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(Grand Justices Council)
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President of Judicial Yuan
Compiled and Executed by
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Justice Tzu-Yi Lin
Justice Vincent Sze
Justice Syue-Ming Yu
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Task Group For Translation

Executive: The Honorable Chief Justice & President of the Judicial Yuan Yueh-Sheng Weng
（翁院長岳生）
Co-Executive: The Honorable Justice Lai, In-Jaw
（賴大法官英照）
Co-Executive: The Honorable Justice Tzu-Yi Lin
（林大法官子儀）
Co-Executive: The Honorable Justice Vincent Sze
（施大法官文森）
Co-Executive: The Honorable Justice Syue-Ming Yu
（余大法官雪明）
Executive Editors:
BAKER & McKENZIE
（國際通商法律事務所）
FORMOSA TRANSNATIONAL, ATTORNEYS AT LAW
（萬國法律事務所）
LEE&LI, ATTORNEYS-AT-LAW
（理律法事務所）
TSAR & TSAI LAW FIRM
（常在國際法律事務所）
THY Taiwan International Law Offices
（台灣通商法律事務所）
Translators: see separate pages
Saff:
Dr. Ta-Liang Wei, Director-general, Department of Clerks for the Justices of the Constitution Court
（魏處長大喨）
Ms. Mei-Jung Chiang, Deputy Director-general, Department of Clerks for the Justices of the Constitutional Court
（江副處長美容）
Mr. Po-Chun Lin, Chief First Section of Department of Clerks for the Justices of the Constitutional Court
（林科長柏君）
Mr. Pei-Min Lin, Executive Officer
（林專員倍銘）

Directory of the Translators

(in alphabetical order)

Chun-Jen Chen（陳俊仁）
Assistant Professor of Law
Graduate Institute of Financial and Economic Law Feng Chia University S.J.D., with Distinction, Georgetown University Law Center

John C. Chen（陳傳岳）
Founder & Senior partner, Formosa Transnational Attorneys at Law
M.C.L., Southern Methodist University Law School, U.S.A

Jui-jen Chen（陳瑞仁）
Public Prosecutor, Taiwan High Court LL.M., Columbia Law School

Tsung-Fu Chen（陳聰富）
Professor of Law, National Taiwan University Law School
J.S.D., New York University School of Law

Chin-Chin Cheng（鄭津津）
Professor of Law, College of Law, National Chung-Cheng University
J.D., University of Cincinnati

Chun-yih Cheng（程春益）
Partner, Formosa Transnational Attorneys at Law
Assistant Professor of Law, Department of Financial and Economic Law Chung Yuan Christian University

Eric Yao-kuo Chiang（江耀國）
Professor, Yuan Ze University.
Ph.D., University of Washington School of Law, Seattle.

Cing-Kae Chiao（焦興鎧）
Research Fellow, Institute of European and American Studies, Academia Sinica
LL.M., Harvard Law School
J.S.D., Candidate, Stanford Law School

Tze-Shiou Chien（簡資修）
Associate Research Fellow, Institutum Iurisprudentiae, Academia Sinica DCL, Georgetown University Law Center, USA

Eleanor Y.Y. Chin（金玉瑩）
Partner Chien Yeh Law Offices
LL. M., Soochow University School of Law M.B.A. Candidate, National Taipei University School of Business

Raymond T. Chu（朱定初）
M.C.L., Southern Methodist University School of Law
Professional legal translator
Formerly Editor, Laws of the Republic of China, published by CUSA 1961 & 1962

Jyh-Pin Fa（法治斌）
J.S.D., Virginia Law School
Professor of Law, National Chengchi University

Fan, Chien-Te（范建得）
Professor & Director,
Institute of Law for Science and Technology, National Tsing Hua University Juris Doctor, University of Puget Sound, School of Law

Spenser Y. Hor（何曜琛）
Senior Consultant Chien Yeh Law Offices J.D., Southern Methodist University School of Law

C. Y. Huang（黃慶源）
S.J.D., Harvard Law School
Managing partner, Tsar & Tsai Law Firm

Wei-Feng Huang（黃偉峰）
J.D. Tulane University
Consultant of THY Taiwan International Law Offices

Yuh-Kae Huang（黃裕凱）
Assistant Professor of Law, Ming Chuan University Faculty of Law Ph.D., Institute of Maritime Law, University of Southampton U.K.

Jau-Yuan Hwang（黃昭元）
Professor of Law, National Taiwan University Law School
S.J.D., Harvard Law School

Su-Po Kao（高思博）
S.J.D., George Washington University Assitant Professor of Law, Shih-Hsin University
Legislator, R.O.C.

Wellington L. Koo（顧立雄）
Partner, Formosa Transnational Attorneys at Law
LL.M., New York University

Vincent C. Kuan（關重熙）
LL.M., University of Pennsylvania Law School Independent consultant & professional legal translator
Member of New York Bar

Cheng-Hwa Kwang（鄺承華）
LL.B., National Taiwan University, LL.M., University of Pennsylvania, USA Ph.D., Cheng Chi University, Law School, Taiwan, ROC Ph.D., University of Sydney, Law School, Australia
Attorney-at-Law, Taipei Bar Association; Professor of Law, Ming Chuan University

Fuldien Li（李復甸）
Professor of Law, School of Law, Chinese Culture University
Partner, Li and Partners, Attorneys-at-Law
Ph.D. in law, Chinese Culture University, Taipei

Nigel N.T.Li（李念祖）
LL.M., Harvard Law School
Partner, Lee and Li, Attorneys-at-Law

Fort Fu-Te Liao（廖福特）
Associate Research Fellow, Institute of Law, Academia Sinica
D.Phil. in Law, Oxford University

Jennifer Lin（林秋琴）
Managing Partner of Tsar & Tsai Law Firm (2004)
LL.M., Harvard Law School (1982), Bachelor of Law, National Taiwan University (1979)

Li-Chih Lin（林利芝）
Assistant Professor of Law, Soochow
University
Faculty of Law
J.D., Loyola University Chicago School of Law

David T. Liou（劉宗欣）
Executive Partner of BAKER & McKENZIE
J.D., University of Florida, College of Law

Lawrence S. Liu（劉紹樑）
Executive Vice President and Chief Strategy Officer, China Development Financial Holding Corporation and Professor, Soochow University
J.D., University of Chicago

Jer-Shenq Shieh（謝哲勝）
S.J.D., University of Wisconsin Law School Professor of Law, National Chung-Cheng University

Ching P. Shih（史慶璞）
J.D., Washburn University, School of Law;
LL.M., Southern Methodist University,
School of Law
Professor of Law, Fu Jen Catholic University

Andy Y. Sun（孫遠釗）
J.D., University of Maryland School of Law
Professor, the Graduate Institute of Technology and Innovation Management,
National Chengchi University

Dennis T. C. Tang（湯德宗）
Director & Research Fellow, Institutum
Iurisprudentiae, Academia Sinica.
S.J.D., Tulane Law School.

Alex C. Y. Tsai（蔡欽源）
Managing Partner Chien Yeh Law Offices
S.J.D. Candidate, Cheng Fa University
Law School Graduate Studies
LL.M., National Taiwan University

TSAI Chiou-ming（蔡秋明）
Head Public Prosecutor, Taipei District Public Prosecutors Office
LL.M., University of Washington

Robert Huai-Ching Tsai（蔡懷卿）
J.D., University of California, Davis Associate Professor, Hsuan-Tsang College
Department of Law

Jaw-Perng Wang（王兆鵬）
Professor of Law, National Taiwan University
S.J.D., University of Chicago

Wen-Yeu Wang（王文宇）
S.J.D., University of Stanford Law School Professor of Law, National Taiwan University

Joe Y.C.Wu（吳永乾）
Dean, School of Lifelong Learning, Shih-Hsin University
Ph. D., University of Washington, Seattle

Pijan Wu（吳必然）
Senior Counsel, LCS & Partners
J.S.D., New York University School of Law

David H.J. Yang（楊鴻基）
Executive Partner of BAKER & McKENZIE
J.D., Florida State University

Chi-Chang Yu（游啟璋）
Partner, Lee and Li, Attorneys-at-Law
Adjunct Assistant Professor, Department of Accounting, National Taiwan University
J.S.D., Stanford Law School

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No. 331 ····· 447

Article 69, Paragraph 2, of the Public Officials Election and Recall Act provides: "to those elected pro rata based upon the votes won by each political party, the provisions governing recall procedure are not applicable." Is said exclusion in conflict with the Constitution, thus being null and void?

No. 332 ····· 452

Does the term "continued service" under Article 6 of the Act Governing the Retirement of School Teachers and Staff mean that by the time of retirement, school teachers or principals shall have remained employed continuously for 20 years?

No. 333 ····· 456

Is it in contravention of the Constitution to recognize the previous service years of a childcare worker, who has the qualification of kindergarten teacher, in computing or advancing his or her salary one level, after the fulfillment of a respective full year of service, up to the permissible maximum when such childcare worker has transferred from the position of a childcare worker (having previously served at all levels of a government-owned childcare center) to that of a public school kindergarten teacher?

No. 334 ····· 459

Shall the broad definition of the term "bond" have the same meaning as the term "bond" defined under the Central Government Development Bonds Issuance Act, and shall it be further stipulated pursuant to the laws?

No. 335 ····· 467

Should the Enforcement Rules of the Lodgment Act, providing that the title to unclaimed property will pass to the National Treasury notwithstanding the failure of the public lodgment office to act in compliance with the

legal requirement of service or publication of a notice of lodgment, be reviewed and revised to better protect the people's property right under the Constitution?

No. 336 ····· 473

Does Article 50 of the Urban Planning Act, which does not require the government to procure land reserved for public facilities within a limited period, violate the Constitution?

No. 337 ····· 477

Is the Ministry of Finance directive consistent with the Business Tax Act and the Constitution in holding a business operator who has purchased goods liable to a fine for tax evasion as prescribed in the said Act regardless of whether he has made false entries of the tax payment on such purchases for tax evasion?

No. 338 ····· 483

Is the precedent holding to the effect that a person dissatisfied with the determination as to his or her ranking or remuneration may not initiate an administrative litigation in violation of the Constitution?

No. 339 ····· 486

Is Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act excessive and contradictory to the Constitution?

No. 340 ····· 489

Is the relevant provision of the Public Officials Election and Recall Act, which provides to the effect that the guarantee deposit for a party-recommended candidate may be reduced by half, unconstitutional?

No. 341 ····· 493

Are the rules 3 of basic-level specific examination of 1981, providing that the registration, admission and assignment will be conducted and/or determined by district, and that a successful examinee shall serve in his or her original examination district for a certain period, in violation of the Constitution?

No. 342 ····· 498

Have the Organic Act of the National Security Council, National Security

Bureau and Bureau of Personnel Administration of the Executive Yuan been passed by the resolution of the Legislature? Are the disputes subject to the judicial review of this Yuan?

No. 343 ····· 509

Is the directive issued by the Ministry of Finance to the effect that a privately built road is not the kind of thing eligible for tax payment consistent with the Constitution?

No. 344 ····· 516

Is the provision of the applicable standards prescribed by the Taipei City Government in respect of compensation for crops, lumber and fish, which imposes restrictions on the quantities of such crops, lumber or fish as are eligible for compensation, constitutional?

No. 345 ····· 520

Are the relevant provisions of the Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit, which impose various exit restrictions, unconstitutional?

No. 346 ····· 524

Is it constitutionally permissible for a statute to establish a statutory authorization on taxation obligation for particular purpose, if the obligation is established in statutory provisions clearly defined and within the application scope specifically set out?

No. 347 ····· 529

Is the provision of the Precautionary Matters on the Submission of Application and Issuance of Self-Tilling Certificates, which determines the ability to engage in self-tilling based on the location of a tiller's residence and farmland, unconstitutional?

No. 348 ····· 534

Are the relevant directions issued by the Ministry of Education, which require that publicly funded medical students of Yang-Ming Medical School accept assignments after their graduation and surrender their professional licenses for safekeeping before expiry of their service terms, unconstitu-

tional?

No. 349 539

Is the precedent holding that a bona fide transferee of a jointly owned property should nevertheless be bound by the original contract of division or management in respect of such property in violation of the Constitution?

No. 350 544

Are the provisions of the Guidelines for the Review of Recording of Superficies Acquired by Prescription, which require that the owner be specified at the time of application and that the application be dismissed even if finding out the name, address, etc., of the owner is impossible, consistent with the Constitution?

No. 351 549

Is the provision of the Act Governing the Conversion of State Owned Enterprises, providing that those workers who will not transfer to the new private enterprise simultaneously shall " receive an additional pay equivalent to six-months' salary," also applicable to those workers who remain in employment?

No. 352 554

Are the relevant provisions of the Land Act, providing that a land scrivener shall be licensed after only passing an examination and being evaluated according to law, and that those already engaged in the business prior to the amendment of the said Act may continue the practice under certain transitional conditions, in violation of the Constitution?

No. 353 558

Is the Supreme Administrative Court Precedent constitutional in holding that a motion to stay the enforcement of an administrative act may be filed only if an administrative proceeding has already been instituted?

No. 354 562

Is the provision of the Act Governing the Handling of Land Grant Certificates to Soldiers, providing that a land grant certificate is deemed to have been issued to a retired non-duty officer in Taiwan who is away from his

military post, unconstitutional?

No. 355 ····· 567

Does the Supreme Court's precedent, which limits the evidence discovered by the litigants and yet to be considered to that which had already come to light before the oral arguments of a trial on matters of fact are concluded, contradict Article 16 of the Constitution?

No. 356 ····· 573

Is Article 49 of the Value-Added and Non-Value-Added Business Tax Act excessive and does it thus contradict the Constitution?

No. 357 ····· 578

Is the Auditor General a political appointee?

No. 358 ····· 581

Is the Ministry of Interior directive constitutional in disallowing the partition of a fire escape, vehicle passageway, or frontage of a building for the purpose of recordation?

No. 359 ····· 585

Is the directive of the Ministry of Finance, providing to the effect that a fine equivalent to the total amount of land value increment tax free of collection will be imposed on a farmland transferred to a non-self-tilling farmer or used for non-agricultural purposes without authorization, in line with the Constitution?

No. 360 ····· 589

Are the relevant provisions of the Regulation Governing the Supervision of Land Scriveners, setting forth restrictions on the qualifications of a person who may apply for a land scrivener's certificate, in violation of the Constitution?

No. 361 ····· 594

Where a Ministry of Finance directive established a standard tax rate for income from the sale of houses in Taipei for the year 1987 pursuant to the Enforcement Rules of the Income Tax Act, is such a directive consistent with the Constitution?

No. 362 ····· 601
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No. 369 ····· 640

Are the House Tax Act provisions with respect to the legal basis on which house tax may be collected, tax rates, the procedure authorizing local governments to determine the tax rates, and house tax exemption and reduction constitutional?

No. 370 ····· 646

Does the statute of limitations on a petition to invalidate an already registered trademark constitute deprivation of property right protection, thus violating Article 15 of the Constitution?

No. 371 ····· 650

Do Article 5, Paragraphs 2 and 3 of the Constitutional Interpretation Procedure Act authorizing only the Supreme Court and Administrative Court to have the right to petition the Grand Justices Council for the interpretation of statutes governing pending litigation violate Article 80 of the Constitution, which provides that a judge shall try cases in accordance only with law?

No. 372 ····· 657

The Supreme Court's precedent holds that "although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to sue for divorce, it does not include cases where the other party temporarily loses control and overreacts to the spouse's misconduct." Is the said precedent in conflict with the Constitution, thus being void?

No. 373 ····· 663

Is the provision of the Labor Union Act, prohibiting technicians and janitors of an educational enterprise from organizing a labor union, in violation of the Constitutional?

No. 374 ····· 668

Is it constitutional for courts to dismiss a civil case brought by a contesting landowner who did not dispute on site during a land survey but who did contest the survey results without success within the period of public notice?

No. 375 ····· 676
May the tax exemption provided for in Article 31 of the Agricultural Development Act apply to the situation where there is only one heir eligible to inherit the agricultural land?
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No. 382 ····· 721

Under the Constitution, is a discharged student entitled to bring an administrative appeal and later an administrative litigation against his/her respective school to challenge the discharge?

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Are the Ordinance and Directive issued by the Ministry of Economic Affairs according to the authorization of Articles 1 and 34 of the Mining Act in contravention to the law and the Constitution?

No. 384 ····· 733

Articles 5, 6, 7, 12, and 21 of the Gangster Prevention Act authorize the police arbitrarily to classify a person as a gangster, to force him to appear before the police or arrest him, to adopt a secret witness system, and to impose a rehabilitative program upon him irrespective of due process of law. Do the said provisions constitute an infringement on the people's freedom and rights as guaranteed by the Constitution?

No. 385 ····· 745

Are the relevant provisions of the Act of Encouragement of Investment, providing to the effect that, upon expiry of the said Act, a foreign company which still enjoys tax benefits thereunder shall be subject to the 20% withholding income tax after paying the after-tax surplus to its head office, in line with the Constitution?

No. 386 ····· 750

Is the provision of the Central Government Development Bonds Issuance Act, providing that no registration of loss or stop payment may be made for various reasons, including lost vouchers of the bond, in violation of the Constitution?

No. 387 ····· 755

Shall the Premier (President of the Executive Yuan) submit his resignation to the President prior to the newly elected legislators' swearing-in for their

new term?

No. 388 760

Shall an incumbent President who is campaigning for re-election be subject to criminal prosecution, despite the provision of Article 52 of the Constitution, which provides that the President, unless he is recalled or discharged from office, shall not be subject to any criminal prosecution except being charged with rebellion or treason?

No. 389 764

Is it unconstitutional to exclude hereditary chronic disease or a deformity that occurred/existed before a worker enrolled in the labor insurance program from labor insurance coverage?

No. 390 769

Is the Regulation Governing Factory Set-up Registration constitutional in stipulating that a factory which fails to apply for setup registration, operate the business for proscribed purposes, or violates other related laws and regulations shall be closed or shall suspend operation without specific authorization of law?

No. 391 773

May the Legislative Yuan, without changing the total amount of the general budget, add, delete or adjust the amount of individual items within each or among different government agencies and in the form of individual member's proposals, as in the review process of a statutory bill, without violating the Constitution?

No. 392 781

Is the "unlawful" arrest and detention condition imposed by Article 1 of the Habeas Corpus Act inconsistent with Article 8 of the Constitution?

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J. Y. Interpretation No.234（March 3, 1989）*

ISSUE: Are the applicable provisions of the Act Governing the Allocation of Government Revenues and Expenditures concerning the demarcation of national, provincial and county tax receipts with respect to business tax and stamp duty in violation of the Constitution?

RELEVANT LAWS:

Article 107, Subparagraph 7,and 147 of the Constitution（憲法第一百零七條第七款及第一百四十七條）; Article 12 of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第十二條）.

KEYWORDS:

demarcation of national, provincial and county tax revenues（國稅與省稅、縣稅之劃分）, business tax（營業稅）, stamp duty（印花稅）.**

HOLDING: Under Article 107, Subparagraph 7, of the Constitution, the Central Government shall have the power of legislation and administration regarding the demarcation of national, provincial and county tax receipts. Article 12,

解釋文：國稅與省稅、縣稅之劃分，依憲法第一百零七條第七款規定，由中央立法並執行之。財政收支劃分法第十二條第二項及第三項就有關營業稅與印花稅統籌分配之規定，符合憲法第一百四十七條謀求地方經濟平衡發

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

Paragraphs 2 and 3, of the Act Governing the Allocation of Government Revenues and Expenditures regarding the centralized organization and allocation of business tax and stamp duty receipts conform to Article 147 of the Constitution, which advocates balanced local economic development, and do not contradict the Constitution.

展之意旨，與憲法並無牴觸。

REASONING: The Central Government shall have the power of legislation and administration regarding the demarcation of national, provincial and county tax receipts. It is prescribed respectively in Articles 107 and 147 of the Constitution that the Central Government, in order to attain balanced local economic development among the provinces, and the provinces, in order to attain balanced economic development among the county, shall give appropriate aid to poor or unproductive provinces/county. A special municipality under the direct jurisdiction of the Central Government like a province ("directly-governed municipality") is at the same level as the province, and under Paragraph 1 of Article 12 of the Act Gov-

解釋理由書：按國稅與省稅、縣稅之劃分，由中央立法並執行之；中央為謀省與省間、省為謀縣與縣間之經濟平衡發展，對於貧瘠之省縣應酌予補助，憲法第一百零七條第七款、第一百四十七條著有明文。而直轄於行政院之市，其地位與省相當，財政收支劃分法第十二條第一項規定營業稅及印花稅為省及直轄市稅；同條第二項及第三項復分別規定營業稅及印花稅，在省應以其總收入百分之五十，由省統籌分配所屬之縣（市）（局）；在直轄市應以其總收入百分之五十，由中央統籌分配省及直轄市；旨在統籌中央及地方之財源，以謀求地方經濟之平衡發展。

erning the Allocation of Government Revenues and Expenditures, business taxes and stamp duties are imposed by provinces and directly-governed municipalities. Article 12, Paragraphs 2 and 3, of said Act further provide that from business tax and stamp duty receipts, 50% of total receipts of the province shall be allocated through its centralized organization to hsiens (and cities and government agencies) that fall within its administrative zone, and 50% of total receipts of the directly-governed municipality shall be allocated through the centralized organization of the Central Government to the province and the directly-governed municipality. The purpose is to pool the financial resources at the Central Government and local government levels into centralized organization, so as to achieve balanced local economic development.

Business taxes and stamp duties are imposed by provinces and directly-governed municipalities. However, factories and mines are, in most cases, located in various areas in county and cities within a province, whereby related expen-

營業稅與印花稅雖經劃分為省及直轄市稅，但在通常情形，工廠、礦場大多分布在省屬各縣市，關於教育、衛生、交通、警政及其他公益事項所需費用，勢必增加當地政府之負擔。因營業稅依規定得在總機構所在地繳納，印花

diture on education, public health, communications, police and other public-interest work inevitably increases the financial burden for the local government. Under the existing system, business taxes are collected according to where the corporate headquarters are, and stamp duties are also mostly collected according to the location of the corporate headquarters, which are often in a directly-governed municipality. As a result, county and cities fail to collect much business taxes and stamp duties from local factories and mines. The provisions of Article 12, Paragraphs 2 and 3, of the Act Governing the Allocation of Government Revenues and Expenditures purport to adjust tax receipts of provinces and cities reasonably through centralized organization and allocation, thereby facilitating normal economic development even in poor regions, so as to build a self-sufficient society. The aforesaid fulfills the purpose of Article 147 of the Constitution. The provincial revenue to be legislated and administrated by the provinces or to be delegated to the county for administration referred to in Article 109, Paragraph 1, Subparagraph 7, of the

稅在總機構所在地繳納情形亦屬較多，而總機構又多設在直轄市區內，致使工廠、礦場所在地之縣市，取得該類稅金較少。財政收支劃分法第十二條第二項及第三項之規定，即係透過統籌分配之方式，合理調劑省市之所得，使較為貧瘠之地區，亦可獲得正常之經濟發展，以達成全民生活均足之目標，符合憲法第一百四十七條之意旨。至憲法第一百零九條第一項第七款所稱由省立法並執行或交由縣執行之省稅，係指依國稅與省縣稅合理劃分之中央立法，已劃歸省自行分配者而言，財政收支劃分法第十二條第二項及第三項之規定，亦與上開憲法條文尚無牴觸。

Constitution means the tax receipts already authorized to be allocated to the provinces under the reasonable division of taxation at the national, provincial and hsien levels per legislation of the Central Government. Article 12, Paragraphs 2 and 3, of the Act Governing the Allocation of Government Revenues and Expenditures do not contradict the aforesaid Article of the Constitution.

J. Y. Interpretation No.235（March 17, 1989）*

ISSUE: Are the auditing divisions in provinces (cities) that conduct audits of the finances of the respective provincial (municipal) government in said provinces (cities) under Article 5 of the Audit Act in conflict with the Constitution?

RELEVANT LAWS:

Article 90 and Article 107, Subparagraph 13, of the Constitution（憲法第九十條及第一百零七條第十三款）; Article 5 of the Audit Act（審計法第五條）; Article 4, Paragraph 1, of the Organic Act of the Control Yuan（監察院組織法第四條第一項）; Article 14 of the Organic Act of National Audit Office（審計部組織法第十四條）; Article 31 of the Financial Statement Act（決算法第三十一條）.

KEYWORDS:

separation of five-power system（五權分立制度）, control power（監察權）, auditing power（審計權）.**

HOLDING: The Constitution of the Republic of China upholds the separation of five-power system. The auditing power is within the sphere of the control power. In view of Article 90 and Article

解釋文：中華民國憲法採五權分立制度，審計權乃屬監察權之範圍，應由中央立法並執行之，此觀憲法第九十條及第一百零七條第十三款規定自明。隸屬於監察院之審計部於省（市）

* Translated by Ching P. Shih.

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

107, Subparagraph 13, of the Constitution, it is clear that the power shall be enacted and implemented by the Central Government. The National Auditing Office, supervised by the Control Yuan, establishes auditing divisions in provinces (cities) and conducts audits of the finances of the provincial (municipal) government in said provinces (cities) under Article 5 of the Audit Act. This does not contradict the Constitution.

設審計處，並依審計法第五條辦理各該省（市）政府及其所屬機關財務之審計，與憲法並無牴觸。

REASONING: The Constitution of the Republic of China upholds the separation of five-power system. The Control Yuan is the supreme controlling authority of the nation and exercises consent, impeachment, discipline, and auditing powers. In view of Article 90 and Article 107, Subparagraph 13, of the Constitution, it is clear that the powers shall be enacted and implemented by the Central Government. To exercise the auditing power, the Control Yuan established the National Auditing Office to govern auditing matters as provided in Subparagraphs of Article 4, Paragraph 1, of the Organic Act of the Control Yuan. Since the audit-

解釋理由書：中華民國憲法採五權分立制度，監察院為國家最高監察機關，行使同意、彈劾、糾舉及審計權；而依憲法所定關於中央之事項，由中央立法並執行之，此觀憲法第九十條及第一百零七條第十三款規定自明。監察院為行使審計權設審計部，掌理監察院組織法第四條第一項各款所定之審計事項，審計權既屬於中央權限，審計部組織法第十四條規定：審計部於各省（市）設審計處，掌理各該政府及其所屬機關之審計事項。審計法第五條並規定：各省（市）政府及其所屬機關財務之審計，由各該省（市）審計處辦理之，均為建立隸屬於中央之統一審計體系，以監督各省（市）預算之執行所必

ing power is within the scope of the Central Government, Article 14 of the Organic Act of National Audit Office states: "The National Auditing Office shall establish an auditing division in every province (city) which governs auditing matters of the provincial (municipal) government where it is located." Article 5 of the Audit Act also states: "The auditing of the finances of every provincial (municipal) government shall be carried out by the auditing division located in said province (city)." These provisions are for establishing a uniform auditing system belonging to the central government and the necessity of supervising the execution of the budget of each province (city). They do not contradict the Constitution. Article 111 of the Constitution is concerned with the matters not enumerated in the provisions of Articles 107-110 of the Constitution. The auditing power has been clearly prescribed within the sphere of the central powers; it is impossible to apply that provision. Furthermore, when exercising the power of review of the examination statement of the annual report, the relationship between the auditing authori-

要，與憲法並無牴觸。至憲法第一百十一條係指憲法第一百零七條至第一百十條未列舉之事項而言，審計權憲法已明定屬於中央之權限，自無適用該條之餘地。又中央在地方設置之審計機關，與地方民意機關行使審議決算之審核報告職權時之關係，依決算法第三十一條規定，本應另以法律定之，僅在法律未制定前，準用現行決算法之規定而已，主管機關應在適當時期訂定地方決算法律，乃屬當然，併此指明。

ties established in localities by the central government and local representative institutions shall be governed by another law under Article 31 of the Financial Statement Act. Until the law is enacted, it is only applicable mutatis mutandis to the provisions of the current Financial Statement Act. It is certain that the competent authority shall enact a local annual reporting law in an appropriate period of time.

J. Y. Interpretation No.236（March 17, 1989）*

ISSUE: According to the legal requirements of Article 219 of the Land Act, shall the timely use of lands condemned in accordance with an approved plan be judged from the progress of use for the entire package of land or from the use of discrete parcels in a piecemeal fashion?

RELEVANT LAWS:

Articles 15, 23, 108-I (14) and 143-I of the Constitution（憲法第十五條、第二十三條、第一百零八條第一項第十四款、第一百四十三條第一項）; Article 219 of the Land Act（土地法第二百十九條）.

KEYWORDS:

condemnation（徵收）, eminent domain（公用徵收）, not carry out the plan（不實行使用）.**

HOLDING: Article 219 of the Land Act prescribes: "If, after condemnation of privately owned land, a government agency does not use said land in accordance with an approved plan, or does not carry out the plan within a year, the original owner is entitled to buy back

解釋文：土地法第二百十九條規定：「徵收私有土地後，不依核准計畫使用，或於徵收完畢一年後不實行使用者，其原土地所有權人得照原徵收價額收回其土地。」所謂「不依核准計畫使用」或「不實行使用」，應依徵收目的所為土地使用之規劃，就所徵收之全

* Translated by Huai-Ching Tsai, Esq.

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

his/her land by paying said agency the same amount he/she received as compensation. “Not use in accordance with an approved plan” or “not carry out the plan” shall be determined by the scheme of use to achieve the condemnation goal, taking the entire condemnation package as a whole into account. Where there is clear evidence to support a finding that the land in question belongs to an integral plan, the determination ought to be made discretely in order to conform to the legislative intent of eminent domain. The Precedent P.T. No.52 (Ad. Ct., 1979) and the Executive Order No.T.53 N.4534 (Executive Yuan, June 30, 1964) agree with the foregoing in spirit and are not contrary to Article 15 of the Constitution.

部土地整體觀察之，在有明顯事實，足認屬於相關範圍者，不得為割裂之認定，始能符合公用徵收之立法本旨。行政法院六十八年判字第五十二號判例及行政院五十三年六月三十日台五十三內四五三四號令，即係本此意旨，與憲法第十五條並不牴觸。

REASONING: The right of property shall be guaranteed to the people, which is made explicit in Article 15 of the Constitution, whereas the state can condemn private land for public purpose under the authority of Article 23, Article108-I (14), and Article 143-I (first part) of the Constitution. After such condemnation, the condemner that has acquired the

解釋理由書：按人民之財產權應予保障，憲法第十五條定有明文。惟基於憲法第二十三條、第一百零八條第一項第十四款及第一百四十三條第一項前段規定之意旨，國家為公用之需要，得依法徵收人民之土地。土地徵收後，需用土地人，即應在一定期限內，依照核准計劃實行使用，以防止徵收權之濫用，而保障人民私有土地權益。故土地

land shall, within the specified time frame, use said land in accordance with an approved plan to prevent abuse of eminent domain and to protect private ownership. Hence, Section 219 of the Land Act prescribes: "After condemnation of private land, if the agency that acquired the land does not use said land in accordance with an approved plan, or does not carry out the plan within a year, the original owner is entitled to buy back his/her land by paying said agency the same amount he/she received as compensation. The aforementioned requirements "not use in accordance with an approved plan" or "not carry out the plan" shall be determined by the scheme of use to achieve the expropriation goal, taking the entire condemnation package as a whole into account. Where there is clear evidence to support a finding that the land in question belongs to an integral plan, the determination ought to be made discretely in order to conform to the legislative intent of eminent domain. The Precedent P.T. No.52 (Ad. Ct., 1979, erroneously cited as 1980 in the Final Judgment) states: "The stipulation -- not use in accordance with an

法第二百十九條規定：「徵收私有土地後，不依核准計劃使用，或於徵收完畢一年後不實行使用者，其原土地所有權人得照原徵收價額收回其土地」。上述規定所謂「不依核准計劃使用」或「不實行使用」，應依徵收目的所為土地使用之規劃，就所徵收之全部土地整體觀察之，在有明顯事實，足認屬於相關範圍者，不得為割裂之認定，始能符合公用徵收之立法本旨。行政法院六十八年判字第五十二號（行政法院確定判決誤為六十九年判字第五十二號）判例：「土地法第二百十九條所謂『徵收私有土地後，不依核准計劃使用』，係對於所徵收土地之整體不依原核准計劃使用而言，若就徵收之土地已按原核准計劃逐漸使用，雖尚未達到該土地之全部，但與不依核准計劃使用之情形有間，應無該條之適用。」及行政院五十三年六月三十日台五十三內四五三四號令：「需地機關是否已於徵收完畢一年後實行使用之認定，應以該項徵收土地之整體為準，而不能仍按徵收前之個別原所有權之各個地區以為認定已否實行使用之準據」各等語，即係本此意旨，與憲法第十五條並不牴觸。

approved plan after condemnation of private land -- prescribed in Article 219 of the Land Act is for violation of approved use of the entire condemnation package. Where the land has been put into use gradually in accordance with an approved plan but the process has not been completed, it cannot reasonably be deemed a violation for non-use and said Article shall have no application." Executive Order No.T.53 N.4534 (Executive Yuan, June 30, 1964) states: "Whether the agency that acquired the land has carried out the plan within one year of condemnation shall be judged from the use of the entire condemnation package and not from the use of discrete parcels in a piecemeal fashion." These statements are consistent with the spirit of the legislation and not contrary to Article 15 of the Constitution.

Whether the condemnation complies with legal requirements, as well as whether the size of the condemnation package exceeds the actual need are questions concerning the legality of condemnation action; and under what circumstances

至徵收土地是否符合法定要件，其徵收之範圍有無逾越必需之限度，乃該徵收處分是否違法之問題；就所徵收之土地，於如何情形下，為依核准計劃為整體之使用，乃具體案件事實認定事項；又原土地所有權人依土地法第二百

the use of the condemned land is deemed an integral use of the approved plan is an ad hoc factual determination. The above-mentioned issues and the issue of whether there is a statute of limitation to preclude the original owner from reclaiming property under Article 219 of the Land Act are all beyond the scope of this Interpretation.

十九條主張收回其土地，有無期間之限制，均不在本件憲法解釋範圍內，併此說明。

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.237（March 17, 1989）*

ISSUE: Is there a conflict with the Constitution when the deadline for issuing a uniform invoice is the date of payment collection, but the uniform invoice is issued on the date specified on the accepted post-dated check?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 128, Paragraph 2 of the Act of Negotiable Instruments（票據法第一百二十八條第二項）; Article 12 of the Business Tax Act（營業稅法第十二條）; Article 17 of the Regulation Governing the Use of Uniform Invoices（統一發票使用辦法第十七條）.

KEYWORDS:

Date of drawing（發票日）, uniform invoice（統一發票）, payable on demand（見票即付）.**

HOLDING: A check is essentially a financial bill of payment, and may be used as a substitute for cash as a means of payment. Paragraph 2 of Article 128 of the Act of Negotiable Instruments for payment prior to the date of drawing

解釋文：支票本為支付證券，得代替現金使用。票據法第一百二十八條第二項雖規定：「支票在票載發票日前，執票人不得為付款之提示」。但票載日期後之支票，仍為見票即付，此觀同條第一項規定自明。財政部六十九年

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

indicated on the check". However, a check shall still be payable on demand after the date of drawing specified on the check, as provided in Paragraph 1 of said Article. Article 17 of the Regulation Governing the Use of Uniform Invoices amended by the Ministry of Finance on September 20, 1970, provides: "According to the Table of Business Tax Classification and Calculation, when the deadline for issuing a uniform invoice is the date of payment collection, the uniform invoice may be issued on the date specified on the accepted post-dated check". The aforesaid is prescribed in consideration of the interests of business operators who receive checks prior to the date specified thereupon, and conforms to the legislative purpose of Paragraph 1 of Article 12 of the Business Tax Act at the time and does not contradict Article 23 of the Constitution.

九月二十日修正之統一發票使用辦法第十七條規定：「依本法營業稅分類計徵標的表規定，凡以收款時為開立統一發票之期限者，其所受之遠期支票，得於票載發票日開立統一發票」，係顧及收受未屆票載發票日支票之營業人利益而設，符合當時之營業稅法第十二條第一項之立法意旨，與憲法第二十三條規定，並無牴觸。

REASONING: A profit-seeking enterprise, when conducting business, shall issue uniform invoices per Article 12 of the Business Tax Act. A check, being a note of payment, can be used in place of cash payment. Paragraph 2 of Article 128

解釋理由書：營利事業發生營業行為時，應依營業稅法第十二條規定開立統一發票。其以支票為價金之支付者，因支票本為支付證券，得代替現金使用。票據法第一百二十八條第二項雖規定：「支票在票載發票日前，執票人

of the Act of Negotiable Instruments prescribes that: “The holder shall not present for payment prior to the date of drawing indicated on the check”. However, a check shall still be payable on demand after the date of drawing specified on the check, as provided in Paragraph 1 of said Article.

不得為付款之提示」。但票載日期屆至後之支票，仍為見票即付，此觀同條第一項規定自明。

The rule for issuing an invoice by a business engaged in trading is formulated on an accrual basis. In principle, the deadline for issuing an invoice depends on the time of shipping, provided where payment is made prior to the shipping, the invoice shall be first issued accordingly. The aforesaid is prescribed in the Table of Business Tax Classification and Calculation. In such circumstances, where payment for goods is made by check prior to the specified date thereupon, the check, as a substitute for cash, may be a means of payment for goods. Article 17 (Article 16 of the Regulation currently in force) of the Regulation Governing the Use of Uniform Invoices amended by the Ministry of Finance on September 20, 1970, provides: “According to the Table of Business Tax Classification and Calculation, when the

買賣業開立統一發票，係採權責發生制，其開立時限原則上以發貨時為準，但發貨前已收貨款部分，應先行開立；營業稅分類計徵標的表定有明文。在此情形，若以未屆票載發票日之支票支付貨款者，支票既係代替現金使用，得作為支付貨款之工具，財政部於六十九年九月二十日修正之統一發票使用辦法第十七條（現行辦法第十六條）規定：「依本法營業稅分類計徵標的表規定，凡以收款時為開立統一發票之期限者，其所受之遠期支票，得於票載發票日開立統一發票」。因票載發票日屆至後之支票，仍為見票即付，則上述規定顯係顧及收受未屆票載發票日支票之營業人利益而設，符合當時之營業稅法第十二條第一項之立法意旨，與憲法第二十三條規定，並無牴觸。

deadline for issuing a uniform invoice is the date of payment collection, the uniform invoice may be issued on the date specified on the accepted post-dated check". Since after the date specified on the check, the check is still payable at sight, apparently the aforesaid is provided for in consideration of the interests of business operators who receive checks prior to the date specified thereupon, and conforms to the legislative purpose of Paragraph 1 of Article 12 of the Business Tax Act at the time and does not contradict Article 23 of the Constitution.

The petitioner alleged that Article 44 of the Tax Levy Act contradicted the Constitution. In substance, the dispute was over whether a belatedly issued uniform invoice violated said Article and whether Article 48-1 of said Act should apply in such case, not whether or how the aforesaid rule contradicts the Constitution and thus is beyond the scope of Interpretation in the subject case. It is hereby also explained.

至聲請人指稱稅捐稽徵法第四十四條違憲之部分，實質上係對遲開統一發票是否違反該條規定及應否適用同法第四十八條之一之爭議，並非上述規定有何牴觸憲法之疑義，不在本件受理解釋之範圍，併此說明。

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋鄭大法官健才提出不同意見書。

J. Y. Interpretation No.238（March 31, 1989）*

ISSUE: Is a procedural violation of the law in trial proceedings subject to an extraordinary appeal if it does not affect the outcome of the trial decision?

RELEVANT LAWS:

Articles 172, 379, Subparagraph 10, 380, 441, and 447 of the Code of Criminal Procedure（刑事訴訟法第一百七十二條、第三百七十九條第十款、第三百八十條、第四百四十一條及第四百四十七條）; J.Y. Interpretation No. 181（司法院釋字第一八一號解釋）.

KEYWORDS:

extraordinary appeal（非常上訴）, plain violation of the law（當然違背法令）, procedural violation of the law; procedure held to be in some way in violation of the law（訴訟程序違背法令）, a procedural violation of the law which apparently does not affect the outcome of the trial decision（訴訟程序違背法令而顯於判決無影響者）, fact finding（事實認定）, applying the law（法律適用）, Resolution of the Joint Meeting of the Civil and Criminal Panels of the Supreme Court（最高法院民刑庭總會決議）.**

* Translated by TSAI Chiou-ming, Head Public Prosecutor.

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HOLDING: "The evidence should be investigated at trial according to the provisions in this Code" as provided in Article 379, Subsection 10, of the Code of Criminal Procedure (hereinafter the "CCP") refers to the evidence that serves objectively as the basis for investigating the facts and applying the laws in a trial court. If the court fails to investigate such evidence, the ensuing decision will be deemed as a plain violation of the law. However, for the evidence which does not fall into the abovementioned category, the court's failure of investigation at trial will not be subject to the provision mentioned above, i.e., no plain violation of the law will result. The failure to investigate such evidence can constitute a procedural violation of the law. However, since such violation provides no grounds for an appeal of the third instance (i.e., an appeal on account of legal grounds) due to the provision of Article 380 of the CCP (which provides that a procedural violation of the law which apparently does not affect the outcome of the trial decision will constitute no grounds for an appeal of the third instance), it will not accordingly

解釋文：刑事訴訟法第三百七十九條第十款所稱「依本法應於審判期日調查之證據」，指該證據在客觀上為法院認定事實及適用法律之基礎者而言。此種證據，未予調查，同條特明定其判決為當然違背法令。其非上述情形之證據，未予調查者，本不屬於上開第十款之範圍，縱其訴訟程序違背法令，惟如應受同法第三百八十條之限制者，既不得據以提起第三審上訴，自不得為非常上訴之理由。中華民國二十九年二月二十二日最高法院民、刑庭總會議決議關於「訴訟程序違法不影響判決者，不得提起非常上訴」之見解，就證據部分而言，即係本此意旨，尚屬於法無違，與本院釋字第一八一號解釋，亦無牴觸。

constitute a basis for an extraordinary appeal. Thus, the part "the procedural violation of the law is not subject to an extraordinary appeal, if it in no way affects the trial decision" in the Resolution of the Joint Meeting of the Civil and Criminal Panels of the Supreme Court issued on February 22, 1950, in terms of evidence investigation, is not contrary to the law nor is it contradictory to J.Y. Interpretation No. 181.

