or witnesses; or (iii) She has committed an offense punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than five years." This provision shows that the purpose of detaining a criminal defendant shall be limited to the preservation of the criminal prosecution, the trial process and the execution of the final judgment. Therefore, even if the defendant may commit the felonies as indicted under Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure, when there is no evidence indicating that there is a risk of obvious difficulties with regard to the prosecution, the trial process, or the execution of the final judgment owing to the defendant's escape or destruction of evidence, the necessary element of a statutory detention is not met. Namely, the order of a detention issued by the court solely because of the defendant's commission of felonies will deviate from the nature of the statutory detention which is a part of the evidence preventive procedure and will run afoul of the principle of proportionality as it is against the principle of the equality of weapon and limits

等與充分防禦權行使上之限制，即可能違背比例原則。再者，無罪推定原則不僅禁止對未經判決有罪確定之被告執行刑罰，亦禁止僅憑犯罪嫌疑就施予被告類似刑罰之措施，倘以重大犯罪之嫌疑作為羈押之唯一要件，作為刑罰之預先執行，亦可能違背無罪推定原則。是刑事訴訟法第一百零一條第一項第三款如僅以「所犯為死刑、無期徒刑或最輕本刑為五年以上有期徒刑之罪」，作為許可羈押之唯一要件，而不論是否犯罪嫌疑重大，亦不考量有無逃亡或滅證之虞而有羈押之必要，或有無不得羈押之情形，則該款規定即有牴觸無罪推定原則、武器平等原則或過度限制刑事被告之充分防禦權而違反比例原則之虞。

the full exercise of the right of defense of the defendant. Moreover, according to the principle of the presumption of innocence, it is prohibited not only to execute criminal punishments upon a defendant who is not proven guilty in a court of law, but also to impose similar criminal punishments upon a defendant solely on mere suspicion of crime commitment. If an order of a detention of a defendant issued solely based on the suspicion that she is a major suspect, the detention will constitute an execution of criminal punishments prior to a trial and will likely be deemed in contravention of the principle of the presumption of innocence. Hence, if Article 101, Paragraph 1, Subparagraph 3 of the Code of Criminal Procedure prescribed the "the crime committed carries the capital punishment, life imprisonment, or a basic penalty of no less than five-year imprisonment" as the only element of a statutory detention regardless of whether the defendant is a major suspect, of whether she is likely to escape or to destroy evidence and therefore shall be detained in order to prevent from happening, or of whether she falls into the category of the

statutory limitations of detentions, the statutory language would be in contravention of the principle of the presumption of innocence, the principle of the equality of weapon, and the principle of proportionality due to its undue restriction of the defendant's right to fully exercise her right of defense.

But, a close look of the stipulations of the Code of Criminal Procedure will reveal otherwise. If we read Article 101, Paragraph 1, Subparagraph 3, and Article 101-2 of the Code of Criminal Procedure together, it is clear that the statutory detention consists of four elements which shall be met before a court can issue an order of a detention. Those four elements are: (i) the defendant is a major suspect; (ii) there is a statutory cause of detentions; (iii) there is a necessity of a detention (i.e., there is an apparent difficulty with respect to the prosecution, the trial process, or the execution of the final judgment without ordering a detention); and (iv) there is no statutory limitation of detentions which prohibit a court order of a detention under Article 101-2 of the

惟查依刑事訴訟法第一百零一條第一項第三款及第一百零一條之二之規定，法官決定羈押被告之要件有四：犯罪嫌疑重大，有法定之羈押事由，有羈押之必要（即非予羈押，顯難進行追訴、審判或執行），無同法第一百十四條不得羈押被告之情形。是被告縱符合同法第一百零一條第一項第三款之羈押事由，法官仍須就犯罪嫌疑是否重大、有無羈押必要、有無不得羈押之情形予以審酌，非謂一符合該款規定之羈押事由，即得予以羈押。

Code of Criminal Procedure. Therefore, even if a defendant falls under the statutory cause of detentions specified by Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure, the judge shall take into account whether she is a major suspect, whether there is a necessity of a detention, and whether there is a statutory limitation of detentions which prohibit a court order of a detention. It is a misinterpretation of law to deem that a defendant may be detained so long as there is a cause of a statutory detention under Article 101, Paragraph 1, of the Code of Criminal Procedure.

Since a defendant is a major suspect of a felony which is punishable with the death penalty, life imprisonment, or a minimum punishment of imprisonment for no less than five years and since the applicable criminal punishment is severe, it is reasonable to expect that there will be an increasing likelihood of avoidance of the execution of the sentenced criminal punishments or of obstruction of the trial process as the likelihood of a trial process increases. Thus, the statutory cause of a

刑事訴訟法第一百零一條第一項第三款規定之羈押，係因被告所犯為死刑、無期徒刑或最輕本刑為五年以上有期徒刑之罪者，其可預期判決之刑度既重，該被告為規避刑罰之執行而妨礙追訴、審判程序進行之可能性增加，國家刑罰權有難以實現之危險，該規定旨在確保訴訟程序順利進行，使國家刑罰權得以實現，以維持重大之社會秩序及增進重大之公共利益，其目的洵屬正當。又基於憲法保障人民身體自由之意旨，被告犯上開條款之罪嫌疑重大者，仍應

detention under Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure was enacted with a view to ensure that the trial process will be uninterrupted and that the state's power of imposing criminal punishments upon nationals will not be curtailed in order to preserve the significant social order and to further material public interests. The statutory purpose of Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure is legitimate. In addition, based on the constitutional guarantee of people's personal freedom, in order to satisfy the statutory requirements, prior to ordering a detention the trial court shall has a reasonable ground to believe that the defendant is likely to escape, to destroy, forge, or alter evidence, or to conspire with accomplices or witnesses, and at the same time the court shall has a reasonable ground to believe that the less harmful measures such as a bail, a consignment to custody, and the limitation on residence are not sufficient to preserve the prosecution, the trial process, or the execution of the final judgment. When the trial court has those two reasonable grounds, an

有相當理由認為其有逃亡、湮滅、偽造、變造證據或勾串共犯或證人等之虞，法院斟酌命該被告具保、責付或限制住居等侵害較小之手段，均不足以確保追訴、審判或執行程序之順利進行，始符合該條款規定，非予羈押，顯難進行追訴、審判或執行之要件，此際羈押乃為維持刑事司法權有效行使之最後必要手段，於此範圍內，尚未逾越憲法第二十三條規定之比例原則，符合本院釋字第三九二號、第六五三號、第六五四號解釋意旨，與憲法第八條保障人民身體自由及第十六條保障人民訴訟權之意旨，尚無違背。

order of the detention of a defendant in fact serves as the last and necessary resort to preserve the effective implementation of state's power of criminal justice. Accordingly, Article 101, Paragraph 1, Subparagraph 3, of the Code of Criminal Procedure does not exceed the constitutional mandate of the principle of proportionality under Article 23 of the Constitution, and is not in contravention of J.Y. Interpretation Nos. 392, 653 and 654 and the constitutional guarantees of people's personal freedom and of people's right to institute legal proceedings under Articles 8 and 16 of the Constitution respectively.

III. The Stipulation Which Empowers the Prosecutor to Appeal on the Trial Court's Ruling of Ceasing the Detention of a Defendant under Article 403, Paragraph 1 of the Code of Criminal Procedure

三、刑事訴訟法第四百零三條第一項關於檢察官對於審判中法院所為停止羈押之裁定得提起抗告之規定部分

Article 16 of the Constitution guaranteeing people's right to institute legal proceedings is with a view to ensure people may bring forth legal actions under statutory procedural processes and to ensure people a fair trial. With respect to

憲法第十六條規定人民有訴訟權，旨在確保人民得依法定程序提起訴訟及受公平之審判。至於訴訟救濟應循之審級、程序及相關要件，應由立法機關衡量訴訟案件之種類、性質、訴訟政策目的以及訴訟制度之功能等因素，以法律

the courts' jurisdictions, litigation procedures, and related elements, all of these shall be determined by the legislative branch to enact laws to regulate them reasonably after taking into account different kinds and natures of litigation, the purpose of the litigation policy and the functions of the litigation system. (*See* J.Y. Interpretation Nos. 442, 512 and 574.) In accordance with the above cited J.Y. Interpretations, whether or not the prosecutor may appeal on the trial court's ruling of ceasing the detention of a defendant is an issue falling under the domain of the criminal litigation system to be regulated reasonably by the legislative branch after taking account relevant factors.

為合理之規定（本院釋字第四四二號、第五一二號、第五七四號解釋參照）。檢察官對於審判中法院所為停止羈押之裁定是否得提起抗告，乃刑事訴訟制度之一環，衡諸本院上開解釋意旨，立法機關自得衡量相關因素，以法律為合理之規定。

The order of a detention is a compulsory power which statutorily reserved to the judges. Article 403, Paragraph 1 of the Code of Criminal procedure prescribes that, "Unless this Code provides otherwise, a party who disagrees with the ruling of a court may appeal to the court of its direct appellate level." Article 404 of the Code of Criminal procedure prescribes that, "Those rulings with respect to the

羈押之強制處分屬於法官保留事項，刑事訴訟法第四百零三條第一項規定：「當事人對於法院之裁定有不服者，除有特別規定外，得抗告於直接上級法院。」第四百零四條規定：「對於判決前關於管轄或訴訟程序之裁定，不得抗告。但下列裁定，不在此限：……二、關於羈押、具保、責付、限制住居、搜索、扣押或扣押物發還、因鑑定將被告送入醫院或其他處所之裁定及依

jurisdictions or trial procedures issued by the courts prior to handing down judgments are not appealable, but a party may appeal on one of the following rulings: …… (ii) a ruling of a detention, a bail, a consignment to custody, the limitation on residence, a search, an attachment, a return of attached materials, having the defendant examined by a hospital or other institutes, or a prohibition or an attachment issued pursuant to Article 105, Paragraphs 3 and 4 of this Code." Article 3 of the Code of Criminal procedure prescribes that, "The term 'party' as used in this Code refers to a public prosecutor, a private party plaintiff (self claimant), or a defendant." In accordance with the foregoing statutory law, a prosecutor may certainly appeal the trial court's ruling of ceasing the detention of a defendant. When a prosecutor appeal the trial court's ruling of ceasing the detention of a defendant, the defendant is not deprived either of the right to equally access to information during trials, or of the exercise of the right of defense; hence there is no contravention of the principle of the equality of weapon. Furthermore, the appellate court