REASONING: The mechanism of extraordinary appeal in criminal procedure is designed to ensure the uniform application of the law in trials and to offer relief for the parties who claim that a final trial decision is contrary to the law. Due to its unique nature, an extraordinary appeal does not apply, either by a plain application or that of mutatis mutandis, to any CCP provision concerning the appeal of the third instance except for Article 349 of the Code. Article 441 of the CCP provides: "When a decision which is finalized in terms of appeal (i.e., the relief of appeal has run out) is found as the result of a trial to be in violation of the law, the

解釋理由書：非常上訴，係為統一審判上法律之適用，而對審判違背法令之確定判決所設之特別救濟程序，除刑事訴訟法第三百九十四條外，並無準用第三審上訴程序之規定。依刑事訴訟法第四百四十一條規定，「判決確定後，發見該案件之審判係違背法令者，最高法院之檢察長得向最高法院提起非常上訴」。所謂「案件之審判係違背法令」，包括原判決違背法令及訴訟程序違背法令，後者係指判決本身以外之訴訟程序違背程序法之規定，與前者在實際上時相牽連，如判決前之訴訟程序違背法令，致適用法令違誤，而顯然於判決有影響者，為兼顧被告之利益，仍應認為原判決違背法令而有同法第四百

Public Prosecutor General should file an extraordinary appeal against it with the Supreme Court." The expression "a trial held to be in some way in violation of the law" includes the trial decision and trial procedure in violation of the law. The latter means the trial procedure other than the decision itself is held to be in violation of procedural provisions and in effect renders the trial decision contradictory to the law. For instance, a previous trial proceeding was held to be in violation of the CCP provisions, resulting in an error in the application of law in turn adversely affecting the holding of the decision. In the interest of the accused, such error will be regarded as a case of a trial decision in violation of the law and subject to Article 447, Section 1, Subsection 1, of the CCP, as clarified by J.Y. Interpretation No. 181. In the case where "the evidence should have been investigated during the trial proceedings according to this Code" as provided in Article 379, Subsection 10, of the CCP, both the trial proceeding and the decision derived are plainly contrary to the law. However, "the evidence should be investigated during the trial proceeding

四十七條第一項第一款規定之適用，經本院釋字第一八一號解釋釋明在案。刑事訴訟法第三百七十九條第十款規定：「依本法應於審判期日調查之證據而未予調查者」，其判決當然為違背法令，亦為判決前之訴訟程序違背法令。惟所稱「依本法應於審判期日調查之證據」，指事實審訴訟程序中已存在之證據，而在客觀上為法院認定事實及適用法律之基礎者而言。此種證據，未予調查，同條特明定其判決當然為違背法令。如在客觀上非認定事實及適用法律基礎之證據，既無調查之必要，則為避免訴訟程序延滯，影響公益，自得不予調查，此觀同法第一百七十二條之規定自明。此種未予調查之情形，本不屬於上開第十款之範圍，縱因法院未駁回其調查之聲請，致訴訟程序違背法令，惟如應受同法第三百八十條之限制者，既不得據以提起第三審上訴，自不得為非常上訴之理由。中華民國二十九年二月二十二日最高法院民、刑庭總會議決議關於「訴訟程序違法不影響判決者，不得提起非常上訴」之見解，就證據未踐行調查程序部分而言，即係本此意旨，尚屬於法無違，與本院釋字第一八一號解釋，亦無牴觸。至關於證據未調查致訴訟程序違背法令，是否為同法第三百

according to this Code" refers to the evidence that should be admitted apparently as basis for investigating the facts and applying the law by the trial court. If the trial court fails to investigate such evidence, the decision made will be deemed as a plain violation of the law. Any evidence that does not objectively serve as the basis for investigating the facts or applying the law by the trial court will not be investigated so as to avoid any delay in trial proceedings or otherwise affect the public interest. The holding above is clearly justified with reference to the provision of Article 172 of the CCP (which provides that the trial court may dismiss a motion for an investigation of evidence when the investigation is viewed as unnecessary). Accordingly, the decision not to investigate such evidence does not fall into the application category of Article 447, Section 1, Subsection 1, of the CCP. The decision not to investigate such evidence can constitute a procedural violation of the law. However, since such violation provides no grounds for an appeal of the third instance (i.e., an appeal on account of legal grounds) due to the pro-

八十條之限制範圍，乃個案判斷問題，併予說明。

vision of Article 380 of the CCP (which provides that a procedural violation of the law which apparently does not effect the outcome of the trial decision will constitute no grounds for an appeal of the third instance), it will not accordingly constitute a basis for an extraordinary appeal. The part "the trial proceedings contrary to the law, which would in no way affect the outcome of the trial, are not subject to the review of an extraordinary appeal" in the Resolution of the Joint Meeting of the Civil and Criminal Panels issued on February 22, 1950, in terms of evidence investigation, is not contrary to the law nor does it contradict J.Y. Interpretation Shi-Tzi No. 181. As to whether the failure to investigate evidence results in a violation of the procedural rules, this is a matter to be decided on a case-by-case basis.

Justice Cheng-Tao Chang filed dissenting opinion in part, in which Justice Zu-Zan Yang and Justice Geng Wu joined.

本號解釋張大法官承韜、楊大法官日然與吳大法官庚共同提出一部不同意見書。

J. Y. Interpretation No.239（May 12, 1989）*

ISSUE: Is the Provisional Act Governing the Monopolistic Sale on Cigarettes and Wines in Taiwan Province applicable to the restructured Kaohsiung City?

RELEVANT LAWS:

Article 172 of the Constitution（憲法第一百七十二條）; Article 15 of the Standard Act for the Laws and Rules（中央法規標準法第十五條）; Article 1 of the Provisional Act Governing the Monopolistic Sale on Cigarettes and Wines in Taiwan Province（臺灣省內菸酒專賣暫行條例第一條）.

KEYWORDS:

Executive Yuan（行政院）, Kaohsiung City（高雄市）, Taiwan Province（台灣省）.**

HOLDING: The Provisional Act Governing the Monopolistic Sale on Cigarettes and Wines in Taiwan Province became applicable to all the cities and counties within the jurisdiction of the Taiwan Province when the statute was promulgated on July 7, 1953. Even with the upgrading of Kaohsiung City to a municipal-

解釋文：中華民國四十二年七月七日公布施行之台灣省內菸酒專賣暫行條例，係以當時包括高雄市在內之台灣省所屬各縣市為施行區域，此項法律施行區域未依法定程序變更前，仍應繼續適用於改制後之高雄市。

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* Translated by Nigel N.T. Li, Lee and Li, Attorneys-at-Law.

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

ity under the direct jurisdiction of the Central Government, the areas to which this law applies shall remain the same until an amendment is promulgated.

REASONING: The Provisional Act Governing the Monopolistic Sale on Cigarettes and Wines in Taiwan Provinces (hereinafter "the Act") became applicable to all the cities and counties within the jurisdiction of the Taiwan Province when this law was promulgated on July 7, 1953. Kaohsiung City became a municipality under the direct jurisdiction of the Central Government on July 1, 1979. Nonetheless, the areas to which the Act applies shall remain the same. Until an amendment is promulgated, Kaohsiung City shall remain subject to the Act. According to Article 1, Paragraph 2, of the "Principles of the Application and Reformation of Central and Local Laws and Regulations after the Upgrading of Kaohsiung City to a Municipality" announced by the Executive Yuan in its Letter (Tai 68 Nei No. 6008), any central government laws or regulations whose titles contain the term "Taiwan Province Area," "in the

解釋理由書：中華民國四十二年七月七日公布施行之台灣省內菸酒專賣暫行條例係以當時包括高雄市在內之台灣省所屬各縣市為施行區域，高雄市於六十八年七月一日改制為直轄市後，此項法律施行區域並未改變，在未依法定程序變更前，上開條例仍適用於改制後之高雄市。行政院台六十八內字第六〇〇八號函發布之「高雄市改制後中央及地方法令規章適用及整理原則」，其第一項第二款所稱：中央法令冠有「台灣省區」、「台灣省內」、「台灣省」名稱者，於改制後之高雄市繼續適用，就台灣省內菸酒專賣暫行條例而言，符合該條例之立法原意，於中央法規標準法第十五條亦無違背，惟因行政區域變更，致法規名稱與施行區域不符者，宜由有關機關從速依法檢討修正，俾名實相符，併此指明。

Taiwan Province," or "Taiwan Province" shall remain applicable to Kaohsiung City after its upgrade. This announcement is in line with the legislative purpose of the Act and does not violate Article 15 of the Standard Act for the Laws and Rules. However, given the fact that the administrative area has been changed, the actual areas that are subject to this law are different from those indicated by the title of the Act. Therefore, the relevant authorities should amend the Act as soon as possible to avoid further confusion.

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋鄭大法官健才提出不同意見書。

J. Y. Interpretation No.240（May 12, 1989）*

ISSUE: Is Article 162 of the Code of Civil Procedure constitutional in providing that, in calculating the statutory period, the time needed for traveling to the court by a party residing outside the venue of the court, said time shall be deducted from such period unless the party has an agent *ad litem* inside the venue of the court?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條、第二十三條）; Article 70, Paragraph 1, Proviso, Article 162, Paragraph 1 and Article 440 of the Code of Civil Procedure（民事訴訟法第七十條第一項但書、第一百六十二條第一項、第四百四十條）.

KEYWORDS:

time for journey to the court（在途期間）, statutory period（法定期間）, venue of the court（法院所在地）, agent *ad litem*（訴訟代理人）, right to the benefit of justice（司法上受益權）, proviso（但書）.**

HOLDING: The Code of Civil Procedure provides in Article 162, Paragraph 1, that "where a party resides out

解釋文：民事訴訟法第一百六十二條第一項規定：「當事人不在法院所在地住居者，計算法定期間，應扣除

* Translated by Raymond T. Chu.

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

side the venue of the court, the time for his journey to promulgated on July 7, 1953. Even with the upgrading of Kaohsiung City to a the court shall be deducted from the statutory period when calculating such period provided, however, that this does not apply where the party has an agent *ad litem* residing inside the venue of the court capable of carrying out all the litigation acts required to be done within such period." The proviso is intended to make the statutory period practically the same length for all parties to carry out the litigation acts so that there will be no adverse effect on the exercise of the people's right of instituting legal proceedings. It is thus not in conflict with Articles 16 and 23 of the Constitution..

其在途之期間。但有訴訟代理人住居法院所在地，得為期間內應為之訴訟行為者，不在此限」。其但書部分，乃為求當事人為訴訟行為之法定期間實際相同，於人民訴訟權之行使不生影響，與憲法第十六條、第二十三條並無牴觸。

REASONING: The right of instituting legal proceedings of the people as provided in Article 16 of the Constitution is the people's right to the benefit of justice. In other words, people have the right to bring suit to seek remedy when they suffer injury to their right, and the court, on the other hand, has the duty to try under law. Under Article 23 of the

解釋理由書：憲法第十六條所定人民之訴訟權，乃人民司法上之受益權，即人民於其權利受侵害時，有訴請救濟之權利，法院亦有依法審判之職責，惟此項權利，依憲法第二十三條之規定，為防止妨礙他人自由，避免緊急危難，維持社會秩序或增進公共利益所必要者，得以法律限制之。就民事訴訟法第四百四十條所定上訴期間之限制而

Constitution, however, this right is subject to restrictions by law as may be necessary for the purpose of preventing infringement upon the freedom of others, averting an imminent crisis, maintaining social order, or furthering public interest. Thus, the restriction imposed by Article 440 of the Code of Civil Procedure on the period for appeal is meant to define the rights and duties of the parties where the period for appeal has expired and no legal appeal has been brought. Similarly, the Act provides in Article 162, Paragraph 1, that "where a party resides outside the venue of the court, the time for his journey to the court shall be deducted from the statutory period when calculating such period provided, however, that this does not apply where the party has an agent ad litem residing inside the venue of the court, capable of carrying out all the litigation acts required to be done within such period." The law is so made as to take into consideration the factor that, although the party is residing outside the venue of the court, he has appointed an agent *ad litem* residing inside the venue of the court with special authorization given under the proviso

言，乃在使當事人間權利義務關係得於上訴期間屆滿而無合法之上訴時確定。同法第一百六十二條第一項：「當事人不在法院所在地住居者，計算法定期間，應扣除其在途之期間。但有訴訟代理人住居法院所在地，得為期間內應為之訴訟行為者，不在此限」。係以當事人雖不在法院所在地住居，但有訴訟代理人住居法院所在地，且已依民事訴訟法第七十條第一項但書受有為當事人提起上訴之特別委任者，則其於收受判決後，既有權斟酌應否於法定之不變期間內為當事人提起上訴，自不應扣除在途期間，立法意旨在使距離法院路程、交通情形不盡相同之當事人，及其在法院所在地有無得為訴訟行為之人，為訴訟行為之法定期間實際相同。乃為增進公共利益所必要，且於人民訴訟權之行使不生影響，自難謂與憲法第十六條、第二十三條有何牴觸。

to Paragraph 1 of Article 70 of the Act to file an appeal on his behalf, who is empowered to use his discretion to decide upon receiving the court decision whether or not to file an appeal for the party within the statutory peremptory period. Thus, the time needed for the party to travel to the place of the court must not be deducted from the statutory period. The purpose of the law is to make the statutory period practically the same length for all parties to carry out the litigation acts, notwithstanding the difference in the distances and traffic conditions for the parties to make the journey to the court and whether or not they have any other person to carry out litigation acts for them at the place of the court. We hold that the law is essential to the furtherance of the public interest and will cause no adverse effect on the exercise of the people's right of instituting legal proceedings. It is thus not in conflict with Articles 16 and 23 of the Constitution.

J. Y. Interpretation No.241（May 26, 1989）*

ISSUE: Shall the special tax benefit of a 70% land value increment tax reduction be applied to condemned lands that had been designated for public facilities reservation prior to the amendment of the Urban Planning Act on September 6, 1973, and the government published land value was fixed then, but a transfer by inheritance occurred thereafter?

RELEVANT LAWS:

Articles 15,19, and 172 of the Constitution（憲法第十五條、第十九條及第一百七十二條）; the amendment of the Urban Planning Act on September 6, 1973（六十二年九月六日都市計畫法修正）; Article 42, Paragraph 1, of the Equalization of Land Rights Act（平均地權條例第四十二條）; Article 39, Paragraph 1, of the Land Tax Act（土地稅法第三十九條）.

KEYWORDS:

land designated for public facilities reservation（公共設施保留地）, government published land value（公告地價）, transfer by inheritance（繼承移轉）, land value at the time of transfer（移轉現值）, land value increment tax（增值稅）, principle of taxation by law（租稅法律主義）, principle of fairness（公平原則）.**

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* Translated by Huai-Ching Tsai, Esq.

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HOLDING: Ordinance T.T.S. No. 34819 (Ministry of Finance, July 25, 1977) states that: "For land that had been designated for public facilities reservation prior to the amendment of the Urban Planning Act on September 6, 1973, and because the government published land value was fixed then, but a transfer by inheritance occurred thereafter, the proviso of Article 42, Paragraph 1, of the Equalization of Land Rights Act shall not be applied upon the condemnation of said land." This is because the transfer by inheritance occurred after the amendment of the Urban Planning Act, and calculation of the capital gain for the condemnation price was based on the government published land value at the commencement of the inheritance which had been fixed beforehand, so generally the burden of land value increment tax has been lessened. Therefore, the provision for 40% land value increment tax reduction contained in the first part of Article 42, Paragraph 1, of the aforementioned Act shall be applied, and the 70% land value increment tax reduction contained in the proviso of the same Act shall not be applicable. The

解釋文：財政部中華民國六十六年七月二十五日台財稅字第三四八一九號函稱：「在六十二年九月六日都市計畫法修正公布前經編為公共設施保留地，並已規定地價；但在該法修正公布後曾發生繼承移轉者，於被徵收時，不適用平均地權條例第四十二條第一項但書規定」，係基於都市計畫法修正公布後，已有因繼承而移轉之事實，於該土地被徵收時，既以繼承開始時之公告土地現值為計算土地漲價總額之基礎，則其土地增值稅負在一般情形已獲減輕，故應依上開條例第四十二條第一項前段規定減徵土地增值稅百分之四十，不適用同條但書減徵土地增值稅百分之七十之規定。上開財政部函符合前述法條之立法意旨，於租稅法律主義及公平原則無違，並不牴觸憲法。

abovementioned Ministry of Finance's Ordinance is consistent with the legislative intent of said Act, is not in violation of the principle of taxation by law and the principle of fairness, and hence, is not unconstitutional.

REASONING: The state may condemn private land for public purpose. However, for fairness, it must compensate the land owner for the land value with complements, as well as tax benefits whenever appropriate. Article 39, Paragraph 1, of the Land Tax Act and Article 42, Paragraph 1, of the Equalization of Land Rights Act prescribe: "The land value increment tax for condemned lands shall be reduced by 40%. But the land value increment tax reduction shall be 70% for land that was designated for public facilities reservation prior to the amendment of the Urban Planning Act on September 6, 1973, and the government published land value was fixed then, but no transfer occurred after said amendment of the Urban Planning Act." The legislative intent was founded on this principle of fairness.

解釋理由書：國家因興辦公共事業之需要，得依法徵收私有土地，惟對於為公益而犧牲其權利之土地所有權人，除給予地價補償及其他補償費外，並斟酌情形給予相當之租稅優惠，以符公平原則。土地稅法第三十九條第一項及平均地權條例第四十二條第一項均規定：「被徵收之土地，其土地增值稅一律減徵百分之四十。但在中華民國六十二年九月六日都市計畫法修正公布前，經編定為公共設施保留地，並已規定地價，且在該次都市計畫法修正公布後未曾移轉者，其土地增值稅減徵百分之七十」，即係本於上述意旨。

The capital gain for land that has been condemned usually is calculated on the current government published land value minus the original value or prior land value at the time of transfer. If there was an inheritance of land, the prior land value at the time of transfer was the government published land value at the commencement of inheritance. According to the aforementioned Act, the land value increment tax reduction for condemned lands is generally 40%. For those lands that did not change hands after the amendment of the Urban Planning Act on September 6, 1973, the gap between the current government published land value and the original value has widened because of the time lapse. Therefore, a benefit of 70% land value increment tax reduction shall be given. If an inheritance commenced after the abovementioned date, the land value increment tax had been exempted for transfer by inheritance. Generally, the difference between the current government published land value at condemnation and prior land value at the time of transfer is smaller, and the tax burden has been lessened. Therefore, the

土地被徵收者，其土地漲價總數額之計算，通常係以被徵收時之公告土地現值，減去原規定地價或前次移轉現值為準，其經過繼承之土地，則以繼承開始時之公告土地現值作為前次移轉現值。又依上開法條規定，被徵收土地之土地增值稅，一般減徵率為百分之四十，其在中華民國六十二年九月六日都市計畫法修正公布後，未曾移轉者，因經過時間較久，徵收時之公告土地現值與原規定地價相差較大，特給予減徵百分之七十之優惠；其在前開日期以後，有繼承開始之事實者，屬於因繼承而移轉，依法已免徵土地增值稅，而徵收時之公告土地現值與前次移轉現值，在一般情形相差較小，其稅負已獲減輕，故應依一般減徵率計算土地增值稅，不適用減徵百分之七十之規定。否則，反失其平。財政部中華民國六十六年七月二十五日台財稅字第三四八一九號函，認為繼承亦屬土地移轉方式之一種，與財產權主體變更即為權利移轉之概念相符，其所稱：「在六十二年九月六日都市計畫法修正公布前經編為公共設施保留地，並已規定地價；但在該法修正公布後曾發生繼承移轉者，於被徵收時，不適用平均地權條例第四十二條第一項但書規定」，即係基於前述旨趣，符合

ordinary reduction rate for capital gain shall be applicable in lieu of the 70% reduction rate, or unfairness may result. Ordinance T.T.S.No.34819 (Ministry of Finance, July 25, 1977) regards inheritance as one method of land transfer and conforms to the concept that change in the subject of property is equal to transfer of rights. The statement that: "For land that had been designated for public facilities reservation prior to the amendment of the Urban Planning Act on September 6, 1973, and the government published land value was fixed then, but a transfer by inheritance occurred thereafter, the proviso of Article 42, Paragraph 1, of the Equalization of Land Rights Act shall not be applied upon the condemnation of said land" was derived from this viewpoint. It is consistent with the legislative intent of said Act, is not in violation of the principle of tax by law or the principle of fairness, and hence, is not unconstitutional.

首揭法條之立法意旨，於租稅法律主義及公平原則無違，並不牴觸憲法。

J. Y. Interpretation No.242（June 23, 1989）*

ISSUE: The Part of Family in the Civil Code prohibits bigamy. In case of violation of the said prohibitory provision, an interested party may petition the court for its annulment. However, if a second marriage was concluded after the spouse of the first marriage was forcibly separated from her husband or his wife during the civil war period and had no hope to be reunited under this drastic change of circumstances and this situation has lasted for decades, shall the spouse of the first marriage still be permitted to avail herself (or himself) of said prohibitory provisions to invalidate this putative marriage, thus depriving the innocent putative spouse of the rights and protections so provided in Article 22 of the Constitution?

RELEVANT LAWS:

Article 22 of Constitution（憲法第二十二條）; Articles 985 and 992 of the Civil Code（民法第九百八十五條、第九百九十二條）.

KEYWORDS:

marriage（婚姻）, monogamy（一夫一妻婚姻制度）, spouse（配偶）.**

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* Translated by Dr. Tze-Shiou Chien, Associate Research Fellow, Sun Yat-Sen Institute for Social Sciences and Philosophy, Academia Sinica.

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HOLDING: Article 985 of the Part of Family in the Civil Code before the revision of June 3, 1985, provides that "Any person who has a spouse shall not marry again." Article 992 provides that "For any marriage in violation of Article 985, interested parties may bring action asking the court to invalidate the marriage. But once the relationship of a prior marriage has ended, this request will be denied." These two articles are necessary for maintaining a monogamous society. They are not in conflict with the Constitution. However, those subsequent marriages arising from the circumstances of significant changes in the nation which caused earlier spouses to be separated and prevented their reunion inherently are different from normal ones. For these subsequent marriages having long time of actual cohabitation, if the above-mentioned Article 992 were applied to these subsequent marriages, it would significantly disrupt the family life and human relations and might lead to social disorder. This would be in conflict with Article 22 of the Constitution which provides that people's freedoms and rights shall be protected.

解釋文：中華民國七十四年六月三日修正公布前之民法親屬編，其第九百八十五條規定：「有配偶者，不得重婚」；第九百九十二條規定：「結婚違反第九百八十五條之規定者，利害關係人得向法院請求撤銷之。但在前婚姻關係消滅後，不得請求撤銷」，乃維持一夫一妻婚姻制度之社會秩序所必要，與憲法並無牴觸。惟國家遭遇重大變故，在夫妻隔離，相聚無期之情況下所發生之重婚事件，與一般重婚事件究有不同，對於此種有長期實際共同生活事實之後婚姻關係，仍得適用上開第九百九十三條之規定予以撤銷，嚴重影響其家庭生活及人倫關係，反足妨害社會秩序，就此而言，自與憲法第二十二條保障人民自由及權利之規定有所牴觸。

REASONUNG: The legislative purpose of Article 985 of the Part of Family in the Civil Code before the revision of June 3, 1985, which provides that "Any person who has a spouse shall not marry again", is to reaffirm the genuine institution of monogamy. For any marriage in violation of this article, Article 992 shall apply, which provides that "For any marriage in violation of Article 985, interested parties may bring action asking the court to invalidate this marriage. But once the relationship of a prior marriage has ended, this request will be denied." The absence of a statute of limitations on this right to bring action is not in conflict with the Constitution because allowing actions to be brought any time is necessary to maintain a monogamous society. In contrast to the revised Article 988, which renders subsequent marriages void, the Part of Family in the Civil Code before the revision only declares subsequent marriages revocable. Therefore, subsequent marriages are still valid unless they are invalidated by the court. Those subsequent marriages arising from the circumstances of significant changes in the nation which

解釋理由書：中華民國七十四年六月三日修正公布前之民法親屬編，其第九百八十五條規定：「有配偶者，不得重婚」，旨在建立一夫一妻之善良婚姻制度，其就違反該項規定之重婚，於第九百九十二條規定：「結婚違反第九百八十五條之規定者，利害關係人得向法院請求撤銷之。但在前婚姻關係消滅後，不得請求撤銷」，以資限制。此項規定，並不設除斥期間，乃在使撤銷權人隨時得行使其撤銷權，為維持一夫一妻婚姻制度之社會秩序所必要，與憲法並無牴觸。惟修正公布前民法親屬編未如修正公布後之第九百八十八條規定重婚為無效，則重婚未經撤銷者，後婚姻仍屬有效，而國家遭遇重大變故，在夫妻隔離，相聚無期，甚或音訊全無，生死莫卜之情況下所發生之重婚事件，有不得已之因素存在，與一般重婚事件究有不同，對於此種有長期實際共同生活事實之後婚姻關係，仍得適用上開第九百九十二條之規定予以撤銷，其結果將致人民不得享有正常婚姻生活，嚴重影響後婚姻當事人及其親屬之家庭生活及人倫關係，反足以妨害社會秩序，就此而言，自與憲法第二十二條保障人民自由及權利之規定，有所牴觸。至此情形，聲請人得依本院釋字第一七七號及

caused earlier spouses to be separated and prevented their reunion, or even any contact with each other, inherently, are different from normal ones. For these subsequent marriages having long time of actual cohabitation, if the above-mentioned Article 992 were applied, it would significantly disrupt the family life and human relations and might lead to social disorder. And this would be in conflict with Article 22 of the Constitution which provides that people's freedoms and rights shall be protected. Therefore, according to this Court's Interpretations Nos. 177 and 185, the petitioner of this case may request the court to retry this case.

第一八五號解釋意旨，提起再審之訴，併予說明。

Justice Tieh-Cheng Liu n filed dissenting opinion.

Justice Rui-Tang Chen filed dissenting opinion.

本號解釋劉大法官鐵錚、陳大法官瑞堂分別提出不同意見書。

J. Y. Interpretation No.243（July 19, 1989）*

ISSUE: May a public functionary who is subjected to an administrative decision of either removal from office or recording of a demerit institute an administrative litigation?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; J.Y. Interpretations Nos. 187 and 201（司法院釋字第一八七號及第二〇一號解釋）; Articles 2 and 24 of the Public Functionary Service Act（公務員服務法第二條及第二十四條）; Public Functionaries Merit Evaluation Act（公務人員考績法）; Regulation Governing the Evaluation of Performance by Members of Public School Faculty and Staff（公立學校教職員成績考核辦法）; Precedent P.T. No. 19 (Ad. Ct. 1951)（行政法院四十年判字第十九號判例）; Precedents P.T. No.398 (Ad. Ct. 1962)（行政法院五十一年判字第三九八號判例）; Precedent P.T. No. 229 (Ad. Ct. 1964)（行政法院五十三年判字第二二九號判例）; Precedent T.T. No. No. 19 (Ad. Ct. 1965)（行政法院五十四年判字第十九號判例）; Precedent P.T. No. 414 (Ad. Ct. 1968)（行政法院五十七年判字第四一四號判例）.

KEYWORDS:

right to file administrative appeal（訴願權）, right to sue（訴

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* Translated by Vincent C. Kuan.

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訟權）, right to hold public office（服公職權）, capacity pf public functionary（公務員身分）, decision of removal from office（免職處分）, disciplinary measure（懲戒處分）, administrative act（行政處分）, administrative litigation（行政爭訟）, decision of recording of a demerit（記過處分）, internal order（職務命令）.**

HOLDING: An administrative decision made by either a central or a local government authority to remove a public functionary from his office pursuant to the provisions of the Public Functionaries Merit Evaluation Act or other applicable laws and/or regulations has a direct impact on the constitutionally guaranteed right of such public functionary to hold public office. Therefore, such public functionary may, as a matter of course, exercise his right to file an administrative appeal or right to sue as provided for under Article 16 of the Constitution. Such public functionary has petitioned the competent authorities and the personnel authorities, respectively, for a review and a second review of the decision at issue pursuant to relevant laws and, by doing so

解釋文：中央或地方機關依公務人員考績法或相關法規之規定，對公務員所為之免職處分，直接影響其憲法所保障之服公職權利，受處分之公務員自得行使憲法第十六條訴願及訴訟之權。該公務員已依法向該管機關申請復審及向銓敘機關申請再復審或以類此之程序謀求救濟者，相當於業經訴願、再訴願程序，如仍有不服，應許其提起行政訴訟，方符有權利即有救濟之法理。行政法院五十一年判字第三九八號、五十三年判字第二二九號、五十四年裁字第十九號、五十七年判字第四一四號判例與上開意旨不符部分，應不再援用。至公務人員考績法之記大過處分，並未改變公務員之身分關係，不直接影響人民服公職之權利，上開各判例不許其以訴訟請求救濟，與憲法尚無牴觸。

or resorting to other similar procedures to petition for relief, an administrative appeal and re-appeal proceeding should be deemed to have been sought. If such public functionary is not satisfied with the decisions of the aforesaid authorities, he should be allowed to institute an administrative litigation so as to bring the matter in line with the legal principle that there is a remedy where there is a right. Those portions of the opinions, as given in Precedents P.T. No. 398 (Ad. Ct. 1962), P.T. No. 229 (Ad. Ct. 1964), T.T. No. 19 (Ad. Ct. 1965) and P.T. No. 414 (Ad. Ct. 1968), which are not in line with the intent described above, should no longer be cited and applied. In respect of the decision of a major demerit made under the Public Functionaries Merit Evaluation Act, since the capacity of a public functionary is not altered thereby and, thus, no right of a national to hold public office is directly affected, the aforesaid Precedents, in denying the public functionary his right to seek relief through litigation, are not in violation of the Constitution.

Precedent P.T. No. 19 (Ad. Ct. 1951) 行政法院四十年判字第十九號判

is intended to interpret the application of Articles 2 and 24 of the Public Functionary Service Act. The internal order at issue was given by a superior agency within the parameters of its power of supervision, but was not an unfavorable disposition that would affect the capacity of the public functionary, who was not entitled to sue for relief in connection therewith. The said Precedent is not unconstitutional.

例，係對公務員服務法第二條及第二十四條之適用，所為之詮釋，此項由上級機關就其監督範圍內所發布之職務命令，並非影響公務員身分關係之不利益處分，公務員自不得訴請救濟，此一判例，並未牴觸憲法。

REASONING: Under Article 77 of the Constitution, the discipline of a public functionary is a power entrusted to the Judicial Yuan, under which the Committee on the Discipline of Public Functionaries is established to take charge of disciplinary matters. A decision to remove a public functionary from his office is, in essence, a disciplinary action regardless of the language used in rendering such decision. Whether the exercise of such power and authority and the provision of administrative relief are adequate under the Constitution is a question for the relevant authorities to answer after a comprehensive and thorough review of the current practice and the appropriate adjustment

解釋理由書：公務員之懲戒，依憲法第七十七條規定，屬於司法院職權範圍，司法院設有公務員懲戒委員會，為主管懲戒事項之司法機關。對於公務員所為具有懲戒性質之免職處分，不論其形式上用語如何，實質上仍屬懲戒處分，此項權限之行使及其救濟程序如何規定，方符憲法之意旨，應由有關機關通盤檢討，而為適當之調整。

thereof.

Whether a public functionary who is subjected to an administrative decision may institute an administrative litigation depends on the subject matter of such decision, as has been made clear in J.Y. Interpretations Nos. 187 and 201. An administrative decision made by either a central or a local government authority to remove a public functionary from his office pursuant to the provisions of the Public Functionaries Merit Evaluation Act or the Regulation Governing the Evaluation of Performance by Members of Public School Faculty and Staff has a direct impact on the constitutionally guaranteed right of such public functionary to hold public office. Before the relevant laws are properly amended or modified, any public functionary who is subjected to such disposition may, as a matter of course, exercise his right to file an administrative appeal and right to sue as guaranteed under Article 16 of the Constitution by petitioning a judicial authority for relief.

因公務員身分受行政處分得否提起行政爭訟，應就處分之內容分別論斷，業經本院釋字第一八七號及第二〇一號解釋闡釋在案，中央或地方機關依公務人員考績法或公立學校教職員成績考核辦法，對公務員所為之免職處分，直接影響其憲法所保障服公職之權利，在相關法律修正前，受處分之公務員自得行使憲法第十六條訴願及訴訟之權，於最後請求司法機關救濟。

The public functionary has petitioned

受免職處分之公務員已依法向該

the competent authorities and the personnel authorities, respectively, for a review and a second review of the decision at issue pursuant to relevant laws and, by doing so or resorting to other similar procedures to petition for relief, an administrative appeal and re-appeal proceeding should be deemed to have been sought. If such public functionary is not satisfied with the decisions of the aforesaid authorities and believes that his lawful rights have been infringed upon thereby, he should be allowed to bring an administrative litigation so as to bring the matter in line with the legal principle that there is a remedy where there is a right. Precedent P.T. No. 398 (Ad. Ct. 1962) says, "According to Article 1 of the Administrative Appeal Act, no administrative appeal may be instituted unless any right or interest of a person is infringed upon as a result of an inequitable or illegal disposition made by either a central or a local government agency. In respect of the disciplinary measure received by a public functionary, regardless of the level of the government in which such public functionary is serving, in his capacity as a public function-

管機關申請復審及向銓敘機關申請再復審，或以類此之程序謀求救濟者，相當於業經訴願、再訴願程序，如仍認為原處分、再復審核定或類似之決定違法損害其權利，應許其提起行政訴訟，方符有權利即有救濟之法理。行政法院五十一年判字第三九八號判例：「依訴願法第一條規定，提起訴願，唯人民對於中央或地方官署所為不當或違法之處分致損害其權利或利益者，始得為之。至各級公務人員以公務員身分所受主管官署之懲戒處分，則與以人民身分因官署處分而受損害者有別，自不得對之提起訴願。」五十三年判字第二二九號判例：「公務員以公務員身分受行政處分，純屬行政範圍，非以人民身分因官署處分受損害者可比，不能按照訴願程序提起訴願，原告現雖解職，已無公務人員身分，但該項處分既係基於原告之公務人員關係而發生，自仍不能視其為人民受官署之處分而許其對之提起訴願。」五十四年裁字第十九號判例：「行政訴訟之提起，須以官署對人民之處分違法，致損害其權利，經過訴願再訴願而不服其決定者，始得為之。原告以公務人員身分，而受主管官署人事行政上之處分，顯與以人民身分受官署違法處分而損害其權利之情形有別，除有正當理由

ary, no such administrative appeal may be brought in connection therewith because such measure differs in its nature from the disposition made by a government agency which infringes upon the rights of anyone as a civilian." Precedent P.T. No. 229 (Ad. Ct. 1964) states, "An administrative act subjecting a public functionary to any disciplinary action in his capacity as a public functionary is purely a matter of administrative discretion, which is not comparable to a disposition made by a government agency which infringes upon the rights of anyone as a civilian, and, as such, no administrative appeal may be instituted under any administrative appeal proceedings in respect thereof. In spite of the discharge of the Plaintiff from his office and, consequently, loss of his capacity as a public functionary, no administrative appeal may be filed by the Plaintiff, who should not be regarded as a civilian having been subjected to an administrative decision made by a government agency, because the administrative act at issue occurred at a time when the Plaintiff was still a public functionary." "An administrative suit may not be brought

得向該管監督官署呈請糾正外，自不得依行政訴訟程序以求救濟，且考試院秘書處之通知，亦並非適用訴願程序所為之訴願決定，乃原告遽向本院提起行政訴訟，其起訴自非合法。」五十七年判字第四一四號判例：「公務人員以公務員身分受主管官署或上級官署之處分，純屬人事行政範圍，與以人民身分受官署之處分有別，不得對之提起訴願。」均未分別行政處分之內容，一概限制公務員依法提起訴願及行政訴訟之權利，上開各判例與前述意旨不符部分，應不再援用。至依公務人員考績法僅記大過之處分，並未改變公務員之身分關係，不直接影響人民服公職之權利，上開各判例不許其以訴訟請求救濟，與憲法尚無牴觸。

unless and until a plaintiff has filed an administrative appeal and, subsequently, an administrative re-appeal against such government agency as has made an illegal disposition which infringed upon the right of such plaintiff who is not satisfied with the decisions rendered therein. The Plaintiff, in his capacity as a public functionary, was subjected to an administrative act in respect of personnel administration, which is apparently different from the situation where a disposition made by a government agency infringes upon the right of anyone as a civilian. Other than filing with the relevant supervising authorities in charge of the matter at issue for a corrective decision in regard thereto, no administrative litigation procedure should be resorted to for relief. As an additional note, the notice given by the Secretariat of the Examination Yuan is not a decision made under the procedure applicable to an administrative appeal and, therefore, the Plaintiff has erred in bringing an unlawful administrative suit in this Yuan," so reasoned the court in Precedent T.T. No. 19 (Ad. Ct. 1965). And, finally, Precedent P.T. No. 414 (Ad. Ct. 1968)

restated, "An administrative act subjecting a public functionary to any disciplinary action in his capacity as a public functionary is purely a matter of administrative discretion, which should be distinguished from a disposition made by a government agency which infringes upon the rights of anyone as a civilian, and, as such, no administrative appeal may be instituted against such agency in respect thereof." None of the aforesaid Precedents has tried to distinguish between contents of the administrative acts but, instead, has restricted the right of a public functionary to file an administrative appeal legally and to bring an administrative litigation altogether. Those portions of the opinions as given in such Precedents, which are not in line with the intent described above, should no longer be cited and applied. In respect of the mere decision of a major demerit made under the Public Functionaries Merit Evaluation Act, since the capacity of a public functionary is not altered thereby and, thus, no right of a national to hold public office is directly affected, the aforesaid precedents, in denying the public functionary his right to seek

relief through litigation, are not in violation of the Constitution.

Precedent P.T. No. 19 (Ad. Ct. 1951) states, "The capacity of a public functionary is different from that of a civilian in that a public functionary at a lower level has a duty to obey any order given by his superior agency-in-charge within the scope of its power of supervision and no administrative appeal may be filed under the Administrative Appeal Act in respect of such order. A teacher or member of the staff of a high school or primary school who is appointed by law and/or order and rewarded with remuneration is a public functionary within the meaning of the Public Functionary Service Act, but such is not the case with a hired teacher or staff member." The foregoing Precedent is intended to interpret the application of Articles 2 and 24 of the Public Functionary Service Act. The internal order at issue was given by a superior agency within the parameters of its power of supervision, but was not an unfavorable disposition that would affect the capacity of the public functionary, who was not entitled

行政法院四十年判字第十九號判例：「公務員之身分與人民身分不同，下級公務員對於該管上級官署，就其監督範圍內所發布之命令，有服從之義務，不得援引訴願法提起訴願。依法令委任之中小學教職員，受有俸給者，為公務員服務法上之公務員，聘任之教職員則否。」係對公務員服務法第二條及第二十四條之適用，所為之詮釋，此項由上級機關就其監督範圍內所發布之職務命令，並非影響公務員身分關係之不利益處分，公務員自不得訴請救濟，此一判例並未牴觸憲法。

to sue for relief in connection therewith. The said Precedent is not unconstitutional.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

Justice Chih-Peng Lee filed dissenting opinion, in which Justice Chung-Sheng Lee joined.

本號解釋鄭大法官健才提出一部不同意見書；李大法官志鵬、李大法官鐘聲共同提出不同意見書。

J. Y. Interpretation No.244（July 26, 1989）*

ISSUE: Is the Supreme Administrative Court precedent constitutional in holding that opinions of the law delivered by a court are not material objects admissible as evidence to support an action for retrial under the Code of Civil Procedure?

RELEVANT LAWS:

Article 492, Paragraph 1, Subparagraphs 9, 10 and 11 of the Code of Civil Procedure before amended on February 1, 1968（中華民國五十七年二月一日修正前民事訴訟法第四百九十二條第一項第九款、第十款、第十一款）; Supreme Administrative Court's Precedent T.T. 36 (Supreme Administrative Court 1966)（行政法院五十五年裁字第三六號判例）; J.Y. Interpretation No. 110（司法院釋字第一一〇號解釋）; Interpretation Yuan-Tzu No. 2704（司法院院字第二七〇四號解釋）.

KEYWORDS:

action for retrial（再審之訴）, material objects admissible as evidence（物證）, just compensation（補償地價）, stability of the order of law（法律秩序之安定性）, opinion of the law（法律上見解）, settlement（和解）, mediation（調解）, peremptory period（不變期間）.**

* Translated by Raymond T. Chu.

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

HOLDING: The Supreme Administrative Court's holding in its Precedent T.T. 36 (Supreme Administrative Court, 1966) that opinions of the law are not material objects admissible as evidence to support an action for retrial under Article 492, Paragraph 1, Subparagraph 11, of the Code of Civil Procedure before it was amended on February 1, 1968, is not in conflict with the Constitution. Apropos, it must be pointed out that upon amendments made on February 1, 1968, and December 12, 1975, respectively, to the Code of Civil Procedure and the Administrative Proceedings Act, "clearly erroneous in the application of law in an irrevocable judgment" is made admissible as one of the reasons by which actions for retrial may be brought.

解釋文：行政法院五十五年度裁字第三十六號判例，認法律上之見解，非為中華民國五十七年二月一日修正前民事訴訟法第四百九十二條第一項第十一款所稱之證物，不得據以提起再審之訴，與憲法並無牴觸。惟民事訴訟法及行政訴訟法於五十七年二月一日及六十四年十二月十二日相繼修正後，已將確定判決適用法規顯有錯誤，列為再審理由，併予指明。

REASONING: An action for retrial is a proceeding whereby an objection is filed to an irrevocable final judgment, and it is necessary that reasonable restriction be placed on such action for the purpose of maintaining the stability of the order of law. The Supreme Administrative Court held in its Precedent T.T. 36 (Su-

解釋理由書：按提起再審之訴，乃對於確定終局判決聲明不服之程序，為顧及法律秩序之安定性，自應作相當之限制。行政法院五十五年度裁字第三十六號判例稱：「依司法院大法官會議議決釋字第一一〇號及司法院院字第二七〇四號解釋所示意旨，原祇謂需用土地人不依規定期限繳交補償地價及

preme Administrative Court, 1966): "J.Y. Interpretation No. 110 delivered upon resolution of the Grand Justices Council Adjudication Act and Interpretation Yuan-Tze 2704 of the Judicial Yuan mean essentially that if the land condemner fails to pay just compensation and other compensatory fees within the specified time limit the original approval granted to the condemnation shall be construed to have become no longer effective, rather than intended to render the original condemnation unlawful. Such opinion of the law cannot be deemed to be a material object admissible as evidence under Article 492, Paragraph 1, Subparagraph 11, of the Code of Civil Procedure, nor is it comparable with an irrevocable adjudication or administrative act referred to in Subparagraph 9 of the same article and paragraph or an irrevocable judgment, settlement, or mediation referred to in Subparagraph 10 thereof. Now that the plaintiff in retrial, in instituting this proceeding of retrial, has no legal cause of action for the retrial, and furthermore, because this action is instituted after a lapse of over one year since the original judgment was served, there is

其他補償費時，原徵收土地核准案應解為從此失其效力，並不解為原徵收處分因此認為違法，且此種法律上之見解，亦不能認為民事訴訟法第四百九十二條第一項第十一款所稱之證物，尤非同條項第九款所指之確定裁判或行政處分及第十款所指之確定判決或和解調解可比。再審原告提起本件再審之訴，原不具備法定再審之原因，且距原判決送達時已逾年餘之久，自亦無從主張提起再審之訴之不變期間可自事由發生或知悉時起算，其遽行提起再審之訴，自難認為合法。」此項判例之主要意旨，乃在揭示法律上之見解，與以物之存在或狀態為資料之物證有別，不得以之作為發見未經斟酌之證物而提起再審之訴，並非不許依法定再審理由提起再審之訴，與憲法自無牴觸。惟民事訴訟法及行政訴訟法於中華民國五十七年二月一日及六十四年十二月十二日相繼修正後，已將確定判決適用法規顯有錯誤，列為再審理由，併予指明。

no ground for him to argue that the peremptory period for instituting an action for retrial begins to run from the time the facts occur or are known to him. His institution of this action for retrial in such circumstances is thus legally non-permissible." The main purpose of the decision is to make it clear that an opinion of the law is different from a material object to be used as evidence, which gives information by the physical existence or condition of the object, and is not admissible as a discovered but unconsidered piece of evidence to support an action for retrial. As the decision does not debar the institution of a proceeding of retrial on legal cause of action for retrial, it is therefore not in conflict with the Constitution. Apropos, it must be pointed out that upon amendments made on February 1, 1968, and December 12, 1975, respectively, to the Code of Civil Procedure and the Administrative Proceedings Act, "clearly erroneous in the application of law" in an irrevocable judgment is made admissible as one of the reasons by which actions for retrial may be brought.

J. Y. Interpretation No.245（July 28, 1989）*

ISSUE: Is it legally sound for a court to instruct directly on its own motion to convert an imprisonment penalty to a fine sanction in its decision revoking a prosecutorial order that disapproved the application for the conversion?

RELEVANT LAWS:

Article 41 of the Criminal Code（刑法第四十一條）; Articles 384, 457, 480, 484 and 486 of the Code of Criminal Procedure（刑事訴訟法第三百八十四條、四百五十七條、第四百八十條、第四百八十四條、第四百八十六條）; J. Y. Interpretations No. Yuan-jieh-tzi 2939（司法院院解字第二九三九號解釋）; J. Y. Interpretations No. Yuan-tzi 1387（司法院院字第一三八七號解釋）.

KEYWORDS:

Penalty conversion（刑之易科）, to convert an imprisonment penalty to a fine sanction（易科罰金）, to file an objection（聲明異議）, a prosecutorial order； an order rendered by a prosecutor（檢察官命令）. **

HOLDING: According to Article 384 of the Code of Criminal Procedure (hereinafter the "CCP"), an objection can

解釋文：受刑人或其他有異議權人對於檢察官不准易科罰金執行之指揮認為不當，依刑事訴訟法第四百八十

* Translated by TSAI Chiou-ming, Head Public Prosecutor.

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

be filed in the trial court that rendered a conviction and a sentence of imprisonment, by a prisoner or whoever is otherwise entitled to object to a prosecutorial order that had previously disapproved the application for converting an imprisonment penalty to a fine sanction. Two types of remedy are available for the court when an objection with sound reason is filed on the ground that the prosecutorial disapproval order is inappropriate. As the court finds merits in revoking the prosecutorial order, the public prosecutor will be informed to redeliver his/her order to effect the reversal decision asked for. As an alternative, the court may directly instruct on its own motion a conversion of penalty in its decision. Such case is distinct from the cases which invoked the J. Y. Interpretations Nos. Yuan-jieh-tzi 2939 and Yuan-tzi 1387.

四條向諭知科刑裁判之法院聲明異議，法院認為有理由而為撤銷之裁定者，除依裁定意旨得由檢察官重行為適當之斟酌外，如有必要法院自非不得於裁定內同時諭知准予易科罰金，此與本院院解字第二九三九號及院字第一三八七號解釋所釋情形不同。

REASONING: The discretion of approval for converting an imprisonment penalty into a fine sanction, which is provided by Article 41 of the Criminal Code, is in nature a prosecutorial power in the light of Article 457 of the CCP. How-

解釋理由書：刑法第四十一條易科罰金之換刑處分應否准許，依刑事訴訟法第四百五十七條之規定，固由檢察官指揮之，而屬於檢察官之職權。惟檢察官指揮執行如有不當，為保障受刑人之利益，刑事訴訟法第四百八十四

ever, if the prosecutorial discretion is exercised inappropriately, the law can intervene and offer remedies. Thus, Articles 480 and 486 of the CCP provide, respectively: “A prisoner, his legal representative or spouse may file an objection in the trial court, which rendered the conviction decision with sentence, on the ground that the prosecutorial discretion on penalty conversion had not been exercised appropriately.” ;and “The trial court should make a decision on the objection.” Since the law obligates the sentencing court to decide on the merits of the objection and no restriction is imposed on the court in terms of the approach in making its decision, more than one type of remedy may be available. When the court finds the objection is to be sustained, it must revoke the prosecutorial order that disapproved the application for penalty conversion. To serve the relief of the applicants requesting penalty conversion, the court may either reserve for the public prosecutor a chance to reconsider his/her discretion or instruct on its own motion of the penalty conversion in its decision. The rationale is the same as that in Article 416 of the

條、第四百八十六條分別規定：「受刑人或其法定代理人或配偶以檢察官執行之指揮為不當者，得向諭知該裁判之法院聲明異議」；「法院應就異議之聲明裁定之」。法律既規定此項異議歸由法院裁定，又未限制法院之裁定內容，則受刑人或其他有異議權人對於檢察官不准易科罰金執行之指揮聲明異議，經法院認為異議有理由而為撤銷檢察官指揮之裁定者，除依裁定意旨，得由檢察官重行為適當之斟酌外，如有必要法院自非不得於裁定內同時諭知准予易科罰金，以達救濟目的。此與同法第四百一十六條，關於法院得撤銷或變更檢察官處分之規定，具有同一之法律上理由。

CCP, which provides the judicial power for altering or revoking a prosecutorial order.

As for the interpretation: "If the trial judge ordered the accused to pay the converted fine and turned in a judicial certificate showing the payment of the fine right after his/her declaration of conviction with an imprisonment penalty, it would be difficult to consider the execution of decision a sound one. If the court indicated in the decision reasoning that the accused should be allowed the conversion of the penalty to a fine, the public prosecutor is not bound by such decision while executing the sentence" as held by Interpretation Yuan-jieh-tzi No.2939, it was made with a view to clarifying that the discretional power over the execution of penalty is a discretion reserved by law for the public prosecutor, and that whether or not any execution difficulty is posed is a matter to be considered and decided by the public prosecutor, taking into account the factual surroundings at the time of execution. In addition, the interpretation: "As to the penalty conversion to fine provided by

至本院院解字第二九三九號解釋所謂：「此項易科罰金，如推事於宣示判決後，逕命被告繳納並黏貼司法印紙，自難認為合法之執行，至判決書僅於理由內說明被告應為易科罰金，檢察官執行時，自不受其拘束」，旨在釋示判決之執行為檢察官之職權，執行是否顯有困難，由檢察官就執行時之事實斟酌之。又本院院字第一三八七號解釋「刑法第四十一條之易科罰金，法院祇須依刑事訴訟法第三百零一條第二款於判決主文中諭知其折算標準，無庸就執行有無困難預為認定」，亦係釋示得否易科罰金，應就執行時之事實斟酌之。此與執行異議程序，法院為撤銷檢察官指揮之裁定，得同時准予易科罰金之情形不同。

Article 41 of the Criminal Code, the court has to instruct as to the conversion rate between different penalties, but it does not need to decide in advance whether there exists any difficulty with the penalty execution (as the pre-condition for a penalty conversion)" as held by Yuan-tzi Interpretation No.1387, means to clarify that the availability of fine conversion depends on the facts surrounding the penalty execution. Neither the Yuan-jieh-tzi Interpretation nor the Yuan-tzi Interpretation involves the case of an objection filed against penalty execution where the trial court may revoke the prosecutorial decision against fine conversion in the mean time permitting the application for penalty conversion.

J. Y. Interpretation No.246（September 29, 1989）*

ISSUE: The interpretative letter issued by the Ministry of Civil Service states that the monthly salary used as a basis for calculating retirement pension or old-age benefits under the Public Functionaries Insurance Act does not include work allowance, full attendance allowance for military staffers and supervisors' allowance. Is said letter repugnant to the meaning and purpose of Articles 22, 155 and 172 of the Constitution?

RELEVANT LAWS:

Article 8, Paragraph I of Public Functionaries Retirement Act（公務人員退休法第八條第一項）; Article 24 of the Public Functionaries Insurance Act（公務人員保險法第二十四條）; Article 15, Paragraph I of the Enforcement Rules of the Public Functionaries Insurance Act（公務人員保險法施行細則第十五條第一項）; Article 7 of the Public Functionaries Remuneration Act（公務人員俸給法第七條）.

KEYWORDS:

scope of discretion（裁量範圍）, retirement（退休）, pension（退職金）. **

HOLDING: While public functionaries have legal rights to claim pension and seniors' insurance, the payment

解釋文：公務人員之退休及養老，依法固有請領退休金及保險養老給付之權利，惟其給付標準如何，乃屬立

* Translated by Pijan Wu.

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

standards are a matter of legislative policy to be stipulated by laws or regulations delegated by laws. Regarding the payable amount of pension under the item of "Other Cash Pay" as provided in Article 8, Paragraph 1, of the Public Functionaries Retirement Act, paragraph 2 of the same Article stipulates that the Examination Yuan shall set the standards in collaboration with the Executive Yuan. Accordingly, Article 24 of the Public Functionaries Insurance Act delegates its Enforcement Rules to provide (in Article 15, Paragraph 1) that "the monthly pay or the current-month pay for the insured, as referred to in Articles 8 and 14 of the Act [the Public Functionaries Insurance Act] is temporarily set according to the monthly pay standard for government employees and teachers." Article 7 of the Regulation Governing the Payment of Remuneration to Military, Public and Teaching Personnel, promulgated by the Executive Yuan on June 12, 1981, provides that work allowance, full attendance allowance for military staff and supervisors' allowance shall not be included when calculating the civil (military) re-

法政策事項，仍應由法律或由法律授權之命令定之。公務人員退休法第八條第二項就同條第一項所稱「其他現金給與」之退休金應發給數額，授權考試院會同行政院定之。公務人員保險法第二十四條授權訂定之同法施行細則第十五條第一項規定「本法第八條及第十四條所稱被保險人每月俸給或當月俸給，暫以全國公教人員待遇標準支給月俸額為準」，而中華民國七十年六月十二日行政院訂頒之全國軍公教人員待遇支給辦法第七條則對工作津貼及軍職幹部服勤加給、主官獎助金，不列入退休（役）保險俸額內計算，以及對於不服勤人員不予支給加以規定，乃係斟酌國家財力、人員服勤與否或保險費繳納情形等而為者，尚未逾越立法或立法授權之裁量範圍，與憲法並無牴觸。至行政院台五十九人政肆字第一七八九七號函載「因案停職人員在停職期間，既未正式服勤，關於停職半薪及復職補薪，均不包括工作補助費計支」，則係兼顧有服勤工作始應支給補助費之特性所為之說明，與憲法亦無牴觸。

tirement insurance and that allowances shall not be paid to those who do not actually discharge the duties. The above rules do not exceed the scope of discretion embodied in the laws or the delegated regulations and thus do not violate the Constitution since they are based on the financial status of the country, on the actual conditions of services, and on the payment of insurance premiums. Likewise, the ordinance made in the Executive Yuan letter (Letter No.Tai- (59)Ren-Jung-Sze-Tze 17897) stating that "the half pay for a public functionary during his/her suspension period and the reimbursement pay upon his/her reinstatement shall not include work allowance since he/she did not actually discharge the duties" is consistent with the Constitution because it is merely an explanation of the concept that work allowance is only for those who actually discharge their duties.

REASONING: The State enacts laws establishing the retirement and pension programs for public functionaries under the mandate of Article 83 of the Constitution. Therefore, public function-

解釋理由書：國家基於憲法第八十三條規定之意旨，制定法律，建立公務人員退休及養老制度。公務人員依法固有請領退休金及保險養老給付之權利，惟其給付標準如何，乃屬立法政策

aries have legal rights to claim pension and seniors' insurance. However, the payment standards are a matter of legislative policy to be stipulated by laws or regulations delegated by laws. Regarding the payable amount of pension under the item of "Other Cash Pay" as provided in Article 8, Paragraph 1, of the Public Functionaries Retirement Act, paragraph 2 of the same article stipulates that the Examination Yuan shall set the standards in collaboration with the Executive Yuan. Accordingly, Article 24 of the Public Functionaries Insurance Act delegates its Enforcement Rules to provide (in Article 15, Paragraph I) that "the monthly pay or the current-month pay for the insured, as referred to in Articles 8 and 14 of the Act [the Government Employee Insurance Act] is temporarily set according to the monthly pay standard for government employees and teachers." The Public Functionaries Remuneration Act, before or after its amendment on July 16, 1986, also mandated that the competent authority shall set the standards of various allowances and the criteria for converting credits into remuneration. In order to im-

事項，仍應由法律或由法律授權之命令定之。公務人員退休法第八條第二項就同條第一項所稱「其他現金給與」之退休金應發給數額，授權考試院會同行政院定之。公務人員保險法第二十四條授權訂定之同法施行細則第十五條第一項規定：「本法第八條及第十四條所稱被保險人每月俸給或當月俸給，暫以全國公教人員待遇標準支給月俸額為準」；公務人員俸給法於中華民國七十五年七月十六日修正前後，關於公務員之各種加給及俸點折算俸額標準，亦均有授權主管機關訂定之規定，行政院為實施此項法律，於中華民國七十年六月十二日修正發布全國軍公教人員待遇支給辦法，其第七條則對工作津貼及軍職幹部服勤加給、主官獎助金，不列入退休（役）保險俸額內計算，以及對於不服勤人員不予支給」加以規定；銓敘部並曾先後作相關函示（銓敘部(67) 台楷特二字第〇五七九號函、(68) 台楷特三字第二三四八三號函）；均係斟酌國家財力、人員服勤與否或為計算養老給付基礎之保險費繳納情形等而為者，得視國民經濟狀況而調整，並非一成不變，尚未逾越立法或立法授權之裁量範圍，與憲法並無牴觸。至行政院台五十九人政肆字第一七八九七號函載「因案停職人

plement this law, the Executive Yuan amended the Regulation Governing the Payment of Remuneration to Military, Public and Teaching Personnel on June 12, 1981, Article 7 of which provides that work allowance, full attendance allowance for military staff and supervisors' allowance shall not be included when calculating the civil (military) retirement insurance and that allowances shall not be paid to those who do not actually discharge the duties. On these points, the Ministry of Civil Service has also given directives (Letter No. (67)Tai-Kai-Te-Er-Tze 0579 and (68) Tai-Kai-Te-Sen-Tze 2348). The above rules and directives do not exceed the scope of discretion embodied in the laws or the delegated regulations and thus do not violate the Constitution since they are based on the financial status of the country, on the actual conditions of services, and on the payment of insurance premiums relating to the seniors' program. In other words, the above rules and directives are flexible for they are set and adjusted based on the economic situations of the citizens. Likewise, the ordinance made in the Executive Yuan

員在停職期間，既未正式服勤，關於停職半薪及復職補薪，均不包括工作補助費計支」，則係兼顧因工作而支給補助費之特性所為之說明，與憲法亦無牴觸。

letter (Letter No. Tai- (59) Ren-Jung-Sze-Tze 17897) stating that "the half pay for a public functionary during his/her suspension period and the reimbursement pay upon his/her reinstatement shall not include work allowance since he/she did not actually discharge the duties is consistent with the Constitution because it is merely an explanation of the concept that work allowance is only for those who actually discharge their duties.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.247（October 27, 1989）*

ISSUE: Is the order issued by the Ministry of Finance, providing to the effect that investigation, re-collection and discretionary fines may still be conducted or imposed on a taxpayer whose declared amount exceeds the criteria for incomes, unconstitutional?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 80, 103 and 110 of the Income Tax Act（所得稅法第八十條、第一百零三條、第一百十條）; Articles 21 and 30 of the Tax Levy Act（稅捐稽徵法第二十一條、第三十條）; Articles 3 and 4 of the Regulation Governing the Cases Randomly Selected for Reviewing on Profit-making-Enterprise Tax Return（營利事業所得稅結算申報書面審核案件抽查辦法第三條及第四條）; Article 2 of the Regulation Governing the Assessment of Income Tax Returns of Profit-making Enterprises（營利事業所得稅結算申報查核準則第二條）; Tai Tsai Suei Tze Ordinance No. 23798（台財稅字第二三七九八號令）.

KEYWORDS:

taxation agency（稽徵機關）, simplifying the taxation procedures（簡化稽徵手續）, honest filing of income taxes（誠實申報）, collecting taxes evaded and rendering a fine（補徵及裁罰）, evasion, omission, or under-reporting of taxable income（匿報、短報或漏報）.**

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* Translated by Chi-chang Yu.

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

HOLDING: When the taxation agency determines the income standard of each trade according to Paragraph 2, Article 80, of the Income Tax Act, and the taxpayer's reported amount is above such standard, the reported income shall be taken as the basis for taxation pursuant to Paragraph 3 of the same Article. The purpose of this rule is to simplify the taxation procedures for the conveniences of both the taxation agency and the taxpayer. However, it does not mean that the taxpayer is exempt from the honest filing of income taxes. The taxation agency may investigate taxation records and documentation, collect evaded taxes, and render a fine in cases of evasion, omission, or under-reporting of taxable income, pursuant to Articles 103 and 110 of the Income Tax Act and Articles 21 and 30 of the Tax Levy Act . The Regulation Governing the Cases Randomly Selected for Reviewing on Profit-making-Enterprise Tax Return, the Regulation Governing the Assessment of Income Tax Returns of Profit-making Enterprises, and Tai Tsai Suei Tze Ordinance No. 23798 published by the Ministry of Finance on May 18, 1970, were en-

解釋文：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，仍得依所得稅法第一百零三條、第一百一十條、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。財政部發布之營利事業所得稅結算申報書面審核案件抽查辦法、營利事業所得稅結算申報查核準則及中華民國五十九年五月十八日台財稅字第二三七九八號令即係為執行該等法律之規定而訂定，就此而言，與憲法尚無牴觸。惟前述抽查辦法第三條、第四條查核準則第二條及上開令示，與所得稅法第八十條第三項之規定，文義上易滋誤解，應予檢討修正。

acted to implement the provisions of the Laws mentioned above. Therefore, they are not unconstitutional. Nevertheless, the wordings of Articles 3 and 4 of the Regulation, Article 2 of the Regulation, of the Ordinance, and Paragraph 2, Article 80, of the Income Tax Act are often misleading and should be amended accordingly.

REASONING: Article 80 of the Income Tax Act provides that the taxation agency shall, after receiving income tax returns, dispatch an agent to verify the amounts of taxable income and taxes due. Where there is great number of taxpayers in the vicinity, the taxation agency may conduct random checks by trade and set the income standard of each trade. If the taxpayer's reported income tax amount is above the standard amount, then the amount reported shall be taken as the basis for taxation. The reported amount, if lower than the standard amount, shall be determined after an individual check. The purpose of such provision is to alleviate the taxation agency's administrative burden of investigating every case, enabling it to assess the taxable income of taxpay-

解釋理由書：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。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。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」。旨在解決稽徵機關逐案調查之困難，使其得依結算申報書核定納稅義務人所得額，以簡化稽徵手續，而期徵納兩便，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，仍得依所得稅法第一百零三條、第一百一十條、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。財政部發布之營利事業所得稅結算申報書面審核案

ers on their tax return, as well as to simplify the taxation procedure. It does not mean that a taxpayer whose reported income tax is higher than the standard amount is exempt from the obligation of honest filing of income taxes. According to Articles 103 and 110 of the Income Tax Act and Articles 21 and 30 of the Tax Levy Act, if there is tax evasion, omission, or under-reporting, the taxation agency must still examine documentation and investigate, collect evaded taxes and render a fine. The Regulation Governing the Cases Randomly Selected for Reviewing on Profit-making-Enterprise Tax Return, the Regulation Governing the Assessment of Income Tax Returns of Profit-making Enterprises, and the directive of May 18, 1970, Tai-Tsai-Suei Tze Ordinance No. 23798 were published and enacted by the Ministry of Finance to implement the provisions of the Laws discussed above. Therefore, they are not unconstitutional.

件抽查辦法、營利事業所得稅結算申報查核準則及中華民國五十九年五月十八日台財稅字第二三七九八號令即係為執行該等法律之規定而訂定，就此而言，與憲法尚無牴觸。

Articles 3 and 4 of the Regulation Governing the Cases Randomly Selected for Reviewing on Profit-making-Enterpri-

前述營利事業所得稅結算申報書面審核案件抽查辦法第三條及第四條、營利事業所得稅結算申報查核準則第二

se Tax Return, and Article 2 of the Regulation Governing the Assessment of Income Tax Returns of Profit-making Enterprises provide the wordings regarding random selection. In addition, the Ministry of Finance's May 18, 1970, Tai-Tsai-Suei Tze Ordinance No. 23798 stipulates that the taxation agency should verify the amounts of income tax reported by taxpayers whose reported amounts are higher than or equal to their standard amounts; if the amounts and items reported are not correct, they should be adjusted accordingly. The rule attempts to prevent dishonesty in tax reporting, yet is misleading. The third Paragraph of Article 80 of the Income Tax Act provides that "if the taxpayer's reported income tax amount is above the standard amount, then the amount reported shall be taken as the basis for taxation," causing this rule to be misinterpreted as the taxation agency may adjust or change the taxpayer's reported income through speculation. Therefore, the rule should be amended.

條，對營利事業申報所得額達各該業所得額標準者，均有實施審查及抽查之字樣；又前述財政部五十九年台財稅字第二三七九八號令，指示所屬稽徵機關，對申報之所得額已達各該業所得額標準者，應予以書面審核，如項目及數額與規定不符，並予以調整。雖係為防止不實申報所作之規定，但易使人誤以為稽徵機關對所得稅法第八十條第三項前段所稱「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」之案件，不問有無事實足認其有逃漏稅情事，均得以推測方式逕行調整或變更納稅義務人申報之所得額，在文義上易滋誤解，應予檢討修正。

Justice Chien-Hua Yang filed dissenting opinion.

本號解釋楊大法官建華提出不同意見書。

J. Y. Interpretation No.248（November 24, 1989）*

ISSUE: Is the order issued by the Ministry of Finance, providing to the effect that the method of expense restoration will be used to estimate and determine the sales volume in levying the tax, consistent with the principle of fair taxation?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 13, 17, 24 and 40 of the Business Tax Act（營業稅法第十三條、第十七條、第二十四條、第四十條）.

KEYWORDS:

method of deduction from expenses（費用還原法）, business revenue appraisal（推計銷售額）, equal taxation principle（租稅公平原則）.**

HOLDING: The Operational Outlines Regulating the Audit of Income Taxes of Small-Scale Businesses, Standard Fee Schedule for the Audit and Levy of Business Tax on Small-Scale Businesses, Specific Tax Rates for the Audit and Levy of Business Tax on Small-Scale Businesses, and the Regulation Govern-

解釋文：財政部於中華民國七十三年五月一日核定發布之小規模營利事業營業稅查定作業要點、小規模營利事業查定課徵營業稅費用標準及小規模營利事業查定課徵營業稅專用費用率，係依據中華民國六十九年六月廿九日修正公布施行之營業稅法第十七條而訂定。該法於中華民國七十四年十一月十

* Translated by Chi-chang Yu.

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ingthe Audit on Business Income Taxes Special Amounts, enacted and published on May 17, 1984, by the Ministry of Finance, were promulgated according to Article 17 of the Business Tax Act, amended and published on June 29, 1980. This Act was again amended and published on November 15, 1985 and came into force on April 1, 1986. The Ministry of Finance then concurrently enacted the Regulation pursuant to Section 3, Article 40, of the said Act. The Regulation makes up the "method of deduction from expenses," which appraises business revenues of taxation from business expenses over the expense rate. The method serves to simplify the taxation procedure for the owners of small-scale businesses. For practical purposes, it applies to economically diverse areas in different ways. In case the owner of a small-scale business does not wish to pay taxes according to the method, he or she is entitled to file an ordinary tax return. This arrangement is consistent with the equal taxation principle. Therefore, the abovementioned regulations are not unconstitutional.

五日修正公布，並於次年四月一日施行後，財政部另又依據該法第四十條第三項合併訂定營業稅特種稅額查定辦法一種。均係用「費用還原法」，依營業費用除以費用率之計算公式，推計銷售額據以課稅，以簡化對於小規模營業人之課稅手續，既已兼顧不同地區不同經濟情形，以期切合實際，而小規模營業人如不願依此特種方法計算稅額，仍得自行申請依一般方法計算稅額，符合租稅公平原則。是上開法令與憲法並無牴觸。

REASONING: Article 19 of the Constitution stipulates that the people have the obligation to pay taxes according to the law. This provision does not restrict the law from adopting appraising measures to levy tax under special circumstances, as declared by Interpretation No. 218 of this Yuan. Article 17 of the Business Tax Act was amended on June 29, 1970, to provide that small-scale businesses and dispersed transactions under Paragraph 3 of Article 12, and other businesses permitted to declare no tax under the rules of the Finance Ministry, are assessed at the discovered materials according to the tax bracket stipulated by the competent agency. The tax is levied once every three months. The above assessment formula is stipulated by the Provincial (or City) government, and approved by the Ministry of Finance. Thereafter, the Law was amended on November 15, 1985, and enacted on April 1, 1986. Paragraph 2 of Article 13 declares that the small-scale business is excluded by Articles 11 and 12 because of its size and because its average sales per month are below the standard set by the Ministry 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。」並未限制法律規定於特定情形下以推計核定方法課稅，前經本院釋字第二一八號解釋闡明其旨。中華民國六十九年六月二十九日修正公布之營業稅法第十七條規定：「第十二條第三項規定規模狹小、交易零星之營利事業，及其他依照財政部規定免予申報營業額之營利事業，由主管稽徵機關依各該業營業狀況，釐訂稅級，根據調查之資料予以查定，每三個月定額課徵一次。前項查定計算公式，由各省（市）政府訂定，報由財政部核定之。」嗣該法於中華民國七十四年十一月十五日修正公布，並於次年四月一日施行，其第十三條第二項規定：「前項小規模營業人，指第十一條、第十二條所列各業以外之規模狹小、平均每月銷售額未達財政部規定標準而按查定課徵營業稅之營業人。」第四十條第一項、第三項分別規定「依第二十一條規定，查定計算營業稅額之典當業及依第二十三條規定，查定計算營業稅額之營業人，由主管稽徵機關查定其銷售額及稅額，每三個月填發繳款書通知繳納一次。」、「前二項查定辦法，由財政部定之。」均屬法律於特定情形下以推計核定方法課稅之規定。財政部依此有

Finance. Paragraphs 2 and 3 provide that the pawn shop business, whose business taxes are assessed under Article 21, and the business, whose business taxes are assessed under Article 23, should calculate their sale amount and tax, and serve the notification of payment of taxes to be collected once every three months. The abovementioned method of assessment is regulated by the Ministry of Finance, and is used by the Law to appraise the tax under special circumstances. Pursuant to these provisions, the Ministry of Finance subsequently published the Operational Outlines Regulating the Audit of Income Taxes of Small-Scale Businesses, the Standard Fee Schedule for the Audit and Levy on Business Tax of Small-Scale Businesses, and the Specific Tax Rates for the Audit and Levy on Business Tax of Small-Scale Businesses on May 1, 1984, and the Regulation Governing the Audit on Business Income Taxes Special Amounts, which were enacted concurrently with the amendment to the Business Tax Act, on July 7, 1976. These provisions are consistent and can be applied together since they all use the "method of

關規定，先後於中華民國七十三年五月一日核定發布小規模營利事業營業稅查定作業要點、小規模營利事業查定課徵營業稅費用標準及小規模營利事業查定課徵營業稅專用費用率，及中華民國七十五年七月七日隨營業稅之修正而合併訂定營業稅特種稅額查定辦法一種。前後規定一貫，可相繼適用，即均係用「費用還原法」，依營業費用除以費用率之計算公式，推計銷售額，而據以依法定稅率課稅，以簡化對於小規模營業人之課稅手續。其中營業費用標準，依該查定辦法第五條第三項規定，省（市）主管稽徵機關應視轄區經濟發展情形，按地段或行政區域，擬定等級評定表，報財政部備案，以資兼顧而期切合實際；而小規模營業人如不願依此特種方法計算稅額，並得依前述七十四年十一年十五日修正公布之營業稅法第二十四條第一項「小規模營業人及其他經財政部規定免予申報銷售額之營業人，得申請依照本章第一節規定計算其營業稅額，並依第三十五條規定申報繳納」之規定，自行申請依一般方法計算稅額，使與一般營業人申報繳納之方法完全相同，符合租稅公平原則。是上開法令，自與憲法並無牴觸。至統一發票給獎辦法第八條，並未為確定終局裁判所

deduction from expenses," which appraises business revenues of taxation from business expenses over the expense rate. The method serves to simplify the taxation procedure for the owners of small-scale businesses; it is a formula for the expenses calculated by dividing the expense ratio to appraise the sales amount and serves as a basis for taxation under the statutory tax rate in order to simplify the taxation procedures. For practical purpose and completeness, the standard fee schedule is provided in the list of assessment levels enacted by the Provincial (or City) taxation agency pursuant to Paragraph 3 of Article 5 of the Regulation regarding separate economically diverse areas, filed and approved by the Ministry of Finance. In case the owner of a small-scale business does not wish to pay taxes according to the method, he or she is entitled to file an ordinary tax return under the abovementioned Paragraph 1 of Article 24 of the Business Tax Act, amended and implemented on November 15, 1985. This rule stipulates that small business entities or other business entities that are exempted from reporting their sales amount

適用，應不予解釋，合併指明。

by the Ministry of Finance shall compute their tax amounts under Section 1 of this Chapter. They shall file tax returns in accordance with Article 35 to calculate their taxes in the ordinary way consistent with the way general businesses report and pay taxes. This arrangement is consistent with the equal taxation principle. The above-mentioned regulations, therefore, are not unconstitutional. Article 8 of the Regulation Governing the Encouragement of Uniform Invoices, which was not applied in the final decision, should not be interpreted.

J. Y. Interpretation No.249（November 24, 1989）*

ISSUE: Is it constitutional to order an informer in a criminal case to appear before the court and, if he fails to do so without good cause, arrest and force him to appear to give testimony, like a witness?

RELEVANT LAWS:

Article 178, Paragraph 1 of the Code of Criminal Procedure（刑事訴訟法第一百七十八條第一項）; J.Y.Interpretation Yuan-tze No. 47（司法院院字第四七號解釋）.

KEYWORDS:

informer（告發人）, witness（證人）, summon（傳喚）, arrest（拘提）, testify（作證）, *yuan*（元）.**

HOLDING: An informer is a third person other than a "party" in a case as defined by the Code of Criminal Procedure. If the court deems it necessary to call an informer to testify, he may of course be summoned in pursuance of Article 178 of the Code of Criminal Procedure concerning a witness. He may also be arrested and forced to appear before

解釋文：告發人為刑事訴訟當事人以外之第三人，法院如認為有命其作證之必要時，自得依刑事訴訟法第一百七十八條關於證人之規定傳喚之，無正當理由而不到場者，並得加以拘提，強制其到場作證，以達發見真實之目的。基此，本院院字第四十七號解釋，認對告發人得適用當時之刑事訴訟法第九十五條即現行刑事訴訟法第一百七十

* Translated by Raymond T. Chu.

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

the court for the purpose of discovering the truth if he fails to appear without good cause. Accordingly, our Interpretation Yuan-tze No. 47 holding that Article 95 of the Code of Criminal Procedure then prevailing, i.e., Article 178 of the present Act as amended, may be made applicable to informers is not in conflict with the Constitution.

REASONING: A witness is a third party who is ordered by the court to state what he has seen or heard in relation to an action, and whatever he has seen or heard may serve as an important basis for discovery of the truth and is non-substitutable. Unless otherwise prescribed by law, every person has the duty to testify before a court. Thus, the Code of Criminal Procedure provides in Article 178, Paragraph 1, that "a lawfully summoned witness who fails to appear without proper reason may be fined a sum of not more than fifty yuan, and in addition thereto may be arrested with a warrant. If he fails to appear when summoned again, the same punishment may be imposed." Discovery of the truth of a case may be

八條之規定辦理，與憲法並無牴觸。

解釋理由書：證人係依法院之命，在訴訟上陳述其見聞事實之第三人。此項見聞事實為發見真實之重要根據，且有不可替代性。除法律有特別規定外，不問何人於訴訟程序上，均有作證之義務。是故刑事訴訟法第一百七十八條第一項規定：「證人經合法傳喚，無正當理由而不到場者，得科以五十元以下之罰鍰，並得拘提之；再傳不到者亦同」。俾藉訊問證人而達發見真實之目的。此為維持社會秩序，增進公共利益所必要。告發人為刑事訴訟當事人以外之第三人，法院如於訴訟程序中認有命其陳述見聞事實之必要時，自得以其為證人而依上開規定辦理。本院院字第四十七號解釋，認對告發人得適用當時之刑事訴訟法第九十五條即現行刑事訴訟法第一百七十八條之規定，與憲法並

achieved through examination of the witness, and is essential to maintaining the social order and increasing the public interest. Like a witness, an informer is a third party other than a "party" in a criminal case. If the court deems it necessary to call an informer to state during the proceeding what he has seen or heard, he may of course be taken as a witness and treated in pursuance of the provision quoted above. Accordingly, our Interpretation No. Yuan-tze 47 holding that Article 95 of the Code of Criminal Procedure then prevailing, i.e., Article 178 of the present Act as amended, may be made applicable to informers is not in conflict with the Constitution.

無牴觸。

J. Y. Interpretation No.250（January 5, 1990）*

ISSUE: Is a military personnel whose active service was suspended for taking a civil office in violation of Article 140 of the Constitution?

RELEVANT LAWS：

Article 140 of the Constitution（憲法第一百四十條）; Article 12, Paragraph 1, Subparagraph 6, of the Armed Forces Officers Service Act（陸海空軍軍官服役條例第十二條第一項第六款）; Article 9, Paragraph 1, Subparagraph 8, and Paragraph 2；Article 10 and Article 12 of the Enforcement Rules of the Armed Forces Officers Service Act（陸海空軍軍官服役條例施行細則第九條第一項第八款及第二項、第十條、第十二條）; Article 25, Subparagraph 1, of the Conscription Act（兵役法第二十五條第一款）.

KEYWORDS:

military personnel in active service（現役軍人）, civil office（文官職務）, military personnel in the reserved forces service（後備軍人）, suspension（停役）, suspension for taking an outside position（外職停役）, retirement from the military（退役）.**

* Translated by Huai-Ching Tsai, Esq.

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HOLDING: Article 140 of the Constitution provides: "No military personnel in active service may concurrently hold a civil office." The purpose of prohibiting military personnel in active service from holding civil positions is to preclude their involvement in politics and to maintain the normal functions of democratic constitutionalism. A military personnel whose active service was suspended for cause will be transferred to the reserved forces service, managed by the reserved forces system, and enlisted as a military personnel in the reserved forces service. If, at the request of a civil agency, a military personnel in active service who qualified for a civil office applies for a suspension from an outside position prior to retirement from the military in order to serve in the civil office commensurate with his qualification, this is different from the aforementioned prohibition of holding concurrent positions, and cannot be said to be in conflict with the aforementioned constitutional provision. However, the conditions for a military personnel officer to suspend active service and transfer to a civil office, as well as the

解釋文：憲法第一百四十條規定：「現役軍人，不得兼任文官」，係指正在服役之現役軍人不得同時兼任文官職務，以防止軍人干政，而維民主憲政之正常運作。現役軍人因故停役者，轉服預備役，列入後備管理，為後備軍人，如具有文官法定資格之現役軍人，因文職機關之需要，在未屆退役年齡前辦理外職停役，轉任與其專長相當之文官，既與現役軍人兼任文官之情形有別，尚難謂與憲法牴觸。惟軍人於如何必要情形下始得外職停役轉任文官，及其回役之程序，均涉及文武官員之人事制度，現行措施宜予通盤檢討，由法律直接規定，併此指明。

procedure for returning from civil office to military service, both involve the personnel system of public service. It is pointed out herein that current measures in these regards should be reviewed thoroughly and prescribed directly by law.

REASONING: Article 140 of the Constitution provides: "No military personnel in active service may concurrently hold a civil office." The purpose of prohibiting military personnel in active service from holding civil office is to preclude their involvement in politics and to maintain the normal functions of democratic constitutionalism. As for military personnel officers who have been removed form active service, retired, or suspended and transferred to the reserved forces service, they have no active military power. Consequently, we are not concerned here with their political involvements.

解釋理由書：憲法第一百四十條規定：「現役軍人，不得兼任文官」，係指正在服役之現役軍人不得同時兼任文官職務，旨在防止軍人干政，以維民主憲政之正常運作，至已除役、退伍或因停役等情形而服預備役之軍人，既無軍權，自無干政之虞。

Pursuant to Article 12, Paragraph 1, Subparagraph 6, of the Armed Forces Officers Service Act and Article 9, Paragraph 1, Subparagraph 8, and Paragraph 2

依陸海空軍軍官服役條例第十二條第一項第六款、同條例施行細則第九條第一項第八款及第二項規定，常備軍官在現役期間，經核准任軍職以外之公

of the Enforcement Rules of the Act, a regular officer in active service who has been approved to serve in a public office outside the military shall be suspended from the military service on the date of approval. The military personnel suspended for an outside position must be in the reserved forces service. When the Ministry of Defense gives its approval for a change of status, it shall notify the agency managing the reserved forces and enlist the person in the reserved forces system for personnel management. According to Article 25, Subparagraph 1, of the Conscription Act, the abovementioned suspended person must be a military personnel in the reserved forces service and does not have the status of a military personnel in active service. If, at the request of a civil agency, a military personnel in active service who qualified for civil office applies for a suspension from an outside position prior to retirement from the military in order to serve in the civil office commensurate with his qualification, this is different from the aforementioned prohibition of holding concurrent positions, and cannot be said to be in conflict with

職者，自核准之日起為外職停役。外職停役人員係服預備役，經層報國防部核定後，通知後備軍人管理機關列入後備管理。依兵役法第二十五條第一款規定，是項停役人員為後備軍人，已無現役軍人身分。如具有文官法定資格之現役軍人，因文職機關之需要，在未屆退役年齡前辦理外職停役，轉任與其專長相當之文官，與現役軍人兼任文官之情形有別，尚難謂與首開憲法規定有何牴觸。

the aforementioned constitutional provision.

The Current Armed Forces Officers Service Act provides for "suspension" only, and does not directly provide for "suspension for taking an outside position." The term "suspension for taking an outside position" is found only in Article 9, Paragraph 1, Subparagraph 8, Article 10 and Article 12 of the Enforcement Rules of the Act. Military personnel suspended for taking a civil position can return to the military service and can advance in the military ranks. This may raise a concern of commingling the civil track with the military track. The conditions for a military personnel to be suspended from active service and transferred to a civil office, as well as the procedure for returning from civil office to military service, both involve the personnel system of public service. It is pointed out herein that current measures in these regards should be reviewed thoroughly under guidance of the Constitution and prescribed directly by law.

現行陸海空軍軍官服役條例僅有「停役」之規定，並未直接規定「外職停役」，「外職停役」一詞，見之於該條例施行細則第九條第一項第八款、第十條、第十二條等有關規定，而外職停役人員轉任文官後，又得回服現役或晉任軍階，易滋文武不分之疑慮，且軍人於如何必要情形下，始得以外職停役方式轉任文官，其停役及回役之程序如何，均涉及文武官員之人事制度，現行措施宜本憲法精神通盤檢討改進，由法律直接規定，併此指明。

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.251（January 19, 1990）*

ISSUE: Does the Act Governing the Punishment of Police Offences permitting the police department to take measures restricting physical freedom contravene the Constitution?

RELEVANT LAWS:

Article 8 of the Constitution（憲法第八條）; Article 28 of the Act Governing the Punishment of Police Offenses（違警罰法第二十八條）.

KEYWORDS:

individual's physical freedom（人民身體自由）, reformatory education（矯正）, learning living skills（學習生活技能）, unconstitutional（違憲）.**

HOLDING: The detention and forced labor (hard labor) ordered by the police department under the Act Governing the Punishment of Police Offences (hereinafter "the Act") are types of punishment relating to physical freedom. It would be desirable to revise the law expeditiously, whereby these punishments may be decided by the courts in accordance

解釋文：違警罰法規定由警察官署裁決之拘留、罰役，係關於人民身體自由所為之處罰，應迅改由法院依法定程序為之，以符憲法第八條第一項之本旨，業經本院於中華民國六十九年十一月七日作成釋字第一六六號解釋在案。

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* Translated by Professor Tsung-fu Chen.