第一百零五條第三項、第四項所為之禁止或扣押之裁定。」又第三條規定：「本法稱當事人者，謂檢察官、自訴人及被告。」是依上開法律規定，檢察官對於審判中法院所為停止羈押之裁定自得提起抗告。檢察官依上開規定對於審判中法院所為停止羈押之裁定提起抗告，並未妨礙被告在審判中平等獲得資訊之權利及防禦權之行使，自無違於武器平等原則；且法院就該抗告，應依據法律獨立公平審判，不生侵害權力分立原則之問題。是刑事訴訟法第四百零三條第一項關於檢察官對於審判中法院所為停止羈押之裁定得提起抗告之規定部分，乃立法機關衡量刑事訴訟制度，以法律所為合理之規定，核與憲法第十六條保障人民受公平審判之意旨並無不符。

which hears the appeal shall, in accordance with law, hold trials independently, and shall be free from any interference; hence, there is no genuine issue of infringing the principle of the separation of powers. Accordingly, Article 403, Paragraph 1 of the Code of Criminal procedure, for the relevant part which empowers a prosecutor to appeal the trial court's ruling of ceasing the detention of a defendant, is a reasonable stipulation enacted by the legislative branch after taking into account the nature of the criminal litigation system, and is not in contravention of the constitutional guarantee of people's right to a fair trial under Article 16 of the Constitution.

IV. The Denials of the Petition for Interpretation and for Granting a Temporary Order

The Petitioner's petition for interpretation for the part of Articles 5, 78, 79 and 81 of the Court Organic Act and Article 4, Paragraph 2 of the Regulation of Departmental Affairs of the District Court Its Regional Branches shall be denied because those laws are irrelevant to the final

四、不受理及暫時處分部分

聲請人關於法院組織法第五條、第七十八條、第七十九條及第八十一條，地方法院及其分院處務規程第四條第二項規定聲請解釋憲法部分，因確定終局裁定並未適用上開法令，自不得以上開法令為聲請解釋之客體。是此部分之聲請核與司法院大法官審理案件法第

and conclusive ruling and are not relied by the court, and hence are not suitable for interpretation. Accordingly, pursuant to Article 5, Paragraph 1, Subparagraph 2, and Paragraph 3 of the Constitutional Interpretation Procedure Act, the petition is denied.

五條第一項第二款規定不合，依同條第三項規定，應不受理。

The Petitioner's petition for the part of staying the trial of the Criminal Case Gin-Tzu-Chung-Su-Tze No. 1 (2008) and of re-assigning the case pursuant to the result of the case assignment decided on December 12, 2008 is hereby denied as the disputed provisions concerning case assignment has been interpreted and is no longer necessary for review. With respect to the petition to issue for a mandamus (or writ of *habeas corpus*) to stay the district court's temporary disposition to detain to release the Petitioner, the Petitioner may at any time file a petition to the trial court for ceasing the detention with bail pursuant to Article 110, Paragraph 1 of the Code of Criminal Procedure; therefore, the Petitioner has no ground to claim that she is suffering an irreparable or difficultly reparable harm due to an infringe

本件關於聲請命臺灣臺北地方法院停止審理九十七年度金矚重訴字第一號刑事案件，改依該法院九十七年十二月十二日之分案結果進行審理之暫時處分部分，因前述系爭分案要點之規定業經作成解釋，已無審酌必要；關於聲請命該法院立即停止羈押聲請人之暫時處分部分，因聲請人對於其羈押裁定，得隨時依刑事訴訟法第一百十條第一項規定，向法院聲請具保停止羈押，難謂其基本權利已受不可回復或難以回復之重大損害，是此部分之聲請核與本院釋字第五八五號及第五九九號解釋意旨不符。上開聲請均應予駁回。

ment of her fundamental rights. Thus, for the reasons stated above, the petition, for relevant parts, is in contravention of our J.Y. Interpretation Nos. 585 and 599, and hence shall be denied.

Justice Mao-Zong Huang filed concurring opinion.

Justice Chun-Sheng Chen filed concurring opinion in part.

Justice Tzong-Li Hsu filed concurring opinion in part and dissenting opinion in part.

Justice Tzu-Yi Lin filed concurring opinion in part and dissenting opinion in part.

Justice Yu-Hsiu Hsu filed dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

本號解釋黃大法官茂榮提出協同意見書；陳大法官春生提出部分協同意見書；許大法官宗力提出部分協同、部分不同意見書；林大法官子儀提出部分協同、部分不同意見書；許大法官玉秀提出部分不同意見書；李大法官震山提出部分不同意見書。

EDITOR'S NOTE:

Summary of facts:

I. On November 3, 2006, the Petitioner's spouse was indicted for violations of the Anti-Corruption Act and the Taiwan Taipei District Court pursuant to its case assignment procedure assigned and

編者註：

事實摘要：

一、聲請人配偶等因貪污治罪條例等案件，於九十五年十一月三日遭起訴，並經臺灣臺北地方法院分案（以下簡稱前案），由第十六庭審理。

docketed the case, Taiwan Taipei District Court Criminal Case Tzu-Chung-Su-Tze No. 4 (2006) (*hereinafter* referred to as the PREVIOUS CASE), to its Sixteenth Division presided by Division Chief Judge Shou-Hsun Tsai[1].

II. On December 12, 2008, the Petitioner himself was indicted for violations of the Anti-Corruption Act and the Taiwan Taipei District Court pursuant to its case assignment procedure assigned and docketed the case, Criminal Case Gin-Tzu-Chung-Su-Tze No. 1 (2008)(*hereinafter* referred to as the SUBSEQUENT CASE), to its Third Division presided by Division Chief Judge Chan-Chun Chou.

二、聲請人因貪污治罪條例等案件於九十七年（下同）十二月十二日遭起訴，並經臺灣臺北地方法院分案（以下簡稱後案），由第三庭審理。

III. On December 13, 2008, the Third Division of the Taiwan Taipei District Court, which tried the SUBSEQUENT CASE and ruled on the petition of whether to keep detaining the Petitioner,

三、第三庭就是否繼續羈押聲請人部分，於十二月十三日裁定命聲請人限制住居，將聲請人無保釋放（以下簡稱第一次裁定）。

1 [Editor's Note] The Petitioner of this case is Mr. Chen, Shui-Bian, former President of the Republic of China (2000-2008). As of the end of 2010, Mr. Chen was eventually convicted of some of the corruption charges, dismissed in a few others and is serving prison terms while several criminal cases against him are still pending. Mr. Chen has become the very first former president in the Republic history to be convicted.

ordered the release of the Petitioner without bail and subject him to residential restrictions (*hereinafter* referred to as the "FIRST RULING").

四、檢察官不服第一次裁定，於十二月十六日提起抗告。臺灣高等法院裁定，撤銷該第一次裁定，發回臺灣臺北地方法院。

IV. On December 16, 2008, the prosecutor disagreed and filed a motion to set aside the FIRST RULING. The motion was granted and the FIRST RULING was set aside by the Taiwan High Court on December 17, 2008 and the case was remanded to Taiwan Taipei District Court.

五、第三庭於十二月十八日裁定命聲請人限制住居（以下簡稱第二次裁定）。

V. On December 18, 2008, the Third Division of the Taiwan Taipei District Court which tried the SUBSEQUENT CASE ruled on the petition again and ordered residential restrictions on the Petitioner (*hereinafter* referred to as the "SECOND RULING").

六、第三庭於十二月二十四日，以前、後二案係屬相牽連案件，有合併審理之必要，簽會第十六庭併案審理，惟第十六庭不同意併辦。

VI. The Third Division of the Taiwan Taipei District Court which tried the SUBSEQUENT CASE was of the opinion that both the PREVIOUS CASE and the SUBSEQUENT CASE are correlated cases and deemed it necessary to integrate those two cases and therefore submitted a

request to the Taiwan Taipei District Court for cases integration on December 24, 2008. However, the Sixteenth Division of the Taiwan Taipei District Court disagreed.

VII On December 25, 2008, the request for cases integration was reviewed by the Reviewing Unit of the Taiwan Taipei District Court and an order to integrate the SUBSEQUENT CASE into the PREVIOUS CASE was issued in accordance with the Case Assignment Directions of the Taiwan Taipei District Court which stipulated that when two or more cases are related, the later case(s) may be integrated into the first one.

VIII. On December 25, 2008, the prosecutor disagreed and filed a motion to set aside the SECOND RULING.

IX. The motion was granted and the SECOND RULING was set aside by the Taiwan High Court on December 27, 2008 and the case was remanded to Taiwan Taipei District Court.

七、第三庭於十二月二十五日簽請該法院審核小組議決，依該法院分案要點，採取後案併前案的方式，將後案由第十六庭合併審理，嗣經審核小組於同日決議，依照該法院分案要點，將後案併由前案審理。

八、檢察官不服第二次裁定，於十二月二十五日提起抗告。

九、臺灣高等法院於十二月二十七日，裁定撤銷臺灣臺北地方法院第二次裁定並予發回。

X. On December 30, 2008, the Sixteenth Division of the Taiwan Taipei District Court which tried the PREVIOUS CASE ordered to detain the Petitioner on the ground that the criteria of a statutory detention as specified under Article 101, Paragraphs 1-3 of the Code of Criminal Procedure are met.

十、第十六庭於十二月三十日，以聲請人有刑事訴訟法第一０一條第一項第一款至第三款事由裁定羈押。

XI. The Petitioner disagreed and filed a motion to set aside the order of the Sixteenth Division of the Taiwan Taipei District Court. The motion was denied and the order was upheld by the Taiwan High Court. The decision of the Taiwan High Court, Taiwan High Court Criminal Ruling Kon-Tze No. 7 (2009), became final and conclusive.