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with legal procedure, so as to conform to Article 8, Paragraph 1, of the Constitution. This tenor has been addressed under this Yuan's Interpretation No. 166 on November 7, 1980.

Article 28 of the Act provides the punishment of "sending (criminals) to a specific place for recorrection or for learning living skills." This punishment imposes restrictions on physical freedom; therefore, it does not conform to the Constitution when it is subject to the jurisdiction of the police department. This has to be revised, thereby allowing the courts to render decisions under legal procedure. The existing procedure regarding the detention and forced labor indicated in the former interpretation and the punishments addressed in this interpretation will be null and void after July 1, 1991. All relevant laws also have to be revised by that date. The Interpretation No. 166 thus has to be complemented.

依違警罰法第二十八條規定所為「送交相當處所，施以矯正或令其學習生活技能」之處分，同屬限制人民之身體自由，其裁決由警察官署為之，亦與憲法第八條第一項之本旨不符，應與拘留、罰役之裁決程序，一併改由法院依法定程序為之。前述解釋之拘留、罰役及本件解釋之處分裁決程序規定，至遲應於中華民國八十年七月一日起失其效力，並應於此期限前修訂相關法律。本院釋字第一六六號解釋應予補充。

REASONING: Under Article 8 of the Constitution, physical freedom shall be protected, and except in the case of

解釋理由書：按人民身體之自由，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

flagrante delicto as provided by law, no person shall be arrested or detained other than by a judicial or a police agency in accordance with procedures provided by law. Further, individuals shall not be tried or punished other than by a court of law in accordance with procedures prescribed by law. Among the punishments provided by the Act are detention and forced labor, which are decided by the police and concern the individual's physical freedom. It would be desirable to revise the law expeditiously, whereby these punishments will be decided by the courts in accordance with legal procedure, so as to conform to the rule of the Constitution. This tenor has been addressed under this Yuan's Interpretation No. 166 on November 7, 1980.

序不得逮捕拘禁，非由法院依法定程序不得審問處罰，憲法第八條第一項定有明文。違警罰法所定之違警罰中，由警察官署裁決之拘留、罰役，係關於人民身體自由所為之處罰，應迅改由法院依法定程序為之，以符上開憲法規定之本旨，前經本院於中華民國六十九年十一月七日作成釋字第一六六號解釋公布在案。

Article 28 of the Act provides that "those who are loitering with intent or lazy and habitually commit offenses punishable by the police will receive severer punishments than others. They may be sent to a reformatory or be required to learn living skills in a specific place after being released from a prison." The so-called correction or learning living skills

違警罰法第二十八條規定：「因遊蕩或懶惰而有違警行為之習慣者，得加重處罰。並得於執行完畢後，送交相當處所，施以矯正或令其學習生活技能」。其所謂送交相當處所，施以矯正或令其學習生活技能，係附隨於違警罰之一種處分，同屬限制人民之身體自由。此種處分由警察官署逕為裁決，依前述解釋之同一理由，亦不符憲法第八

in a specific place are kinds of punishment imposed by the police, which restrict physical freedom. Such punishment is decided by the police and thus is contradictory to Article 8, Paragraph 1, of the Constitution, similar to the situation of the former interpretation. Those procedures relating to correction and learning living skills in a specific place, as well as detention and forced labor, shall be decided in a court under legal procedure. The procedures under the existing law will be null and void after July 1, 1991, and the relevant laws have to be revised by that date. The Interpretation No. 166 has to be complemented.

條第一項之本旨，應與拘留、罰役之裁決程序，一併改由法院依法定程序為之。前述解釋之拘留、罰役及本件解釋之處分裁決程序規定，至遲應於中華民國八十年七月一日起失其效力，並應於此期限前修訂相關法律。本院釋字第一六六號解釋應予補充。

J. Y. Interpretation No.252（February 16, 1990）*

ISSUE: Is the Ministry of Finance directive in conflict with the Constitution in demanding that a business be held punishable under the Tax Levy Act if it, when making sale of goods, issues sales invoices to customers of its purchasers instead of issuing such invoices to direct purchasers as required by law?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 1 and 44 of the Tax Levy Act（稅捐稽徵法第一條、第四十四條）; Article 32, Paragraph 1 and Article 48 of the Business Tax Act（營業稅法第三十二條第一項、第四十八條）; Ministry of Finance Directive (69) Tai-Tsai-Shui-Tze No. 36624 (August 8, 1980)（財政部六十九年八月八日（六九）台財稅字第三六六二四號函）.

KEYWORDS:

Business entity（營利事業）, business operator（營業人）, correct tax voucher system（正確課稅憑證制度）, fair taxation（稅負公平）, tax assessment data（稽徵資料）, antecedent and subsequent parties to transaction（交易前後手）, direct purchaser（直接買受人）, direct seller（直接銷售人）, sales voucher（銷售憑證）, uniform invoice（統一發票）, uniform serial number（統一編號）, extensive application（擴張適用）, prior application（優先適用）.**

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* Translated by Raymond T. Chu.

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

HOLDING: The Ministry of Finance Directive (69) Tai-Tsai-Shui-Tze No. 36624 (August 8, 1980) takes the position that a business entity which, when making sale of goods, fails to issue uniform invoices to direct purchasers of the goods but instead issues such invoices to customers of such purchasers shall be punishable in the manner as prescribed in Article 44 of the Tax Levy Act. This directive is consistent with the purpose of the Act in establishing a correct tax voucher system among business entities, and is not in conflict with the Constitution.

解釋文：財政部中華民國六十九年八月八日（六九）臺財稅字第三六六二四號函，認為營利事業銷售貨物，不對直接買受人開立統一發票，而對買受人之客戶開立統一發票，應依稅捐稽徵法第四十四條規定論處。此項命令，核與上述法律規定，係為建立營利事業正確課稅憑證制度之意旨相符，與憲法尚無牴觸。

REASONING: Article 19 of the Constitution provides that the people have the duty to pay tax as prescribed by law. To encourage every citizen to perform such duty honestly so as to ensure fair taxation, the state may of course take necessary actions to prevent tax evasion. Article 44 of the Tax Levy Act before the amendment made on January 24, 1990, provided: “Where a business entity fails to give others vouchers as required by law or to obtain from others vouchers as re-

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務。國家為促使人民誠實履行上述義務，達成稅負公平之目的，自得採取必要措施，以防止逃漏稅。中華民國七十九年一月二十四日修正布前之稅捐稽徵法第四十四條規定：「營利事業依法規定應給予他人憑證而未給予，或應自他人取得憑證而未取得者，應就其未給予憑證或未取得憑證，經查明所漏列之金額，處百分之五罰鍰。」係為使營利事業據實給予或取得憑證，俾交易前後手稽徵資料臻於

quired, it shall be liable to a fine of five percent of the amount of business it is found to have failed to enter into books as a result of its failure to give or obtain such vouchers." This is a statute designed to establish a correct tax voucher system by bringing into line the tax assessment data of the antecedent and subsequent parties to transactions through the giving and obtaining by business entities of vouchers truly reflecting all transactions done, and is necessary for the realization of the substance of Article 19 of the Constitution.

翔實，以建立正確課稅憑證制度，乃實現憲法第十九條意旨所必要。

The expression "as required by law" in Article 44 of the abovementioned Tax Levy Act refers to the requirement of Article 32, Paragraph 1, of the Business Tax Act, which states: "A business operator making sale of any goods or services shall issue and deliver to the purchaser a uniform invoice within the time limit set forth in the Schedule of Time Limit on the Issue of Sales Vouchers by Business Operators as annexed hereto." (The former Business Tax Act, Art. 12, Par. 1, states: "A business entity shall, at the time of doing any business transaction, issue and

上述稅捐稽徵法第四十四條所謂「依法」，係指依營業稅法第三十二條第一項：「營業人銷售貨物或勞務，應依本法營業人開立銷售憑證時限表規定之時限，開立統一發票交付買受人」之規定而言（舊營業稅法第十二條第一項：「營利事業發生營業行為時，應依本法分類計徵標的表規定之時限，開立統一發票交付買受人」）。而所謂「他人」，則指貨物或勞務之直接買受人或直接銷售人，非指直接買受人或直接銷售人以外之他人。據此，營利事業未依「營業人開立銷售憑證時限表」（舊營業稅法分類計徵標的表）之規定，給予

deliver to the purchaser a uniform invoice within the time limit specified in the Table of Categorized Items Subject to Business Tax herein incorporated.") And the term "others" means the direct purchasers or direct sellers of goods or services, not any persons other than such direct purchasers and sellers. Accordingly, the failure of a business entity to give a "direct purchaser" a voucher or to obtain from a "direct seller" a voucher as required by the Schedule of Time Limit on the Issue of Sales Vouchers by Business Operators (the Table of Categorized Items Subject to Business Tax in the former Business Tax Act) constitutes an act in violation of Article 44 of the Tax Levy Act.

「直接買受人」憑證或自「直接銷售人」取得憑證，即構成稅捐稽徵法第四十四條之違法行為。

The Ministry of Finance Directive (69) Tai-Tsai-Shui-Tze No. 36624 (August 8, 1980) (shown as No. 36634 due to clerical error in the criminal ruling of the Taiwan High Court (76) Tsai-Kang-Tze No. 848) states that the corporation in question which, when making sales of plywood to its distributors during 1977, issued uniform invoices to customers of such distributors instead of issuing uni-

財政部中華民國六十九年八月八日（六九）臺財稅字第三六六二四號（台灣高等法院七十六年度財抗字第八四八號刑事裁定誤寫為第三六六三四號）函釋示，某股份有限公司於六十六年度銷售合板予經銷商時，未依規定開立發票予該經銷商，而以該經銷商之客戶之名義開立統一發票，應依稅捐稽徵法第四十四條規定論處。此項命令，核與前述法律規定之意旨相符，並未擴張

form invoices to such distributors as required by law is punishable in the manner as prescribed in Article 44 of the Tax Levy Act. We find that said directive is consistent with the aforementioned statute without extensive application and is hence not in conflict with the Constitution.

適用，與憲法尚無牴觸。

Incidentally, Article 1 of the Tax Levy Act provides that "The collection of taxes shall be governed by this Act, except for matters not prescribed herein, which shall be governed by provisions of other applicable laws." Thus, in case of any conflict between the Tax Levy Act and any other law, the provision of the Tax Levy Act shall prevail over such other law. Furthermore, the provision of Article 48 of the Business Tax Act relating to the "failure of a business operator to make such entries in uniform invoices as required to be entered or to make correct entries therein" refers to the situation where a business operator has issued and delivered to the purchaser a uniform invoice in compliance with Article 32 of the Business Tax Act, but has failed to make such entries in the uniform invoice as re-

稅捐稽徵法第一條規定：「稅捐之稽徵，依本法之規定；本法未規定者，依其他有關法律之規定」。故稅捐稽徵法與其他稅法規定不相同時，應優先適用稅捐稽徵法。且營業稅法第四十八條有關「營業人開立統一發票應行記載事項未依規定或所載不實」之規定，則係指營業人已依營業稅法第三十二條規定開立統一發票交付買受人，惟其應行記載事項未依規定記載或所載不實，如應書立抬頭而未書立，或應填寫買受人統一編號而未填寫等情形而言，並不包括對於直接買受人不給予憑證之情形在內，更無優先適用營業稅法之問題，併此說明。

quired or has made false entries therein, e.g., omission of the name or the uniform serial number of the purchaser. This article is irrelevant to the requirement with respect to the issue of vouchers to direct purchasers, and therefore has nothing to do with the prior application of the Business Tax Act.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官志鵬提出不同意見書。

J. Y. Interpretation No.253（March 2, 1990）*

ISSUE: Is the provision of the Precautionary Matters on Handling Compulsory Execution, prescribing that a notice of auction should indicate that "a creditor who declares his or her willingness to bear the cost of a second auction prior to the date of such second auction may take at the lowest price of the previous auction," unconstitutional ?

RELEVANT LAWS:

Articles 91 and 92 of the Compulsory Enforcement Act（強制執行法第九十一條、第九十二條）.

KEYWORDS:

notification of the auction date（拍賣期日通知）, re-auction（再拍賣）, facilitating the exercise of people's rights in a timely manner（從速實現人民權利）.**

HOLDING: Paragraph 50 (5) of the Precautionary Matters on Handling Compulsory Enforcement, amended and published on October 18, 1982, by the Judicial Yuan, specifies that the notification of a real-property auction date should contain the following statement: "A creditor who declares his or her willingness to bear the cost of a second auction prior to the date of such second auction may take at the lowest price of the previous auction." This provision is in accordance with the Constitution.

解釋文：司法院七十一年十月十八日修正發布之辦理強制執行事件應行注意事項，其中第五十則㈤ 關於拍賣不動產期日通知書，應記載：「於再行拍賣期日前，債權人聲明願負擔再行拍賣之費用者，仍得照前次拍賣之最低價額承受之」之規定，係依強制執行法

* Translated by Chi-chang Yu.

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tor who declares willingness to bear the expenses of a re-auction before the re-auction date may assume the property to be at the lowest bid price of the previous auction." This provision is enacted under Articles 91 and 92 of the Compulsory Enforcement Act to facilitate the exercise of people's rights in a timely manner; therefore, it is not unconstitutional.

第九十一條及第九十二條意旨所為，乃在求人民權利之從速實現，與憲法尚無牴觸。

REASONING: The Judicial Administration Agency issues the judicial administration orders. If such orders are cited by the judge in the decision at hand, the party may seek interpretation by the Constitutional Court of this Yuan, which delivered Interpretation No. 216. The Precautionary Matters on Handling Compulsory Enforcement are cautious judicial administration orders issued by the Judicial Administration Agency and were cited by the judge in the decision at hand. Thus, the petition for interpretation shall be granted for review.

解釋理由書：司法行政機關所發司法行政上之命令，如經法官於裁判上引用者，當事人得聲請本院大法官會議解釋，業經本院以釋字第二一六號解釋在案，前開辦理強制執行事件應行注意事項，係司法行政機關所發之司法行政上注意命令，既經法官於裁判上引用，依上述解釋意旨，在程序上應予受理。

Article 91 of the Compulsory Enforcement Act mandates that if the real property being auctioned is not sold, or if

強制執行法第九十一條規定：「拍賣之不動產，無人應買或應買人所出之最高價未達拍賣最低價額，而債權

the buyer's bid price is lower than the minimum required price, the auction agency should set the minimum price at the lowest bid price, transfer the real property and title transfer documents to the creditor, and set a new auction date. According to previous regulations, the new minimum price cannot be discounted more than 20 percent from the original price. Following this rule, the new minimum price should be lower than the previous minimum price.

人願承受者，執行法院應依該次拍賣所定之最低價額，將不動產交債權人承受，並發給權利移轉證書，其不願承受或依法不得承受者，由執行法院定期再行拍賣」。「依前項規定再行拍賣時，執行法院應酌減拍賣最低價額，酌減數額不得逾百分之二十」。同法第九十二條規定：「再行拍賣期日，無人應買或應買人所出之最高價，未達於減定之拍賣最低價額者，準用前條之規定；如再行拍賣，其酌減數額，不得逾減定之拍賣最低價額百分之二十」。依上述規定，再行拍賣期日最低價額，應較前次拍賣最低價額為低。

Paragraph 50(5) of the Precautionary Matters on Handling Compulsory Enforcement , amended and published on October 18, 1982, by the Judicial Yuan, specifies that the notification of a real property auction date should contain the following statement: "A creditor who declares willingness to bear the expenses of a re-auction before the re-auction date may assume the property to be at the lowest bid price of the previous auction." This statement is consistent with the regulation and is therefore not unconstitutional.

司法院七十一年十月十八日修正發布之辦理強制執行事件應行注意事項，其中第五十則㈤ 關於拍賣不動產期日通知書，應記載：「於再行拍賣期日前，債權人聲明願負擔再行拍賣之費用者，仍得照前次拍賣之最低價額承受之」之規定，即係因在通常情形，前次拍賣之最低價額，恆較再行拍賣之價額為高，符合上開法律意旨，乃在求債權人權利之從速實現，並兼顧債務人之利益，與憲法保障人民財產權之本旨，尚無牴觸。

The abovementioned regulation presents no problems if the two auction dates are not far apart and prices are not rising. If inflation occurs, however, and the property is not re-evaluated and the period of assumption is not defined, it is possible that the property to be assumed may be undervalued. The agency should therefore consider the special circumstances and amend the relevant regulations accordingly.

前開規定，於兩次拍賣期日相距不久，而再行拍賣期日前，物價平穩之通常情形下，固無不妥，惟物價於此期間內如大幅上漲，若不另行估價拍賣，又無承受之確定期間，即難免有承受價額較市價偏低之可能，有關法令，自應斟酌此項異常狀況檢討修正，併此說明。

Justice Chien-Tsai Cheng filed dissenting opinion.

Justice Teh-Sheng Chang filed dissenting opinion.

Justice Zu-Zan Yang filed dissenting opinion.

本號解釋鄭大法官健才、張大法官特生、楊大法官日然分別提出不同意見書。

J. Y. Interpretation No.254（March 16, 1990）*

ISSUE: Is a delegate of the National Assembly who has sworn an oath contrary to the manner or the wording stipulated under the Organic Act of the National Assembly still eligible to perform his/her duty as a delegate of the National Assembly?

RELEVANT LAWS:

Article 34 of the Constitution（憲法第三十四條）; Article 4 of the Organic Act of the National Assembly（國民大會組織法第四條）; Articles 3 to 7 of the Oath Act（宣誓條例第三條至第七條）.

KEYWORDS:

the National Assembly（國民大會）, an oath（宣誓）.**

HOLDING: The provision for an oath in Article 4 of the Organic Act of the National Assembly is an oath to perform official duties. The Judicial Yuan has issued Interpretation No. 199 on this issue. A delegate of the National Assembly who has failed to swear an oath or intentionally sworn an oath contrary to the manner or the wording stipulated under the Act is

解釋文：國民大會組織法第四條規定之宣誓，係行使職權之宣誓，業經本院釋字第一九九號解釋釋示在案，國民大會代表未為宣誓或故意不依法定方式及誓詞完成宣誓者，自不得行使職權。本院上開解釋，應予補充。

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* Translated by Nigel N.T. Li, Lee and Li, Attorneys-at-Law.

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

not eligible to perform his/her duty as a delegate of the National Assembly. Thus, Interpretation No. 199 issued by the Judicial Yuan shall be read in line with this Interpretation.

REASONING: The petitioner of Interpretation No. 199 applied for a supplemental interpretation on the grounds that Interpretation No. 199 does not satisfactorily conclude the issue. In accordance with the holding of Interpretation No. 27 and the reasoning of Interpretations Nos. 82, 147, and 165, the Judicial Yuan should issue a supplemental interpretation.

解釋理由書：本件聲請機關係以其對本院釋字第一九九號解釋，尚有疑義，聲請補充解釋，揆諸本院釋字第二十七號解釋意旨，並參照釋字第八十二號、第一百四十七號、第一百六十五號等解釋理由，應予受理，合先說明。

Article 4 of the Organic Act of the National Assembly, which is authorized by Article 34 of the Constitution, provides, “Delegates to the National Assembly shall swear an oath at the commencement of the meetings of the National Assembly in the following words: ‘I solemnly swear that I will abide by the Constitution and will follow the law in exercising my authority in representing the people of the Republic of China’.” The

國民大會代表之宣誓，依中華民國憲法第三十四條授權制定之國民大會組織法第四條規定：「國民大會代表，於國民大會舉行開會式時，應行宣誓，其誓詞如左：某某謹以至誠，恪遵憲法，代表中華民國人民依法行使職權，謹誓，國民大會代表宣誓後，應於誓詞簽名」，旨在使宣誓人鄭重公開表示其恪遵憲法，盡忠職務，代表全國國民依法行使職權之決心與誠意，俾昭信守。此項宣誓，依本院釋字第一九九號解

oath is a public announcement to show the determination and honesty of the delegates to comply with the Constitution and perform their duties faithfully on behalf of the people of the Republic of China in accordance with the law. In accordance with Interpretation No. 199, the oath described in Article 4 of the Organic Act of the National Assembly is an oath to perform official duties. The oath is a formal act under the Public Laws with specific requirements. In addition to the wording of the oath stipulated in the above Article, the process and manner of the oath shall fulfill the requirements stipulated in Articles 3 to 7 of the Oath Act. A delegate who does not swear an oath, and thereby neglects his/her duty, shall not be eligible to perform his/her duty as a delegate of the National Assembly. In addition, in the event that there is clear evidence to prove that a delegate has intentionally sworn an oath contrary to the process or the wording stipulated by law, no valid oath exists. The effect is as if an oath had never been sworn. Therefore, the delegate shall not be eligible to perform his/her duty as a delegate of the National Assembly. Interpretation.

釋，係屬行使職權之宣誓。上述宣誓係公法上之要式行為，除誓詞由前開法條明文規定外，其程序及方式，應依宣誓條例第三條至第七條之規定。國民大會代表未為宣誓，違反宣誓之義務，固不得行使職權，如有明確之事證足認其於宣誓時，故意不依法定方式及法定誓詞為之者，不能認已踐行該項法定要式行為，與未宣誓同，自亦不得行使職權。本院上開第一九九號解釋，應予補充。

tion No. 199 issued by the Judicial Yuan shall be read in line with this Interpretation.

In addition, the issue of whether a delegate who has failed to swear an oath is entitled to attend the meetings of the National Assembly shall be decided by the National Assembly according to its self-governing rules.

至未依法宣誓之國民大會代表，可否出席會議問題，應由國民大會本議會自律之原則自行處理，併此敘明。

J. Y. Interpretation No.255（April 4, 1990）*

ISSUE: Are the relevant interpretative directives and orders issued by the Ministry of the Interior unconstitutional to the effect that non-planned roads may be removed *ex officio* or upon application after the planned roads are developed and completed?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 90 of the Land Act（土地法第九十條）; Directive Ref. No. (66)-TNYT-730275 issued by the Ministry of the Interior（內政部（六六）台內營字第七三〇二七五號函）; Directive Ref. No. (67)-TNYT-759517 issued by the Ministry of the Interior（內政部（六七）台內營字第七五九五一七號函）; Articles 15, Paragraph 1, Subparagraph 6, 17,18,19,20,21, 22, Paragraph 1, Subparagraph 5 and 23 of the Urban Planning Act（都市計畫法第十五條第一項第六款、第十七條、第十八條、第十九條、第二十條、第二十一條、第二十二條第一項第五款、第二十三條）; Notices Regarding the Application for Removal or Route Change of Lanes or Alleys Not Subject to Urban Planning by Taipei City（台北市非都市計畫巷道廢止或改道申請須知）.

KEYWORDS:

urban planning（都市計畫）, road planning（道路規劃）, removal of roads not subject to urban planning（非都市計畫道路之廢止）.**

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* Translated by Vincent C. Kuan.

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HOLDING: To the extent that an urban plan is implemented, the road planning should be carried out by the competent authorities pursuant to the provisions of the Urban Planning Act. In respect of an area where an urban plan is formulated and a detailed plan is completed according to statutory procedure, the construction and establishment of the roads for such area should then be carried out based on such plans. In mapping out the road systems pursuant to the statutory procedure, any road not subject to such plan is simply meant to be removed and, upon completion of the planned roads, which ought to be available for public traffic, the competent authorities may ex officio or upon application have such non-planned road removed whose existence is no longer necessary for purpose of public traffic. The Directives Ref. No. (66)-TNYT-730275 and Ref. No. (67)-TNYT-759517 as issued by the Ministry of the Interior in respect of the removal of a lane or alley that is not covered by an urban plan, as well as the Notices Regarding the Application for Removal or Route Change of Lanes or Alleys Not Subject to Urban

解釋文：在實施都市計畫範圍內，道路規畫應由主管機關依都市計畫法之規定辦理，已依法定程序定有都市計畫並完成細部計畫之區域，其道路之設置，即應依其計畫實施，而在循法定程序規畫道路系統時，原即含有廢止非計畫道路之意，於計畫道路開闢完成可供公眾通行後，此項非計畫道路，無繼續供公眾通行必要時，主管機關自得本於職權或依申請廢止之。內政部中華民國六十六年六月十日臺內營字第七三〇二七五號、六十七年一月十八日臺內營字第七五九五一七號，關於廢止非都市計畫巷道函及台北市非都市計畫巷道廢止或改道申請須知，既與上述意旨相符，與憲法保障人民權利之本旨尚無牴觸。

Planning by Taipei City, are in line with the intention described above and thus are not in conflict with the constitutional purpose of protecting the rights of the people.

REASONING: It is understood that, pursuant to Article 90 of the Land Act, any district road, ditch and other land for public use located in a city should be planned in advance in accordance with the Urban Planning Act, that a master plan should be first formulated for a city and town plan under an urban plan, pointing out the main roads and other public transportation systems, that a detailed plan should be further executed upon the announcement and implementation of the master plan, further indicating the road systems, that the said master plan and detailed plan should both be submitted to the urban planning committee of the relevant government or the township, town (or county-governed city) for its review, that such plans should be put on display for the public prior to such review, and that, during the period of public display, any citizen or group may come forward with his or their opinions for the relevant urban

解釋理由書：按城市區域道路溝渠及其他公共使用之土地，依土地法第九十條規定，應依都市計畫法預為規定之，都市計畫之市鎮計畫，應先擬定主要計畫書，表明主要道路及其他公眾運輸系統，主要計畫公布實施後，應繼續完成細部計畫，表明道路系統，其主要計畫及細部計畫，均應送由該管政府或鄉鎮（縣轄市）都市計畫委員會審議，在審議前應公開展覽，於公開展覽期間，任何公民或團體均得提出意見，由都市計畫委員會審議，審議結果並應報請上級政府核定後公布實施。此為都市計畫法第十五條第一項第六款、第十七條至第二十一條、第二十二條第一項第五款及第二十三條所明定。是在實施都市計畫範圍內道路之規畫，既應依上述法定程序確定，任何有關之公民或團體，亦均有機會知悉道路設置之狀況並提出意見，則在該計畫確定後，即應依其計畫實施，而在循法定程序規畫道路系統時，原即含有廢止非計畫道路之意，於計畫道路開闢完成可供公眾通行

planning committee to review, the results of which should be reported to the immediately superior government for its approval before the announcement and implementation thereof. The above has been clearly prescribed under Article 15, Paragraph 1, Subparagraph 6; Article 17 through 21, and Article22, Paragraph 1, Subparagraph 5, of the Urban Planning Act. Therefore, since the planning of any road located within the scope of an implemented urban plan should be made certain by means of the statutory procedure described above, any citizen or group concerned ought to have had the opportunity to familiarize himself or themselves with the layout of the roads and render his or their opinions in respect thereof. Once the relevant plan becomes final, it should be carried out accordingly. In mapping out the road systems pursuant to the statutory procedure, any road not subject to such plan is simply meant to be removed and, upon completion of the planned roads, which ought to be available for public traffic, the competent authorities may ex officio or upon application have such non-planned road removed whose

後，此項非計畫道路，無繼續供公眾通行必要時，主管機關本於職權或依申請廢止之，乃符合都市計畫法立法意旨之行政行為。內政部中華民國六十六年六月十日臺內營字第七三〇二七五號、六十七年一月十八日臺內營字第七五九五一七號，關於廢止非都市計畫巷道函及台北市非都市計畫巷道廢止或改道申請須知，既與前述意旨相符，與憲法保障人民權利之本旨尚無牴觸。惟廢止有公用地役關係之既成巷道，事涉公眾利益，以於都市計畫有關法規作明確之規定為宜，併予指明。

existence is no longer necessary for purpose of public traffic. Such act is an administrative act that is consistent with the legislative intent of the Urban Planning Act. The Directives Ref. No. (66)-TNYT-730275 and Ref. No. (67)-TNYT-759517 as issued by the Ministry of the Interior in respect of the removal of a lane or alley that is not covered by an urban plan, as well as the Notices Regarding the Application for Removal or Route Change of Lanes or Alleys Not Subject to Urban Planning by Taipei City, are in line with the intention described above and thus are not in conflict with the constitutional purpose of protecting the rights of the people. Nevertheless, it should also be made clear that the act of removing any pre-existing road with public easement concerns public interest and, thus, should be unambiguously prescribed in the applicable laws and regulations related to urban planning.

J. Y. Interpretation No.256（April 4, 1990）*

ISSUE: Should a judge voluntarily recuse himself from rehearing a case in which he took part in the previous trial or judgment? Is there a limitation on recusal times?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 32, Subparagraph 7, of the Code of Civil Procedure（民事訴訟法第三十二條第七款）; Article 6, Subparagraph 4 of the Administrative Proceedings Act（行政訴訟法第六條第四款）; Supreme Court's Precedent S. T. 362（Supreme Court 1937）（最高法院二十六年判字第三六二號判例）.

KEYWORDS:

voluntarily recuse himself（自行迴避）, previous trial（前審）.**

HOLDING: The purpose of the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure, requiring the voluntary recusal of a judge is to disqualify him from performing his duty in a proceeding to rehear the case in which he took part in the previous trial or judgment

解釋文：民事訴訟法第三十二條第七款關於法官應自行迴避之規定，乃在使法官不得於其曾參與之裁判之救濟程序執行職務，以維審級之利益及裁判之公平。因此，法官曾參與訴訟事件之前審裁判或更審前之裁判者，固應自行迴避。對於確定終局判決提起再審之

* Translated by Raymond T. Chu.

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so as to maintain the interest of all levels of courts and to ensure fair trial and judgment. While a judge who took part in the adjudication of a case in its previous proceeding or the new trial before the case was remanded should voluntarily recuse himself from rehearing the case, a judge who participated in the irrevocable final judgment of a case should likewise voluntarily recuse himself during the new trial where a motion for a new trial has been filed from such irrevocable final judgment. However, taking into consideration the limited number of judges sitting on each court and the purpose of Article 6, Subparagraph 4, of the Administrative Proceedings Act, we hold that the recusal shall be limited to one time only, and that the part of the Supreme Court's Precedent S. T. 362 of 1937 inconsistent with the views herein expressed must be overruled to protect the people's right to fair trial.

訴者，其參與該確定終局判決之法官，依同一理由，於再審程序，亦應自行迴避。惟各法院法官員額有限，參考行政訴訟法第六條第四款規定意旨，其迴避以一次為限。最高法院二十六年上字第三六二號判例，與上述意旨不符部分，應不再援用，以確保人民受公平審判之訴訟權益。

REASONING: The essence of Article 16 of the Constitution is to protect the right of the people to institute a lawsuit in accordance with legal procedure and to receive a fair trial. The purpose of

解釋理由書：憲法第十六條規定人民有訴訟之權，旨在確保人民有依法定程序提起訴訟及受公平審判之權益。現行民事訴訟法第三十二條第七款關於法官應自行迴避之規定，即在當事

the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure, requiring the voluntary recusal of a judge is to disqualify him from performing his duty in a proceeding to rehear the case in which he took part in the previous trial or judgment to which the party has lodged a motion of objection, so as to maintain the neutral and objective position of judges and the interest of all levels of courts and to ensure a fair trial and judgment. While a judge who took part in the adjudication of a case in its previous proceeding or the new trial before the case was remanded should voluntarily recuse himself from rehearing the case, a judge who participated in the irrevocable final judgment of a case should, for the same reason, voluntarily recuse himself during the new trial where a motion for a new trial has been filed from such irrevocable final judgment. However, taking into consideration the limited number of judges sitting on each court and that there is no limit on the number of times for which motions for retrial may be brought, and with reference to the purpose of Article 6, Subparagraph 4, of the Administrative Proceedings Act,

人就法官曾參與之裁判聲明不服時，使該法官於其救濟程序，不得再執行職務，以保持法官客觀超然之立場，而維審級之利益及裁判之公平。因此，法官曾參與該訴訟事件之前審裁判或更審前之裁判者，固應自行迴避；對於確定終局判決提起再審之訴者，其參與該確定終局裁判之法官，依同一理由，於再審程序，亦應自行迴避。但在各法院法官員額有限，而提起再審之訴，又無次數限制之情況下，參照行政訴訟法第六條第四款規定意旨，其迴避以一次為限。例如對於再審確定終局判決及原確定終局判決又合併提起再審之訴者，僅參與再審確定終局判決之法官須迴避，而參與原確定終局判決之法官，則不須再自行迴避。最高法院二十六年上字第三六二號判例謂：「以再審之訴聲明不服之確定終局判決，並非再審程序之前審裁判，推事曾參與此項終局判決者，於再審程序執行職務，不得謂有民事訴訟法第三十二條第七款所定之迴避原因（按該款規定原為：「推事曾參與該訴訟事件之前審裁判或公斷者」，中華民國五十七年二月一日修正為：「推事曾參與該訴訟事件之前審裁判、更審前之裁判或仲裁者」），其與上述意旨不符部分，應不再援用，以維人民受公平審判

we hold that the recusal shall be limited to one time only. By way of example, in a proceeding of a second new trial brought by joining a motion from the irrevocable final judgment entered upon a new trial with a motion from the original irrevocable final judgment, only the judge who took part in making the irrevocable final judgment upon the retrial needs to recuse himself, and the judge who took part in rendering the original irrevocable final judgment is not required to do so. Thus, the Supreme Court's Precedent S. T. 362 of 1937 is inconsistent with our views expressed above in its statement that "an irrevocable final judgment to which objection is raised by filing a motion for retrial is not a decision of the trial preceding the new trial, and a judge who participated in rendering such final and binding judgment shall not be required to recuse himself from hearing the new trial pursuant to the provision of Article 32, Subparagraph 7, of the Code of Civil Procedure." (The text of said Subparagraph was originally: "If the judge participated in the decision of the former trial, or arbitration, of the same action" but has now been amended

之訴訟權益。

to read: "If the judge participated in the decision of the former trial or in the decision before remand for retrial, or arbitration, of the same action.") The part of the Supreme Court judgment quoted above must be overruled to protect the people's right to a fair trial.

J. Y. Interpretation No.257（April 6, 1990）*

ISSUE: Is the provision of the Regulation Governing the Levy of Commodity Tax, which has treated imported compressors used in the assembly of vehicular air conditioners/heaters as being in the category of air conditioners and levied commodity tax accordingly, unconstitutional?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 4, Paragraph 1, Subparagraph 16, 12, 16, Paragraph 2 and 22 of the Commodity Tax Act（貨物稅條例第四條第一項第十六款、第十二條、第十六條第二項、第二十二條）; Article 103-1, Paragraph 2, Subparagraph 6,of the Regulation Governing the Levy of Commodity Tax（貨物稅稽徵規則第一百零三條之一第二項第六款）.

KEYWORDS:

levy of commodity tax（貨物稅之徵收）.**

HOLDING: The former Article 4, Paragraph 1, Subparagraph 16, of the Commodity Tax Act was intended to levy commodity tax on “any and all air conditioners or heaters that regulate tempera-

解釋文：貨物稅條例修正前第四條第一項第十六款㈢，係就「凡用電力調節氣溫之各種冷氣機、熱氣機等」電器類課徵貨物稅之規定。行政院於中華民國六十四年七月二十一日修正

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ture by means of electric power." Article103-1, Paragraph 2, Subparagraph 6, of the Rules Governing the Levy of Taxes on Commodity, as amended and promulgated by the Executive Yuan on July 21, 1975, provides that imported compressors used in the assembly of vehicular air conditioners are treated as being in the category of air conditioners and commodity tax should be levied accordingly. Undoubtedly, the term used therein is not entirely consistent with the provision of the Commodity Tax Act first mentioned above. However, the said Regulation considers that compressors of the kind are not only the primary machine parts of air conditioners/heaters, but are also intended for use in the assembly of vehicular air conditioners/heaters only, that they still fall in the category of electrical appliances as provided for under said Act, and that the relevant taxpayers are not liable for additional tax burden because no more commodity tax would be levied upon completion of such air conditioners/heaters. The aforesaid Regulation has treated imported compressors used in the assembly of vehicular air condition-

發布之貨物稅稽徵規則第一百零三條之一第二項第六款規定，對於國外進口裝配汽車冷暖氣機用之壓縮機，按冷暖氣機類徵收貨物稅，固與貨物稅條例首開條文之用語未盡相符。惟該規則係以此種壓縮機不僅為冷暖氣機之主要機件，且祇能供裝配汽車冷暖氣機之用，仍屬上開條例所規定之電器類範圍，而於冷暖氣機裝配完成後，並不再課徵貨物稅，無加重人民納稅義務之虞。上述規則將汽車冷暖氣機用之壓縮機，依冷暖氣機類課徵貨物稅，亦為簡化稽徵手續，防止逃漏稅捐及維持課稅公平所必要，與憲法第十九條尚無牴觸。

ers/heaters as being in the category of air conditioners and levied commodity tax accordingly for the purposes of simplifying the collection procedure, preventing tax evasion and maintaining equality of taxation, which does not contradict Article 19 of the Constitution.

REASONUNG: The former Article 4, Paragraph 1, Subparagraph 16, of the Commodity Tax Act was intended to levy commodity tax on "any and all air conditioners or heaters that regulate temperature by means of electric power." In addition, Articles 12 and 16 thereof provide, respectively, "The commodity tax shall be levied on any and all goods imported from abroad that are subject to such commodity tax, the taxable amount of which is determined based on the valuation made by the Customs, plus any import duties levied thereon," and "[The commodity tax] for the goods imported from abroad shall be levied by the Customs at the same time customs duties are levied." Pursuant to Article 22 of said Act, as well as Article 103-1, Paragraph 2, Subparagraph 6, of the Rules Governing

解釋理由書：貨物稅條例修正前第四條第一項第十六款㈢，係就「凡用電力調節氣溫之各種冷氣機、熱氣機等」電器類課徵貨物稅之規定。又同條例第十二條及第十六條第二項分別規定：「凡由國外輸入應課貨物稅之貨物，應按照海關估價，加繳納進口稅捐後之總價徵收貨物稅」，「國外輸入之貨物，由海關於徵收關稅時代徵之」。行政院依同條例第二十二條，於中華民國六十四年七月二十一日修正發布之貨物稅稽徵規則第一百零三條之一第二項第六款：「國外進口裝配汽車冷暖氣機用之壓縮機，應按照海關核定之關稅完稅價格加計關稅及其他進口稅捐之總額，乘以四倍作為貨物稅之完稅價格徵收貨物稅，並發給鋁質貨物稅查驗證」，係對於國外進口裝配汽車冷暖氣機用之壓縮機，折算課徵冷暖氣機貨物稅，所為之補充規定，固與貨物稅條例

the Levy of Taxes on Commodity, as amended and promulgated by the Executive Yuan on July 21, 1975, which provides, " In respect of the imported compressors used in the assembly of vehicular air conditioners, the commodity tax shall be levied and the duty-paying value shall be determined by multiplying the aggregate amount of the duty-paying value of customs duty as determined by the Customs plus other import duties by four. In addition, an aluminum certificate of inspection for commodity tax shall be issued thereafter." The foregoing is supplementary to the provision related to the conversion of commodity tax for the imported compressors used in the assembly of vehicular air conditioners/heaters into that for air conditioners/heaters. Undoubtedly, the term used therein is not entirely consistent with the provision of the Commodity Tax Act first above mentioned. However, the said Regulation considers the nature of such compressors as unusual in that compressors of the kind are not only the primary machine parts for air conditioners/heaters, but also intended for use in the assembly of vehicular air

首開條文之用語未盡相符。惟該規則係以此種壓縮機，性質特殊，不僅為冷暖氣機之主要機件，且祇能供裝配汽車冷暖氣機之用，仍屬上開條例修正前第四條第一項第十六款㈢所規定之電器類範圍，而汽車冷暖氣機各組件，又係散裝於汽車內，無單一固定之形體，如不對此種壓縮機，課徵汽車冷暖氣機之貨物稅，則對於以化整為零方式進口之汽車冷暖氣機各部機件，即難以課徵貨物稅，而同時或先後進口其他汽車冷暖氣機用之零組件或進口壓縮機裝配完成汽車冷暖氣機後，均不再課徵貨物稅，其原所課徵者，既屬法有明文之冷暖氣機類之貨物稅，並未新增稅目或變更原定稅率，無加重人民納稅義務之虞，上述規則亦為簡化稽徵手續、防止逃漏稅捐及維持課稅公平所必要，與憲法第十九條尚無牴觸。

conditioners/heaters only, that they still fall in the category of electrical appliances as provided for under the former Article 4, Paragraph 1, Subparagraph 16(3), of said Act. Furthermore, the various components of a vehicular air conditioner/heater are not in one piece and in one fixed form while in an automobile. If no commodity tax for vehicular air conditioners/heaters is levied on such compressors, it would be difficult to impose commodity tax on such various machine parts and components for vehicular air conditioners/heaters as are imported by dividing up the whole into separate parts. Besides, the other parts and components for vehicular air conditioners/heaters that are imported concurrently with, or prior or subsequent to, such compressors or the air conditioners/heaters whose assembly has been completed would not be subject to additional commodity tax. Since the original commodity tax is levied on air conditioners/heaters, which is clearly prescribed by law, and no additional taxable item is added or original tax rate is changed, the relevant taxpayers are not liable for any additional tax burden. The aforesaid Regulation is also

for the purposes of simplifying the collection procedure, preventing tax evasion and maintaining equality of taxation, and hence is not in conflict with Article 19 of the Constitution.

Justice Chih-Peng Lee filed dissenting opinion, in which Justice Rui-Tang Chen joined.

本號解釋李大法官志鵬、陳大法官瑞堂共同提出不同意見書。

J. Y. Interpretation No.258（April 6, 1990）*

ISSUE: How should a special (Executive Yuan-governed) municipality apportion its educational, scientific and cultural funds in its total annual expenditure?

RELEVANT LAWS:

Articles 26, 109, 118, 128, and 164 of the Constitution（憲法第二十六條、第一百零九條、第一百一十八條、第一百二十八條及第一百六十四）; J. Y. Interpretation Nos.77 and 231（司法院釋字第七七號及第二三一號解釋）.