十一、聲請人不服羈押裁定，於九十八年一月七日提起抗告，臺灣高等法院裁定駁回抗告，確定在案。

XII The Petitioner claimed that the laws and regulations which the court applied to the final ruling are in contravention of the right of equal protection under Article 7, the protection of physical freedom under Article 8, the right to institute legal proceedings under Article 16, the limitations to the fundamental rights under Article 23, judicial independence

十二、聲請人認該確定終局裁定所適用法令，有違反憲法第七條平等權、第八條人身自由保障、第十六條訴訟權、第二十三條人民基本權之限制、第八十條法官依法律獨立審判之違憲疑義，於九十八年一月六日聲請解釋及暫時處分。

under Article 80 of the Constitution and filed the petition to the Judicial Yuan for constitution interpretation on January 6, 2009.

J. Y. Interpretation No.666（November 6, 2009）*

ISSUE: Is Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act, which stipulates administrative penalties on those who provide sex for financial gain, constitutional ?

RELEVANT LAWS:

Articles 7 and 23 of the Constitution（憲法第七條、第二十三條）; Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act（社會秩序維護法第八十條第一項第一款）.

KEYWORDS:

Principle of equality（平等原則）, sexual transactions（性交易行為）, *ordre public* and morality (善良風俗）.**

HOLDING: Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act that punishes any individual who engages in sexual conduct or cohabitation with intent for financial gains by detention not more than three days, or by a fine not more than NT$30,000 violates the principle of equality prescribed by Article 7 of the Constitution, and shall

解釋文：社會秩序維護法第八十條第一項第一款就意圖得利與人姦、宿者，處三日以下拘留或新臺幣三萬元以下罰鍰之規定，與憲法第七條之平等原則有違，應自本解釋公布之日起至遲於二年屆滿時，失其效力。

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* Translated by Professor L.J. Lee.

** Contents within frame, not part of the original text, are added for reference purposes only.

cease to be effective no later than two years since the issuance of this Interpretation.

REASONING: The principle of equality prescribed by Article 7 of the Constitution does not mean absolute and mechanical equality in formality, but is for the protection of substantive equal status under the law, which requires matters identical in nature be treated and handled identically without being subjected to differential treatment arbitrarily or for no proper justification. When a law imposes administrative penalties to carry out certain legislative purpose so that the selection of target to be penalized results in differential treatment, it has to have substantive nexus with the legislative purpose in order not to violate the principle of equality.

解釋理由書：憲法第七條所揭示之平等原則非指絕對、機械之形式上平等，而係保障人民在法律上地位之實質平等，要求本質上相同之事物應為相同之處理，不得恣意為無正當理由之差別待遇。法律為貫徹立法目的，而設行政罰之規定時，如因處罰對象之取捨，而形成差別待遇者，須與立法目的間具有實質關聯，始與平等原則無違。

Article 80, Section 1, Sub-section 1 of the Social Order Maintenance Act (hereinafter the disputed provision) provides that any individual who engages in sexual conduct or cohabitation with intent for financial gains is punishable by detention not more than three days, or by a fine not

社會秩序維護法第八十條第一項第一款規定（下稱系爭規定），意圖得利與人姦、宿者，處三日以下拘留或新臺幣三萬元以下罰鍰，其立法目的，旨在維護國民健康與善良風俗（立法院公報第八十卷第二十二期第一０七頁參照）。依其規定，對於從事性交易之行

more than NT$30,000. Its legislative purpose is to maintain protect public health and social morals (*See* The Official Gazette of the Legislative Yuan, vol. 80, no. 22, p. 107). According to this provision, only those who intent for financial gains are subject to penalties, but not the ones who provide the consideration on the other side.

為人，僅以意圖得利之一方為處罰對象，而不處罰支付對價之相對人。

Whereas how to regulate and whether penalty is warranted for sexual transactions is within the confines of legislative discretion, the Social Order Maintenance Act chooses to take administrative penalties as the control measure, with the disputed provision expressly prohibits sexual transactions, imposes penalties only against those who engage in sexual transactions with the intent for financial gains, but not the opposite parties who provide consideration. In addition, by adopting the subjective intent for financial gains as the standard for penalties, a differential treatment has legally been created. Given that the legislative purpose of the disputed provision is to maintain citizens' health as well as *ordre public* and

按性交易行為如何管制及應否處罰，固屬立法裁量之範圍，社會秩序維護法係以處行政罰之方式為管制手段，而系爭規定明文禁止性交易行為，則其對於從事性交易之行為人，僅處罰意圖得利之一方，而不處罰支付對價之相對人，並以主觀上有無意圖得利作為是否處罰之標準，法律上已形成差別待遇，系爭規定之立法目的既在維護國民健康與善良風俗，且性交易乃由意圖得利之一方與支付對價之相對人共同完成，雖意圖得利而為性交易之一方可能連續為之，致其性行為對象與範圍廣泛且不確定，固與支付對價之相對人有別，然此等事實及經驗上之差異並不影響其共同完成性交易行為之本質，自不足以作為是否處罰之差別待遇之正當理由，其雙方在法律上之評價應屬一致。再者，系

morality, and that a sexual transaction require the joint acts between one party having the intent for financial gains and the opposite party who provide consideration, although there is a distinction between the two in that the former is likely to engage in continuous acts which result in uncertain and extended sex partners, such factual and experiential differences does not alter the innate character that a sexual transaction is completed through their joint acts, and not sufficient to justify the differential treatment in imposing penalties while both sides ought to be legally evaluated with consistency. Moreover, since the disputed provision does not consider the party who provides consideration culpable yet penalizes the party having the intent for financial gains, in light of the fact that the gender of the latter is more likely to be female, it virtually amounts to a control that only target and punish those females participated in sexual transactions. Particularly for some of the socially and economically disadvantaged females who engage in sexual transactions, their already miserable situations are often further aggravated by the penalties of the

爭規定既不認性交易中支付對價之一方有可非難，卻處罰性交易圖利之一方，鑑諸性交易圖利之一方多為女性之現況，此無異幾僅針對參與性交易之女性而為管制處罰，尤以部分迫於社會經濟弱勢而從事性交易之女性，往往因系爭規定受處罰，致其業已窘困之處境更為不利。系爭規定以主觀上有無意圖得利，作為是否處罰之差別待遇標準，與上述立法目的間顯然欠缺實質關聯，自與憲法第七條之平等原則有違。

disputed provision. The disputed provision that uses subjective intent for financial gains as the standard for differential treatment on the imposition of penalties apparently does not have substantive nexus with the legislative purpose stated above, and naturally violates the principle of equality prescribed by Article 7 of the Constitution.

In order to carry out the legislative purpose of maintaining citizens' health as well as *ordre public* and morality, the government agency may implement different kinds of management or counseling measures for those engage in sexual transactions with the intent for financial gains in accordance with the law such as physical examinations or safe sex awareness; may also provide job training, career counseling or other educational methods to enhance their work capacity and economic condition so that it is no longer necessary [for them] to use sexual transactions as the means for livelihood; or adopts other effective management measures. Other than providing the most possible protection and assistance to the socio-economically

為貫徹維護國民健康與善良風俗之立法目的，行政機關可依法對意圖得利而為性交易之人實施各種健康檢查或宣導安全性行為等管理或輔導措施；亦可採取職業訓練、輔導就業或其他教育方式，以提昇其工作能力及經濟狀況，使無須再以性交易為謀生手段；或採行其他有效管理措施。而國家除對社會經濟弱勢之人民，盡可能予以保護扶助外，為防止性交易活動影響第三人之權益，或避免性交易活動侵害其他重要公益，而有限制性交易行為之必要時，得以法律或授權訂定法規命令，為合理明確之管制或處罰規定。凡此尚須相當時間審慎規劃，系爭規定應自本解釋公布之日起至遲於二年屆滿時，失其效力。

disadvantaged people, in order to prevent sexual transaction activities from [negatively] impacting on third party's interests, or to avoid sexual transaction activities infringing on other important public interests, the State may, when necessary to restrict sexual transactions, enact statutes or authorize the promulgation of regulations to provide reasonable and precise rules to control or penalize. Given that this requires substantial time for careful planning, the disputed provision shall cease to be effective no later than two years from the issuance of this Interpretation.

Justice Shin-Min Chen filed concurring opinion.

Justice Tzong-Li Hsu filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Sea-Yau Lin filed concurring opinion, in which Justice Ming Chen and Justice Chun-Sheng Chen joined.

Justice Yu-Hsiu Hsu filed concurring

本號解釋陳大法官新民提出協同意見書；許大法官宗力提出協同意見書；葉大法官百修提出協同意見書；黃大法官茂榮提出協同意見書；林大法官錫堯、陳大法官敏、陳大法官春生共同提出協同意見書；許大法官玉秀提出部分協同意見書。

opinion in part.

EDITOR'S NOTE:

Summary of facts: A judge of the Yilan District Court Summary Proceedings Division, in a case concerning the application of Article 80, Section 1, Subsection 1 of the Social Order Maintenance Act, which stipulates that any individual who engages in sexual conduct or cohabitation with intent for financial gains, is punishable by detention not more than three days, or by a fine not exceeding NT$30,000 dollars (hereinafter disputed provision), suspected that this disputed provision may have violated the principle of equality prescribed by Article 7 of the Constitution. The judge then ordered a stay to the litigation and filed a petition for an interpretation of the Constitution.

A judge of Yilan District Court Luodong Summary Proceedings Division had a similar question as to the constitutionality of the disputed provision when hearing another case involving the application of the Social Order Maintenance Act, also granted a stay of the litigation

編者註：

事實摘要：緣臺灣宜蘭地方法院宜蘭簡易庭法官審理社會秩序維護法案件，認所應適用之社會秩序維護法第八十條第一項第一款意圖得利與姦、宿者，處三日以下拘留或新臺幣三萬元以下罰鍰規定（以下簡稱系爭規定），有牴觸憲法第七條平等權等之疑義，裁定停止訴訟程序，聲請解釋。

又臺灣宜蘭地方法院羅東簡易庭法官審理社會秩維護法案件，亦認系爭規定有牴觸憲法第七條平等權等之疑義，裁定停止訴訟程序，聲請解釋，爰併案審理。

and petitioned for an interpretation. The two petitions were then consolidated into one.