KEYWORDS:

fund（經費）, budget（預算）, province（省）, municipality（市）, county（縣）, special（Executive-Yuan-governed）municipality（直轄市）, province-governed municipality（省轄市）, administrative year（施政年度）, total annual expenditure（歲出總額）, total budget（預算總額）.**

HOLDING: Article 164 of the Constitution provides that the funds reserved for education, science and cultural programs shall not be less than fifteen percent of the total national budget,

解釋文：憲法第一百六十四條關於教育、科學、文化之經費，在中央不得少於其預算總額百分之十五，在省不得少於其預算總額百分之二十五，在市、縣不得少於其預算總額百分之三十

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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twenty five percent of the total provincial budget, and thirty five percent of the total municipal or county budget. The objective of the said Article is to prescribe a minimum ratio of the said funds, in proportion to the total annual expenditure, to be abided by governments at various levels when preparing their total budget for the administrative year. Executive-governed municipalities are accorded the same status as provinces by the Constitution; thus the ratio of their educational, scientific and cultural funds in proportion to the total budget shall resemble that of the provinces.

五之規定，旨在確定各級政府編製平常施政年度總預算時，該項經費應佔歲出總額之比例數。直轄市在憲法上之地位，與省相當；其教育、科學、文化之經費所佔預算總額之比例數，應比照關於省之規定。

REASONING: The first sentence of Article 164 of the Constitution stipulates: “Funds reserved for education, science and cultural programs shall not be less than fifteen percent of the total national budget, twenty five percent of the total provincial budget, and thirty five percent of the total municipal or county budget”, which seeks to prescribe a minimum ratio of such funds in proportion to the total budget of the governments at different levels. The so-called “total budget”

解釋理由書：憲法第一百六十四條前段明定：「教育、科學、文化之經費，在中央不得少於其預算總額百分之十五，在省不得少於其預算總額百分之二十五，在市、縣不得少於其預算總額百分之三十五」，以確定該項經費在各級政府預算總額中所佔之比例數。所稱「預算總額」，則指各級政府為平常施政而編製年度總預算時所列之歲出總額而言，經本院釋字第七十七號及釋字第二三一號解釋釋明在案。

refers to the total annual expenditure listed in the various governments' total annual budget prepared for their ordinary annual budget. The foregoing has been explained in this Yuan's Interpretation Nos.77 and 231.

Reference to "municipalities" in the Constitution may be interpreted as referring exclusively to province-governed municipalities, expressed as "province, municipality" in Article 109, Subparagraph 3, and as "municipality" in Article 128; or referring also to Executive-governed municipalities, as can be seen in Article 26, Subparagraph 1, — "county, municipality". Article 118 of the Constitution categorizes the self-governance of Executive-governed municipalities in Chapter XI, "System of Local Government — Province"; thus Executive-governed municipalities that operate on the said legal principles are on the same level as local self-governing bodies, and have the same status, authority, obligations, financial resources and responsibilities as provinces under the Constitution. Executive-governed municipalities are

憲法所稱之「市」，有僅指省轄市者，例如第一百零九條第三款所定「省、市」及第一百二十八條所定之「市」是；有兼指直轄市者，例如第二十六條第一款所定「縣、市」是。憲法第一百十八條既將直轄市之自治，列入第十一章「地方制度」「省」之一節內，則直轄市依法實施自治者，即與省為同級地方自治團體，在憲法上之地位、權責、財源及負擔，與省相當；且直轄市人口密集，在政治、經濟、文化上情形特殊，其環境、衛生、公安及交通等建設，所需經費，恆較縣及省轄市龐大，須將其財源，妥為分配，以免影響市政建設之均衡發展，其教育、科學、文化之經費所佔預算總額之比例數，應比照關於省之規定。

densely populated, have extraordinary political, economic and cultural circumstances, and their infrastructure construction fund needs exceed those of counties and province-governed municipalities. Therefore, their financial resources shall be allocated efficiently so as not to affect the complete development of infrastructure construction adversely, and the ratio of their educational, scientific and cultural funds in proportion to the total budget shall resemble that of the provinces.

J. Y. Interpretation No.259（April 13, 1990）*

ISSUE: Shall the laws of the Central Government be applicable to special (Executive-Yuan-governed) municipalities before laws of local self-governance are enacted?

RELEVANT LAWS:

Article 118 of the Constitution（憲法第一百十八條）.

KEYWORDS:

executive-governed municipality（直轄市）, local self-governance（地方自治）.**

HOLDING: Article 118 of the Constitution expressly stipulates that the self-governance of an special (Executive-Yuan-governed) municipality shall be prescribed by law. However, the abovementioned law has not yet been enacted, and the existing organization of special municipalities and the administration of local self-governance matters are governed by laws of the Central Government. To render the constitutional intent of local self-governance effective, there shall be en-

解釋文：直轄市之自治，以法律定之，為憲法第一百十八條所明定。惟上開法律迄未制定，現行直轄市各級組織及實施地方自治事項，均係依據中央頒行之法規行之。為貫徹憲法實施地方自治之意旨，自應斟酌當前實際狀況，制定直轄市自治之法律。在此項法律未制定前，現行由中央頒行之法規，應繼續有效。

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* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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

acted laws for the special municipalities' self-governance, taking into consideration the practical circumstances. Until such laws are enacted, the existing laws of the Central Government shall remain in effect.

REASONING: The Constitution provides different systems of local government for the province, counties and special municipalities in Chapter XI. Article 118 of the Constitution has authorized the enactment of laws for self-governance of special municipalities. Although the local self-governance of special municipalities need not follow the same procedures as those of the province or counties, it still has to abide by the Constitution and enact the relevant laws.

解釋理由書：憲法關於地方制度，於其第十一章就省、縣與直轄市有不同之規定，直轄市如何實施地方自治，憲法第一百十八條授權以法律定之。故直轄市實施地方自治，雖無須依省、縣自治相同之程序，惟仍應依憲法意旨，制定法律行之。

The Constitution stipulates that local self-governance must be achieved in an orderly manner; however, the abovementioned law has not yet been enacted. The existing organization of special municipalities and the administration of local self-governance matters are governed by laws of the Central Government. To ren-

憲法規定之地方自治，須循序實施，前述直轄市自治之法律，迄未制定。現行直轄市各級組織及實施地方自治事項，均係依據中央頒行之法規行之。為貫徹憲法實施地方自治之意旨，仍應斟酌當前實際狀況，從速制定直轄市自治之法律，以謀求改進。在此項法律未制定前，直轄市之自治與地方行政

der the constitutional intention of local self-governance effective, the government shall promptly enact laws for the special municipalities' self-governance, taking into consideration the practical circumstances in order to facilitate improvement. The self- governance and local administration of special municipalities must not be suspended, thus until the aforementioned laws are enacted, the existing laws of the Central Government shall remain in effect.

事務，不能中斷，現行由中央頒行之法規，應繼續有效。

J. Y. Interpretation No.260（April 19, 1990）*

ISSUE: Do the established provincial representative bodies have legislative power and shall the existing legislations of the provincial assembly and provincial governmental organizations remain operative?

RELEVANT LAWS:

Articles 108, 112 and 113 of the Constitution（憲法第一百零八條、第一百十二條及第一百十三條）; J. Y. Interpretation No.259（司法院釋字第二五九號解釋）.

KEYWORDS:

provincial assembly（省議會）, provincial government（省政府）, local self-governance（地方自治）, representative body（民意機關）.**

HOLDING: According to the system of local government provisions in the Constitution, the Central Government has no authority to enact individual laws for specified provincial assemblies and the organization of the provincial government. The established provincial representative bodies have no legislative power

解釋文：依中華民國憲法有關地方制度之規定，中央尚無得逕就特定之省議會及省政府之組織單獨制定法律之依據，現時設置之省級民意機關亦無逕行立法之權限。

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* Translated by THY Taiwan International Law Offices.

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either.

REASONING: The petitioning institute in this case applied for an interpretation with respect to questions of delegation of local government's legislative power under the Constitution. It is clear that this is not a question concerning the constitutionality of the laws.

解釋理由書：本件聲請機關係就適用憲法關於地方自治立法權限劃分之規定，發生疑義，聲請解釋；非關法規違憲審查問題，合先說明。

With regard to the delegation of the provincial and counties' legislative power, the Constitution has prescribed special provisions in Articles 108, 112 and 113. According to these provisions, the Central Government has no authority to enact individual laws for specified provincial assemblies and the organization of the provincial government. The established provincial representative bodies have no legislative power either. When applying the Constitution, if matters that have not been contemplated at the time of drafting arise, the central government shall respond by balancing the needs of the nation, taking into consideration the special circumstances of the regions, and promptly resolve the matters pursuant to the constitu-

關於省縣地方自治事項立法權限之劃分，中華民國憲法第一百零八條、第一百十二條及一百十三條設有特別規定，依此規定，中央尚無得逕就特定之省議會及省政府之組織，單獨制定法律之依據，現時設置之省級民意機關亦無逕行立法之權限。至行憲後有制憲當時所未料及之情事發生，如何因應，自應由中央盱衡全國之整體需要，兼顧地方之特殊情況，妥速為現階段符合憲法程序之解決。在未依憲法程序解決前，省縣自治及行政事務，不能中斷，依本院釋字第二五九號解釋之同一理由，現行有關台灣省實施地方自治及省議會、省政府組織之法規，仍繼續有效，併予敘明。

tional procedures. Prior to resolution under the constitutional procedures, the self-governance and administration of provincial and county governments cannot be suspended. For the same reason given in this Yuan's Interpretation No.259, the local self-governance system and the existing legislations of the provincial assembly and provincial governmental organizations shall remain operative.

J. Y. Interpretation No.261（June 21, 1990）*

ISSUE: Should the first-term representatives of the three national legislative bodies be allowed to exercise their powers indefinitely without periodical re-election?

RELEVANT LAWS:

Articles 26, 28, 64, 65, 91 and 93 of the Constitution（憲法第二十六條、二十八條、第六十四條、第六十五條、第九十一條及第九十三條）; Paragraph 6 of the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion（動員戡亂時期臨時條款第六項）; J.Y. Interpretation No. 31（司法院釋字第三一號解釋）.

KEYWORDS:

National representatives（中央民意代表）, national legislative bodies（中央民意機構）, periodical re-election（定期改選）, representatives at large（全國性中央民意代表）.**

HOLDING: The terms of office of the national representatives are expressly provided in the Constitution. Since the first-term national representatives were elected and took office, our nation

解釋文：中央民意代表之任期制度為憲法所明定，第一屆中央民意代表當選就任後，國家遭遇重大變故，因未能改選而繼續行使職權，乃為維繫憲政體制所必要。惟民意代表之定期改

* Translator by Professor Jau-Yuan Hwang.

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has suffered severe calamities. As a result, reelection of the national representatives has been infeasible and all of the first-term national representatives have continued to exercise their powers. Such results were necessary for the maintenance of our constitutional system. However, periodical reelection of representatives is crucial for reflection of the will of the people and for implementation of constitutional democracy. Neither J.Y. Interpretation No. 31, nor Article 28, Paragraph 2, of the Constitution, nor Paragraph 6, Subparagraphs 2 and 3, of the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion were intended to allow the first-term national representatives to continue exercising their powers indefinitely. None of these provisions were intended to change their terms of office. Nor did they prohibit the election of the next-term national representatives from being held. In fact, since 1969, the Central Government has been holding regular elections of the national representatives in the Free Area, in order to reinforce our national representative bodies

選，為反映民意，貫徹民主憲政之途徑，而本院釋字第三十一號解釋、憲法第二十八條第二項及動員戡亂時期臨時條款第六項第二款、第三款，既無使第一屆中央民意代表無限期繼續行使職權或變更其任期之意，亦未限制次屆中央民意代表之選舉。事實上，自中華民國五十八年以來，中央政府已在自由地區辦理中央民意代表之選舉，逐步充實中央民意機構。為適應當前情勢，第一屆未定期改選之中央民意代表除事實上已不能行使職權或經常不行使職權者，應即查明解職外，其餘應於中華民國八十年十二月三十一日以前終止行使職權，並由中央政府依憲法之精神、本解釋之意旨及有關法規，適時辦理全國性之次屆中央民意代表選舉，以確保憲政體制之運作。

incrementally. To cope with the present situations, those first-term national representatives who have not been reelected on a periodical basis shall cease the exercise of their powers no later than December 31, 1991. Among them, those who have been de facto incapable of exercising or constantly failed to exercise their powers shall be immediately dismissed, after thorough investigation, from their offices. The Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly.

REASONING: When the Legislative Yuan exercised its budgetary powers, it cast doubt on the constitutional application of J.Y. Interpretation No. 31; Article 28, Paragraph 2, of the Constitution; and Paragraph 6, Subparagraphs 2 and 3, of the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Com-

解釋理由書：本件立法院行使審查預算之職權時，對於本院釋字第三十一號解釋、憲法第二十八條第二項及動員戡亂時期臨時條款第六項第二款、第三款之規定，發生適用憲法之疑義，聲請解釋，依本院大法官會議第一一八次會議決議及司法院大法官會議法第四條第一項第一款規定，應予受理，合先說明。

munist Rebellion. It therefore petitioned for interpretation. In accordance with the resolution of the 118th Meeting of the Council of Grand Justices of the Judicial Yuan and Article 4, Paragraph 1, Subparagraph 1, of the Act of the Constitutional Interpretation Procedure of the Judicial Yuan, this petition is admitted.

The Constitution provides specific terms of office for all national representatives: six years for the National Assembly Delegates, three years for the Legislators and six years for the Members of the Control Yuan, respectively. Such terms are expressly provided for in Article 28, Paragraph 1, and Articles 65 and 93 of the Constitution. After the current Constitution took effect, our nation suffered severe calamities. Upon expiration of the first term of the Legislators and Members of the Control Yuan, it was de facto impossible to hold elections of the second-term representatives in accordance with the laws. In order to prevent the Five-Yuan system as established by the Constitution from being weakened, J.Y. Interpretation No. 31 therefore declared that “before the

中華民國憲法就中央民意代表，設有任期制度。國民大會代表為六年，立法委員為三年，監察委員為六年，此觀憲法第二十八條第一項、第六十五條及第九十三條之規定甚明。行憲後，國家發生重大變故，第一屆立法委員、監察委員任期屆滿後，事實上不能依法辦理次屆選舉，為免憲法所樹立之五院制度陷於停頓，本院釋字第三十一號解釋，乃有「在第二屆委員未能依法選出集會與召集以前，自應仍由第一屆立法委員、監察委員繼續行使其職權」之釋示。至於第一屆國民大會代表，則因憲法第二十八條第二項有「每屆國民大會代表之任期，至次屆國民大會代表開會之日為止」之規定，於任期屆滿後，仍繼續行使職權。迨中華民國六十一年三月二十三日修訂動員戡亂時期臨時條款時，復有第六項第二款及第三款「第一

second-term representatives are elected and convene in accordance with the laws, all of the first-term representatives of both the Legislative and Control Yuans shall continue to exercise their respective powers." As to the first-term National Assembly Delegates, they were allowed to keep exercising their powers after their first term expired, because Article 28, Paragraph 2, of the Constitution provides that "The term of office of the Delegates to each National Assembly term shall cease on the date upon which the next National Assembly term convenes." Furthermore, on March 23, 1972, the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion were amended to include the following provisions: "The first-term national representatives were elected by the people of the entire nation and have been exercising their powers pursuant to the laws. Those elected through the by-elections shall have the same status" (Paragraph 6, Subparagraph 2) and "Those national representatives elected through the elections for additional members, together with the first-

屆中央民意代表，係經全國人民選舉所產生，依法行使職權，其增選補選者亦同」、「增加名額選出之中央民意代表，與第一屆中央民意代表，依法行使職權」之規定。

term national representatives, shall exercise their powers pursuant to the laws" (Paragraph 6, Subparagraph 3).

However, periodical election of representatives is an essential avenue for reflection of the will of the people and implementation of constitutional democracy. That the abovementioned national representatives were allowed to continue the exercise of their powers was necessary in order to deal with the then-existing situations and maintain the constitutional system. Since publication of the abovementioned Interpretation on January 29, 1954, the first-term national representatives have been exercising their powers for more than three decades. Nevertheless, the above-mentioned Interpretation was not intended to permit the indefinite exercise of powers by the first-term Legislators and Members of the Control Yuan, or to change their respective terms. Furthermore, Article 28, Paragraph 1, of the Constitution expressly provides "The National Assembly Delegates shall be elected every six years." Obviously, the intention of Paragraph 2 of this Article is to avoid

惟民意代表之定期改選，為反映民意，貫徹民主憲政之途徑。前述中央民意代表之繼續行使職權，係因應當時情勢，維繫憲政體制所必要。自中華民國四十三年一月二十九日上開解釋公布以來，第一屆中央民意代表繼續行使職權已達三十餘年。但該解釋並無使第一屆立法委員、監察委員得無限期繼續行使職權或變更其任期之意，而憲法第二十八條第一項已明定：「國民大會代表每六年改選一次」，其第二項之規定顯係為避免政權機關職權之行使因改選而中輟，並非謂國民大會代表得無限期延長任期。

any time gap between elections in the course of the National Assembly's exercise of their powers. It is not intended to extend the term of office of the National Assembly Delegates indefinitely.

Furthermore, the abovementioned provisions regarding the first-term national representatives' exercise of powers pursuant to the laws as provided for in Paragraph 6, Subparagraphs 2 and 3, of the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion were amended for those national representatives elected through both the by-elections and elections for additional members. In the spirit of the abovementioned J.Y. Interpretation No. 31, the intention of these two Subparagraphs was not to permit the indefinite exercise of powers by those national representatives who were not reelected periodically. Nor did they prohibit the government from holding the next-term elections of the national representatives. In fact, since 1969, the Central Government has been holding regular elections of the

上開動員戡亂時期臨時條款第六項第二款及第三款關於第一屆中央民意代表依法行使職權之規定，係因增選補選及增加名額中央民意代表之選出而增列，與前開解釋意旨相同，既非謂未定期改選之中央民意代表得無限期行使職權，亦未限制辦理次屆中央民意代表之選舉。事實上，自中華民國五十八年以來，中央政府已在自由地區辦理中央民意代表之選舉，逐步充實中央民意機構。為適應當前情勢，第一屆未定期改選之中央民意代表除事實上已不能行使職權或經常不行使職權者，應即查明解職外，其餘應於中華民國八十年十二月三十一日以前終止行使職權。

national representatives in the Free Area, in order to reinforce the national legislative bodies incrementally. To cope with the present situation, those first-term national representatives who have not been reelected on a periodical basis shall cease the exercise of their powers no later than December 31, 1991. Among them, those who have been de facto incapable of exercising or constantly failed to exercise their powers shall be immediately dismissed, after thorough investigation, from their offices.

As stated above, those national representatives who have not been reelected on a regular basis shall cease the exercise of their powers. However, those provisions regarding election of the national representatives as provided for in Articles 26, 64 and 91 of the Constitution are still not entirely applicable in practice at the present time. Given such circumstances, the Central Government shall make an appropriate plan, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, to hold in due course the next elec-

未定期改選之中央民意代表既須終止行使職權，而憲法第二十六條、第六十四條及第九十一條關於中央民意代表選舉之規定，目前事實上仍不能完全適用，中央政府自應依憲法之精神、本解釋之意旨及有關法規，妥為規劃，在自由地區適時辦理含有全國不分區名額之次屆中央民意代表選舉，以確保憲政體制之運作。至現有增加名額選出之中央民意代表其職權之行使，仍至任期屆滿時為止，併此說明。

tion of the national representatives, including a certain number of representatives-at-large, so that the constitutional system will continue to function. It should be noted here that those current national representatives elected through the elections for additional members shall continue to exercise their powers until the end of their term.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官志鵬提出不同意見書。

J. Y. Interpretation No.262（July 6, 1990）*

ISSUE: Should an impeachment case brought up by the Control Yuan against a serviceman be transferred to the Commission on the Disciplinary Sanctions of Public Functionaries for the latter's deliberation?

RELEVANT LAWS:

Articles 77, 90, 97, 99 and 100 of the Constitution（憲法第七十七條、第九十條、第九十七條、第九十九條及第一百條）; Armed Forces Punishment Act（陸海空軍懲罰法）.

KEYWORDS:

impeachment（彈劾）, the Control Yuan（監察院）, military serviceman（軍人）, the Disciplinary Sanctions of Public Functionaries（公務員懲戒委員會）.**

HOLDING: After the Control Yuan institutes an impeachment proceeding against a military serviceman, the case shall be transferred to, and tried by, the Commission on the Disciplinary Sanctions of Public Functionaries. Wrongdoings by servicemen, other than those that lead to impeachment proceedings, are punishable under the Armed Forces Pun-

解釋文：監察院對軍人提出彈劾案時，應移送公務員懲戒委員會審議。至軍人之過犯，除上述彈劾案外，其懲罰仍依陸海空軍懲罰法行之。

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* Translated by Eric Yao-kuo Chiang.

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

ishment Act.

REASONING: Article 77 of the Constitution states that "The Judicial Yuan shall be the highest judicial organ of the State and responsible for the trial of civil, criminal, and administrative cases and the disciplinary punishment of public employees." The Commission on the Disciplinary Sanctions of Public Functionaries is organized under the Judicial Yuan and the competent authority regarding the discipline of public employees. This is obvious in the wording of Article 7 of the Organic Act of the Judicial Yuan.

解釋理由書：司法院為國家最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒，憲法第七十七條定明文。司法院設公務員懲戒委員會，為公務員懲戒之主管機關，此觀司法院組織法第七條規定甚明。

In those democratic nations with separate executive, legislative and judicial branches, the impeachment power represents the democratic oversight of unlawful and neglectful conduct of high government officials by the parliament on behalf of the people. The scope of the impeachment power exercised by the Control Yuan under Article 90, Paragraph 2 of Article 97, and Articles 99 and 100 of our Constitution is greater than that. With respect to the general proceedings of im-

彈劾權在採取三權分立之民主國家，係議會代表人民對政府高級官員之違法或失職，實施民主監督之制度。我國憲法第九十條、第九十七條第二項、第九十九條及第一百條規定之監察院彈劾權，其範圍較廣。而憲法除就總統、副總統之彈劾程序定有明文外，對於一般彈劾案之審議，並未就文職或武職公務員作不同之規定。因此，監察院如就軍人之違法或失職行為成立彈劾案時，自應將該彈劾案連同證據，移送公務員懲戒委員會審議，方符憲法第七十七條

peachment, no distinction is made in the Constitution between those against civil servants and military servicemen, except for those against the president and the vice president. Hence, if the Control Yuan institutes an impeachment proceeding against the unlawful and neglectful conduct of a serviceman, it shall transfer the case, along with evidence, to the Commission on the Disciplinary Sanctions of Public Functionaries. To comply with Article 77 of the Constitution, it should do so. Accordingly, Article 8 of the Control Act and Article 18 of the Public Functionaries Discipline Act were enacted.

之意旨。監察法第八條及公務員懲戒法第十八條，即係依此意旨所為之規定。

To preserve the unity of power of command and discipline in the military and to ensure a full implementation of commands and military orders, wrongdoings by persons in active military service are punishable under the Armed Forces Punishment Act, except those that lead to impeachment and criminal proceedings.

至陸海空軍現役軍人之過犯，不涉及刑事範圍者，除彈劾案成立者外，為維護軍事指揮權與賞罰權之合一，確保統帥權及軍令之貫徹執行，其懲罰仍應依陸海空軍懲罰法行之。

Justice Chih-Peng Lee filed dissenting opinion.

Justice Chung-Sheng Lee filed dissenting opinion.

本號解釋李大法官志鵬、李大法官鐘聲分別提出不同意見書。

J. Y. Interpretation No.263（July 19, 1990）*

ISSUE: Does the mandatory death penalty, as stipulated in the Robbery Punishment Act, violate the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 2 and 8 of the Robbery Punishment Act（懲治盜匪條例第二條、第八條）; Articles 59, 167 and 347 of the Criminal Code（刑法第五十九條、第一百六十七條、第三百四十七條）.

KEYWORDS:

mandatory death penalty（死刑）, kidnap（擄人）, robbery（勒贖）.**

HOLDING: Article 2, Paragraph 1, Subparagraph 9, of the Robbery Punishment Act, which is a special criminal law, imposes a mandatory death penalty on those who commit kidnapping with the intention of receiving ransom regardless of the details and results of their crimes. This penalty is very rigorous. However, according to Article 8 of the same Act, a judge, upon determining that the penalty

解釋文：懲治盜匪條例為特別刑法，其第二條第一項第九款對意圖勒贖而擄人者，不分犯罪情況及結果如何，概以死刑為法定刑，立法甚嚴，惟依同條例第八條之規定，若有情輕法重之情形者，裁判時本有刑法第五十九條酌量減輕其刑規定之適用，其有未經取贖而釋放被害人者，復得依刑法第三百四十七條第五項規定減輕其刑，足以避免過嚴之刑罰，與憲法尚無牴觸。

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* Translator by Dr.F.T.Liao.

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is too severe to be applied to a certain case, may apply to Article 59 of the Criminal Code to reduce the penalty. The penalty on those who release victims without taking ransom, according to Article 347, Paragraph 5, of the Criminal Code, may also be reduced. Both of them can avoid rigorous penalty. Therefore, Article 2, Paragraph 1, Subparagraph 9, of the Robbery Punishment Act is not contrary to the Constitution.

REASONING: Article 347, Paragraph 1, of the Criminal Code reads: "Those who commit kidnapping with the intention of receiving ransom will be sentenced to death, imprisonment for life or imprisonment for more than 7 years." Article 2, Paragraph 1, Subparagraph 9, of the Robbery Punishment Act, which is a special criminal law, imposes a mandatory death penalty on those who kidnap with the intention of receiving a ransom. Its purpose is to increase the penalty to prevent such crimes, to maintain the security of the society, and to keep the public free from fear. Imposing a mandatory death penalty on those who commit such crimes

解釋理由書：刑法第三百四十七條第一項規定：「意圖勒贖而擄人者，處死刑、無期徒刑或七年以上有期徒刑」。懲治盜匪條例為特別刑法，其第二條第一項第九款對意圖勒贖而擄人者處死刑之規定，則旨在提高意圖勒贖而擄人罪之刑度，期能遏阻此種犯罪，維護治安，使社會大眾免於遭受擄人勒贖之恐懼。此項規定，不分犯罪之情況及其結果如何，概以死刑為法定刑，立法甚嚴，有導致情法失平之虞，宜在立法上兼顧人民權利及刑事政策妥為檢討。惟依同條例第八條之規定，上述擄人勒贖案件，仍適用刑法總則及刑法分則第一百六十七條、第三百四十七條第五項之規定。裁判時若有情輕法重之情

regardless of their details and results is indeed very rigorous, and may create an imbalance between the legal system and the people's sense of justice. A review of legislation is therefore needed in order to maintain equilibrium between the rights of the people and criminal policy. However, according to Article 8 of the same Act, Article 167 and Article 347, Paragraph 5, of the Criminal Code can be applied to the above-mentioned criminal cases. A judge, upon determining that the penalty is too severe to be applied to a certain case, may apply to Article 59 of the Criminal Code to reduce the penalty. The penalty can also be reduced when criminals release victims without taking any ransom. Both of them can avoid over rigorous punishment. Consequently, it can not be established that Article 2, Paragraph 1, Subparagraph 9, of the Robbery Punishment Act is contrary to the Constitution.

形者，本有刑法第五十九條酌量減輕其刑規定之適用，其有未經取贖而釋放被害人者，亦得減輕其刑，足以避免過嚴之刑罰。是上開懲治盜匪條例第二條第一項第九款之規定，尚難謂與憲法牴觸。

J. Y. Interpretation No.264（July 27, 1990）*

ISSUE: Is it unconstitutional for the Legislative Yuan to propose increased spending in a budgetary bill?

RELEVANT LAWS:

Article 70 of the Constitution（憲法第七十條）.

KEYWORDS:

the Legislative Yuan（立法院）, the Executive Yuan（行政院）, expenditures in the budgetary bill（預算案支出）.**

HOLDING: Article 70 of the Constitution provides, "The Legislative Yuan shall not make proposals for an increase in the expenditures in the budgetary bill presented by the Executive Yuan." The intent behind this Article is to curtail the government's haphazard augmentation of the budget, which increases the people's burden. The Legislative Yuan's Resolution of the Twenty-sixth Meeting of the Eighty-fourth Assembly states: "We request the Executive Yuan to grant the military, civil, and teaching personnel

解釋文：憲法第七十條規定：「立法院對於行政院所提預算案，不得為增加支出之提議」，旨在防止政府預算膨脹，致增人民之負擔。立法院第八十四會期第二十六次會議決議：「請行政院在本（七十九）年度再加發半個月公教人員年終工作獎金，以激勵士氣，其預算再行追加」，係就預算案為增加支出之提議，與上述憲法規定牴觸，自不生效力。

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* Translated by Nigel N. T. Li, Lee and Li, Attorneys-at-Law.

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

a year-end bonus in the amount of half of their monthly pay in the current year (79) in order to boost their morale. The budget shall be consequently augmented." The Resolution is indeed a proposal for an increase in the expenditures in the budgetary bill, which violates Article 70 of the Constitution, and shall thus be declared null and void.

REASONING: In accordance with the Constitution, the Executive Yuan shall present the budgetary bill to the Legislative Yuan, which has the power to decide upon it by resolution. Such arrangement is intended to separate the powers of presentation and approval of the budgetary bill so that the Executive Yuan, while setting the national budget, can take into consideration the country's finances, economic condition, and the annual administrative needs. It is by the power vested in the Legislative Yuan by the people that the Legislative Yuan fulfills its role of supervising the government's finances, ultimately ensuring reasonable government expenditure and staunching unnecessary spending. In the spirit of the Con-

解釋理由書：按憲法規定，行政院應提出預算案，由立法院議決之，旨在劃分預算案之提案權與議決權，使行政院在編製政府預算時能兼顧全國財政、經濟狀況與年度施政計畫之需要，並為謀求政府用度合理，避免浪費起見，委由代表人民之立法院議決之，以發揮其監督政府財政之功能。為貫徹上述意旨，憲法第七十條明文規定：「立法院對於行政院所提預算案，不得為增加支出之提議」，以防止政府預算膨脹，致增人民之負擔。立法院第八十四會期第二十六次會議決議：「請行政院在本（七十九）年度再加發半個月公教人員年終工作獎金，以激勵士氣，其預算再行追加」，乃對於行政院所提預算案為增加支出之提議，雖係以委員提案方式作成，實質上仍與前述憲法規定牴

stitution, Article 70 of the Constitution provides, “The Legislative Yuan shall not make proposals for an increase in the expenditures in the budgetary bill presented by the Executive Yuan.” The intent behind the Article is to curtail the government’s haphazard augmentation of the budget, which increases the people’s burden. The Legislative Yuan’s Resolution of the Twenty-sixth Meeting of the Eighty-fourth Assembly states: “We request the Executive Yuan to grant the military, civil, and teaching personnel a year-end bonus in the amount of half of their monthly pay in the current year (79) in order to boost their morale. The budget shall be consequently augmented.” The Resolution is indeed a proposal for an increase in the expenditures in the budgetary bill. Even though the proposal was floated as a motion of the legislators, it is substantially in conflict with Article 70 of the Constitution, and shall thus be declared null and void.

觸，自不生效力。

J. Y. Interpretation No.265（October 5, 1990）*

ISSUE: Is the provision of the National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion, setting forth entry restrictions for those who have failed to reside in the free area of the country for a specified period after leaving the area under the Communists' control, consistent with the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）.

KEYWORDS:

freedom of residence and migration（居住遷徙自由）, principle of proportionality（比例原則）, restrictions on entry into the country（入境限制）, the nation has suffered severe calamities（國家遭遇重大變故）, exercise of administrative discretion（行政裁量權之行使）.**

HOLDING: The restrictions on entry into the country imposed by Article 3-II (ii) of the National Security Act for the Period of National Mobilization for Suppression of the Communist Rebellion were intended to maintain the country's

解釋文：動員戡亂時期國家安全法第三條第二項第二款關於入境限制之規定，乃為維持社會秩序所必要，與憲法並無牴觸。至該法施行細則第十二條第六款前段，關於未在自由地區居住一定期間，得不予許可入境之規定，係

* Translated by Vincent C. Kuan.

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then existing social order during the period for the suppression of the communist rebellion and are therefore not in conflict with the Constitution. As to the provision stating that: "A citizen may not be permitted to enter the country if the citizen has not resided in the free area for a certain period of time," as set forth in the first part of Article 12 (vi) of the Enforcement Rules of the said Act, it is designed to provide a fact-finding guideline for the competent authority while exercising its administrative discretion according to the law mentioned above and thus is consistent with the purposes of the aforesaid Act to guarantee national security and safeguard social stability. However, the said Enforcement Rules should be reviewed and amended from time to time after taking into account the purposes of Article 3-II (ii) of the said Act so as to meet the needs as dictated by social developments.

對主管機關執行上述法律時，提供認定事實之準則，以為行使裁量權之參考，與該法確保國家安全、維護社會安定之立法意旨尚屬相符。惟上述細則應斟酌該法第三條第二項第二款規定之意旨，隨情勢發展之需要，檢討修正。

REASONING: The rationale of Article 10 of the Constitution, which stipulates that the people shall have freedom of residence and migration, is to protect the people's freedom to choose and

解釋理由書：人民有居住及遷徙之自由，固為憲法第十條所規定，但為防止妨礙他人自由、避免緊急危難、維持社會秩序或增進公共利益所必要者，仍得以法律限制之，此觀憲法第二

change their residence and to travel, including the right to exit or enter the country. In accordance with Article 23 of the Constitution, however, such fundamental right shall not be restricted by law except when it is necessary to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain the social order, or to advance the public interest. Article 1 of the National Security Act [Promulgated?] during the Period of National Mobilization for Suppression of the Communist Rebellion expressly provides that the Act was enacted for the purposes of guaranteeing national security and safeguarding social stability during the period of national mobilization for suppression of the communist rebellion. The provision of Article 3-II (ii) of the said Act that entry into and exit from the country may not be permitted if, judging from the facts, it is reasonably suspected that any person may pose a threat to national security or social stability, is a restriction imposed on the people's freedom of travel. As far as entry into the country is concerned, it is necessary to adopt such restriction of entry to maintain social or-

十三條規定甚明。動員戡亂時期國家安全法第一條明示該法係動員戡亂時期為確保國家安全、維護社會安定而制定。其中第三條第二項第二款關於有事實足認為有妨害國家安全或社會安定之重大嫌疑者，得不予許可入出境之規定，即係對於人民遷徙自由所為之限制。就入境之限制而言，當國家遭遇重大變故，社會秩序之維持與人民遷徙之自由發生衝突時，採取此種入境限制，既為維持社會秩序所必要，與憲法並無牴觸。

der when the nation has suffered severe calamities even if a conflict thus exists between the preservation of social order and the people's freedom to travel. As such, it is not in conflict with the Constitution.

As to the provision of the first half of Article 12 (vi) of the Enforcement Rules of the said Act as amended and issued by the Executive Yuan on November 18, 1988, stating that: "A citizen who has not resided in the free area continuously for five years (later amended to four years) after leaving the enemy-occupied area may not be allowed to enter the country," it is designed to provide a fact-finding guideline for the competent authority while exercising its administrative discretion according to the law mentioned above, which does not suggest that entry into the country will be flatly denied in the event of the aforesaid situation. Therefore, the relevant language of the said article prescribing, "…may not be allowed," instead of "…shall not be allowed," is consistent with the purposes of the aforesaid Act to guarantee national security and

至該法施行細則第十二條第六款前段在中華民國七十七年十一月十八日行政院修正發布前，關於「離開淪陷區後，未在自由地區連續住滿五年（已修正為四年）」者，得不予許可入境之規定，係對主管機關執行上述法律規定時，提供認定事實之一種準則，以為行使行政裁量權之參考，並非凡有此情形，一律不予許可入境。故其條文定為「得」不予許可，而非「應」不予許可，與該法確保國家安全、維護社會安定之立法意旨尚屬相符。惟上述細則應斟酌該法第三條第二項第二款規定之意旨，隨情勢發展之需要，檢討修正。

safeguard social stability. However, the said Enforcement Rules should be reviewed and amended from time to time after taking into account the purposes of Article 3-II (ii) of the said Act so as to meet the needs as dictated by social developments.

J. Y. Interpretation No.266（October 5, 1990）*

ISSUE: May a public functionary file an appeal or administrative action for property rights in accordance with laws and regulations, based upon a final result of merit evaluation that does not affect the status of such public functionary?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Public Functionaries Merit Evaluation Act（公務人員考績法）.

KEYWORDS:

public functionary（公務人員）, removal（免職）, administrative litigation（行政訴訟）, merit evaluation（考績）.**

HOLDING: The removal of a public functionary from his or her office pursuant to the Public Functionaries Merit Evaluation Act has changed the status of such public functionary, which directly affects the people's right to serve the state. Based on J. Y. Interpretation No. 243, such removed public functionary may bring administrative action. Public functionaries not satisfied with the out

解釋文：依公務人員考績法所為之免職處分，因改變公務員身分關係，直接影響人民服公職之權利，依本院釋字第二四三號解釋，得許受處分之公務員提起行政訴訟。對於未改變公務員身分之其他考績結果有所不服，仍不許以行政訴訟請求救濟。惟公務人員基於已確定之考績結果，依據法令規定為財產上之請求而遭拒絕者，影響人民之財產權，參酌本院釋字第一八七號及第

* Translated by Alex C. Y. Tsai, Esq. and Chien Yeh Law Offices.

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come of merit evaluation, yet whose status has not been affected, are prohibited from bringing an administrative litigation requesting relief. However, should a public functionary bring a claim, based upon a final result of such merit evaluation, for property rights in accordance with the laws and regulations, such functionary's property right has been affected (see J. Y. Interpretations Nos. 187 and 201) and the person can file an administrative appeal or administrative litigation. The part of Administrative Court Precedent 1957 Pan-Tze No. 11 inconsistent with the above shall no longer be applicable. Whether such property claim is based upon a final merit evaluation is a question of facts, which should be decided case by case, and therefore it does not fall within the scope of this Interpretation.

二〇一號解釋，尚非不得依法提起訴願或行政訴訟，行政法院四十八年判字第十一號判例與上述意旨不符部分，應不再援用。至是否係基於已確定之考績結果所得為之財產上請求，係事實問題，應就具體事件依法認定，不在本件解釋範圍，併予說明。

REASONING: Whether a public functionary may bring an administrative litigation when he or she suffers harm from an administrative act arising out of his or her status of holding office (so as to damage his or her rights available under the law), shall depend upon the contents

解釋理由書：公務員因其身分而受行政處分，致依法應享之權利受損害者，得否提起行政訴訟，應視處分之內容而定，方符憲法保障人民權利之本旨，此觀本院釋字第一八七號、第二〇一號解釋，甚為明顯。依公務人員考績法對公務員所為之免職處分，改變公務

of such administrative decision in order to conform to the constitutional requirement of protecting the rights of the people. This is clearly set forth in J. Y. Interpretations Nos. 187 and 201. The removal of a public functionary from his or her office pursuant to the Public Functionaries Merit Evaluation Act has changed the status of such public functionary, which directly affects the people's right to serve the state as guaranteed by the Constitution. Pursuant to J. Y. Interpretation No. 243, such removed public functionary may bring administrative litigation. Public functionaries not satisfied with the outcome of merit evaluation, yet whose status has not been affected, are prohibited from bringing an administrative litigation for relief. However, should a public functionary bring a claim, based upon a final result of such merit evaluation, for property rights in accordance with the laws and regulations, such functionary's property right has been affected (see J. Y. Interpretations Nos. 187 and 201) and said person can file an administrative appeal or administrative litigation. Administrative Court Precedent 1957 Pan-Tze No. 11 states

員之身分，直接影響其憲法上所保障之服公職權利，依本院釋字第二四三號解釋，得許受處分之公務員提起行政訴訟。至對於未改變公務員身分之其他考績結果，有所不服，則仍不許以行政訴訟請求救濟。惟公務人員基於已確定之考績結果，依據法令規定為財產上之請求而遭拒絕者，影響人民之財產權，參酌本院上開各解釋意旨，尚非不得依法提起訴願或行政訴訟。行政法院四十八年判字第十一號判例：「提起訴願，限於人民因官署之處分違法或不當，而損害其權利或利益者，方得為之。至若基於特別權力關係所生之事項，或因私法關係發生爭執，則依法自不得提起訴願。原告原任被告官署（澎湖縣馬公鎮公所）幹事，係屬編制外人員，縱令仍可視為自治團體之公吏，其與被告官署間亦屬處於特別權力關係，如因補發薪津事項對被告官署處置有所不服，僅得向該管監督機關請求救濟，要不得援引訴願法提起訴願。至原告原服務被告官署之事業課撤銷，經改以水廠技工僱用後，則純屬私經濟關係之僱傭關係，原告對停職期間薪津如有爭執，自屬就私法關係有所爭執，顯亦不得提起訴願。」與上述意旨不符部分，應不再援用。至是否係基於已確定之考績結果所

that: "The right to file an administrative appeal is limited to the people whose rights are infringed upon by an illegal or inappropriate administrative act committed by the authority, which in turn causes damages to the rights or interests thereto. Administrative appeals may not be brought on grounds arising from special power relations or disputes resulting from private law relations. The plaintiff was a public functionary of Makung Town, Penghu County, but not a formal staff member within the governmental body, and even though s/he could be deemed a public functionary of a self-governing organization, the relationship between the plaintiff and the defendant authority should be that of a special relationship of authority. If the plaintiff were dissatisfied with the matters regarding back pay, s/he should have filed a complaint within the said organization but should not have filed an administrative appeal asserting the Administrative Appeal Act. After the dissolution of the plaintiff's department, s/he was hired as an engineer at a water company, which relationship is of a purely private employer-employee type. Thus,

得為之財產上請求，係事實問題，應就具體事件依法定程序認定之，不屬本件解釋範圍，併予說明。

the dispute involves a private relationship and, even though the plaintiff disagreed with the salary given upon suspension, s/he obviously should not have filed an administrative appeal." The foregoing part of the abovementioned Precedent that is inconsistent with this Interpretation above shall no longer be applicable. Further, whether such property claim is based upon a final merit evaluation is a question of facts, which should be decided case by case, and therefore it does not fall within the scope of this Interpretation.

Justice Chung-Sheng Lee filed dissenting opinion.