J. Y. Interpretation No.667（November 20, 2009）*

ISSUE: Are Article 47, Paragraph 3 of the Administrative Appeals Act and Article 73 of the Administrative Proceedings Act unconstitutional because they do not stipulate that depository service of process takes effect ten days after the deposit of documents ?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; J. Y. Interpretation No. 663（司法院釋字第六六三號解釋）; Article 1, Paragraph 1, Article 47, and Article 56, Paragraph 1 of the Administrative Appeals Act（訴願法第一條第一項、第四十七條、第五十六條第一項）; Articles 1, 57, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, and 83 of the Administrative Proceedings Act（行政訴訟法第一條、第五十七條、第六十七條、第六十八條、第六十九條、第七十一條、第七十二條、第七十三條、第七十四條、第七十五條、第七十六條、第七十七條、第七十八條、第七十九條、第八十條、第八十一條、第八十二條、第八十三條）; and Article 138, Paragraph 2 of the Civil Procedure Act（民事訴訟法第一百三十八條第二項）（amended February 7, 2003, effective September 1, 2003）.

KEYWORDS:

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* Translated by Professor Dr. Chi Chung.

** Contents within frame, not part of the original text, are added for reference purposes only.

Service of process（送達）, right to instigate litigation（訴訟權）, depository service（寄存送達）, principle of equality（平等原則）, systemic justice of the legal regime（*Systemgerechtigkeit*; 體系正義）, due process of law, due process（正當法律程序）, right to be notified in accordance with the law（受合法通知之權利）.**

HOLDING: On the part under Article 47, Paragraph 3 of the Administrative Appeal Act which concerns the application, *mutatis mutandis*, of Article 73 of the Administrative Litigation Act in that escrowed service of process shall take effect at soon as the service of process is completed in accordance with the law, does not violate the meaning and purpose of protecting peoples' right of appeal and litigation under Article 16 of the Constitution

解釋文：訴願法第四十七條第三項準用行政訴訟法第七十三條，關於寄存送達於依法送達完畢時，即生送達效力部分，尚與憲法第十六條保障人民訴願及訴訟權之意旨無違。

REASONING: Article 16 of the Constitution protects the people's right to appeal and to litigate. When people's rights are violated by the public authority, they have the right to institute administrative litigation in accordance with due process

解釋理由書：人民之訴願及訴訟權為憲法第十六條所保障。人民於其權利遭受公權力侵害時，有權循法定程序提起行政爭訟，俾其權利獲得適當之救濟。此項程序性基本權之具體內容，包括訴訟救濟應循之審級、程序及相關

to assure proper remedy. The exact content of this procedural fundamental right, including the layers of review, procedure and related requirements, must be realized by the legislative authority through the enactment of proper statutes in accordance with due process that takes into consideration the category and nature of the litigation, the purpose of the litigation policy and the function of the litigation system, among other things. Whether a relevant procedural law is appropriate requires a comprehensive evaluation that depends upon such factors as the subject matter the litigation is concerned with, the severity and scope of the infringement on the fundamental rights, the public interests [the law] intends to pursue, and the availability of alternative procedures and the costs of possible procedures, among other things. (*See* J. Y. Interpretation No. 663)

要件，須由立法機關衡酌訴訟案件之種類、性質、訴訟政策目的以及訴訟制度之功能等因素，制定合乎正當法律程序之相關法律，始得實現。而相關程序規範是否正當，須視訴訟案件涉及之事物領域、侵害基本權之強度與範圍、所欲追求之公共利益、有無替代程序及各項可能程序之成本等因素，綜合判斷而為認定（本院釋字第六六三號解釋參照）。

The service of documents concerning an administrative appeal and litigation, in accordance with the respective regulations under the Administrative Appeal Act and Administrative Litigation Act, is the in-person delivery of documents to the parties

訴願及行政訴訟文書之送達，係訴願法及行政訴訟法所定之送達機關將應送達於當事人或其他關係人之文書，依各該法律之規定，交付於應受送達人本人；於不能交付本人時，以其他方式使其知悉文書內容或居於可得知悉之地

themselves or other related individuals; or, in the event it is not possible, through other means to ensure that [parties] are in the position of knowing or capable of knowing the content of the documents so that they can decide whether to act necessarily to protect their individual rights. To ensure that individuals do in fact acknowledge the content of documents, individuals should have the right to be lawfully notified, which, in turn, shall be protected by the due process of law. As far as the service of an administrative appeal decision is concerned, it is incredibly critical given that it relates to the right of the individual to learn of its content and to institute administrative appeal on the disagreeable part. Article 47, Paragraph 1 of the Administrative Appeals Act stipulates: "The service of documents concerning the administrative appeal documents shall indicate the residential, business or office address of the appealer(s), inter-pleader(s) or their representative(s), be carried over to the postal service and delivered through the means of certified mail." Paragraph 2 states: "In the event documents concerning the administrative appeal cannot be

位，俾其決定是否為必要之行為，以保障其個人權益。為使人民確實知悉文書之內容，人民應有受合法通知之權利，此項權利應受正當法律程序之保障。就訴願決定書之送達而言，攸關人民得否知悉其內容，並對其不服而提起行政訴訟之權利，至為重要。訴願法第四十七條第一項規定：「訴願文書之送達，應註明訴願人、參加人或其代表人、訴願代理人住、居所、事務所或營業所，交付郵政機關以訴願文書郵務送達證書發送。」第二項規定：「訴願文書不能為前項送達時，得由受理訴願機關派員或囑託原行政處分機關或該管警察機關送達，並由執行送達人作成送達證書。」第三項並規定：「訴願文書之送達，除前二項規定外，準用行政訴訟法第六十七條至第六十九條、第七十一條至第八十三條之規定。」故關於訴願文書之送達，原則上應向應受送達人本人為送達（行政訴訟法第七十一條規定參照）；惟如不能依行政訴訟法第七十一條、第七十二條之規定為送達者，得將文書寄存於送達地之自治或警察機關、郵政機關，並作成送達通知書二份，一份黏貼於應受送達人住居所、事務所或營業所門首，另一份交由鄰居轉交或置於應受送達人之信箱或其他適當之處所，以為

delivered in accordance with the methods stated in the previous paragraph, the documents may be delivered by the an agent dispatched by the government agency handling the administrative appeal or by the agency which rendered the original administrative decision or the police department in that jurisdiction, and be certified by the person executing the service of process." Paragraph 3 also states: "In addition to the above two paragraphs, the service of administrative appeal documents shall be governed by, *mutatis mutandis*, Articles 67 to 69, 71 to 83 of the Administrative Proceedings Act." Therefore, as a matter of principle, the documents concerning an administrative appeal shall be delivered to the parties in person (*See* Article 71 of the Administrative Proceedings Act). If it cannot be done in accordance with Articles 71 and 72 of the Administrative Proceedings Act, the documents may be deposited at the office of the local governing authority, police department, or postal service, along with two copies of service notification, one being posted at the door front of the residence, business or office of the party

寄存送達。且寄存之文書自寄存之日起，寄存機關應保存三個月（行政訴訟法第七十三條規定參照）。是寄存送達之文書，已使應受送達人可得收領、知悉，其送達之目的業已實現，自應發生送達之效力。

to be delivered and the other copy be handed over to the neighbor for forwarding to or placed in the mailbox of the party to be delivered or other appropriate location as the means for depository service of process. The deposited office shall maintain the documents for three months since the day of deposit (*See* Article 73 of the Administrative Proceedings Act). Therefore, given that the parties to be delivered should be able to acknowledge and receive the documents through the depository service of process, the purpose of such delivery has been achieved and the service of process should take effect.

The purpose of the administrative appeal and litigation is to handle the disputes concerning public laws between people and the state, with the purpose of protecting the rights and interests of the people and ensuring the legitimate exercise of the executive power of the state in accordance with the law (*See* Article 1, Paragraph 1 of the Administrative Appeals Act and Article 1 of the Administrative Proceedings Act). Although the Legislature may enact statutes to govern the layers of

訴願及行政訴訟係處理人民與國家間之公法爭議，其目的除在保障人民權益外，並確保國家行政權之合法行使（訴願法第一條第一項、行政訴訟法第一條規定參照）。立法機關衡酌訴願及行政訴訟制度之功能及事件之特性，雖得就訴願及行政訴訟制度所應遵循之審級、程序及相關要件，制定相關法律加以規範，但仍應合乎憲法正當法律程序之要求。按行政訴訟法第七十三條雖未如民事訴訟法第一百三十八條第二項就寄存送達之生效日期另設明文，惟訴願

review, procedures, and other relevant requirements for administrative appeals and proceedings while taking into consideration the functions and nature of administrative appeals and proceedings, these statutes should nevertheless satisfy the due process requirement under the Constitution. Although Article 73 of the Administrative Proceedings Act does not explicitly provide the effective date for depository service of process, as in Article 138, Paragraph 2 of the Civil Procedure Act, given that an individual who file administrative appeals or institute administrative proceedings should indicate the address of his/her residence, office or business on the complaint so that the administrative agency that handles the administrative appeal or the Administrative Court may serve documents upon the appropriate parties (*See* Article 56, Paragraph 1 of the Administrative Appeals Act and Article 57 of the Administrative Proceedings Act). In the event the administrative agency or court cannot serve documents to the above-stated addresses in accordance with Articles 71 and 72 of the Administrative Proceedings Act, depository

人或當事人於提起訴願或行政訴訟時，於訴願書或當事人書狀即應載明其住、居所、事務所或營業所（訴願法第五十六條第一項、行政訴訟法第五十七條規定參照），俾受理訴願機關或行政法院得將文書送達於該應受送達人；受理訴願機關或行政法院依上開載明之住、居所、事務所或營業所而為送達，於不能依行政訴訟法第七十一條、第七十二條規定為送達時，自得以寄存送達使應受送達人知悉文書內容，且寄存送達程序尚稱嚴謹，應受送達人亦已居於可得知悉之地位。又訴願及行政訴訟文書之送達屬相關制度所應遵循程序之一環，並有確保訴願及行政訴訟程序迅速進行，以維護公共利益之目的。寄存送達既已使應受送達人處於可得迅速知悉其事並前往領取相關文書之狀態，則以訴願文書寄存送達完畢時作為發生送達效力之時點，已得確保人民受合法通知之權利，就整體而言，尚合乎憲法正當法律程序之要求，並與憲法第十六條保障人民訴願及訴訟權之意旨無違。

service of process is the natural alternative to make the parties for the delivery know the content of the documents. In that regard, the depository service is a conscientious and careful process to ensure that the parties are capable of receiving the documents. Furthermore, service of process in the administrative appeals and litigation is an indispensable requirement that intends to ensure the public interest in speedy proceedings. Given that depository service enables the receiving parties to quickly learn of the matter and to retrieve the relevant documents, having the depository service take effect upon the completion of the process should have preserved the people's right to be legally notified and satisfies the due process requirement under the Constitution, thus does not infringe the right to file administrative appeals and to institute legal proceedings under Article 16 of the Constitution.

Dependent on their differences in purposes, nature, or functions, administrative and civil litigation may differ in their rules on the categories of suits, whether

行政訴訟與民事訴訟，因訴訟目的、性質、功能之差異，其訴訟種類、有無前置程序、當事人地位或應為訴訟行為之期間等，皆可能有不同之規定。

prerequisite proceedings are available, the standing of parties, or the statute of limitations for motions to be made. While there are similar mechanisms between the Administrative Proceedings Act and the Civil Procedure Act, their substantive provisions do not need to be identical except those important provisions that relate to the right to litigate protected under the Constitution. Although certain parts of the Administrative Proceedings Act apply, *mutatis mutantis*, the Civil Procedure Act in consideration of streamlining the statutory provisions, it does not necessarily mean the two should have rules that mirror each other. As far as the system of service of process is concerned, the conditions of individual rights under the impact of depository service are highly complex, and therefore should be carefully distinguished. If the receiving party of depository service should retrieve documents on the same day the documents are deposited, the effect is the same as servicing agency tenders to the receiving party the documents as they meet. Should there be a period being added for the depository service to take effect, it then amounts to a

行政訴訟法與民事訴訟法雖多有類似之制度，但其具體規範內容，除屬於憲法保障訴訟權具有重要性者外，並非須作一致之規定。基於精簡法條之立法考量，行政訴訟法雖設有準用部分民事訴訟法之規定，亦非表示二者須有相同之規定。就送達制度而言，人民權利受寄存送達影響之情形極為複雜，非可一概而論。受寄存送達者，如於文書寄存當日即前往領取，其權利所受影響，即與送達機關於會晤應受送達人時交付文書之送達無異，如增設寄存送達之生效期間，反而形成差別待遇。反之，於文書寄存多日後始前往領取者，其能主張或維護權利之時間，雖不免縮短，惟人民於行政訴訟之前，既已歷經行政程序與訴願程序，當可預計行政機關或法院有隨時送達文書之可能，如確有因外出工作、旅遊或其他情事而未能即時領取之情形，衡諸情理，亦得預先指定送達代收人或採行其他適當之因應措施，以避免受寄存送達或未能即時領取而影響其權利。故訴願、訴訟文書之寄存送達，其發生送達效力之時間，雖可能影響當事人得為訴訟行為之時機，但立法政策上究應如同現行行政訴訟法第七十三條規定，於寄存送達完畢時發生效力，或應如同民事訴訟法第一百三十八條第二

discriminatory treatment. Conversely, for those who retrieve documents several days after the time of deposit, while the period within which claims can be asserted or rights can be maintained may have been inevitably shortened, given that the individual parties should have gone through the administrative procedure and appeals prior to the litigation, and should have expected the possibility of service of documents from the administrative agency or court at any time, if there are indeed reasons such as employment and travel for which individuals cannot receive service documents in time, they may designate agents to receive service documents or take other measures in advance to avoid adverse consequences on their rights that may result from depository service or untimely retrieval of documents. As a result, even though the timing for depository service of administrative appeals or litigation documents to take effect can affect the timing for a party to take certain legal action in a litigation, whether the legislative policy should be the same as the present Article 73 of the Administrative Proceedings Act, which stipulates that depository

項規定，自寄存之日起經十日發生效力，抑或應採較十日為更長或更短之期間，宜由立法者在不牴觸憲法正當程序要求之前提下，裁量決定之，自不能僅因行政訴訟法第七十三條規定未如同民事訴訟法第一百三十八條第二項設有自寄存之日起經十日發生送達效力之規定，即遽認違反平等原則。

service takes effect upon its completion, or should mimic after Article 138, Paragraph 2 of the Civil Procedure Act, which stipulates that service takes effect in ten days since the day of the deposit, or should rather take a longer or shorter period than ten days, shall be subject to the discretion of the Legislature and under the premises that the due process requirement under the constitution is not violated. Therefore, the mere fact that Article 73 of the Administrative Proceedings Act does not stipulate that the service shall take effect in ten days since the day of deposit, as stated in Article 138, Section 2 of the Civil Procedure Act, shall not, in and of itself, be deemed to have violated the principle of equality.

The system of service of process is crucial to whether people's right to instigate administrative appeals and litigation under the Constitution can be realized. Recognizing the fact that individuals may be temporarily absent from their residence for service of documents due to employment, travel or other reasons, and the need to avoid depository service during the

送達制度攸關憲法保障人民訴願及訴訟權是否能具體落實。鑑於人民可能因外出工作、旅遊或其他情事而臨時不在應送達處所，為避免其因外出期間受寄存送達，不及知悉寄存文書之內容，致影響其權利，中華民國九十二年二月七日修正公布、同年九月一日施行之民事訴訟法第一百三十八條第二項，增訂寄存送達，自寄存之日起，經十日

party's absence adversely affecting people's rights by making them not aware of the content of the deposited documents in time, Article 138, Paragraph 2 of the Civil Procedure Act was amended on February 7, 2003 and promulgated on September 1 of the same year, providing for depository service which takes effect ten days after the documents are deposited, a more adequate protection over individuals' right to instigate legal proceedings. Although, as illustrated above, the Legislative Yuan did not stipulate the same rule in the Administrative Appeals Act or the Administrative Proceedings Act, the procedures and ways under Article 73 of the Administrative Proceedings Act meets the due process requirement under the Constitution and does not violate the principle of equality. In order to more adequately and effectively protect individuals' right to instigate administrative appeals and litigation, relevant governing agencies should conduct a timely review of the service of documents in the current system of administrative appeals and litigation to ensure that it is keeping pace with time, taking into consideration the life style of

發生效力之規定，係就人民訴訟權所為更加妥善之保障。立法機關就訴願法及行政訴訟法未與上開民事訴訟法設有相同規定，基於上開說明，行政訴訟法第七十三條規定所設之程序及方式，雖已符合憲法正當法律程序之要求，並無違於平等原則，然為求人民訴願及訴訟權獲得更為妥適、有效之保障，相關機關允宜考量訴願及行政訴訟文書送達方式之與時俱進，兼顧現代社會生活型態及人民工作狀況，以及整體法律制度之體系正義，就現行訴願及行政訴訟關於送達制度適時檢討以為因應，併此指明。

modern society and work conditions of the people, as well as the systemic justice of the entire legal regime (*Systemgerechtigkeit*).

Justice Ming Chen filed concurring opinion, in which Justice Sea-Yau Lin joined.

Justice Pai-Hsiu Yeh filed dissenting opinion.

Justice Yu-Hsiu Hsu filed dissenting opinion.

Justice Mao-Zong Huang filed dissenting opinion.

本號解釋陳大法官敏、林大法官錫堯共同提出協同意見書；葉大法官百修提出不同意見書；許大法官玉秀提出不同意見書；黃大法官茂榮提出不同意見書。

EDITOR'S NOTE:

Summary of facts: (1) A family survivor of a military officer petitioned to the Ministry of National Defense (MND) for pension payment but the petition was denied on June 14, 2005. When the administrative determination of the administrative appeal was delivered to the petitioner on June 23, 2005, neither the petitioner nor his cohabitant or employee(s) who could have received the service of process on his behalf was present. The service of document was then deposited at the nearby post

編者註：

事實摘要：（一）聲請人請求遺族撫卹，向國防部提起訴願，經該部九十四年（下同）六月十四日決定駁回，該訴願決定書於六月二十三日送達時，未獲會晤聲請人或依法得代為收受送達之同居人或受僱人，乃以寄存送達方式，將文書寄存於送達地附近郵政機關，並依法作成送達通知書黏貼及放置。

office and with notice of service being made in accordance with the law glued to and posted on the door.

(2) The petitioner signed the determination of administrative appeal on July 6, and did not instigate an administrative proceeding before the Taipei High Administrative Court until September 5. That court dismissed the suit on the ground that the appeal was made beyond the mandatory statute of limitations. The petitioner brought an interlocutory appeal to the Supreme Administrative Court but the appeal was again denied. The petition for the Judicial Yuan interpretation followed.

（二）聲請人七月六日簽收該訴願決定書，於九月五日始向臺北高等行政法院提起行政訴訟，經該院以逾法定不變期間為由，裁定駁回。聲請人不服，向最高行政法院提起抗告，亦經該院裁定抗告無理由駁回，聲請解釋。

(3) The petitioner claimed that unlike Article 138, Paragraph 2 of the Civil Procedure Act, Article 47, Paragraph 3 of the Administrative Appeals Act and Article 73 of the Administrative Proceedings Act did not expressly stipulate that depository service takes effect ten days after the day the service documents are deposited, thus the time allowed for administrative litigation is ten days shorter then civil litigation. The petitioner, therefore, argued that

（三）聲請人主張訴願法第四十七條第三項及行政訴訟法第七十三條，未如民事訴訟法第一百三十八條第二項明定寄存送達，自寄存之日起，經十日發生效力，致使提起行政訴訟期間較民事訴訟短少十日，乃認系爭兩規定牴觸憲法第七條平等權、第十六條訴願及訴訟權及第二十三條人民基本權之限制規定。

the two disputed provisions violate Articles 7 (principle of equality), 16 (the right to instigate administrative appeals and litigation), and 23 (restrictions on the people's fundamental rights) of the Constitution.