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋李大法官鐘聲、鄭大法官健才分別提出不同意見書。

J. Y. Interpretation No.267（October 11, 1990）*

ISSUE: Are the legislative purposes of civilian housing as set forth in the directive, Tai-Tsai-Shue-Tze No. 37639 issued by the Ministry of Finance in conformity with the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 15, Paragraph 2, Subparagraph 1, of the House Tax Act（房屋稅條例第十五條第二項第一款）.

KEYWORDS:

house tax（房屋稅）, tax benefit（租稅優惠）, civilian housing（平民住宅房屋）, low-income（低收入）.**

HOLDING: Article 15, Paragraph 2, Subparagraph 1, of the House Tax Act stipulates that the civilian housing apportioned for sale by the government shall be subject to one-half of the regular tax rate in order to extend tax benefits to low-income civilians. In accordance with such purpose, the Ministry of Finance, taking into consideration the then existing social and economic condi-

解釋文：房屋稅條例第十五條第二項第一款規定，政府平價配售之平民住宅房屋稅減半徵收，旨在對於低收入人民之住宅給予租稅優惠，財政部依據此項立法意旨，參酌當時社會經濟狀況，於中華民國六十四年十月二十七日以臺財稅字第三七六三九號函，說明此種平民住宅之涵義，與憲法尚無牴觸。

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* Translated by Eleanor Y.Y. Chin, Esq. and Chien Yeh Law Offices.

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tions, explained the meaning of such civilian housing in the letter Tai-Tsai-Shue-Tze No. 37639 dated October 27, 1975, and declared such legislative purposes to be in conformity with the Constitution.

REASONING: Under Article 19 of the Constitution, the people have the obligation to pay taxes. The phrase "payment of taxes as required by law" means that both the scope of taxation and tax exemption shall be stipulated by law. However, in the event of doubt as to the application of law, the relevant authority may, by its own authority, render an interpretation thereon that reflects the purpose of the law.

解釋理由書：人民有依法律納稅之義務，為憲法第十九條所明定。所謂依法律納稅，兼指納稅及免稅之範圍，均應依法律之明文。惟法律條文適用時發生疑義者，主管機關自得為符合立法意旨之闡釋。

Article 15, Paragraph 2, Subparagraph 1, of the House Tax Act provides that civilian housing apportioned for sale by the government shall be subject to one-half of the regular tax rate which, as evidenced by the relevant explanation documented in the Legislative Yuan's Review Report, intends to provide taxation benefits to low-income people (the indigent) to lessen their economic burden. Civilian

房屋稅條例第十五條第二項第一款規定，政府平價配售之平民住宅房屋稅減半徵收，旨在對於低收入人民（貧民）之住宅，給予租稅優惠，以減輕其負擔，此觀立法院審查報告之有關說明即可瞭然。此所謂平民住宅，既以政府平價配售予低收入人民（貧民）者為限，自不包括雖由政府出售而非平價配售之住宅在內。財政部為免適用此項減稅法律，發生疑義，乃依據上述立法原

housing refers to housing apportioned for sale to people of low-income at a flat price, and naturally does not include housing offered for sale by the government at non-flat regular prices. To avoid doubt concerning the application of this tax-cut law, the Ministry of Finance followed the original legislative intent taking into account the then existing social and economic conditions, and stated in the letter, Tai-Tsai-Shue-Tze No. 37639, issued on December 27, 1975: "Civilian housing shall fulfill the following criteria: 1. Must not exceed twelve pings of construction per household; 2. Must comply with standards of the people who will live in said premises, not the people who will come to buy said premises at auction; and 3. The price of civilian housing shall not exceed the construction cost thereof, and the interest derived from construction loans shall be borne by the government." The determination made based upon the foregoing definition of civilian housing as a guideline for authenticating the facts does not surpass the boundaries of the above-mentioned law and does not contravene the Constitution. Such standards for iden-

意，參酌當時社會經濟狀況，於中華民國六十四年十月二十七日，以臺財稅字第三七六三九號函示：「平價配售之平民住宅必須符合下列要件：一、配售住宅每戶建坪不得超過十二坪。二、合乎政府訂定配住人身分標準配售予平民而非標售者。三、平價住宅之售價不大於興建成本，其貸款興建之利息部分，由政府負擔者。」以說明此種平民住宅之涵義，作為認定事實之準則，既未逾越上開法律之規定，與憲法尚無牴觸。至此種平民住宅之認定標準，因社會經濟狀況之演變，自應隨時為合理之調整。事實上財政部其後對於特定情形之住宅（如為配合拆除違章建築，而配售與拆除戶之整建住宅等），亦已先後另訂認定標準，併予敘明。

tifying civilian housing shall be reasonably modified in accordance with the changes in the social and economic environment. In fact, it should be noted that the Ministry of Finance has, over a period of time, set forth standards for certain special housing, such as housing apportioned for sale to inhabitants of buildings constructed without licenses that are torn down for reconstruction.

J. Y. Interpretation No.268（November 9, 1990）*

ISSUE: May the examinee passing the examinations for public functionaries and for professionals and technicians, which have the same criteria for taking the examination with the same subjects, be granted two qualifications?

RELEVANT LAWS:

Article 172 of the Constitution（憲法第一百七十二條）; Article 7 of the Examination Act（考試法第七條）.

KEYWORDS:

examinations for public functionaries（公務人員考試）, examination for professionals and technicians（專門職業與技術人員考試）, acquire the qualifications（資格取得）.**

HOLDING: As promulgated on August 29, 1962, Article 7 of the Examination Act states that the examinee that has passed the examinations for public functionaries and for professionals and technicians, which have the same examination criteria and the same subjects, will be granted two qualifications. Any determination deeming the above Article un-

解釋文：中華民國五十一年八月廿九日修正公布之考試法第七條規定：「公務人員考試與專門職業及技術人員考試，其應考資格及應試科目相同者，其及格人員同時取得兩種考試之及格資格」，如認此項規定有欠週全，應先修正法律，而在法律未修正前，考試院於中華民國七十一年六月十五日修正發布之考試法施行細則第九條第二項則

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sound shall be made by legislative amendment. However, prior to such amendment, Article 9, Paragraph 2, of the Enforcement Rules of the Examination Act, revised and promulgated on June 15, 1982, provides that, in order for the examinee to be granted two qualifications, his/her total scores upon passing the examinations for public functionaries and for professionals and technicians shall meet the standard for the enrollment of professionals and technicians, which creates a restriction apparently departing from the statutory requirement so as to prevent qualified examinees from being granted two qualifications. The said Article 9, Paragraph 2, shall no longer be applicable since it is in contravention to Article 172 of the Constitution, which protects the people's right.

規定：「公務人員考試及格人員，同時取得專門職業及技術人員考試及格資格者，其考試總成績，須達到專門職業及技術人員考試之錄取標準」，增設法律所無之限制，顯與首述法律使及格人員同時取得兩種資格之規定不符，並有違憲法保障人民權利之意旨，依憲法第一百七十二條之規定，應不予適用。

REASONING: Article 18 of the Constitution prescribes that "[t]he people shall have the right to take civil service examinations and hold public office." Taking examinations is an essential step for acquiring qualifications for appointment as public functionaries, or qualifica-

解釋理由書：憲法第十八條規定人民有應考試、服公職之權。人民依法參加考試，為取得公務人員任用資格或專門職業及技術人員執業資格之必要途徑，此觀憲法第八十六條規定甚明。此種資格關係人民之工作權，自為憲法所保障之人民權利，不得逕以命令限制

tions for practice in specialized professions or as technicians, which is clearly regulated by Article 86 of the Constitution. This qualification in relation to the people's right to work, protected by the Constitution, shall not be restricted by ordinances, regulations, or rules. As promulgated on August 29, 1962, Article 7 of the Examination Act provides that: "The examinee that has passed the examinations for public functionaries and for professionals and technicians, which have the same examination criteria and the same subjects will be granted two qualifications." Said Article was created to save trouble for the person who intends to acquire both qualifications but must take two respective examinations. Nevertheless, in terms of the standard for passing the two different examinations, the law has not so regulated to require their being the same. When the standards are different for the said two examinations, it will be hard not to grant two different qualifications, inclusive of the qualification for professionals and technicians, for such examinee having passed the examination for public functionaries. Any determina-

之。中華民國五十一年八月二十九日修正公布之考試法第七條規定：「公務人員考試與專門職業及技術人員考試，其應考資格及應試科目相同者，其及格人員同時取得兩種考試之及格資格」，原為避免欲取得兩種考試及格資格之應考人分別應試之煩。惟兩種考試之錄取標準，法律並無必須相同之限制，則兩種考試所訂錄取標準不同時，對於經公務人員考試錄取者，尚難不予兼取專門職業及技術人員考試及格資格。如認此項規定有欠週全，應先修正法律，考試院雖曾擬具於同條增設「但公務人員考試及格人員，其考試成績，未達專門職業及技術人員考試錄取標準者，不得兼取其及格資格」之修正草案，送請立法院審議，然經立法院於六十九年十一月四日議決，維持該法第七條條文，不予修正（見立法院公報第六十九卷第八十九期第二至十八頁）。而考試院則於七十一年六月十五日修正發布考試法施行細則第九條第二項規定：「公務人員考試及格人員，同時取得專門職業及技術人員考試及格資格者，其考試總成績，須達到專門職業及技術人員考試之錄取標準」，增設法律所無之限制，致同為公務人員考試錄取人員，而有不能同時取得兩種考試及格資格之情形，顯與當時

tion deeming the above Article unsound shall be made by legislative amendment. The Examination Yuan had once drafted a proposed amendment of Article 7 to include the following language: “the examinee that passes the examination for public functionaries, yet wants to attain the passing standard for the examination for professionals and technicians, shall not be granted at the same time the qualification for professionals and technicians.” After the abovementioned proposed draft was delivered to the Legislative Yuan for review on November 4, 1980, the Legislative Yuan rejected said draft and retained the existing Article 7. (See Legislative Yuan Bulletin, Vol. 69, Issue 89, pp. 2-18). On June 15, 1982, the Examination Yuan revised and promulgated Article 9, Paragraph 2, of the Enforcement Rules of the Examination Act, wherein it reads: “In order for the examinee to be granted two qualifications, his/her total scores upon passing the examinations for public functionaries and for professionals and technicians shall meet with the standard for the enrollment of professionals and technicians.” Said Article 9, Paragraph 2, cre-

有效之上述法律使考試及格人員同時取得兩種資格之規定不符，並有違憲法保障人民權利之意旨，依憲法第一百七十二條之規定，應不予適用。

ates a restriction apparently departing from the said statutory requirement so as to prevent qualified examinees from being granted two qualifications simultaneously, and shall no longer be applicable since it is inconsistent with Article 172 of the Constitution, which protects the people's right.

Justice Cheng-Tao Chang filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋張大法官承韜、劉大法官鐵錚分別提出不同意見書。

J. Y. Interpretation No.269（December 7, 1990）*

ISSUE: In the case of a legally established legal person delegated by a government agency to exercise government power with respect to certain specifically designated matters, shall such a legal person have the capacity to be a party in an administrative procedure?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 1, Paragraph 1, of the Administrative Proceedings Act（行政訴訟法第一條第一項）; Article 1 of the Administrative Appeal Act（訴願法第一條）; Article 84 of the Labor Standards Act（勞動基準法第八十四條）.

KEYWORDS:

administrative procedure（行政訴訟程序）, body corporate（法人）, capacity to be a party（當事人能力）.**

HOLDING: In the case of a legally established legal person delegated by a government agency to exercise government power with respect to certain specifically designated matters, such a legal person shall have the capacity to be

解釋文：依法設立之團體，如經政府機關就特定事項依法授與公權力者，以行使該公權力為行政處分之特定事件為限，有行政訴訟之被告當事人能力。行政法院六十年裁字第二三二號判例，與此意旨不符部分，嗣後不再援

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a party in an administrative procedure, but limited to specific matters for which administrative acts pursuant to such delegated government power have been performed. As such, any part of Precedent T.T. No.232 (Ad. Ct., 1971) which is contrary to the Interpretation stated above shall henceforth be inapplicable. Additionally, as the question of whether administrative procedure or civil procedure should be commenced under Article 84 of the Labor Standards Act is irrelevant to said Precedent of the Administrative Court, it is not considered in the present Interpretation. However, if the party involved had nevertheless commenced civil procedure and obtained a final and irrevocable judgment thereof, such party's right to commence legal action was thus never infringed upon.

用。至關於勞動基準法第八十四條之爭執，究應提起行政訴訟，或提起民事訴訟，與上開判例無涉，不在本件解釋範圍內；其當事人如已提起民事訴訟經判決確定者，自無訴訟權受侵害之可言，併此說明。

REASONING: Where a person's rights and interests are considered infringed upon by an unlawful or improper administrative act of a central or local government agency and the person disagrees with the administrative act, such person shall be entitled to commence ad-

解釋理由書：人民對於中央或地方機關之行政處分，認為違法或不當，致損害其權利或利益者，得依法提起訴願、再訴願、行政訴訟，此觀訴願法第一條、行政訴訟法第一條第一項之規定自明。故行政爭訟之被告，原則上應為作成處分或決定之政府機關、行政

ministrative appeal, administrative re-appeal or administrative procedure. This is clearly indicated by Article 1 of the Administrative Appeal Act and Article 1, Paragraph 1, of the Administrative Proceedings Act. Pursuant to Article 9 of the Administrative Proceedings Act, the defendant in an administrative procedure shall be the government agency that performed the alleged administrative act or decision. Normally, a legal person which is not a government agency is not permitted to be a defendant party in an administrative procedure. However, in the case of a legally established legal person delegated by a government agency to exercise government power with respect to certain specifically designated matters, insofar as such a legal person performs the functions of a government agency within the delegated authority, it shall have the capacity to be a party in an administrative procedure, but limited to specific matters for which administrative acts pursuant to such delegated government power have been performed. Precedent T.T. No.232 (Ad. Ct., 1971) states that, "As a state-owned enterprise established in accordance with

訴訟法第九條亦有明文。政府機關以外之團體，原不得作為行政訴訟之被告。惟依法設立之團體，如經政府機關就特定事項依法授與公權力者，在其授權範圍內，既有政府機關之功能，以行使該公權力為行政處分之特定事件為限，當有行政訴訟之被告當事人能力。行政法院六十年度裁字第二三二號判例謂：「依公司法規定設立之公營事業機構，既非官署，自無被告當事人能力，若對之提起行政訴訟，即為法所不許。」概認非官署之團體無被告當事人能力，與上述意旨不符部分，嗣後不再援用。至關於勞動基準法第八十四條之爭執，究應依行政訴訟程序或依民事訴訟程序解決，與上開判例無涉，不在本件解釋範圍內；其當事人如已另行提起民事訴訟經判決確定者，自無訴訟權受侵害之可言，併此說明。

the Company Act is not a government office, it does not have the capacity to be a defendant party. As such, commencement of an administrative procedure against it shall be prohibited by law." Insofar as the Precedent holds that a legal person which is not a government office does not have the capacity to be a defendant party, it is contrary to the present Interpretation and therefore shall henceforth be inapplicable. Additionally, as the question of whether administrative procedure or civil procedure should be commenced under Article 84 of the Labor Standards Act is irrelevant to said Precedent of the Administrative Court, it is not considered in the present Interpretation. However, if the party involved had nevertheless commenced civil procedure and obtained a final and irrevocable judgment thereof, such party's right to commence legal action was thus never infringed upon.

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋鄭大法官健才提出不同意見書。

J. Y. Interpretation No.270（December 7, 1990）*

ISSUE: Are the relevant provisions of the Regulation Governing the Pension and Severance Payment of Ministry-of-Economics-Operated Enterprise Employees, setting forth criteria for retirement based on grade and age, unconstitutional?

RELEVANT LAWS:

Article 144 of the Constitution（憲法第一百四十四條）; Article 84 of the Labor Standards Act（勞動基準法第八十四條）; Article 33 of the Public Functionaries Appointment Act（公務人員任用法第三十三條）; Article 2 of the Public Functionaries Retirement Act（公務人員退休法第二條）.

KEYWORDS:

public enterprises（公營事業）, monopolistic enterprises（獨佔性企業）, retirement age（退休年齡）, public functionaries（公務人員）, Ministry of Personnel（銓敘部）, rewards（獎懲）, survivor relief（撫卹）.**

HOLDING: According to Article 33 of the Public Functionaries Appointment Act, appointments of public enterprise employees are governed by other laws. Prior to the enactment of the

解釋文：公營事業人員之任用，依公務人員任用法第三十三條，應另以法律定之。在此項法律制定前，依公務人員退休法第二條及該法施行細則第二條規定，公營事業人員無從依公務

* Translated by Professor Cing-Kae Chiao.

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aforementioned Act, Article 2 of the Enforcement Rules of the Act stipulated that employees of public enterprises are not subject to the retirement regulations applicable to public functionaries. The Executive Yuan's proclamation of the Regulation Governing the Pension and Severance Payment of Ministry-of-Economics-Operated Enterprise Employees on January 23, 1981, specified in Paragraph 2 of Article 17 the regulations governing classification and retirement age standards for the aforementioned public enterprise employees. Until a law exclusively governing appointment and retirement matters of these employees is enacted, the Executive Yuan's rules shall apply. These rules are consistent with the Constitution insofar as they encourage the turnover and rationalization of public enterprises overseen by the Ministry of Economic Affairs. However, the appointment and retirement of public enterprise employees, as well as their related rights and duties, shall be governed by other laws.

人員退休法辦理退休。行政院於中華民國七十年一月二十三日核定修正發布之「經濟部所屬事業人員退休、撫卹及資遣辦法」第十七條第二項有關訂定分等限齡退休標準之規定，在公營事業人員任用及退休法律制定前，乃為促進經濟部所屬國營事業人事新陳代謝及企業化經營而設，不生牴觸憲法問題，惟公營事業人員之任用及退休，關係此等人員之權利義務，仍應從速以法律定之。

REASONING: Article 144 of the Constitution describes public utilities

解釋理由書：公用事業及其他有獨佔性之企業，以公營為原則，其經

and other monopolistic enterprises as largely state-owned entities, which may also be privately owned if legally permitted. However, the Constitution does not specify whether the appointment and retirement rules applicable to public functionaries also apply to employees of public enterprises. Thus, the legislature may promulgate laws in this domain, provided that the spirit of the Constitution is not violated.

法律許可者，得由國民經營之，憲法第一百四十四條定有明文，但公營事業人員之任用及退休，是否適用以文官為規範對象之公務人員有關法律，憲法並未明文規定，立法機關自得在不牴觸憲法精神範圍內，以法律定之。

Article 2 of the Public Functionaries Retirement Act stipulates that: “The term ‘public functionaries’ mentioned in this Law refers to currently employed persons legally appointed in accordance with the public functionaries appointment laws.” Additionally, Article 2 of the Enforcement Rules of the Public Functionaries Retirement Act stipulates the following: “The term ‘public functionaries appointment laws’ mentioned in Article 2 of the Act refers to the rules set by the Ministry of Personnel for purposes of qualifications, review and registration.” Lastly, Article 33 of the Public Functionaries Appointment Act clearly stipulates that appoint-

公務人員退休法第二條規定：「本法所稱退休之公務人員，係指依公務人員任用法律任用之現職人員」。公務人員退休法施行細則第二條又規定：「本法第二條所稱公務人員任用法律，指銓敘部所據以審定資格或登記者皆屬之」。而公務人員任用法第三十三條則規定，公營事業人員之任用，另以法律定之，由此可知，在上述任用法律制定施行前，公營事業人員無從依公務人員退休法辦理退休。勞動基準法第八十四條規定：「公務員兼具勞工身分者，其有關任（派）免、薪資、獎懲、退休、撫卹及保險（含職業災害）等事項，應適用公務員法令之規定。但其他所定勞動條件優於本法規定者，從其規定」。

ments of public enterprise employees are governed by other laws. From the aforementioned laws, it is clear that before a suitable appointment law is enacted, the procedures for retirement for public functionaries may not be applied to employees of public enterprises. Article 84 of the Labor Standards Act specifies that "for public functionaries who concurrently are also classified as being workers, issues pertaining to appointments, wages, rewards, retirement, survivor relief, and insurance (including workplace accident coverage) shall be governed by the public functionaries regulations". However, all other classes of laborers not subject to the above law shall refer to relevant regulations. Until the enactment of any relevant laws regulating matters of appointment and retirement for employees of public enterprises, the wording "shall be governed by public functionaries regulations" shall refer solely to those regulations applicable explicitly to public functionaries. Paragraph 2, Article 17, of the Regulation Governing the Pension and Severance Payment of Ministry-of-Economics-Operated Enterprise Employees stipulates

其所謂「應適用公務員法令之規定」，亦非使公營事業人員之任用或退休，在上述相關法律未制定前，逕行適用公務人員任用法或公務人員退休法，而排除現行有關法令之適用。行政院於中華民國七十年一月二十三日核定修正發布之「經濟部所屬事業人員退休、撫卹及資遣辦法」第十七條第二項規定，各事業得按職位工作性質及職責情形，訂定分等限齡退休標準報請本部核准酌予提前，但職員不得少於五十五歲，工人不得少於五十歲。此項規定，在公營事業人員任用及退休法律制定施行前，乃為促進經濟部所屬國營事業人事新陳代謝及企業化經營而設，不生牴觸憲法問題。惟公營事業人員之任用及退休，關係此等人員之權利義務，仍應從速以法律定之。

that regulations on standards of classification and retirement age shall be based upon the working and job-related conditions for all enterprises, provided that employees and workers may not retire if under the age of 55 and 50, respectively. These rules are consistent with the Constitution insofar as they encourage the turnover and rationalization of public enterprises overseen by the Ministry of Economic Affairs. However, the appointment and retirement of public enterprise employees, as well as their related rights and duties, shall be governed by other laws.

J. Y. Interpretation No.271（December 20, 1990）*

ISSUE: When the appellate court erroneously overrules a legitimate appeal against the defendant's interest on the wrong grounds, can the trial court restart the trial of the defendant automatically?

RELEVANT LAWS:

Article 8, Paragraph 1, of the Constitution（憲法第八條第一項）; Article 1, Paragraph 1, of the Code of Criminal Procedure（刑事訴訟法第一條第一項）; J. Y. Interpretation No.135（司法院釋字第一三五號解釋）; J. Y. Interpretation Yuan-je Tzu No.790（司法院院解字第七九〇號解釋）; Supreme Court Precedent No.3231 (1936)（最高法院二十五年上字第三二三一號判例）.

KEYWORDS:

procedural decision（程序判決）, an appeal against the defedant's interest（不利於被告之上訴）, serious violation of the law（重大違背法令）,extraordinary-appeal procedure（非常上訴程序）, restart the trial（回復訴訟程序）.**

HOLDING: A final procedural decision made by the appellate court overruling a legitimate appeal against the de-

解釋文：刑事訴訟程序中不利益於被告之合法上訴，上訴法院誤為不合法，而從程序上為駁回上訴之判決確

* Translated by Jui-jen Chen, Public Prosecutor.

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fendant's interest in a criminal procedure on the wrong grounds that it was illegitimate, is indeed a decision in serious violation of the law. Since it is a court-ruled decision, it may only be invalidated by extraordinary-appeal procedure before the trial court restarts the trial of the defendant concerning the legitimately appealed part. Otherwise, it will contradict the rule stated in Article 8, Paragraph 1, of the Constitution that "no person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law." The Supreme Court Precedent No.3231 (1936) shall no longer be cited insofar as it is inconsistent with this Interpretation.

定者，其判決固屬重大違背法令，惟既具有判決之形式，仍應先依非常上訴程序將該確定判決撤銷後，始得回復原訴訟程序，就合法上訴部分進行審判。否則即與憲法第八條第一項規定人民非依法定程序不得審問處罰之意旨不符。最高法院二十五年上字第三二三一號判例，於上開解釋範圍內，應不再援用。

REASONING: Article 8, Paragraph 1, of the Constitution states that, "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

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」。又刑事訴訟法第一條第一項規定：「犯罪，非依本法或其他法律所定之訴訟程序，不得追訴、處罰」。刑事訴訟程序因判決確定而終結者，不論為實體上之判決或程序上之判決，均生法

with the procedure prescribed by law." Moreover, Article 1, Paragraph 1, of the Code of Criminal Procedure states that, "No crimes shall be prosecuted or punished except according to the procedures regulated by this law or other laws." Those criminal procedures that have been concluded with final decisions, either procedural or substantial ones, are legally binding. Although, according to Interpretation No.135, the procedures that are in serious violation of the law are invalid, based on the principles announced by Interpretation Yuan-je Tzu No.790, a final procedural decision overruling legitimate appeal against the defendant's interest is still binding, and the trial court shall not restart the trial to question or punish the defendant until that decision is invalidated by the legal process.

律上之羈束力，其有重大違背法令之情形者，依本院釋字第一三五號解釋，雖不生效力，惟就不利益於被告之合法上訴所為駁回上訴之程序上判決，依本院院字第七九〇號解釋意旨，在未經法定程序撤銷其判決前，自不得回復原訴訟程序，逕行審問處罰。

The implementation out of the criminal procedure should protect the parties' legitimate right to sue and strike a balance between the trust of the defendant in the court decision and the upright performance of the nation's power of criminal punishment. A final procedure-decision

刑事訴訟程序之實施，應保障當事人之合法訴訟權，並兼顧被告對於裁判效力之信賴及國家刑罰權之正確行使。刑事訴訟程序中不利益於被告之合法上訴，上訴法院誤為不合法，而從程序上為駁回上訴之判決確定者，其判決固屬重大違背法令，惟既具有判決之形

made by the appellate court overruling legitimate appeal against the defendant's interest on the wrong grounds that it was illegitimate, is indeed a decision in serious violation of the law. Since its form of court decision makes the defendant trust in its binding effect, as stated above, it must be invalidated by extraordinary-appeal procedure before the trial court restarts the trial of the defendant concerning the legitimately appealed part. Otherwise, it will contradict the rule declared in Article 8, Paragraph 1, of the Constitution that "no person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law." The Supreme Court Precedent No.3231, holding that those procedure-decisions overruling the appeals have no substantial effect and that trials can continue until substantial decisions are reached, shall no longer be cited insofar as it is inconsistent with this Interpretation.

式，足使被告信賴其羈束力，依上開說明，仍應先依非常上訴程序將該確定判決撤銷後，始得回復原訴訟程序，就合法上訴部分進行審判。否則即與憲法第八條第一項規定人民非依法定程序不得審問處罰之意旨不符。最高法院二十五年上字第三二三一號判例，認此種駁回上訴之程序上判決，不發生實質上之確定力，得再逕行為實體上裁判，於上開解釋範圍內，應不再援用。

Justice Geng Wu filed dissenting opinion.

Justice Cheng-Tao Chang filed dissenting opinion in part, in which Justice Shau-Hsien Chai joined.

本號解釋吳大法官庚提出不同意見書；張大法官承韜與翟大法官紹先共同提出一部不同意見書。

J. Y. Interpretation No.272（January 18, 1991）*

ISSUE: Is the provision of the National Security Act During the Period of National Mobilization for Suppression of the Communist Rebellion, prescribing that, even after the martial law id lifted, no appeal or motion to set aside a ruling may filed with a common court as to a final and conclusive judgment rendered by a court-martial during the period of martial law, constitutional?

RELEVANT LAWS:

Article 9 of the Constitution（憲法第九條）; Articles 8, 9 and 10 of the Martial Law（戒嚴法第八條、第九條及第十條）.

KEYWORDS:

final court decision（案件已確定者，即確定判決）, extraordinary appeal（非常上訴）, retrial（再審）.**

HOLDING: Article 9 of the Constitution clearly states that except for those who are in active military service, no person shall be subject to trial by a military tribunal; whereas Articles 8 and 9 of the Martial Law, which stipulate that those who are not in active military ser-

解釋文：人民除現役軍人外，不受軍事審判，憲法第九條定有明文。戒嚴法第八條、第九條規定，非現役軍人得由軍事機關審判，則為憲法承認戒嚴制度而生之例外情形。解嚴後，依同法第十條規定，對於上述軍事機關之判決，得於解嚴之翌日起依法上訴，符合

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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vice may be subject to trial by a military tribunal, are, however, exceptions recognized by the Constitution. Subsequent to the abolishment of the Martial Law, pursuant to Article 10 of the very same Law, a judgment adjudicated by a military tribunal may be appealed from the day after the abolishment of Martial Law so as to conform to the first abovementioned provision of the Constitution. However, the ruling contained in the first sentence of Paragraph 2 of Article 9 of the National Security Act during the Period of National Mobilization for Suppression of the Communist Rebellion, which stipulates that those who are not in active military service may not appeal the final court decisions with respect to criminal cases adjudicated in the military tribunals during the period of the Martial Law to the competent court subsequent to the abolishment of the Martial Law, was set due to the exceptional circumstances arising during and in connection with the interval of more than thirty years from the time the law came into force until the abolishment of the Martial Law, and the intent was to maintain the stability of the courts' final

首開憲法規定之意旨。惟動員戡亂時期國家安全法第九條第二款前段規定，戒嚴時期戒嚴地域內經軍事審判機關審判之非現役軍人刑事案件已確定者，於解嚴後不得向該管法院上訴或抗告，係基於此次戒嚴與解嚴時間相隔三十餘年之特殊情況，並謀裁判之安定而設，亦為維持社會秩序所必要。且對有再審或非常上訴原因者，仍許依法聲請再審或非常上訴，已能兼顧人民權利，與憲法尚無牴觸。至戒嚴非屬於此次特殊情況者，無本解釋之適用，合併指明。

decisions and the social order. Furthermore, those who have cause for a retrial or an extraordinary appeal, may petition for remedy in conformity with the law; Consequently, the intent of the ruling mentioned above does not contradict the Constitution. This interpretation is, nevertheless, not applicable to cases which do not pertain to the above-mentioned circumstance.

REASONING: Article 9 of the Constitution clearly states that except for those who are in active military service, no person shall be subject to trial by a military tribunal. The Martial Law was implemented to deal with emergency circumstances such as wars or rebellion and to maintain national security and social stability and its implementation was, thus, a necessary means to meet the above circumstances. Consequently, cases that could not be adjudicated by ordinary courts during the Martial Law period and within the territories where the Martial Law was applicable, were uniformly adjudicated by a military tribunal. They were exceptions under the Martial Law

解釋理由書：人民除現役軍人外，不受軍事審判，憲法第九條定有明文。戒嚴為應付戰爭或叛亂等非常事變，維護國家安全、社會安定之不得已措施，在戒嚴時期接戰地域內普通法院不能處理之案件，均由軍事機關審判，此為憲法承認戒嚴制度而生之例外情形，亦為戒嚴法第八條、第九條之內容。惟恐軍事審判對人民權利之保障不週，故戒嚴法第十條規定，解嚴後許此等案件依法上訴於普通法院，符合首開憲法規定之意旨。政府為因應動員戡亂之需要，自中華民國三十七年十二月十日起，先後在全國各地區實施戒嚴（台灣地區自三十八年五月二十日起戒嚴），雖戒嚴法規定之事項，未全面實施，且政府為尊重司法審判權，先於四

system, which are recognized by the Constitution, and these are also contained in Articles 8 and 9 of the Martial Law. Nevertheless, lest there be insufficient protection for the people under a military adjudication, Article 10 of the Martial Law provides that after the abolishment of the Martial Law, such types of cases may be appealed to ordinary courts pursuant to the law, which provision conforms to the first abovementioned provision of the Constitution. To meet the requirements as per the Period of National Mobilization for Suppression of the Communist Rebellion, the government had, on December 10, 1948, put the Martial Law in force nationwide (whereas in Taiwan, it began on May 20, 1949); however, the law was, nevertheless, not uniformly enforced in all areas. To respect the jurisdictional authority, the government promulgated the "Regulation Demarcating Cases Adjudicated in the Military Tribunal or in the Ordinary Court in Taiwan during the Execution of Martial Law in 1952" gradually limiting the scope of military adjudication, and enacted the "Military Justice Act" in 1956 to replace "Trial Act for the

十一年發布「台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」，並逐次縮小軍法機關自行審判之範圍，復於四十五年制定「軍事審判法」取代「陸海空軍審判法」及其有關軍事審判程序之法令，以求軍事審判之審慎。惟算至七十六年七月十五日宣告台灣地區解嚴時止，戒嚴期間達三十餘年，情況至為特殊。動員戡亂時期國家安全法第九條規定，戒嚴時期戒嚴地域內經軍事審判之非現役軍人刑事案件，於解嚴後，其審判程序尚未終結者及刑事裁判尚未執行或在執行中者，均分別移送該管檢察官或法院處理。其已確定之刑事案件，不得向該管法院上訴或抗告，則係基於此次長期戒嚴，因時過境遷，事證調查困難之特殊情況，為謀裁判之安定而設，亦為維持社會秩序所必要。且對有再審或非常上訴原因者，仍許依法聲請再審或非常上訴，已能兼顧人民權利，與憲法尚無牴觸。至戒嚴非屬於此次特殊情況者，無本解釋之適用，合併指明。

Armed Forces" and other decrees related to procedures of military trial in order to conduct military adjudication as circumspectly as possible. The Martial Law was in force for more than thirty (30) years from December 10, 1948, through its abolishment on July 15, 1987, and the situation was, indeed, one of emergency circumstances. Article 9 of the National Security Act during the Period of National Mobilization for Suppression of the Communist Rebellion stipulates that criminal cases relating to the non-military personnel, which were adjudicated in the military tribunals during the period of the Martial Law within the territories where the Martial Law was applicable, whose trials are not completed, or whose criminal sentence has not been executed or completed yet after the abolishment of said law, shall then be referred to the competent prosecutor or court, respectively. However, the reasons why the final court decisions with respect to criminal cases adjudicated in the military tribunals may not be appealed to the competent court, are due to the long-term enforcement of the Martial Law, the difficulty in

gathering and investigating evidence after such a long period of time has elapsed and circumstances have changed, and the need for maintaining the stability of judgments and social order. Furthermore, those who have just cause for a retrial or an extraordinary appeal, may petition for remedy in conformity with the law; Consequently the intent mentioned above does not contradict the Constitution. This interpretation is, nevertheless, not applicable to cases which do not pertain to the above-mentioned circumstance.

J. Y. Interpretation No.273（February 1, 1991）*

ISSUE: Is the provision of the Regulation Governing the Surveying and Administration of Urban Planning Stakes, prescribing that no objection may be raised as to a decision regarding second survey, unconstitutional?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）.

REASONING:

right to administrative appeal（訴願權）, right of instituting legal proceedings（訴訟權）, incorrect location of the survey stake（樁位測定錯誤）, objection（異議）.**

HOLDING: The latter part of Article 8 of the Regulation Governing the Surveying and Administration of Urban Planning Stakes as amended and promulgated by the Ministry of the Interior on May 4, 1979, providing that: "no objections may be made against the result of the resurvey determined by the competent authority," has imposed restrictions on the people's right to seek administrative

解釋文：內政部於中華民國六十八年五月四日修正發布之都市計畫樁測定及管理辦法第八條後段「經上級政府再行複測決定者，不得再提異議」之規定，足使人民依訴願法及行政訴訟法提起行政救濟之權利受其限制，就此部分而言，與憲法第十六條之意旨不符，應不予適用。

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* Translated by Vincent C. Kuan.

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

remedies under the Administrative Appeal Act and the Administrative Proceedings Act. The said provision, in that respect, is in conflict with Article 16 of the Constitution and thus shall no longer apply.

REASONING: According to Article 16 of the Constitution, the people have the rights of lodging complaints and of instituting legal proceedings, which means that the people shall have a right to file administrative appeal or to sue when their rights are infringed upon, whereas the authority or court with which the appeal or lawsuit is filed shall be obligated to make a decision or render a judgment, as the case may be, in accordance with the law. The aforesaid right cannot be restricted by means of any administrative regulation.

解釋理由書：憲法第十六條規定人民有訴願及訴訟之權，乃指人民於其權益受侵害時，有提起訴願或訴訟之權利，受理訴願之機關或受理訴訟之法院亦有依法決定或裁判之義務而言。此項權利，不得以行政命令予以限制。

According to Article 23 of the Urban Planning Act, the erection of stakes, the calculation of coordinates, and the survey of division of registration of land shall be made within one year upon the announcement and execution of the detailed plan of the urban plan. Based on the said

都市計畫法第二十三條規定，都市計畫之細部計畫核定發布實施後，應於一年內，豎立樁誌、計算座標、辦理地籍分割測量等事項，內政部基於上述規定，乃於六十八年五月四日修正發布都市計畫樁測定及管理辦法。依該辦法第六條及第八條之規定，土地權利關係

Article, the Ministry of the Interior amended and promulgated the Regulation Governing the Surveying and Administration of Urban Planning Stakes on May 4, 1979. In accordance with Articles 6 and 8 thereof, where an interested party to the land believes that there is any mistake in the location of the survey stake, the party may apply for resurvey and re-resurvey; nonetheless, the latter part of Article 8 provides that "no objections may be made against the result of the resurvey determined by the supervising authority." The Administrative Court, in its 77-Tsai-86 ruling, states that a literal reading of the provision "no objections may be made" includes the meaning that neither administrative appeal nor administrative litigation may be filed. Thus, in that respect, it has imposed restrictions on the people's right to seek administrative remedies under the Administrative Appeal Act and the Administrative Proceedings Act.

人如認為樁位測定錯誤時，雖得申請複測及再複測，但第八條後段則有「經上級政府再行複測決定者，不得再提異議」之規定。行政法院七十七年度裁字第八十六號裁定，依文義解釋認所謂不得再提異議，含有不得訴願及提起行政訴訟之意，就此部分而言，足使人民依訴願法及行政訴訟法提起行政救濟之權利受其限制。

Although there are such remedies as resurvey and re-resurvey under the abovementioned Regulation for the infringement of the interests of an interested

按因樁位測定錯誤，致特定土地權利關係人之權益遭受侵害時，雖上述辦法已有複測及再複測之救濟途徑，然其限制人民訴願及行政訴訟之權部分，

party to the land resulting from the mistake in the location of the survey stake, the restrictions on the people's rights of filing administrative appeal and administrative litigation are apparently in conflict with the abovementioned constitutional intent to protect the people's rights and hence shall no longer apply.

則與憲法保障人民權利之意旨不符，應不予適用。

J. Y. Interpretation No.274（February 22, 1991）*

ISSUE: Is the provision, limiting retention of the insured years to a period of five years, under the Enforcement Rules of the Public Functionaries Insurance Act unconstitutional?

RELEVANT LAWS:

Article 21, Paragraph 2 and Article 24 of the Public Functionaries Insurance Act（公務人員保險法第二十一條第二項及第二十四條）; Article 68 of the Enforcement Rules of the Public Functionaries Insurance Act（公務人員保險法施行細則第六十八條）.

KEYWORDS:

public functionaries Insurance（公務人員保險）, insured（被保險人）, insured years（保險年資）.**

HOLDING: Article 68 of the Enforcement Rules of the Public Functionaries Insurance Act amended and promulgated by the Examination Yuan on July 25, 1962, states that "(T)he retention of the insured years on the record requested by the insured shall be limited to a period of five years. Those who renew their

解釋文：考試院於中華民國五十一年七月二十五日修正發布之公務人員保險法施行細則第六十八條規定：「被保險人請准保留保險年資者，其時效以五年為限，逾期再行參加保險者，以新加入保險論」，與當時有效之公務人員保險法第二十一條第二項：「合於前項退費規定，不為申請退費而申請保

* Translated by David H. J. Yang.

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insurance policy after the expiration of the five-year period shall be considered as newly insured." This Article is in conflict with Article 21, Paragraph 2, of the then effective Public Functionaries Insurance Act which provides that "(A)ll the original insured years on the record shall remain effective in full when the insurance policy is renewed if the insured applies for a retention of the insured years on the record instead of the refund in accordance with the preceding paragraph regarding the refund." Therefore, Article 68 of the said Enforcement Rules shall not be enforced as it imposes a limitation of period that is not mentioned in the Act in violation of the constitutional right of the people.

留保險年資者，續保時，其原有年資全部有效」之規定不符，增加法律所無之期間限制，有違憲法保障人民權利之意旨，應不予適用。

REASONING: Article 21, Paragraphs 1 and 2, of the Public Functionaries Insurance Act of January 29, 1958, provides that "(T)hose who quit their office without obtaining any insurance payment may apply for a refund of the part of the self-paid premium from the insurer. Those who resume their office and renew their insurance policy shall be deemed as newly insured. However, for

解釋理由書：中華民國四十七年一月二十九日公布之公務人員保險法第二十一條第一項、第二項規定：「被保險人離職，迄未領取任何保險給付者，得向承保機關申請退還其自付部分之保險費，其復行任職，再投保者，以新加入保險論。合於前項退費規定，不為申請退費而申請保留保險年資者，續保時，其原有年資全部有效」。同法第二十四條固授權有關機關訂定該法之施

those who were qualified for the refund of the insurance premium in accordance with the preceding paragraph and did not apply for the refund of the premium but applied for the retention of the insured years instead, all the original insured years on the record shall remain effective in full when the insurance policy is renewed." Though Article 24 of the same Act authorizes the relevant government institutions to establish the enforcement rules of the Act, it does not authorize the making of any restriction on the substantive right of the insured to retain his/her insured years on the record. Article 68 of the Enforcement Rules of the Public Functionaries Insurance Act amended and promulgated by the Examination Yuan on July 25, 1962, states that "(T)he retention of the insured years on the record requested by the insured shall be limited to a period of five years. Those who renew their insurance policy after the expiration of the five-year period shall be considered as newly insured." This Article shall not be enforced as it unduly imposes a limitation of period that is not mentioned in the Act in violation of the constitutional right of the people.

行細則，但未授權限制被保險人保留保險年資之實體上權利。考試院於中華民國五十一年七月二十五日修正公布之公務人員保險法施行細則第六十八條則規定：「被保險人請准保留保險年資者，其時效以五年為限，逾期再行參加保險者，以新加入保險論」，增加法律所無之期間限制，有違憲法保障人民權利之意旨，應不予適用。

J. Y. Interpretation No.275（March 8, 1991）*

ISSUE: Does the Administrative Court's Precedent which states that neither intent nor negligence is essential to establish liability for the imposition of administrative penalty contradict the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Precedent P.T. Nos. 30 and 350 (Ad. Ct. 1973)（行政法院六十二年判字第三〇號及三五〇號判例）.