J. Y. Interpretation No.668（December 11, 2009）*

ISSUE: For inheritances commenced prior to the implementation of the Civil Code on Inheritance, whether designations of heir is permitted only for those taken place prior to the implementation of the Code ?

RELEVANT LAWS:

Civil Code on Inheritance（民法繼承編）; Article 8 of the Enforcement Act of the Civil Code on Inheritance（民法繼承編施行法第八條）.

KEYWORDS:

pronouncement of death（死亡宣告）, deceased（被繼承人）, linear descendants（直系血親卑親屬）, statutory heir（法定繼承人）, designated heir（指定繼承人）, selected heir（選定繼承人）, family meeting（親屬會議）, duration on selection（選定期間）.**

HOLDING: Article 8 of the Enforcement Act of Civil Code on Inheritance stipulates: "For inheritance commenced prior to the implementation of the Civil Code on Inheritance, if the deceased should have no linear descendant, and

解釋文：民法繼承編施行法第八條規定：「繼承開始在民法繼承編施行前，被繼承人無直系血親卑親屬，依當時之法律亦無其他繼承人者，自施行之日起，依民法繼承編之規定定其繼承人。」其所定「依當時之法律亦無其他

* Translated by Assistant Professor Huai-Ching Robert Tsai.

** Contents within frame, not part of the original text, are added for reference purposes only.

there is no other heir in accordance with the laws of the time, the heir(s) shall be determined in accordance with the provisions of the Civil Code on Inheritance as of the date of its implementation." The requirement that "there is no other heir in accordance with the laws of the time" should include situations where no selected heir(s) could have been made in accordance with the laws of that time. Therefore, for inheritances that commenced prior to the implementation of the Civil Code on Inheritance, and that heir(s) may be selected in accordance with the laws or customs of the time, such selection of heir(s) is not limited to those taken place before the implementation of the Civil Code on Inheritance. However, given that the Civil Code on Inheritance has been implemented in Taiwan for over sixty-four years, and the need to avoid prolonged suspension and indetermination on succession, which hinders the stable order of Civil Code on Inheritance, for inheritance which commenced prior to the implementation of the Civil Code on Inheritance but with heir(s) yet to be legally designated as of the date this Interpretation

繼承人者」，應包含依當時之法律不能產生選定繼承人之情形，故繼承開始於民法繼承編施行前，依當時之法規或習慣得選定繼承人者，不以在民法繼承編施行前選定為限。惟民法繼承編施行於臺灣已逾六十四年，為避免民法繼承編施行前開始之繼承關係久懸不決，有礙民法繼承法秩序之安定，凡繼承開始於民法繼承編施行前，而至本解釋公布之日止，尚未合法選定繼承人者，自本解釋公布之日起，應適用現行繼承法制，辦理繼承事宜。

is issued, the succession matters shall be determined in accordance with the inheritance mechanism under the current legal system on the date this Interpretation is issued.

REASONING: Article 1 of the Enforcement Act of the Civil Code on Inheritance, as promulgated on January 24, 1931 and implemented on May 5, 1931, stipulates: "For inheritance commenced prior to the implementation of the Civil Code on Inheritance, except otherwise provided in this Act, the Civil Code on Inheritance does not apply." Article 8 of the same Act provides: "For inheritances commenced prior to the implementation of the Civil Code on Inheritance, if the deceased should have no linear descendant, and there is no other heir in accordance with the laws of the time, the heir(s) shall be determined in accordance with the provisions of Civil Code on Inheritance as of the date of its implementation." The purpose is to allow inheritances commenced prior to the implementation of the Civil Code on Inheritance continue to apply the laws or customs

解釋理由書：中華民國二十年一月二十四日制定公布、同年五月五日施行之民法繼承編施行法（下稱施行法）第一條規定：「繼承在民法繼承編施行前開始者，除本施行法有特別規定外，不適用民法繼承編之規定。」又同法第八條規定：「繼承開始在民法繼承編施行前，被繼承人無直系血親卑親屬，依當時之法律亦無其他繼承人者，自施行之日起，依民法繼承編之規定定其繼承人。」旨在使繼承開始於民法繼承編施行前之繼承事件，繼續適用民法繼承編施行前之繼承法規或習慣。故發生於三十四年十月二十四日之前，應適用臺灣繼承舊慣之繼承事件，不因之後民法繼承編規定施行於臺灣而受影響。

existing before the implementation of Civil Code on Inheritance. Therefore, inheritance matters occurred before October 24, 1945 shall apply previous customs in Taiwan and not to be affected by the subsequent implementation of the Civil Code on Inheritance.

A Civil Judgment of the Supreme Court (47 Tai Shan Tsu No. 298 (1958), which has been designated as a judicial precedent) takes the position that for inheritances commenced prior to the implementation of the Civil Code on Inheritance in Taiwan, the existing Taiwanese inheritance customs of the time shall be applicable, *i.e.*, on the death of the head of the household (the inherited), if there was no heir being identified by law or designation, a [new] head of the household may be legally selected by the family meeting of the deceased to become the heir, regardless of whether the designee is male or female or any limitation on the duration of designation. Yet an Administrative Judgment of the Kaohsiung High Administrative Court, (96 Su-Tsu No. 959 (2007); *appeal denied*, Supreme Administrative

最高法院四十七年度台上字第二八九號民事判決（業經選為判例）認為，繼承開始於民法繼承編施行於臺灣之前，應適用當時臺灣繼承習慣辦理，於戶主即被繼承人死亡時，如無法定或指定繼承人，得由被繼承人之親屬會議合法選定戶主以為繼承，所選定之繼承人不分男女皆得繼承，選定期間亦無限制。而高雄高等行政法院九十六年度訴字第九五九號判決（經上訴後，業經最高行政法院九十七年度裁字第三七二六號裁定上訴駁回），則認為自民法繼承編施行於臺灣後，已不得再由親屬會議選定戶主繼承人，從而未於民法繼承編施行前選定繼承人者，於民法繼承編施行後即不得再行選定，而應循現行民法繼承編規定處理繼承事宜。就施行法第八條規定之適用，不同審判系統法院之見解有異。

Court, 97 Tzai Tsu Ti No. 3726 (2008)) considers, rather, that, since the implementation of the Civil Code on Inheritance in Taiwan, the family meeting may no longer select a head of the household to inherit. Thus, in the event a heir was not selected before the implementation of the Civil Code on Inheritance, no longer can such selection be done since the implementation and all matters that concern the inheritance shall be resolved in accordance with the current Civil Code on Inheritance. There is a diversity of opinions concerning the application of Article 8 of the Implementing Act between different adjudication systems.

Given that the designation of heir(s) must be taken place after the inheritance has occurred, if the deceased's time of death was not too far away before the implementation of the Civil Code on Inheritance, or was declared as such by the court after the implementation of the Code, it can hardly be expected or possible that heirs can be selected before the implementation of the Code. As a result, "no other heir in accordance with the laws

查選定繼承人必在繼承事件發生之後，如被繼承人死亡時間距民法繼承編施行時不遠，或於民法繼承編施行後，方由法院判決宣告死亡於繼承編施行前者，即難以期待或無從於民法繼承編施行前為繼承人之選定。故施行法第八條所定「依當時之法律亦無其他繼承人者」，應包含依當時之法律不能產生選定繼承人之情形，故繼承開始於民法繼承編施行前，依當時之法規或習慣得選定繼承人者，不以在民法繼承編施行

of the time," as stipulated under Article 8 of the Enforcement Act of the Civil Code on Inheritance, should include situations where no heir(s) could have been selected in accordance with the law at that time. Therefore, for inheritances that commenced prior to the implementation of the Civil Code on Inheritance and that heir(s) may be selected in accordance with the laws or customs of the time, such selection of heir(s) is not limited to those taken place before the implementation of the Civil Code on Inheritance. However, given that the Civil Code on Inheritance has been implemented in Taiwan for over sixty-four years, and the need to avoid prolonged suspension and indetermination on succession, which hinders the stable order of Civil Code on Inheritance, for inheritance which commenced prior to the implementation of the Civil Code on Inheritance but with heir(s) yet to be legally designated as of the date this Interpretation is issued, the succession matters shall be determined in accordance with the inheritance mechanism under the current legal system on the date this Interpretation is issued.

前選定為限。惟民法繼承編施行於臺灣迄今已逾六十四年，民法繼承編施行前開始之繼承關係，猶有至今尚未能確定者，顯非民法繼承編立法者所能預見，為避免民法繼承編施行前開始之繼承關係久懸不決，有礙現行民法繼承法秩序之安定，凡繼承開始於民法繼承編施行前，至本解釋公布之日止，尚未合法選定繼承人者，自本解釋公布之日起，應適用現行繼承法制，辦理繼承事宜。

Justice Yu-Hsiu Hsu filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pi-Hu Hsu filed dissenting opinion, in which Justice Chi-Ming Chih joined.

Justice Shin-Min Chen filed dissenting opinion.

Justice Chun-Sheng Chen filed dissenting opinion.

本號解釋許大法官玉秀提出協同意見書；黃大法官茂榮提出協同意見書；徐大法官璧湖、池大法官啟明共同提出不同意見書；陳大法官新民提出不同意見書；陳大法官春生提出不同意見書。

EDITOR'S NOTE:

Summary of facts: Petitioner claimed that in accordance with Article 8 of the Enforcement Act of the Civil Code on Inheritance, for inheritances commenced prior to the implementation of the Civil Code on Inheritance, the pervious customs in Taiwan that allowed the relatives to convene a family meeting to select heir(s) posthumously may be applicable in the event the deceased has neither statutory nor designated heir(s).

編者註：

事實摘要：聲請人主張：依民法繼承編施行法第八條規定，發生於民法繼承編施行前的繼承事件，得適用臺灣舊有選定繼承人的習慣，在被繼承人無法定繼承人及指定繼承人時，被繼承人的親屬得組成親屬會議，選定繼承人以為追立繼承。

Acting as a selected heir, Petitioner requested the Office of Land Administration in Yong-Kang, Tainan County to

聲請人以被選定人的身分，向臺南縣永康地政事務所請求土地繼承登記。該地政事務所認為，於民法繼承編

record an inherited land. The office denied his request on the ground that after the implementation of Civil Code on Inheritance, heirs of estate can only be determined in accordance with the Civil Code on Inheritance.

施行後，僅能依民法繼承編規定定繼承人，駁回聲請人申請。

Petitioner appealed to the Tainan County Government and the case was again denied. He then filed an administrative litigation before the Kaohsiung High Administrative Court. The court ruled against him on the ground that for inheritances commenced prior to the implementation of the Civil Code on Inheritance, selected heirs must be done prior to the implementation of the Code. Once the Civil Code on Inheritance is implemented, no selection of heir can be rendered. Petitioner [again] appealed, and the Supreme Administrative Court affirmed the original judgment and dismissed the appeal.

聲請人不服，向臺南縣政府提出訴願，亦遭決定駁回，再向高雄高等行政法院提起行政訴訟，經該院判決：發生於民法繼承編前之繼承事件，限於繼承編施行前已經選定，繼承編施行後，即不得再行選定繼承人，駁回聲請人之訴。聲請人上訴，經最高行政法院裁定，維持原審判決，駁回上訴。

Petitioner believed that the aforementioned court decisions limiting the duration within which selection of heirs for inheritances commenced prior to the implementation of the Civil Code on

聲請人認為前揭裁定與判決，就發生於民法繼承編施行前之繼承事件，限制選定繼承人之期間，與最高法院四十七年台上字第二八九號判例選定期間無限制之見解，有所不同，係屬於不同

Inheritance is contrary to the Civil Judgment of the Supreme Court (47 Tai Shan Tsu No. 298 (1958), which set no time limit for heir selection. Since there is a conflict between different courts for the application of Article 8 of the Enforcement Act of the Civil Code, on Inheritance, Petitioner requested the Grand Justices for a uniform interpretation.

審判系統法院間，適用民法繼承編施行法第八條規定有歧異見解之情形，聲請統一解釋。

J. Y. Interpretation No.669（December 25, 2009）*

ISSUE: Is the provision on the penalty against the acts of manufacturing, selling, trafficking air guns in Paragraph 1, Article 8 of Firearms, Knives and Other Weaponry Control Act constitutional ?

RELEVANT LAWS:

Article 8, Paragraph1 of Firearms, Knives and Other Weapons Control Act（槍炮彈藥刀械管制條例第8條第1項）.

KEYWORDS:

excessive and disproportionate punishment（過當處罰）, capability of causing injuries or death（殺傷力）, freedom of person（人身自由）, firearms（槍炮）, air gun/air-propelled gun（空氣槍）; principle of proportionality（比例原則）.**

HOLDING: Article 8, Paragraph 1 of Firearms, Knives and Other Weaponry Control Act stipulates : "[Anyone who] manufactures, sells, traffics without permission pen guns, gas guns, anesthetic guns, hunting rifles, air-propelled guns or any gun or cannon provided by Article 4,

解釋文：槍砲彈藥刀械管制條例第八條第一項規定：「未經許可，製造、販賣或運輸鋼筆槍、瓦斯槍、麻醉槍、獵槍、空氣槍或第四條第一項第一款所定其他可發射金屬或子彈具有殺傷力之各式槍砲者，處無期徒刑或五年以上有期徒刑，併科新臺幣一千萬元以下

* Translated by Tsai Chiou-Ming.

** Contents within frame, not part of the original text, are added for reference purposes only.

Paragraph 1, Section of the present Act that can emit metals or bullets and are capable of causing personal injuries or death, is punishable with a life- imprisonment or no less than 5 years of imprisonment, and a fine no more than NTD 10,000,000."

Following this statute, an issue of excessive punishment is arising as all the acts of unpermitted manufacturing, selling, or transporting air guns that are capable of causing personal injury can be subject to the penalty of no less than five years of imprisonment up to a life-imprisonment. Especially, in cases involving minor violations committed in forgivable situation, the minimum penalty imposed can still go as high as 2 and half years of imprisonment. The court is unable to appraise individually the corresponding responsibility the offenders should assume so as to render a sentence parole or order a substitution of fine, even though it applies Article 51 of Penal Code with a view to reducing the punishment. Such sentencing will accordingly create a disproportion between culpability and

罰金。」其中以未經許可製造、販賣、運輸具殺傷力之空氣槍為處罰要件部分，不論行為人犯罪情節之輕重，均以無期徒刑或五年以上有期徒刑之重度自由刑相繩，對違法情節輕微、顯可憫恕之個案，法院縱適用刑法第五十九條規定酌減其刑，最低刑度仍達二年六月以上之有期徒刑，無從具體考量行為人所應負責任之輕微，為易科罰金或緩刑之宣告，尚嫌情輕法重，致罪責與處罰不相對應。首揭規定有關空氣槍部分，對犯該罪而情節輕微者，未併為得減輕其刑或另為適當刑度之規定，對人民受憲法第八條保障人身自由權所為之限制，有違憲法第二十三條之比例原則，應自本解釋公布之日起至遲於一年屆滿時，失其效力。

penalty. As far as the above-mentioned provision on air-propelled guns is concerned, the statute does not provide a combined sentence reduction nor other appropriate alternative sentences for those who commit minor violations. As a result, such restriction on the right of personal freedom, as safeguarded by Article 8 of the Constitution, is in violation of the principle of proportionality mandated by Article 23 of the Constitution and the provision in question shall be invalidated no later than one year since the issuance of this Interpretation.

REASONING: As mandated by Article 8 of the Constitution of the Republic of China, the people's bodily freedom shall be protected. Given that criminal penalty on bodily freedom restricts the fundamental rights of the people, it shall only be exercised as the last resort when no alternative is available. To safeguard those fundamental legal interests in line with Constitutional values, a criminal penalty that restricts people's freedom of person can be imposed by applying a law passed by the Legislation, if the imposition

解釋理由書：人民身體之自由應予保障，憲法第八條定有明文。鑑於限制人身自由之刑罰，嚴重限制人民之基本權利，係屬不得已之最後手段。立法機關如為保護合乎憲法價值之特定重要法益，並認施以刑罰有助於目的之達成，又別無其他相同有效達成目的而侵害較小之手段可資運用，雖得以刑罰規範限制人民身體之自由，惟刑罰對人身自由之限制與其所欲維護之法益，仍須合乎比例之關係，尤其法定刑度之高低應與行為所生之危害、行為人責任之輕重相符，始符合罪刑相當原則，而與憲

of penalty is helpful for attaining its goal in terms of public interest and if no other approaches which embrace similar validity and pose relatively minor violation to personal freedom can be relied on. However, there should exist a proportion between the restriction to the freedom of person and the legal interests to be defended. In particular, it must be proportionate between the codified realm of penalty, the hazard caused by the criminal offences, and the liability incurred upon the offenders, so as to be in accord with the principle of proportionality required by Article 23 of the Constitution. (*See*, J. Y. Interpretation No. 646, No. 551, as well as No. 554)

法第二十三條比例原則無違（本院釋字第六四六號、第五五一號、第五四四號解釋參照）。

Article 8, Paragraph 1 of Firearms, Knives and Other Weaponry Control Act stipulates: "[Anyone who] manufactures, sells, traffics without permission pen guns, gas guns, anesthetic guns, hunting rifles, air-propelled guns or any gun or cannon provided by Article 4, Paragraph 1, Section of the present Act that can emit metals or bullets and are capable of causing personal injuries or death, is punishable

槍砲彈藥刀械管制條例第八條第一項規定：「未經許可，製造、販賣或運輸鋼筆槍、瓦斯槍、麻醉槍、獵槍、空氣槍或第四條第一項第一款所定其他可發射金屬或子彈具有殺傷力之各式槍砲者，處無期徒刑或五年以上有期徒刑，併科新臺幣一千萬元以下罰金。」係為防止暴力犯罪，以保障人民生命、身體、自由及財產等之安全，立法目的符合重要之憲法價值。其中關於空氣槍

with a life- imprisonment or no less than 5 years of imprisonment, and a fine no more than NT$ 10,000,000." It is enacted to prevent violent crimes and protect the safety of the lives, bodies, freedom and property of the people. Thus the legislative objective of this enactment is in conformity with the fundamental constitutional values.

Due to the physical hazards for causing injuries as well as its relatively easy access, use, and transfiguration, the air-propelled guns tend to be employed as criminal instruments. Hence, the acts of manufacturing, trafficking and selling the air guns that endanger life or body are so highly hazardous as to warrant the penalization legislation, taking into consideration its general prophylactic function. In this sense, the provision in question that punishes said acts is positive for helping accomplish important public interests. In addition, given that no other equally effective yet less intrusive alternatives are available, the penalty measure is not deemed unnecessary.

之規定部分（下稱系爭規定），由於空氣槍之取得、使用、改造較為便利，且具有物理上之危險性，容易成為犯罪之工具，是製造、運輸、販賣具有殺傷力空氣槍之行為，雖對一般民眾之生命、身體、自由及財產等法益尚未構成直接之侵害，但立法機關認前述行為已足造成高度危險，為保護上開重要法益，乃採取刑罰之一般預防功能予以管制，可認係有助於重要公益目的之達成。此外，因別無其他與上開刑罰規定相同有效，但侵害較小之替代手段可資採用，是該刑罰手段亦具有必要性。

However, since the objects of the manufacturing, trafficking, or selling offenses stipulated by said provision are relatively in wide range, the acts involving certain air guns with lesser capacity of causing injuries will likewise be subject to punishment. From the perspective of crime prevention, while the legislature has an authority to impose higher statutory penalties by enacting special penal laws, the imposition of life imprisonment of at least 5 years imprisonment on those acts risks of constituting an excessively harsh penalty and in turn injuring the substantive justice the penal system is seeking, if the culpability can not be specifically evaluated in some individual cases involving minor offences which are committed in an obviously forgivable condition.