KEYWORDS:

statutory duty（法律上義務）, administrative penalty（行政罰）, prohibitive regulation（禁止規定）, a legal duty to act（作為義務）, negligence（過失）, the administrative court（行政法院）, presume（推定）.**

HOLDING: Where an act violates a statutory duty and is thus subject to administrative penalty, and where the law does not specify otherwise, then although intent may not necessarily be an essential condition for establishing the offender's liability, negligence would be one such

解釋文：人民違反法律上之義務而應受行政罰之行為，法律無特別規定時，雖不以出於故意為必要，仍須以過失為其責任條件。但應受行政罰之行為，僅須違反禁止規定或作為義務，而不以發生損害或危險為其要件者，推定為有過失，於行為人不能舉證證明自己

* Translated by John C. Chen, Attorney at Law.

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condition. An act subject to administrative penalties however, need not cause damage or danger, but need merely violate a prohibitive regulation or a legal duty to act. Such an act must be presumed negligent, and the offender shall be penalized if he/she cannot produce evidence proving a lack of negligence. The Administrative Court's Precedent P.T. No. 30 (Ad. Ct., 1973) states, "Neither intent nor negligence is essential to conditions for establishing liability for the imposition of administrative penalties." Precedent P.T. No. 350 of the same Court in the same year states, "The establishment of acts constituting an administrative offence does not rely on intent as a condition for liability. The cause of the false declarations regarding the degrees of quality and the value of the goods therefore, is not a matter of concern." Those parts of the above precedents that fail to conform to the meaning of the above are contrary to the spirit of the constitutional purpose of protecting people's rights, and shall subsequently cease to apply.

無過失時，即應受處罰。行政法院六十二年度判字第三〇號判例謂：「行政罰不以故意或過失為責任條件」，及同年度判字第三五〇號判例謂：「行政犯行為之成立，不以故意為要件，其所以導致偽報貨物品質價值之等級原因為何，應可不問」，其與上開意旨不符部分，與憲法保障人民權利之本旨牴觸，應不再援用。

REASONING: Administrative

解釋理由書：人民因違反法律

penalties imposed on those who violate statutory duties are a type of sanction against the people. The general principle is that an offender should have a cause of liability attributable to him. In the event that the law fails to specify, however, then even if intent may not be a condition for liability, negligence would be one such condition. For the purpose of ensuring the realization of administrative goals while safeguarding people's rights, an act need only violate prohibitive regulations or a legal duty to act in order to be subject to administrative penalties. Such an act must be presumed to be negligent, and the offender shall be punished unless he can produce evidence proving the lack of such negligence. The Administrative Court's Precedent P.T. No. 30 (Ad. Ct., 1973) states, "Neither intent nor negligence is essential to conditions for establishing liability for the imposition of administrative penalties." Precedent P.T. No. 350 of the same Court in the same year states, "The establishment of acts constituting administrative offences does not rely on intent as a condition of liability. The cause of the false declarations regarding the de-

上義務而應受之行政罰，係屬對人民之制裁，原則上行為人應有可歸責之原因，故於法律無特別規定時，雖不以出於故意為必要，仍須以過失為其責任條件。但為維護行政目的之實現，兼顧人民權利之保障，應受行政罰之行為，僅須違反禁止規定或作為義務，而不以發生損害或危險為其要件者，推定為有過失，於行為人不能舉證證明自己無過失時，即應受處罰。行政法院六十二年度判字第三〇號判例謂：「行政罰不以故意或過失為責任條件」，及同年度判字第三五〇號判例謂：「行政犯行為之成立，不以故意為要件，其所以導致偽報貨物品質價值之等級原因為何，應可不問」失之寬泛。其與上開意旨不符部分，與憲法保障人民權利之本旨牴觸，應不再援用。

grees of quality and the value of the goods therefore, is not a matter of concern." The opinions in the above Precedents are too broad and vague. Therefore, those parts of the above Precedents that fail to conform to the meaning of the above are contrary to the constitutional essence of protecting people's rights, and should subsequently cease to apply.

Justice Chien-Hua Yang filed dissenting opinion in part.

本號解釋楊大法官建華提出一部不同意見書。

J. Y. Interpretation No.276（March 8, 1991）*

ISSUE: Is the failure of the Cooperatives Act and the Regulation for the Encouragement of Cooperative Enterprises to prescribe the requirements and procedure for dissolving a cooperative in violation of the Constitution?

RELEVANT LAWS:

Articles 15 and 171 of the Constitution（憲法第十五條及第一百七十一條）; Subparagraph 6, Paragraph 1, of Article 55 of the Cooperatives Act（合作社法第五十五條第一項第六款）.

KEYWORDS:

cooperative（合作社）, involuntary disincorporation order（解散命令）, disposition that terminates the personality of a legal entity as well as elements and procedures of such disposition（法人人格消滅處分之要件及程序）.**

HOLDING: The involuntary dissolution order of Subparagraph 6, Paragraph 1, of Article 55 of the Cooperatives Act is a disposition dissolving any cooperative. However, no clear elements and procedures of such disposition have been

解釋文：合作社法第五十五條第一項第六款規定之解散命令，乃解散合作社之處分，對於此種處分之要件及程序如何，該法未為明確之規定，宜由主管機關妥為檢討修正。內政部於中華民國六十九年二月二十六日修正發布之

* Translated by Professor Fuldien Li.

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clarified in the said Act Therefore, the governmental authority in charge shall accordingly review and amend said Act Further, the related Regulation for the Encouragement of Cooperative Enterprises issued by the Ministry of Interior on February 26, 1980, which require the involuntary dissolution of those cooperative enterprises that were graded as E class by the regional county or city governmental authority in charge shall be reviewed and amended accordingly.

合作事業獎勵規則，關於合作事業成績考列戊等者，由縣市合作社主管機關令飭解散之規定，應配合上開法律一併檢討修正。

REASONING: It is specified in Paragraph 1, Article 55, of the Cooperatives Act that: "A cooperative may be disincorporated in any of the following circumstances: 1. A cause for disincorporation as set forth in the Constitution occurs; 2. The members' congress determines a resolution of disincorporation; 3. There are less than seven members; 4. The cooperative is incorporated into another cooperative. 5. Bankruptcy; and 6. Order of disincorporation." In the above paragraph, the disincorporation order of Subparagraph 6 means a disincorporation that will dissolve a cooperative and terminate its

解釋理由書：合作社法第五十五條第一項規定：「合作社因左列各款情事之一而解散：一、章程所定解散之事由發生。二、社員大會之解散決議。三、社員不滿七人。四、與他合作社合併。五、破產。六、解散之命令。」其中第六款「解散之命令」，乃解散合作社，消滅其法人人格之處分。惟此種處分之要件及程序，該法未為明確之規定，宜由主管機關妥為檢討修正。內政部於中華民國六十九年二月二十六日修正發布之合作事業獎勵規則，關於合作事業成績考列戊等者，由縣市合作社主管機關令飭解散之規定，目的雖屬正當，惟合作社法既待檢討修正，仍應配

personality accordingly. However, no clear elements and procedures of such disposition have been clarified in the said Act. We therefore believe that the governmental authority in charge of such act should accordingly review and amend such act. Further, regarding the related Regulation for the Encouragement of Cooperative Enterprises issued by the Ministry of Interior on February 26, 1980, which require the involuntary disincorporation of those cooperative enterprises that were graded as E class by the regional county or city governmental authority in charge, we confirm that the purpose of such requirement is just and reasonable. Nonetheless, it shall be reviewed and amended in accordance with the amendment of the aforementioned Credit Cooperative Association Act.

合一併檢討修正。

Justice Chien-Hua Yang filed dissenting opinion, in which Justice Zu-Zan Yang and Justice Geng Wu joined.

本號解釋楊大法官建華、楊大法官日然與吳大法官庚共同提出理由不同意見書。

J. Y. Interpretation No.277（March 22, 1991）*

ISSUE: Are the relevant provision of the Act Governing the Allocation of Government Revenues and Expenditures, prescribing that ‘’the central government shall lay down general principles for the various taxes as the basis of lawmaking for the provincial and county governments, ‘’ and that the central government shall make an overall planning for and allocation of certain local tax revenues, in violation of the Constitution?

RELEVANT LAWS:

Articles 107, Subparagraph 7, 109, Paragraph 1, Subparagraph 7 and 110, Paragraph 1, Subparagraph 6, 147 of the Constitution（憲法第一百零七條第七款、第一百零九條第一項第七款及第一百十條第一項第六款、第一百四十七條）; Article 7and 12 of the Division of Financial Revenue and Expenditure Act（財政收支劃分法第七條、第十二條）.

KEYWORDS:

national tax （國稅）, provincial tax（省稅）, central government（中央政府）, general tax principles（稅法通則）.**

HOLDING: The second sentence of Article 7 of the Act Governing the Allocation of Government Revenues

解釋文：財政收支劃分法第七條後段關於省及直轄市、縣（市）（局）稅課立法，由中央制定各該稅法

* Translated by David Yang and Jane Lai of Baker&Mckenzie Law Offices, Taipei.

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and Expenditures, which stipulates that the general tax principles of provinces, municipalities and counties (cities and bureaus) under the direct governance of the Executive Yuan shall be established by the central government as the basis of tax legislation of provinces and counties, is enacted in accordance with Article 107, Subparagraph 7 of the Constitution for the separation of national, provincial, and county tax and to meet the principle of taxation-by-law and is not contrary to the Constitution. Therefore, in order to enable the local governments to exercise the power of legislation as authorized by Article 109, Paragraph 1, Subparagraph 7 and Article 110, Paragraph 1, Subparagraph 6 of the Constitution, the central government shall, for tax allocated to local governments, enact general tax principles for local governments or establish general tax principles in the various tax laws applicable to local governments in accordance with the provisions of the Act Governing the Allocation of Government Revenues and Expenditures referred to in the above. Currently there are no general tax principles for local governments nor

通則，以為省、縣立法依據之規定，係中央依憲法第一百零七條第七款為實施國稅與省稅、縣稅之劃分，並貫徹租稅法律主義而設，與憲法尚無牴觸。因此中央應就劃歸地方之稅課，依財政收支劃分法前開規定，制定地方稅法通則，或在各該稅法內訂定可適用於地方之通則性規定，俾地方得據以行使憲法第一百零九條第一項第七款及第一百十條第一項第六款賦予之立法權。目前既無地方稅法通則，現行稅法又有未設上述通則性規定者，應從速制定或增訂。在地方未完成立法前，仍應依中央有關稅法辦理。至中央與地方財政收支劃分之規定，中央自應斟酌實際情形，適時調整，以符憲法兼顧中央與地方財政均衡之意旨，併予說明。

do the current tax laws provide general tax principles applicable to local governments. Such laws shall be enacted as soon as possible. However, before the enactment of such laws, local taxation shall be implemented according to the relevant central government tax laws. As for the division of revenue and expenditure between the central and local governments, the central government shall adjust such division from time to time according to the factual situation so as to meet the spirit of the Constitution with due consideration of the central government.

REASONING: Article 7 of the Act Governing the Allocation of Government Revenues and Expenditures stipulates that "the legislation of the provincial and county (city and bureau) taxes shall be proposed only when it is expressly provided in the Act, and the central government shall establish general tax principles as the legislative basis of the local governments." The second part of the above quoted provision is based on Article 107, Paragraph 7 of the Constitution to implement the separation of national, pro-

解釋理由書：財政收支劃分法第七條規定：「省及直轄市、縣（市）（局）稅課立法，以本法有明文規定者為限，並由中央制定各該稅法通則，以為省、縣立法之依據」，其後段部分，係中央依憲法第一百零七條第七款為實施國稅與省稅、縣稅之劃分，並貫徹租稅法律主義而設，與憲法尚無牴觸。憲法第一百零九條第一項第七款及第一百十條第一項第六款規定，省稅及縣稅由省縣立法並執行之，係指地方得依國稅與省縣稅合理劃分之中央立法，就已劃歸省縣之稅課，自行立法並執行之。因

vincial, and county tax and to meet the principle of taxation-by-law and is not contrary to the Constitution. The provisions of Article 109, Paragraph 1, Subparagraph 7 and Article 110, Paragraph 1, Subparagraph 6, which stipulate that the local governments shall have the power of legislation and taxation of the provincial and county tax means the provincial and county taxes that have been reasonably allocated to the local governments according to the laws made by the central government. Therefore, in order to enable the local government to exercise the power of tax legislation authorized by the Constitution, the central government shall enact general tax principles for local taxes, or establish general tax principles in the various tax laws applicable to local government in accordance with the Act Governing the Allocation of Government Revenues and Expenditures referred to in the above. Currently, there are no general tax principles nor do the current tax laws provide general tax principles applicable to local governments. Such laws shall be enacted as soon as possible. However, before the enactment of local tax laws, the

此中央應就劃歸地方之稅課，依財政收支劃分法前開規定，制定地方稅法通則，或在各該稅法內訂定可適用於地方之通則性規定，俾地方得據以行使憲法賦予之立法權。目前既無地方稅法通則，現行稅法又有未設上述通則性規定者，應從速制定或增訂。在地方未完成立法前，有關地方稅課之中央立法繼續有效，仍應依其規定辦理。至財政收支劃分之規定，中央自應斟酌經濟發展及稅課來源等實際情形，適時調整，以符憲法兼顧中央與地方財政均衡之意旨；又財政收支劃分法第十二條第二項及第三項就有關營業稅與印花稅統籌分配之規定，符合憲法第一百四十七條謀求地方經濟平衡發展之意旨，與憲法並無牴觸，業經本院釋字第二三四號解釋釋示在案，併此說明。

relevant provisions regarding local tax as provided in the tax laws of the central government shall continue to be valid and shall be enforced accordingly. As for the allocations of revenue and expenditure, the central government shall adjust them from time to time according to the factual situation of economic development and the sources of tax. Such allocations should comply with the constitutional spirit of financial balance of the central and local governments. Furthermore, Paragraphs 2 and 3 of Article 12 of the Act Governing the Allocation of Government Revenues and Expenditures, which provide for the centralized collection and allocation of business tax and stamp duty, are in conformity with the provision of Article 147 of the Constitution, which advocates balanced local economic development, and therefore are not contrary to the Constitution. This has already been interpreted by this Court in Interpretation No. 234.

Justice Chung-Sheng Lee filed dissenting opinion in part.

本號解釋李大法官鐘聲提出一部不同意見書。

J. Y. Interpretation No.278（May 17, 1991）*

ISSUE: (1) Is Article 21 of the Educators Appointment Act requiring that qualification for employment as school staff shall be based on passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects consistent with the Constitution?

(2) May school staff who have not been qualified through examination only be employed at their original schools?

RELEVANT LAWS:

Article 85 of the Constitution（憲法第八十五條）; Article 21 of the Educators Appointment Act（教育人員任用條例第二十一條）.

KEYWORDS:

open competitive examination（公開競爭考試）, appointment by examination（考試及格任用）, qualification for employment as school staff（學校職員之任用資格）.**

HOLDING: Pursuant to Article 21 of the Educators Appointment Act Educational Personnel, as amended and promulgated on December 19, 1990, qualification for employment as school

解釋文：中華民國七十九年十二月十九日修正公布之教育人員任用條例第二十一條規定，學校職員之任用資格，應經學校行政人員考試及格或經高普考試相當類科考試及格，與憲法第八

* Translated by Eleanor Y. Y. Chin, Esq., of the CHIEN YEH LAW OFFICES.

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staff shall be based on passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects; such language is consistent with the purpose of appointment by examination as stated in Article 85 of the Constitution. With respect to currently employed school staff who were selected for employment prior to the enactment of said Act, the language "the original laws and regulations shall apply" appearing in said Article does not grant to those who have not been qualified through examination the same status for appointment to public office as those who have been so qualified. Therefore, such persons may only remain employed at their original schools. The Examination Yuan may determine the qualifications of such school staff through examination.

十五條所定公務人員非經考試及格不得任用之意旨相符。同條關於在該條例施行前已遴用之各類學校現任職員，其任用資格「適用各該原有關法令」之規定，並不能使未經考試及格者取得與考試及格者相同之公務人員任用資格，因之，僅能繼續在原學校任職。考試院對此類學校職員，仍得以考試定其資格。

REASONING: Pursuant to Article 85 of the Constitution, a system of open competitive examination shall be put into operation in the selection of public functionaries, and no person shall be appointed to a public office without being qualified through such examination. This

解釋理由書：憲法第八十五條規定，公務人員之選拔，應實行公開競爭之考試制度，非經考試及格者，不得任用，乃明示考試用人之原則。中華民國七十九年十二月十九日修正公布之教育人員任用條例第二十一條規定，學校職員之任用資格，應經學校行政人員考

explicitly sets forth the principle of appointment by examination. Article 21 of the Educators Appointment Act Educational Personnel, as amended and promulgated on December 19, 1990, stipulates that qualification for employment as school staff shall be subject to the passing of the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects, conforming to the principle elucidated above. Paragraphs 1 and 2 of said Article, as amended and promulgated on May 1, 1985, stipulate that "qualification for employment as school staff, with the exception of technical personnel, accounting personnel and human resource personnel being governed by their relevant regulations, shall be based on passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects." "The Examination Yuan shall, within a specified time, hold examinations for currently employed school staff who were employed by selection prior to enactment of this Regulation, excepting those who have already been qualified by law, to determine their quail-

試及格或經高普考試相當類科考試及格，與上述意旨相符。中華民國七十四年五月一日公布施行之該條第一項、第二項規定：「學校職員之任用資格，除技術人員、主計人員、人事人員分別適用各該有關法律之規定外，應經學校行政人員考試及格，或經高普考試相當類科考試及格。」「本條例施行前已遴用之學校現任職員，除已依法取得任用資格者外，應由考試院限期辦理考試，以定其資格，其考試辦法，由考試院會同行政院定之。未通過考試者，得繼續任原職至其離職為止」，係為兼顧考試用人原則及該條例施行前遴用之學校現任職員未經考試及格者之原有權益。七十九年十二月十九日該條修正時，將原第一項第二項合併修正為：「學校職員之任用資格，除技術人員、主計人員、人事人員及本條例施行前已遴用之各類學校現任職員，分別適用各該原有關法令之規定外，應經學校行政人員考試及格，或經高普考試相當類科考試及格。」其所謂本條例施行前已遴用之各類學校現任職員，分別適用各該原有關法令之規定，係例外規定，並不能使未經考試及格者取得與考試及格者相同之公務人員任用資格，因之，僅能繼續在原學校任職。此類學校職員，既未具有

fications. The method of examination shall be established by the Examination Yuan in consultation with the Executive Yuan. Personnel who do not pass the examination may remain at their current posts until leave." The purpose of the above provisions is to protect the original rights of personnel who were employed by selection prior to enactment of this Regulation but have not been subsequently been qualified through examination. Amendment to the Regulation on December 19, 1990, combined the then first and second Paragraphs: "Qualification for employment as school staff, with the exception of technical personnel, accounting personnel and human resource personnel and other currently employed persons selected for employment prior to enactment of this Regulation being governed by their relevant regulations, shall be subject to passing the School Administrative Personnel Examination or the Senior and Junior Examinations of comparable subjects." The provision that currently employed persons selected for employment prior to enactment of this Regulation shall be governed by their relevant regula-

法定考試及格之任用資格，對於願應試者，考試院仍得依其法定職權辦相關考試，以定其資格。

tions is an exceptional measure, and may cause those who have not been duly qualified through examination to obtain the same status for appointment to public office as those who have been so qualified. Therefore, such persons may only remain at their original posts. Since such personnel have not been qualified through examination, the Examination Yuan may, within its professional capacity, hold relevant examinations for those willing to participate therein.

Justice Chien-Hua Yang filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋楊大法官建華、劉大法官鐵錚分別提出不同意見書。

J. Y. Interpretation No.279（May 17, 1991）*

ISSUE: In the provision of the Labor Insurance Act concering the premium subsidy provided by the provincial or city government to various categories of those insured with labor insurance, what does the term "provincial (city) government" refer to?

RELEVANT LAWS:

Article 5, 6, 8, 9 and 15 of the Labor Insurance Act（勞工保險條例第五條、第六條、第八條、第十五條）; Article 7 of the Grand Justices Council Adjudication Act（司法院大法官會議法第七條）.

KEYWORDS:

labor insurance（勞工保險）, Legislative Power（立法權）, Judicial review（司法審查）, premium（保險費）.**

HOLDING: In Article 15 of the Labor Insurance Act, relating to the premium subsidy provided by the provincial or city government to various categories of those insured with labor insurance, the term "provincial (city) government" refers to the city or province whose residents are covered under labor insurance and fall

解釋文：勞工保險條例第十五條，有關各類勞工保險費由省（市）政府補助之規定，所稱「省（市）政府」，係指該省（市）有勞工為同條第二款至第四款規定之被保險人者而言，與該省（市）政府是否直接設立勞工保險局無關。

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* Translated by BAKER & McKENZIE.

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

into the categories of (city) government, paragraphs 2 to 4 of the abovementioned Article, and is irrespective of whether such provincial (city) government has set up a Labor Insurance Bureau.

REASONING: The Taipei City Council, which submitted this request for interpretation, in its examination of the Taipei City Government's proposed budget, questioned the interpretation of the Council of Labor Affairs, Executive Yuan, in relation to the Labor Insurance Act, which stipulated that the labor insurance subsidy should be included in the annual budget and contended that such interpretation was contrary to Article 5 of the Labor Insurance Act and therefore requested a uniform interpretation pursuant to Article 7 of the Grand Justices Council Adjudication Act.

解釋理由書：本件聲請解釋機關台北市議會審查台北市政府預算，認該府依行政院勞工委員會對勞工保險條例之規定所持見解，編列勞工保險補助預算，與該條例第五條規定不合，聲請統一解釋，依司法院大法官會議法第七條規定，應予受理，合先說明。

The Labor Insurance Act in Article 15 provides that the insurance premium of the insured listed in Article 6, Paragraph 1, Subparagraphs 7 and 8; Article 8, Paragraph 1, Subparagraph 4; and Article 9-1, shall be subsidized by the provincial (city)

勞工保險條例第十五條規定，同條例第六條第一項第七款、第八款、第八條第一項第四款及九條之一所定各類勞工保險費由省（市）政府分別予以百分之二十或百分之四十之補助，旨在減輕轄區內，無一定雇主或自營作業而參

government by 20-40%. The objective of the subsidy is to reduce the burden of insurance premiums on persons with no permanent employer or who are self-employed but are members of a trade union, fisherman's union, temporarily employed marine crew who belong to a marine union or capitals' union, or persons whose employment has been terminated but voluntarily continue to subscribe to labor insurance and whose domiciles are located in the jurisdictions of the provincial (city) government in order to ensure their livelihood and promote the security of society. The provincial (city) government is under an obligation to provide such benefits to laborers.

The so-called "provincial (city) government" is the provincial (city) government whose residents are the insured workers of the abovementioned categories. As to the provision in Article 5 which states that: "prior to the establishment of the Central Labor Insurance Bureau, the nation may be divided into districts, and the provincial (city) government with a larger population of labor in a particular

加職業工會、漁會，參加海員總工會或船長公會為會員之外僱船員，或被裁減資遣人員而自願繼續參加勞工保險等勞工之保險費負擔，藉以保障勞工生活、促進社會安全，係省（市）政府在勞工福利上應負之義務。所稱「省（市）政府」，係指該省（市）有上述勞工參加勞工保險為被保險人者而言。至同條例第五條規定：「在中央勞工保險局未成立前，得劃分地區，委由各該區內勞工人數較多之省（市）政府直接設勞工保險局，辦理勞工保險業務……」係為兼顧現實情況而設，與該省（市）政府是否直接設立勞工保險局無關。

district may establish a labor insurance bureau to undertake (underwrite) labor insurance, " it is a provision which deals with the practical side of the matter and is unrelated to whether the provincial (city) government should directly set up a labor insurance bureau.

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋鄭大法官健才提出不同意見書。

J. Y. Interpretation No.280（June 14, 1991）*

ISSUE: Is the directive issued by the Ministry of Civil Services, providing to the effect that a government employee or teacher who, after receiving a lump-sum retirement payment, keeps receiving remuneration from the National Treasury as an irregular employee may not continue to enjoy preferential rates as to his or her bank deposits, unconstitutional ?

RELEVANT LAWS:

Article 83 of the Constitution（憲法第八十三條）; Article 31 of the Enforcement Rules of the Government Employee Retirement Act（公務人員退休法施行細則第三十一條）.

KEYWORDS:

government employee retirement（公務人員退休）, maintenance of livelihood（基本生活之維持）, preferred savings for retirement pensions（退休金優惠存款）.**

HOLDING: For [former] government employees and teachers, who receive pensions and who are later contractually hired as non-organic members with compensation offered from the public treasury, if the interest accrued from

解釋文：領取一次退休金之公教人員，再任依契約僱用而由公庫支給報酬之編制外員工，其退休金及保險養老給付之優惠存款每月所生利息，如不能維持退休人員之基本生活（例如低於編制內委任一職等一級公務人員月俸

* Translated by Professor Fuldien Li.

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their respective and preferred savings for pensions or endowment insurance recovery shall not be sufficient for their livelihood (for example, the accrued interest is lower than the monthly compensation of the consigned government employee with initial grade and class), then such preferred savings for pensions shall not be terminated. Any part of the Letter (74) Tai-Hwa-Ter-Shan-Tzu No. 22854 issued on June 12, 1985, by the Ministry of Civil Services that is in conflict with the explanation above shall no longer be applicable.

額），其優惠存款自不應一律停止。銓敘部中華民國七十四年六月十二日(74)臺華特三字第二二八五四號函，與上述意旨不符部分，應停止適用。

REASONING: Government employees shall be faithful to their duties and serve the people. Similarly, the nation shall take care of and ensure such employees' livelihood with proper retirement pensions or annuities upon their retirement to comply with the purposes of establishing institutions for the retirement of government employees as required in Article 83 of the Constitution. The regulations in connection with the Preferred Savings for Pensions of Retired Government Employees were established accord-

解釋理由書：公務人員應盡忠職守，為民服務，國家對於公務人員亦應照顧其生活，於其年老退休時，給予適當之退休年金，以保障其退休後之生活，方符憲法第八十三條設置國家機關掌理公務人員退休、養老等事項之意旨。退休公務人員退休金優惠存款辦法，係依考試院發布之公務人員退休法施行細則第三十一條規定所訂定，為政府在公務人員待遇未能普遍提高或年金制度未建立前之過渡措施，甚目的在鼓勵領取一次退休金之公務人員儲存其退休金，藉適當之利息收入，以維持其生

ing to Article 31 of the Enforcement Rules of the Government Employee Retirement Act, as promulgated by the Examination Yuan. These regulations are a temporary measure adopted before the increase in the amount of government employee remuneration and the establishment of an annuity system. The purpose of these regulations is to encourage government employees to save their pensions. The livelihood of such retired government employees can thus be ensured by the interest accrued from such preferred savings. The Letter (74) Tai-Hwa-Ter-Shan-Tzu No. 22854 issued on June 12, 1985, by the Ministry of Civil Services states that retired government employees shall not receive such preferred savings upon their occupation of public office, such as employment in any public institution, school or academy, or employment as technicians and fellow workers or temporary workers who are paid from the public treasury. The purposes of such requirement are to prevent overlapping expenditures of the public treasury as well as maintenance of the retirement system, and we consider such requirement

活。銓敘部於中華民國七十四年六月十二日以(74)臺華特三字第二二八五四號函示，退休人員如再任各機關學校約聘僱人員、技工、工友、臨時僱工等由公庫支給待遇之公職，不得續存優惠存款，係為維護退休制度及避免公庫重複負擔，就通常情形而言，固屬適當。惟領取一次退休金之公教人員，再任依契約僱用而由公庫支給報酬之編制外員工者，多係基層人員，其原領退休金及養老給付為數較少，早期退休者尤然。若其全部退休金及保險養老給付之優惠存款每月所生利息，不能維持退休公教人員生活，例如低於委任一職等一級公務人員月俸額者，尚難認為已足以保障其退休後之基本生活，其再任上述約僱員工，所得不多，僅係彌補性質，自不應一律停止其優惠存款，此與非基層人員退休，或再任由公庫支給報酬之非約僱人員不同，不能相提並論。銓敘部前開函釋，與上述意旨不符部分，應停止適用。

proper, in general. However, most such government employees and teachers who receive lump-sum pensions and who are contractually hired as non-organic members with compensation offered from the public treasury were fundamental members. Their pensions or retirement allowances are limited, especially for those who retired before such pension laws were enacted. If the interest accrued from their respective and preferred savings for pensions or endowment insurance recovery shall not be sufficient for their livelihood (for example, the accrued interest is lower than the monthly compensation of the consigned government official with initial grade and class), we consider that the livelihood of such government employees and teachers cannot be ensured [without such preferred savings]. Compensation received by such government employees and teachers is limited as well, and we think it is insufficient. Therefore, such preferred savings shall not be terminated for other non-fundamental retired government employees and teachers as well as [organic] members compensated from the public treasury. Any part of the above

letter issued by the Ministry of Civil Services that is in conflict with the explanation above shall no longer be applicable.

J. Y. Interpretation No.281（June 28, 1991）*

ISSUE: Do Article 35-1, Paragraph 2, and Article 51-1 of the Customs Act violate Article 19 of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 35-1, Paragraph 2, 51-1 of the Customs Act（關稅法第三十五條之一第二項、第五十一條之一）.

KEYWORDS:

customs duty（關稅）, bonded factory（保稅工廠）, smuggling goods（私運貨物）.**

HOLDING: Article 35-1, Paragraph 2, of the Customs Act states that "Products manufactured or processed by a bonded factory and the raw materials exempted from Customs duty under the provisions in the preceding paragraph shall not be released from the factory for domestic sale unless otherwise approved by Customs and import application and payment of Customs duty and taxes have been completed in respect of the condition

解釋文：關稅法第三十五條之一第二項規定：「保稅工廠所製造或加工之產品及依前項規定免徵關稅之原料，非經海關核准並按貨品出廠形態報關繳稅，不得出廠內銷。」同法第五十一條之一規定：「違反第三十五條之一第二項之規定，將保稅工廠之產品或免徵關稅之原料出廠內銷者，以私運貨物進口論，依海關緝私條例有關規定處罰。」旨在防止逃漏關稅，維持課稅公平，為增進公共利益所必要，與憲法並

* Translator by Assistant Professor Y.K.Huang.

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and form of the goods to be released from the factory." Article 51-1 of the same Act states that "Where the products or duty-free raw materials of a bonded factory are released from the factory for domestic sale in violation of the provisions provided for in Article 35-1, Paragraph 2, such action shall be treated as the smuggling of goods into this country and be liable to punishment under the relevant provisions of the Customs Smuggling Control Act." The aims of both provisions are to prevent Customs duty evasion and maintain fairness in assessing taxes, which are necessary to promote the public interest and not contrary to the Constitution.

無牴觸。

REASONING: Raw materials are a kind of goods, which when imported from abroad shall have Customs duty levied upon them. However, in order to promote the economic development and enrich the people's livelihood by encouraging the importation of raw materials, which are to be exported after being manufactured and processed, it is specially provided in Article 35-1, Paragraph

解釋理由書：按原料為貨物之一種，自國外進口原料，本應依法徵收關稅。惟國家為鼓勵進口原料，在國內製造或加工為產品後外銷，以促進經濟發展，富裕民生，特在關稅法第三十五條之一第一項規定：「外銷品製造廠商，得經海關核准登記為海關管理保稅工廠，其進口原料存入保稅工廠製造或加工產品外銷者，得免徵關稅。」保稅工廠之廠商，如欲改變原意，將保稅工

1, of the Customs Act that "Export processing factories may be registered, with due approval of the Customs, as bonded factories under Customs supervision. All imported raw materials to be stored and used in such bonded factories for manufacturing or processing into finished products for export shall be exempt from customs duty." Thereinafter, in the case where the firm of the bonded factory intends to change its original purpose and sell the products manufactured or processed in the bonded factory domestically or store all raw materials exempt from customs duty in the bonded factory, that is no difference from importing the products from abroad and selling the raw materials domestically, which may not be done unless it has been approved by Customs and the Customs duty and taxes have been paid. Article 35-1, Paragraph 2, of the Customs Act states that "Products manufactured or processed by a bonded factory and the raw materials exempted from Customs duty under the provisions in the preceding paragraph shall not be released from the factory for domestic sale unless otherwise approved by Customs and the

廠所製造或加工之產品及存入保稅工廠免徵關稅之原料出廠內銷，則已與自外國進口產品及原料內銷者相同，自應經海關核准並補徵關稅後方得為之。關稅法第三十五條之一第二項規定：「保稅工廠所製造或加工之產品及依前項規定免徵關稅之原料，非經海關核准並按貨品出廠形態報關繳稅，不得出廠內銷。」及第五十一條之一規定：「違反第三十五條之一第二項之規定，將保稅工廠之產品或免徵關稅之原料出廠內銷者，以私運貨物進口論，依海關緝私條例有關規定處罰。」旨在防止逃漏關稅，維持課稅公平，為增進公共利益所必要，與憲法並無牴觸。

import application and payment of Customs duty and taxes have been completed in respect of the condition and form of the goods to be released from the factory." Article 51-1 of the same Act states that "Where the products or duty-free raw materials of a bonded factory are released from the factory for domestic sale in violation of the provisions provided for in Article 35-1, Paragraph 2, such action shall be treated as smuggling goods into this country and be liable to punishment under the relevant provisions of the Customs Smuggling Control Act." The aims of both provisions are to prevent Customs duty evasion and maintain fairness in assessing taxes, which are necessary to promote the public interest and not contrary to the Constitution.

J. Y. Interpretation No.282（July 12, 1991）*

ISSUE: Are the positions of the Delegates to the National Assembly without pay?

RELEVANT LAWS:

Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion（動員戡亂時期臨時條款）; J.Y. Interpretation No.76（司法院釋字第七十六號解釋）.

KEYWORDS:

National Assembly（國民大會）, Legislative Yuan（立法院）, Control Yuan（監察院）, remuneration（報酬）, compensation（報酬）.**

HOLDING: By the nature of their constitutional duty, Delegates to the National Assembly do not meet regularly, and the performance of their duty does not require the payment of periodic compensation of an annual retainer or honorarium for their public service. Accordingly, such positions are without pay. Interpretation No. 76 of the Judicial Yuan states that,

解釋文：國民大會代表，依憲法所定職務之性質，不經常集會，並非應由國庫定期支給歲費、公費等待遇之職務，故屬無給職。本院釋字第七十六號解釋所稱：「就憲法上之地位及職權之性質而言，應認國民大會、立法院、監察院共同相當於民主國家之國會」，非謂各該機關在我國憲法上之性質、職權或其人員之待遇相同。本院上開解

* Translated by LAWRENCE S. LIU.

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insofar as the constitutional status and powers of their positions are concerned, the National Assembly, Legislative Yuan and Control Yuan collectively are equivalent to the parliamentary body of democratic nations. This interpretation does not mean that these agencies are the same in terms of their nature, powers or the remuneration of their members under the Constitution. This interpretation is hereby amended accordingly. Where Delegates to the National Assembly receive compensation under specific circumstances, such as meeting in session to exercise their power, such compensation shall be treated in the same manner as in the case of compensation to other elected parliamentary members of the central government, and shall require legislation specifying the categories and standards of such compensation before payment from the budget may be made.

釋，應予補充。至國民大會代表在特定情形下，例如集會行使職權時，所得受領之報酬，亦應與其他中央民意代表之待遇，分別以法律明定其項目及標準，始得據以編列預算支付之。

Delegates to the National Assembly shall receive the same amount of remuneration during the same period of time. To be sure, Delegates to the National Assembly elected from additional quotas

國民大會代表，在同一時期所得受領之報酬，應歸一律。依動員戡亂時期臨時條款增加名額選出之國民大會代表，其所得受領之報酬，應與第二屆國民大會代表相同，乃屬當然。

arising under the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the Communist Rebellion shall receive the same remuneration as Delegates of the second term of the National Assembly.

This interpretation shall take effect from January 1, 1992.

本解釋自中華民國八十一年一月一日起生效。

REASONING: By the nature of their constitutional duty under Articles 27 through 30 of the Constitution, Delegates to the National Assembly do not meet regularly, and they are not prohibited from holding other public offices or engaging in other business or professions. In addition, the performance of their duty does not require the payment of periodic compensation of an annual retainer or honorarium for their public service. Accordingly, such positions are without pay. Interpretation No. 76 of the Judicial Yuan states that, insofar as the constitutional status and powers of their positions are concerned, the National Assembly, Legislative Yuan and Control Yuan collectively are equivalent to the parliamentary body

解釋理由書：國民大會代表依憲法第二十七條至第三十條所定職務之性質，不經常集會，亦未禁其兼任公職或執行業務，並非應由國庫定期支給歲費、公費等待遇之職務，故屬無給職。本院釋字第七十六號解釋所稱：「就憲法上之地位及職權之性質而言，應認國民大會、立法院、監察院共同相當於民主國家之國會」，非謂各該機關在我國憲法上之性質、職權或其人員之待遇相同。本院上開解釋，應予補充。至國民大會代表在特定情形下，例如集會行使職權時，所得受領之報酬、以及其他中央民意代表所得受領之待遇，均涉及人民之納稅負擔，自應分別以法律明定其適當之項目及標準，始得據以編列預算支付之。

of democratic nations. This interpretation doe not mean that these agencies are the same in terms of their nature, powers or the remuneration of their members under the Constitution. This interpretation is hereby amended accordingly. Where Delegates to the National Assembly receive compensation under specific circumstances, such as meeting in session to exercise their power, or where other parliamentary members of the central government receive remuneration, the people will bear such cost through taxation. The payment of such compensation shall require legislation specifying the categories and standards of such compensation before payment from the budget may be made.

In accordance with the principle of equality, Delegates to the National Assembly shall receive the same amount of remuneration during the same period of time. To be sure, Delegates to the National Assembly elected from additional quotas arising under the Temporary Provisions Effective During the Period of National Mobilization for the Suppression of the

國民大會代表，在同一時期，所得受領之報酬，依平等原則，應歸一律。依動員戡亂時期臨時條款增加名額選出之國民大會代表，其所得受領之報酬，應與第二屆國民大會代表相同，乃屬當然。

Communist Rebellion shall receive the same remuneration as Delegates of the second term of the National Assembly.

This interpretation will require considerable time for the enactment and amendment of relevant legislation. Accordingly, it shall take effect from January 1, 1992.

本解釋有關法律之制定或修正，尚需相當之時間，爰定本解釋自中華民國八十一年一月一日起生效。

J. Y. Interpretation No.283（August 6, 1991）*

ISSUE: Does a pardon granted by the President have retroactive effect?

RELEVANT LAWS:

Article 40 of the Constitution（憲法第四十條）; Article 3 of the Amnesty Act（赦免法第三條）.

KEYWORDS:

pardon（特赦）, retroactive（溯及既往）, deprivation of civil rights（褫奪公權）.**

HOLDING: The President's pardon, which declares the nullity of a pronounced offense and punishment, granted in accordance with Article 40 of the Constitution and the latter part of Article 3 of the Amnesty Act does not have retroactive effect on executed punishment. The civil rights of a person that have been pronounced to be deprived shall be restored from the effective date of the pardon order. With respect to public office lost due to a final conviction, the convicted person may apply to the competent authority

解釋文：總統依憲法第四十條及赦免法第三條後段規定所為罪刑宣告無效之特赦，對於已執行之刑，不生溯及既往之效力。其經宣告褫奪公權者，自赦免令生效之日起，回復其公權。至因有罪判決確定而喪失之公職，有向將來回復之可能者，得由當事人聲請主管機關，依有關法律處理之。

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* Translated by Jennifer Lin of Tsar & Tsai Law Firm.

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

requesting the disposition of this matter according to relevant laws, provided that the lost public office can be prospectively reinstated.

REASONING: The Constitution of the Republic of China provides in Article 40 that: "The President shall, in accordance with law, exercise the power of granting general pardons, pardons, commutation of sentences and restoration of civil rights." Article 3 of the Amnesty Act states that: "After a pardon is granted to a person subject to a pronouncement of offense and punishment, the execution of the punishment is waived; under special circumstances the pronouncement of offense and punishment may be deemed a nullity." In order to maintain the stability of legal order and the existing result of the execution [of a sentence] according to the law, the pardon granted by the President in accordance with the aforesaid Article 40 of the Constitution and the latter part of Article 3 of the Amnesty Act declaring the nullity of the pronounced offense and punishment shall not have retroactive effect. However, since the pronounced of-

解釋理由書：中華民國憲法第四十條規定：「總統依法行使大赦、特赦、減刑及復權之權」。赦免法第三條規定：「受罪刑宣告之人經特赦者，免除其刑之執行，其情節特殊者，得以其罪刑之宣告為無效」。總統依上述憲法第四十條及赦免法第三條後段規定所為罪刑宣告無效之特赦，為維持法律秩序之安定，及依法執行而生之既成效果，對於已執行之刑，應不生溯及既往之效力。惟罪刑之宣告，既自赦免令生效之日起為無效，其經宣告褫奪公權者，亦應自赦免令生效之日起，回復其公權。至因有罪判決確定而喪失之公職，有向將來回復之可能者，得由當事人聲請主管機關依本解釋意旨及有關法律處理之。

fense and punishment become invalid from the effective date of the pardon order, the person pronounced to be deprived of civil rights shall recover his civil rights from that effective date. With respect to public office lost due to a final conviction, the convicted person may apply to the competent authority requesting the disposition of this matter according to this Interpretative ruling and relevant laws, provided that the lost public office can be prospectively reinstated.

J. Y. Interpretation No.284（September 13, 1991）*

ISSUE: Is the provision of the Act Governing the Punishment for Violation of Road Traffic Regulations, prescribing to the effect that license of a car drive who flees from the scene after causing an accident resulting in death or injury will be revoked, unconstitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 62, Paragraph 2, of the Act Governing the Punishment for Violation of Road Traffic Regulations（道路交通管理處罰條例第六十二條第二項）.