To be noted, an air gun which does not possess a capacity to causes injury is nothing more than an entertaining merchandise item that can be obtained easily in legal way. The transfiguration of such air guns takes no high technology, given the easy availability of their spare parts. If a person transfigures an air gun that was

惟系爭規定所禁止製造、運輸、販賣之客體相對廣泛，一部分殺傷力較低之空氣槍，亦在處罰範圍內。基於預防犯罪之考量，立法機關雖得以特別刑法設置較高之法定刑，但其對構成要件該當者，不論行為人犯罪情節之輕重，均以無期徒刑或五年以上有期徒刑之重度自由刑相繩，未能具體考量行為人違法行為之惡害程度，對違法情節輕微、顯可憫恕之個案，可能構成顯然過苛之處罰，而無從兼顧實質正義。按不具殺傷力且無危害安全之虞之空氣槍係合法而容易取得之休閒娛樂商品，而改造此類空氣槍，所需零件易於取得，亦無須高度之技術。倘人民僅出於休閒、娛樂等動機而改造合法之空氣槍，雖已達殺傷力標準，但若其殺傷力甚微，對他人生命、身體、自由、財產等法益之危險甚低，或有其他犯罪情節輕微情況，法院縱適用刑法第五十九條規定酌減其刑，最低刑度仍達二年六月以上之有期徒刑，無從具體考量行為人所應負責任之輕微，而為易科罰金或緩刑之宣告，尚嫌情輕法重，致罪責與處罰不相對應。系爭規定對犯該罪而情節輕微者，未併為得減輕其刑或另為適當刑度之規定，對人民受憲法第八條保障人身自由權所為之限制，有違憲法第二十三條之

legally acquired for a purpose of amusement or entertainment, resulting a product to a general standard of endangering, the hazard to the legal interest on life, body, freedom or property of others are fairly low if the endangering capacity so attained is regarded as minor. In a case of a minor violation which is committed in particularly pitiful conditions, the minimum penalty on the offense can still amount to 2 and half years imprisonment, even if the trial courts applies Article 51 of Penal Code to lessen the punishment. In such event, no parole of sentence or substitution of fine is available for the offenders whose liability is relatively inconsiderable. Accordingly, an injustice of overly severe punishment and a disproportion between offence and penalty is created. From this view, the aforementioned provision is considered to violate the principle of proportionality provided by Article 23 of the Constitution of the Republic of China and is invalidated by the end of one year since the promulgation of this Interpretation.

比例原则。

A legal concept contained in a statute enacted by the State aiming at restraining people’s freedoms or rights is deemed to be not inconsistent with the principle of certainty of law, as long as it is foreseeable for the regulated and likely to be confirmed by means of judicial review. This position has been firmly assumed by several Interpretations by this Yuan. The concept of “endangering capacity” in provision in question should be interpreted as an emitted bullet can cause a penetrating injury to human skin when the body is stroke, based on a general understanding of daily-life verbal expression. According to current judicial practice, the adopted standard of “endangering capacity” for firearms means an emitted bullet bears an energy that can penetrate human skin and muscle layers within its most powerful distance. (Referred to Secretary General’s Letter Mi-Tai-Ting(2)No. 06985, June 11,1991 of this Yuan)

In finding out whether a firearm bears an endangering capacity, the trial courts will draw as in practice an evaluation reports from professional assessment

國家以法律限制人民自由權利者，法律規定所使用之概念，其意義依法條文義及立法目的，為受規範者所得預見，並可經由司法審查加以確認，即與法律明確性原則無違，迭經本院解釋在案。系爭規定所謂之殺傷力，依據一般人民日常生活與語言經驗，應能理解係指彈丸擊中人體可對皮膚造成穿透性傷害。而揆諸現行司法審判實務，亦係以其在最具威力之適當距離，以彈丸可穿入人體皮肉層之動能為槍械具殺傷力之基準（本院秘書長中華民國八十一年六月十一日秘台廳（二）字第０六九八五號函參照）。法院於具體個案中，並審酌專業鑑定機關對槍砲發射動能之鑑定報告，據以認定槍砲是否具有殺傷力。是系爭規定以是否具有殺傷力為構成要件，其意義為受規範者所得預見，亦得經司法審查予以確認，尚與法律明確性原則無違。

agencies on the emission energy of the firearms in question. When the endangering capacity constitutes the core concept of the provision in question, which is foreseeable by the regulated people and likely to be reviewed by judicial process, the provision in question is consistent with the principle of legal interpretation certainty.

The governing agency is due to amend the provision on air gun in Paragraph 1, Article 8 of the Firearms, Knives and Other Weapons Control Act in accordance with this Interpretation within a year since the promulgation of this Interpretation, with a view to consoling the proper application of national penalty authority and the protection of people's bodily liberty. If the anticipated amendment is not made in the given period as mandated above, the provision in question shall be invalid.

有關機關應自本解釋公布之日起一年內，依本解釋之意旨檢討修正槍砲彈藥刀械管制條例第八條第一項有關空氣槍之規定，以兼顧國家刑罰權之妥善運作及保障人民之人身自由，逾期未為修正者，該部分規定失其效力。

Justice Tzong-Li Hsu filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

本號解釋許大法官宗力提出協同意見書；黃大法官茂榮提出協同意見書；陳大法官新民提出協同意見書；許大法官玉秀、林大法官子儀共同提出協

Justice Shin-Min Chen filed concurring opinion.

Justice Yu-Hsiu Hsu filed concurring opinion, in which Justice Tzu-Yi Lin joined.

同意見書。

EDITOR'S NOTE:

Summary of facts: X along with other three persons purchased an air gun for entertainment use. A bullet jamming happened with the gun later. Accordingly, X et al. engaged to replace the recoil spring to address the bullet jamming issue. After the transfiguration, the air gun was somehow found and seized by the police, which submitted the seized gun to the competent agency for a regular assessment. According to the assessment report, the transfigured air gun bears an emission force over 20 joule/per square centimeter and falls into the category of the air guns capable of causing injury and death. The police reported the case to the competent District Prosecutors Office. The four persons were then indicted and the case was referred to Kimen District Court for trial, applying Article 8, Paragraph 1 of Firearms, Knives and Other

編者註：

事實摘要：X 等四人為休閒娛樂之用購入空氣槍，所購槍枝有卡彈現象，乃自行換裝彈簧，嗣被查獲，因渠等改造後之空氣槍，經鑑定其發射動能單位面積均逾二十焦耳/平方公分，業屬實務認定具殺傷力之空氣槍，依槍砲彈藥刀械管制條例第八條第一項規定（以下簡稱系爭規定），予以起訴。聲請人金門地方法院刑事庭於審理該案件時，對系爭規定有具體之違憲確信，乃裁定停止訴訟，聲請解釋。

Weaponry Control Act. The trial court, Kimen District Court suspended the trial proceedings of this case and submitted, as the petitioner, the relevant issue to the Judicial Yuan seeking for an interpretation, based on a hypothesis that the aforementioned statute violated the Constitution.

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Translators	**Interpretation No.**
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Jyh-Pin Fa（法治斌）	161(Ⅰ)、166(Ⅰ)、178(Ⅰ)、189(Ⅰ)、289(Ⅱ)、328(Ⅱ)、357(Ⅱ)、467(Ⅲ)、481(Ⅲ)
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Jau-Yuan Hwang（黃昭元）	31(Ⅰ)、85(Ⅰ)、261(Ⅱ)、450(Ⅲ)
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Su-Po Kao（高思博）	290(Ⅱ)、295(Ⅱ)、378(Ⅱ)、485(Ⅲ)
Wellington L. Koo（顧立雄）	145(Ⅰ)、176(Ⅰ)、269(Ⅱ)、422(Ⅲ)
Vincent C. Kuan（關重熙）	243(Ⅱ)、255(Ⅱ)、257(Ⅱ)、265(Ⅱ)、273(Ⅱ)、320(Ⅱ)、340(Ⅱ)、343(Ⅱ)、344(Ⅱ)、345(Ⅱ)、347(Ⅱ)、348(Ⅱ)、350(Ⅱ)、354(Ⅱ)、377(Ⅱ)、445(Ⅲ)、446(Ⅲ)、457(Ⅲ)、465(Ⅲ)、468(Ⅲ)、521(Ⅳ)、522(Ⅳ)、527(Ⅳ)、538(Ⅳ)、546(Ⅳ)、573(Ⅴ)、582(Ⅴ)、583(Ⅴ)、585(Ⅴ)、588(Ⅴ)、589(Ⅴ)、591(Ⅴ)、592(Ⅴ)、593(Ⅴ)、594(Ⅴ)、595(Ⅴ)、596(Ⅴ)、597(Ⅴ)、599(Ⅴ)、601(Ⅴ)、603(Ⅴ)、607(Ⅴ)、608(Ⅴ)、609(Ⅴ)、611(Ⅴ)、612(Ⅴ)、613(Ⅴ)、614(Ⅴ)、615(Ⅴ)、617(Ⅴ)、618(Ⅴ)、619(Ⅴ)、621(Ⅴ)、622(Ⅴ)、623(Ⅵ)、624(Ⅵ)、626(Ⅵ)、627(Ⅵ)、628(Ⅵ)、629(Ⅵ)、660(Ⅵ)
Cheng-Hwa Kwang（鄺承華）	341(Ⅱ)、352(Ⅱ)、359(Ⅱ)、506(Ⅳ)
Lawrence L. C. Lee（李禮仲）	28(Ⅰ)、51(Ⅰ)、53(Ⅰ)、55(Ⅰ)、56(Ⅰ)、57(Ⅰ)、58(Ⅰ)、60(Ⅰ)、61(Ⅰ)、62(Ⅰ)、63(Ⅰ)、64(Ⅰ)、65(Ⅰ)、66(Ⅰ)、67(Ⅰ)、69(Ⅰ)、70(Ⅰ)、71(Ⅰ)、73(Ⅰ)、74(Ⅰ)、77(Ⅰ)、78(Ⅰ)、79(Ⅰ)、80(Ⅰ)、