KEYWORDS:

automobile accident（道路交通事故）, immediate assistance（及時救護）, mitigate damages（防止損害範圍之擴大）, hit and run（肇事逃逸）, the liability of the accident（肇事責任）, revoke the driver's license（吊銷駕駛執照）.**

HOLDING: Article 62, Paragraph 2, of the Act Governing the Punishment for Violation of Road Traffic Regulations provides that if an automobile driver causes an automobile accident re-

解釋文：道路交通管理處罰條例第六十二條第二項規定：「汽車駕駛人如肇事致人受傷或死亡，應即採取救護或其他必要措施，並向警察機關報告，不得逃逸，違者吊銷其駕駛執

* Translated by Li-Chih Lin, Esq., J.D.

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sulting in injury or death, the automobile driver shall offer immediate assistance or other necessary measures to the victims and shall notify the police about the accident. In addition, the driver's license of a hit-and-run automobile driver will be revoked. The purpose of the above-stated regulations is to improve traffic safety, protect the rights and interests of the people and to maintain the social order. The duties and sanctions imposed upon the automobile driver under Article 62, Paragraph 2, of the Act Governing the Punishment for Violation of Road Traffic Regulations are permissible under Article 23 of the Constitution and are consistent with the legislative intent of the Constitution.

照。」旨在增進行車安全，保護他人權益，以維持社會秩序，為憲法第二十三條之所許，與憲法尚無牴觸。

REASONING: After the occurrence of an automobile accident resulting in injury or death, the person who causes the accident shall offer immediate assistance or other necessary measures to the victims to mitigate damages. It is necessary to impose strict sanctions on the automobile driver who hits and runs because if the automobile driver who causes

解釋理由書：道路交通事故發生後，有受傷或死亡之情形者，應即時救護或採必要之措施，以防損害範圍之擴大。如駕駛人於肇事後，隨即駕車逃離現場，不僅使肇事責任認定困難，更可能使受傷之人喪失生命，自有從嚴處理之必要。道路交通管理處罰條例第六十二條第二項規定：「汽車駕駛人如肇事致人受傷或死亡，應即採取救護或其

the accident flees from the scene of the accident, it will be difficult to determine the liability of the accident and the opportunity to save lives may be lost. Article 62, Paragraph 2, of the Act Governing the Punishment for Violation of Road Traffic Regulations provides that if an automobile driver causes an automobile accident resulting in injury or death, the automobile driver shall offer immediate assistance or other necessary measures to the victims and shall notify the police about the accident. In addition, the driver's license of a hit-and-run automobile driver will be revoked. The purpose of the above-stated regulations is to improve traffic safety, protect the rights and interests of the people and to maintain the social order. The duties and sanctions imposed upon the automobile driver under Article 62, Paragraph 2, of the Act Governing the Punishment for Violation of Road Traffic Regulations are permissible under Article 23 of the Constitution and are consistent with the legislative intent of the Constitution. However, if an automobile driver leaves the scene of an accident without realizing that an accident has occurred,

他必要措施，並向警察機關報告，不得逃逸，違者吊銷其駕駛執照。」旨在增進行車安全，保護他人權益，以維持社會秩序，為憲法第二十三條之所許，與憲法尚無牴觸。至汽車駕駛人於交通事故發生時，是否因不知其已肇事而離開現場，乃個別案件之事實認定及法律適用問題，不在本案解釋範圍，併予指明。

his/her liability shall be determined based on the established facts and other applicable laws. Such situation falls outside the scope of this interpretation and thus shall be clarified accordingly.

J. Y. Interpretation No.285（September 27, 1991）*

ISSUE: Is the directive issued by the Executive Yuan, providing that a retirement pension does not include "the subsidy for the funeral and burial of family dependents" and that a retiree may not apply for such subsidy, in violation of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 8 of the Act Governing the Retirement of School Teachers and Staff（學校教職員退休條例第八條）; the Central Government and Public School Employee Welfare Subsidies Payments Guidelines（中央公教人員生活津貼支給要點）.

KEYWORDS:

pension（退休金）, family funeral allowance（眷屬喪葬補助津貼）, government and public school employees（公教人員）.**

HOLDING: The "monthly pension payment", stipulated in the Act Governing the Retirement of School Teachers and Staff (hereinafter, "the Act"), does not include the "family funeral allowance" by its nature. The wording "family funeral

解釋文：學校教職員退休條例所稱月薪額，性質上本無從包括「公教人員之眷屬喪葬補助費」，行政院中華民國六十九年四月十六日臺六十九人政肆字第七四九八號函未將此項補助費列入退休金之範圍，與該條例之立法意旨

* Translated by Professor Chin-Chin Cheng.

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allowance not included in the pension payment" was interpreted in the Tai (69) Ren Cheng Si Tze No. 7498 Letter, issued by the Executive Yuan on April 16, 1980. This interpretation does not violate the legislative purpose of the Act. Moreover, the "Central Government and Public School Employee Welfare Subsidies Payments Guidelines" (hereinafter, "the Guidelines"), issued by the Executive Yuan, are mandated to ensure the livelihood of the current government and public school employees. The Guidelines are discretionary measures made by the authorized administrative agency, and do not apply to non-government employees. Retired government employees, of course, are not entitled to the "family funeral allowance" payment. Therefore, the relevant administrative order and guidelines issued by the Executive Yuan do not violate the Constitution.

無違。又中央公教人員生活津貼支給要點，係行政院為安定現職公教人員生活而訂定，乃主管機關依職權所為之裁量措施，原不適用於非現職人員，退休人員自不得據以請領眷屬喪葬補助費，上述行政院函及要點與憲法均無牴觸。

REASONING: The "monthly pension payment", regulated in Article 8 of the Act Governing the Retirement of School Teachers and Staff (hereinafter, "the Act"), includes basic remuneration

解釋理由書：學校教職員退休條例所稱月薪額，同條例第八條明定包括實領本薪及其他現金給與，性質上本無從包括並非按月給付而於特定事故發生時始得支領之眷屬喪葬補助費。行政

and other cash allowances. By its nature, it does not include the "family funeral allowance", which is not paid monthly and is not available until certain events occur. The wording "family funeral allowance not included in the pension payment" was interpreted in the Tai (69) Ren Cheng Si Tze No. 7498 Letter, issued by the Executive Yuan on April 16, 1980. This interpretation does not violate the legislative purpose of the Act. Moreover, the "Central Government and Public School Employee Welfare Subsidies Payments Guidelines"(hereinafter, "the Guidelines"), issued by the Executive Yuan in the Tai (77) Ren Cheng Si Tze No. 23391 Letter on June 30, 1988, are mandated to ensure the livelihood of the current government and public school employees. The Guidelines are discretionary measures made by the authorized administrative agency. Article 4 of the Guidelines provides that the Guidelines are only applicable to current government employees under the limited budgets of government agencies and public schools. Retired government employees are not entitled to apply for the "family funeral

院中華民國六十九年四月十六日臺六十九人政肆字第七四九八號函未將此項補助費列入退休金之範圍，與上開條例之立法意旨無違。又同院七十七年六月三十日臺七十七人政肆字第二三三九一號函發布之中央公教人員生活津貼支給要點，係為安定公教人員生活而訂定，乃主管機關依職權所為之裁量措施，該要點第四點明定，以各機關學校預算員額內之現職人員為適用對象，其所定「公教人員之眷屬喪葬補助費」，退休人員自不得請領。上述行政院函及要點與憲法均無牴觸。至主管機關為照顧退休人員之生活，衡量國家財力及各項津貼之性質，於法定退休給與以外酌予補助，亦屬行政權之裁量範圍，非所有津貼均應比照現職人員辦理，併此說明。

allowance". Therefore, the relevant administrative order and guidelines issued by the Executive Yuan do not violate the Constitution. The extra benefits, besides the pension payment, paid by the government to provide for the livelihood of retired employees are remunerated under administrative discretion after calculating the nation's capital and the nature of all kinds of benefits. However, retired government employees are not entitled to all of the benefits available to current government employees.

J. Y. Interpretation No.286（November 29, 1991）*

ISSUE: Are the relevant provisions of the Equalization of Land Rights Act and the Enforcement Rules thereof, providing that the land value increment tax for a land whose value increases naturally shall be levied based on the balance of the aggregate amount of price increase minus the cost of its improvement, in violation of the Constitution?

RELEVANT LAWS:

Article 15, Paragraph 3, of Article 143 of the Constitution（憲法第十五條、第一百四十三條第三項）; Article 35, and Paragraphs 1 and 2 of Article 36 of the Equalization of Land Rights Act（平均地權條例第三十五條、第三十六條第一項、第二項）; Article 53 of the Enforcement Rules of the Equalization of Land Rights Act（平均地權條例施行細則五十三條）.

KEYWORDS:

property right（財產權）, land value increment tax（土地增值稅）, accruing the increased land value to the public（漲價歸公）, the total amount of the increased land value（土地漲價總數額）, expenses for land improvement（土地改良費用）.**

* Translated by Jer -Shenq Shieh.

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HOLDING: Paragraph 3 of Article 143 of the Constitution provides: "If the value of a parcel of land has increased, not through the exertion of labor or the employment of capital, the State shall levy thereon a land value increment tax, the proceeds of which shall accrue to the public." This provision is for the purpose of implementing the policy of accruing the automatically increased land value to the public. Article 35, and Paragraphs 1 and 2 of Article 36 of the Equalization of Land Rights Act, which was amended and promulgated on February 2, 1977, and Article 53 of the Enforcement Rules of this Act issued by the Executive Yuan on April 1 in the same year provide that, the land value which has automatically increased after the landowner declared the land value shall be calculated on the basis of the remainder of the total amount of the increased land value by subtracting all of the expenses for land improvement already paid by the landowner, and the land value increment tax shall thus be levied; though this remainder might include the value which has increased because of the improvement on the land, this calculation

解釋文：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」，旨在實施土地自然漲價歸公政策。中華民國六十六年二月二日修正公布之平均地權條例第三十五條、第三十六條第一項、第二項及同年四月一日行政院發布之同條例施行細則第五十三條規定，土地所有權人於申報地價後之土地自然漲價，應依照土地漲價總數額，減去土地所有權人為改良土地已支付之全部費用後之餘額計算，徵收土地增值稅；其間縱有因改良土地而增加之價值，亦因認定及計算不易，難以將之與自然漲價部分明確劃分，且土地增值稅並未就漲價部分全額徵收，已足以兼顧其利益，與憲法第十五條及第一百四十三條第三項規定之意旨尚無牴觸。

of the automatically increased land value is still not in conflict with the intent of Article 15 and Paragraph 3 of Article 143 of the Constitution, for this value which has increased because of the improvement on the land is not easily recognized and calculated, is hard to clearly distinguish from the value which has automatically increased, and the interests of the landowner have to be taken into account because the land value increment tax is not levied on the full amount of the increased land value.

REASONING: Paragraph 3 of Article 143 of the Constitution provides: "If the value of a parcel of land has increased, not through the exertion of labor or the employment of capital, the State shall levy thereon a land value increment tax, the proceeds of which shall accrue to the public." This provision is for the purpose of implementing the policy of accruing the automatically increased land value to the public. The first part of Article 35 of the Equalization of Land Rights Act, which was amended and promulgated on February 2, 1977, provides: "In order to

解釋理由書：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」，旨在實施土地自然漲價歸公政策。中華民國六十六年二月二日修正公布之平均地權條例第三十五條前段規定：「為實施漲價歸公，土地所有權人自行申報地價後之土地自然漲價，應徵收土地增值稅」。同條例第三十六條第一項前段及第二項規定：「土地增值稅之徵收，應依照土地漲價總數額計算，於土地所有權移轉或設定典權時行之」、「前項土地漲價總數額，應減去土地所有權人為改良土地

implement the policy of accruing the increased land value to the public, the land value increment tax shall be levied on the land, the value of which has automatically increased after the landowner declared the land value." Paragraph 1, the first part, and Paragraph 2 of Article 36 of the same Act provide: "The levy of land value increment tax shall be calculated on the basis of the total amount of the increased land value and shall accrue to the public at every transfer of land ownership or at creation of the right of dian"; and "From the total amount of the increased land value as referred to in the preceding paragraph, there shall be subtracted all of the expenses for land improvement already paid by the landowner." Paragraph 1, the first part, and Paragraph 2 of Article 53 of the Enforcement Rules of this Act issued by the Executive Yuan on April 1 in the same year further provide: "The expenses which shall be subtracted according to Paragraph 2 of Article 36 of this Act include the expenses for land improvement, construction benefit charge, and the costs of land consolidation"; and "The expenses subtracted according to the preceding

已支付之全部費用」。同年四月一日行政院發布之同條例施行細則第五十三條第一項前段及第二項復規定：「依本條例第三十六條第二項規定應減去之費用，包括改良土地費、工程受益費及土地重劃負擔總費用。」、「依前項規定減去之費用，應由土地所有權人於土地增值稅繳納前，提出工程受益費繳納收據、工務（建設）機關發給之改良土地費用證明書或地政機關發給之土地重劃負擔總費用證明書。」是土地所有權人於申報地價後之土地自然漲價，應依照土地漲價總數額，減去土地所有權人為改良土地已支付之全部費用後之餘額計算，徵收土地增值稅。其間縱有因改良土地而增加之價值，亦因認定及計算不易，難以將之與自然漲價部分明確劃分，且土地增值稅並未就漲價部分全額徵收，已足以兼顧其利益，與憲法第十五條及第一百四十三條第三項規定之意旨尚無牴觸。至計算土地自然漲價數額時，應如何核實訂定扣減改良土地費用之標準，本可有從嚴從寬之抉擇，而此與增值稅稅率之調整及是否另徵所得稅有密切關連，應由有關機關隨稅捐稽徵技術之進步，在立法得裁量之範圍內，適時通盤檢討改進，併予指明。

paragraph shall be proved by a receipt of payment of the construction benefit charge, a certificate of expenses for land improvement made by the engineering (construction) office, or a certificate of costs of land consolidation made by the land administration office, and these receipts or certificates shall be submitted by the landowner before paying the land value increment tax." Therefore the land value which has automatically increased after the landowner declared the land value shall be calculated on the basis of the remainder of the total amount of the increased land value by subtracting all of the expenses for land improvement already paid by the landowner, and the land value increment tax shall be thus levied. Though this remainder might include the value which has increased because of the improvement on the land, this calculation of the automatically increased land value is still not in conflict with the intent of Article 15 and Paragraph 3 of Article 143 of the Constitution, for this value which has increased because of the improvement on the land is not easily recognized and calculated, is hard to clearly distinguish

from the value which has automatically increased, and the interests of the land-owner have to be taken into account because the land value increment tax is not levied on the full amount of the increased land value. As to how to actually set the standard for the subtraction of expenses for land improvement during the calculation of the amount of the automatically increased land value, it could be set strictly or leniently, and it should be closely related to the adjustment of the value increment tax rate and the question of whether another income tax should be levied. We hereby additionally point out that it shall be comprehensively reviewed and improved in time by the authority concerned, accompanied with improvements in the tax levying procedure and be within the range of delegation of the statute.

Justice Yu-Ling Yang filed dissenting opinion.

本號解釋楊大法官與齡提出不同意見書。

J. Y. Interpretation No.287（December 13, 1991）*

ISSUE: What is the force and effect of a finalized administrative measure taken in accordance with a directive issued by an administrative agency prior to the issuance of a second directive by the same agency when the second directive is inconsistent with the first one?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）, Article 28 of the Tax Levy Act（稅捐稽徵法第二十八條）, Directive T.T.S.T. No. 7530447 dated March 21, 1986, of the Ministry of Finance（財政部七十五年三月二十一日臺財稅字第七五三〇四四七號函）.

KEYWORDS:

an inconsistency between a prior and later interpretation（前後釋示不一致）, stability of the legal order（法律秩序之安定）, taxpayers（納稅義務人）, the taxation decree（課稅處分）.**

HOLDING: Generally, interpretation of administrative statutes by an administrative governing agency is to elucidate the original legislative intent of the

解釋文：行政主管機關就行政法規所為之釋示，係闡明法規之原意，固應自法規生效之日起有其適用。惟在後之釋示如與在前之釋示不一致時，在

* Translated by Professor Wen-Yeu Wang.

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administrative statutes. Hence, the interpretation shall be applicable from the respective effective date of the relevant statutes. However, in the situation where there is an inconsistency between a prior and later interpretation, any administrative actions executed based on the prior interpretation before the release of the later interpretation shall be allowed to stand unaffected by the later interpretation if the prior interpretation is not contrary to law and not obviously wrong. This is to maintain the stability of the legal order. Directive T.T.S.T. No. 7530447 dated March 21, 1986, of the Ministry of Finance, which states: "No alteration shall be made to cases of business entities that had their payment of for-profit-business income tax determined before the announcement of this decree. Those business entities whose cases have not been determined, or have been determined but with unsettled or uncollected payment shall make good without penalty the shortfall in tax in accordance with this decision" adheres to the above stated principle and hence is consistent with the Constitution.

前之釋示並非當然錯誤，於後釋示發布前，依前釋示所為之行政處分已確定者，除前釋示確有違法之情形外，為維持法律秩序之安定，應不受後釋示之影響。財政部中華民國七十五年三月二十一日臺財稅字第七五三〇四四七號函說明四：「本函發布前之案件，已繳納營利事業所得稅確定者，不再變更；尚未確定或已確定而未繳納或未開徵之案件，應依本函規定予以補稅免罰」，符合上述意旨，與憲法並無牴觸。

REASONING: Administrative governing agencies derive their authority from law. Hence, an interpretation of an administrative statute is to elucidate the original legislative intent of such statute. It is not an independent administrative decree by nature and thus shall be applicable from the respective effective date of the relevant statutes. However, in the situation where there is an inconsistency between a prior and later interpretation and where the prior interpretation is not obviously wrong, any administrative actions executed based on the prior interpretation before the release of the later interpretation and which had been determined through administrative proceedings shall only be subject to rehearing based on statutory rehearing causes. For cases determined other than by administrative proceedings, subject to the exceptions of the prior interpretation being contrary to law, thus injuring the right and interest of the people and which must be altered by the governing agency, the later interpretation shall have no effect on maintaining the stability of the legal order. Directive T.T.S.T. No. 7530447 dated March 21,

解釋理由書：行政機關基於法定職權，就行政法規所為之釋示，係闡明法規之原意，性質上並非獨立之行政命令，固應自法規生效之日起有其適用。惟對同一法規條文，先後之釋示不一致時，非謂前釋示當然錯誤，於後釋示發布前，主管機關依前釋示所為之行政處分，其經行政訴訟判決而確定者，僅得於具有法定再審原因時依再審程序辦理；其未經訴訟程序而確定者，除前釋示確屬違法，致原處分損害人民權益，由主管機關予以變更外，為維持法律秩序之安定，應不受後釋示之影響。財政部中華民國七十五年三月二十一日臺財稅字第七五三〇四四七號函說明四：「本函發布前之案件，已繳納營利事業所得稅確定者，不再變更，尚未確定或已確定而未繳納或未開徵之案件，應依本函規定予以補稅免罰」，符合上述意旨，與憲法並無牴觸。又稅捐稽徵法第二十八條之規定，係指適用法令錯誤或計算錯誤溢繳稅款者，納稅義務人得於五年之法定期間內，申請退還。故課稅處分所依據之行政法規釋示，如有確屬違法情形，其已繳稅款之納稅義務人，自得依此規定申請退還。惟若稽徵機關作成課稅處分時，適用當時法令並無錯誤，則已確定之課稅處分，自不因

1986, of the Ministry of Finance, which states: "No alteration shall be made to cases of business entities that had their payment of for-profit-business income tax determined before the announcement of this decision; those business entities whose cases have not been determined, or have been determined but with unsettled or uncollected payment shall make good without penalty the shortfall in tax in accordance this decision" adheres to the above stated principle and hence is consistent with the Constitution. Similarly, Article 28 of the Tax Levy Act states that taxpayers who had overpaid tax due to either erroneous application of statutes or errors in calculation can apply for a refund within the 5-year statutory limitation period. Hence, if the interpretation of the administrative statute which the taxation decree was based on was indeed contrary to the law, those taxpayers who have paid the tax can apply for a refund in accordance with this statute. However, if there was no erroneous application of statutes at the time the tax collecting agency executed the relevant taxation decrees, those taxation decrees which had been deter-

嗣後法令之改變或適用法令之見解變更而受影響，應無上開規定之適用，乃屬當然。至財政部中華民國六十九年三月二十八日發布之臺財稅字第三二五五二號函，並非本件確定終局裁判所適用之法律或命令，聲請人當時繳納稅款，亦因未請求行政救濟，行政法院無從就該函為應否適用之判斷，故不在本件解釋範圍。

mined shall not be affected by any subsequent changes in the statute or its interpretation. The said statute naturally has no application in this later scenario. Directive T.T.S.T. No. 32552 is not an applicable law or decree with respect to this present final award determination. As the applicant had paid the tax and had not applied for administrative remedy, the Administrative Court is unable to determine the application of that decision. Hence, it is not covered by this present interpretation.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.288（December 13, 1991）*

ISSUE: Is the provision of the Commodity Tax Act requiring that the person punishable by a fine lodge a deposit with the taxing authority or furnish a form of security before he can file an appeal with the court in conflict with the Constitution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 20 of the Commodity Tax Act（貨物稅條例第二十條）.

KEYWORDS:

deposit（保證金）, fine（罰鍰）, person liable to penalty（受處分人）, confiscation（沒入）, guaranty executed by a reliable business establishment（殷實商保）, right of appeal（上訴／抗告權）.**

HOLDING: Article 20, Paragraph 3, of the Commodity Tax Act before its amendment made on January 24, 1990, provided: "In filing an appeal, the person liable to penalty shall lodge a deposit with the competent taxing authority in sum equal to the fine payable or the value of the commodity subject to confis-

解釋文：中華民國七十九年一月二十四日修正前之貨物稅條例第二十條第三項：「受處分人提出抗告時，應先向該管稅務稽徵機關提繳應納罰鍰或其沒入貨價之同額保證金，或覓具殷實商保」之規定，使未能依此規定辦理之受處分人喪失抗告之機會，係對人民訴訟權所為不必要之限制，與憲法第十六

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cation or furnish a guaranty therefor to be executed by a reliable business establishment." To the extent that this provision deprives the person liable to penalty who is unable to meet such requirement of the opportunity to file an appeal, it imposes an unnecessary restraint on the people's right of instituting legal proceedings, and is thus contrary to the purpose of Article 16 of the Constitution in protecting the people's right of instituting legal proceedings people.

REASONING: The people's right of instituting legal proceedings protected by Article 16 of the Constitution includes the right of appeal in case of dissatisfaction with the judgment or ruling made by a lower court, and may not be restricted except where it is necessary as specified by Article 23 of the Constitution. The Commodity Tax Act before its amendment made on January 24, 1990, provided in Article 20, Paragraph 1: "All cases of penalty of fine and confiscation under this Act shall be referred by the relevant taxing authorities to the court for a ruling thereon." And Paragraph 2 of the

條保障人民訴訟權之意旨有所牴觸。

解釋理由書：憲法第十六條所保障人民之訴訟權，應包括對下級法院裁判不服時之上訴或抗告權，除有憲法第二十三條所定必要情形外，不得加以限制。中華民國七十九年一月二十四日修正前之貨物稅條例第二十條第一項前段規定：「依本條例應處罰鍰及沒入貨物之處分者，由該管稅務稽徵機關移送法院裁定」。同條第二項規定，「受處分人不服法院裁定時，得於接到法院裁定通知書十日內提出抗告」，但同條第三項則規定：「受處分人提出抗告時，應先向該管稅務稽徵機關提繳應納罰鍰或其沒入貨價之同額保證金，或覓具殷實商保」。此項規定雖為防止受處分人

same article states: “If the person liable to penalty is dissatisfied with the ruling delivered by the court, he may file an appeal within ten days from the receipt of the court ruling.” But in contrast, Paragraph 3 thereof provided: “In filing an appeal, the person liable to penalty shall lodge a deposit with the competent taxing authority in sum equal to the fine payable or the value of the commodity subject to confiscation or furnish a guaranty therefor to be executed by a reliable business establishment.” While this provision is designed to prevent the person liable to penalty from instituting a frivolous appeal for the purpose of delaying the payment of fine, the institution of appeal has no effect in staying the enforcement of the penalty. Accordingly, to the extent that the provision of Paragraph 3 quoted above deprives the person liable to penalty who is unable to meet such requirement of the opportunity to file an appeal, it imposes an unnecessary restraint on the people's right of instituting legal proceedings, and is thus contrary to the purpose of Article 16 of the Constitution in protecting the people’s right of instituting legal proceedings.

任意提起抗告，拖延繳納罰鍰而設；惟抗告並無停止執行之效力，是上述第三項之規定，使未能依此項規定辦理之受處分人喪失抗告之機會，係對人民訴訟權所為不必要之限制，與憲法第十六條保障人民訴訟權之意旨有所牴觸。

J. Y. Interpretation No.289（December 27, 1991）*

ISSUE: Does the procedure on tax sanctions imposed by the courts, based upon the Regulation Governing the Handling of Financial Penalties, violate the constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Regulation Governing the Handling of Financial Penalties Cases（財務案件處理辦法）.

KEYWORDS:

administrative rule（行政規則）, legislation（立法）, individual rights（人民權利）.**

HOLDING: The procedure on tax sanctions imposed by the courts shall be provided by law for the purpose of the constitutional guarantee of individual rights. The Interpretations Yuan-je tze Nos. 3685 and 4006, and Regulation Governing the Handling of Financial Penalties Cases, amended and promulgated on October 11, 1972, were temporary arrangements made prior to the enactment of legislation and shall become void

解釋文：稅法規定由法院裁定之罰鍰，其處理程序應以法律定之，以符合憲法保障人民權利之意旨。本院院解字第三六八五號、第四〇〇六號解釋及行政院於中華民國六十一年十月十二日修正發布之財務案件處理辦法，係法制未備前之措施，均應自本解釋公布之日起，至遲於屆滿二年時失其效力。

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* Translated by Professor J. P. Fa.

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within two years from the date of this Interpretation.

REASONING: The procedure on tax sanctions imposed by the courts shall be provided by law for the purpose of the constitutional guarantee of individual rights. The Interpretations Yuan-je tze Nos. 3685 and 4006, and Regulation Governing the Handling of Financial Penalties Cases, amended and promulgated on October 11, 1972, were temporary arrangements made prior to the enactment of legislation and shall become void within two years from the date of this Interpretation. In view of legislative policy, it is permissible to provide a judicial procedure dealing with tax violations even if these sanctions are by nature administrative acts for all purposes. This judicial procedure differs from civil and criminal procedure, but in practice has always been regarded as a part of criminal procedure. Furthermore, the Executive Yuan has promulgated the Regulation Governing the Handling of Financial Penalties Cases on October 2, 1954, to serve as the necessary legal basis. These arrangements were

解釋理由書：國家因人民違反稅法而課處罰鍰，雖屬行政處分性質之行政秩序罰，惟基於立法政策之考量，亦非不可於稅法規定由法院以裁定為之。法院依此規定所應處理之罰鍰裁定案件，乃為民事、刑事訴訟案件以外之其他訴訟案件，而由於法院組織法修正前，普通法院管轄之訴訟案件，僅有民事與刑事兩種，實務上依本院以往解釋將之歸於刑事訴訟程序處理，並由行政院於中華民國四十三年十月二日發布財務案件處理辦法為處理之準據，實為法制未完備前之不得已措施，此種情形不宜任其長久繼續存在。上述稅法規定由法院裁定之罰鍰，其處罰及救濟程序自應以法律定之，以符憲法保障人民權利之意旨。惟為顧及有關法律之制定尚需相當時間，本院院解字第三六八五號及第四〇〇六號解釋謂：「法院罰鍰裁定確定後，不得以發現新證據聲請更正原裁定」、「抗告法院所為違反稅法之裁定，縱有錯誤，在現行法上尚無補救之途」，暨六十一年十月十二日修正發布之上述財務案件處理辦法，均應自本解釋公布之日起，至遲於屆滿二年時失其

intended to be transitional and thus shall not be operative over a long period of time. The judicial procedure on tax sanctions and remedies shall be provided by legislation only in order to meet the constitutional guarantee of individual rights. In view of the fact that the enactment of legislation takes time, the Interpretations Yuan-je tze Nos. 3685 and 4000, which state that "After the tax sanctions imposed by the courts have become irrevocable, the party concerned can not petition for correcting the original ruling" and that "Even if there are errors in the ruling of violating the tax Act, made by the court of appeal, there are no measures to amend in the exiting laws," and the abovementioned Regulation, amended and promulgated on October 12, 1972, shall become void within two years from the date of this Interpretation. Based on the differences which exist between civil, criminal and administrative litigations and the progress of the reform of administrative procedure, as well as tax enforcement procedures, the government departments concerned shall amend the legislation comprehensively without further delay.

效力。在此期間，主管機關應本民事、刑事及行政訴訟程序各有不同之意旨，並參酌行政訴訟制度及財務案件執行程序之改革，就有關法律通盤檢討修正，併此說明。

Justice Chung-Sheng Lee filed dissenting opinion.

Justice Zu-Zan Yang filed dissenting opinion in part.

Justice Chien-Hua Yang filed dissenting opinion in part.

本號解釋李大法官鐘聲提出不同意見書；楊大法官日然、楊大法官建華分別提出一部不同意見書。

J. Y. Interpretation No.290（January 24, 1992）*

ISSUE: Are the relevant provisions of the Public Officials Election and Recall Act During the Period of National Mobilization for Suppression of the Communist Rebellion, prescribing restrictions for the education and experience of candidates for elected representatives at the various levels, unconstitutional?

RELEVANT LAWS:

Article 130 of the Constitution（憲法第一百三十條）; Article 32, Paragraph 1, of the Public Officials Election and Recall Act During the Period of National Mobilization for Suppression of the Communist Rebellion（動員戡亂時期公職人員選舉罷免法第三十二條第一項）.

KEYWORDS:

election and recall（選舉與罷免）.**

HOLDING: Article 32, Paragraph 1, of the Public Officials Election and Recall Act During the Period of National Mobilization for Suppression of the Communist Rebellion (the title of the Act was changed to the Public Service Election and Recall Act on August 2, 1991),

解釋文：中華民國七十八年二月三日修正公布之動員戡亂時期公職人員選舉罷免法（八十年八月二日法律名稱修正為公職人員選舉罷免法）第三十二條第一項有關各級民意代表候選人學、經歷之限制，與憲法尚無牴觸。惟此項學、經歷之限制，應隨國民之教育

* Translated by Su-Po Kao.

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revised and publicized on February 3, 1989, with regard to the restrictions on educational background and working experience of candidates for all levels of elected representatives, does not contradict the Constitution. However, such restrictions should be reconsidered in light of the popularity of education among people. Should they be deemed necessary, their underlying reasoning should be supported by evidence? The circumstances of those who have difficulty completing compulsory education should also be taken into consideration and appropriate rules should be proposed accordingly. These should be done through the reasonable discretion of the legislature.

普及加以檢討，如認為仍有維持之必要，亦宜重視其實質意義，並斟酌就學有實際困難者，而為適當之規定，此當由立法機關為合理之裁量。

People should seek redress through administrative appeal and litigation for any administrative dispositions they deem to be unjust. However, there are no rules in the current State Compensation Act governing whether the procedure of administrative litigation should be applied first where the issue is the legality of an administrative disposition which is a precondition for recovery in a civil action.

人民對於行政處分有所不服，應循訴願及行政訴訟程序請求救濟。惟現行國家賠償法對於涉及前提要件之行政處分是否違法，其判斷應否先經行政訴訟程序，未設明文，致民事判決有就行政處分之違法性併為判斷者，本件既經民事確定終局判決，故仍予受理解釋，併此說明。

Therefore, some cases that involve the legality of administrative dispositions have been decided in civil court. It should be further noted that since the final judgment has been rendered in a civil action for the case currently before us, we still accept the filing for Constitutional interpretation.

REASONING: Article 130 of the Constitution provides: "Any citizen of the Republic of China who has attained the age of 20 years shall have the right to vote in accordance with law. Except as otherwise provided by this Constitution or by law, any citizen who has attained the age of 23 years shall have the right to be elected in accordance with law." Accordingly, the law provides some latitude by stipulating some conditions to regulate the exercise of the right to be elected within reasonable discretion. Article 32, Paragraph 1, of the Public Officials Election and Recall Act During the Period of National Mobilization for Suppression of the Communist Rebellion (the title of the Act was changed to the Public Service Election and Recall Act on August 2, 1991),

解釋理由書：憲法第一百三十條規定：「中華民國國民年滿二十歲者，有依法選舉之權；除本憲法及法律別有規定者外，年滿二十三歲者，有依法被選舉之權」，是法律對於被選舉權之具體行使，於合理範圍內，並非完全不得定其條件。中華民國七十八年二月三日修正公布之動員戡亂時期公職人員選舉罷免法（八十年八月二日法律名稱修正為公職人員選舉與罷免法）第三十二條第一項有關各級民意代表候選人學、經歷之限制，雖與其他國家不盡相同，但為提升各級民意代表機關之議事功能及問政品質，衡諸國情，尚難謂其與憲法有所牴觸。惟國民之教育日益普及，選舉人對於候選人選擇之能力相對提高，此項對各級民意代表候選人學、經歷之限制是否仍繼續維持，宜參酌其他民主國家之通例，隨時檢討，如認有繼

revised and publicized on February 3, 1989, with regard to the restrictions on educational background and working experience of candidates for all levels of elected representatives, though not typical in comparison with other countries, shall not be deemed contrary to the Constitution for the purpose of promoting the efficacy and quality of all levels of representative organs in light of the current state of this country. However, as the pursuit of education grows even more popular and voters' ability to make informed choices becomes better, whether such restrictions should be maintained should be considered in light of the examples of other democracies. Should they be deemed necessary, their underlying reasoning should be supported by evidence. The circumstances of those who have difficulty completing compulsory education should also be considered (e.g., those with physical or other disabilities who have difficulties completing a normal education) and appropriate rules should be stipulated accordingly by reasonable discretion of the legislature.

續維持之必要，亦應重視其實質意義，並斟酌就學有實際困難之人士（例如因身體或其他原因其接受學校教育顯較一般國民有難於克服之障礙者），由立法機關為合理之裁量，而作適當之規定。

People should seek redress through

人民對於行政處分有所不服，應

administrative appeals and litigation for administrative dispositions they deem unjust. However, there are no rules in the current State Compensation Act governing whether the procedure of administrative litigation should be applied first where the issue is the legality of an administrative disposition which is a precondition for recovery in a civil action. Therefore, some cases that involve the legality of administrative dispositions have been decided in civil court. It should be further noted that since the final judgment has been rendered in a civil action for the case currently before us, we still accept the filing for Constitutional interpretation.

循訴願及行政訴訟程序請求救濟。惟現行國家賠償法對於涉及前提要件之行政處分是否違法，其判斷應否先經行政訴訟程序，未設明文，致民事判決有就行政處分之違法性併為判斷者，本件既經民事確定終局判決，故仍予受理解釋，併此說明。

Justice Chien-Tsai Cheng filed dissenting opinion in part, in which Justice Zu-Zan Yang joined.

本號解釋鄭大法官健才與楊大法官日然共同提出理由一部不同意見書。

J. Y. Interpretation No.291（February 28, 1992）*

ISSUE: Is the Guidelines for Review on the Registration of Superficies Acquired by Prescription constitutional in requiring that an applicant for recordation of superficies for a building constructed on land of another person must file documents to prove that the building is a "legitimate one"?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 768 through 772 and Article 876 of the Civil Code（民法第七百六十八條至第七百七十二條、第八百七十六條）; Article 70, Paragraphs 1 and 2 of the Regulation Governing Land Registration（土地登記規則第七十條第一項、第二項）; Guidelines for Review of Recording of Superficies Acquired by Prescription, Ministry of Interior, August 17, 1988, Section 5, Paragraph 1（內政部七十七年八月十七日發布時效取得地上權登記審查要點第五點第一項）.

KEYWORDS:

positive（acquisitive）prescription（取得時效）, fulfillment of the prescription（時效完成）, legitimate building（合法建物）, recordation（recording）of superficies（地上權登記）, owner of superficies（地上權人）, building occupation permit（建築物使用執照）, office of hsiang, township, city, or precinct（鄉、鎮、市、區公所）, construction regulation（建築管理）.**

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* Translated by Raymond T. Chu.

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

HOLDING: The acquisitive prescription system is intended for the public interest, and a property right acquired under this system is protected by the Constitution. The Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter dated August 17, 1988, set forth in Section 5, Paragraph 1, that "a person making use of land for the purpose of [owning] a building thereon shall produce the certificates required by Article 70 of the Regulation Governing Land Registration to show that the building is a legitimate building," making it impossible for a person who, having taken longtime possession of the private land owned by another person, would otherwise be legally entitled to acquire superficies over the land by prescription, to have the recordation of his superficies perfected because of his inability to produce the required certificates in respect of such legitimate building. Such rule is contrary to the purpose of the Constitution in protecting the people's property rights and must be rendered inoperative. Incidentally, where a dispute arises over the rent or

解釋文：取得時效制度，係為公益而設，依此制度取得之財產權應為憲法所保障。內政部於中華民國七十七年八月十七日函頒之時效取得地上權登記審查要點第五點第一項規定：「以建物為目的使用土地者，應依土地登記規則第七十條提出該建物係合法建物之證明文件」，使長期占有他人私有土地，本得依法因時效取得地上權之人，因無從提出該項合法建物之證明文件，致無法完成其地上權之登記，與憲法保障人民財產權之意旨不符，此部分應停止適用。至於因取得時效完成而經登記為地上權人者，其與土地所有權人間如就地租事項有所爭議，應由法院裁判之，併此說明。

other matters in connection with the lease of the land between the owner and the person who is recorded as an owner of superficies over such land upon fulfillment of the acquisitive prescription, the case must be submitted to a decision of the court.

REASONING: Articles 768 through Article 772 inclusive of the Civil Code with respect to the acquisition of ownership or other property rights by reason of prescription are intended to promote the public interest by encouraging the owner of the original right to better fulfill his social responsibility of positive utilization of his property and recognizing the value of the order established by long-time possession. This property right, being acquired by operation of law, must be protected by the Constitution. The right of claim to have a superficies acquired upon fulfillment of prescription over the private land owned by others recorded for the purpose of owning a building on such land has no relation with the issue of whether or not the building constructed on the land owned by others is a "legitimate

解釋理由書：民法第七百六十八條至第七百七十二條關於因時效而取得所有權或其他財產權之規定，乃為促使原權利人善盡積極利用其財產之社會責任，並尊重長期占有之既成秩序，以增進公共利益而設。此項依法律規定而取得之財產權，應為憲法所保障。以有建築物為目的而因時效完成取得他人私有土地之地上權登記請求權，與該建於他人土地上之建築物，是否為「合法建物」無關。如非「合法建物」，應依有關建築管理法規處理。而地上權之登記與建築物之登記，亦屬兩事。關於土地登記規則第七十條第一項規定應提出使用執照；第二項規定：「實施建築管理前建造之建物，無使用執照者，如建物與基地同屬一人所有者，應提出建築主管機關或鄉鎮市區公所之證明文件或實施建築管理前繳納房屋稅、水電費之憑證。建物與基地非屬同一人所有者，並

building." If the building is not a "legitimate building," the case must be dealt with pursuant to applicable construction laws and regulations. And the recordation of superficies is an entirely different matter from the recordation of the interests in a building. As regards the building occupation permit required by the Regulation Governing Land Registration, Article 70, Paragraph 1, and the provision of the second paragraph of the same article that "with respect to a building constructed before the implementation of the construction regulation regime for which no building occupation permit was issued, the applicant shall produce documentary evidence issued by the authority in charge of the construction or by the office of the hsiang, township, city, or precinct or evidence of payment of the house tax and water and electricity bills made before the implementation of the construction regulation regime if the building and the land on which the building sits belong to the same owner; and in addition thereto, the applicant must produce documentary evidence to support his use of the land if the building and the land on which the

另附使用基地之證明文件。」係指「合法建物」之登記而言。內政部於中華民國七十七年八月十七日函頒之時效取得地上權登記審查要點，其第五點將此「合法建物」登記之規定，移用於地上權之登記，而於其第一項為「以建物為目的使用土地者，應依土地登記規則第七十條提出該建物係合法建物之證明文件」之規定，使已證明係以行使地上權之意思而長期和平繼續占有他人私有土地，本得依法因時效取得地上權之占有人，因無從提出該項合法建物之證明文件，致無法完成其地上權之登記，與憲法保障人民財產權之意旨不符，此部分應停止適用。至因時效完成而經登記為地上權人者，土地所有權人既未喪失其所有權，而仍須承受稅捐等之負擔，為平衡雙方權益，參照民法第八百七十六條之法理，當事人如就地租事項有所爭議，應由法院裁判之，併此說明。

building sits do not belong to the same owner," are texts whose provisions are meant to refer to the recordation of "legitimate buildings." This "legitimate building" requirement is adopted by the Guidelines for Review on the Registration of Superficies Acquired by Prescription issued by the Ministry of Interior per letter dated August 17, 1988, and transplanted into the system of recordation of superficies to prescribe in Section 5, Paragraph 1, thereof that "a person making use of land for the purpose of [owning] a building thereon shall produce the certificates required by Article 70 of the Regulation Governing Land Registration to show that the building is a legitimate building," making it impossible for a person who, having taken longtime peaceful and continuous possession of the private land owned by another person with proven intent to exercise superficies thereon, would otherwise be legally entitled to acquire superficies over the land by prescription, to have the recordation of his superficies perfected because of his inability to produce the required certificates in respect of such legitimate building. Such rule is con-

trary to the purpose of the Constitution in protecting the people's property rights and must be rendered inoperative. Incidentally, it must be noted that where a person is recorded as the owner of a superficies upon fulfillment of the acquisitive prescription, the owner of the land is not deprived of his title to the land and is thus continuously liable to payment of all tax and dues thereon. For this reason, if a dispute arises between them over the rent or other matters in connection with the lease of the land, the case, in the light of the general principle of law as embodied in Article 876 of the Civil Code, must be submitted to a decision of the court to ensure a balance of interests between the parties.

Justice Chung-Sheng Lee filed dissenting opinion.

本號解釋李大法官鐘聲提出不同意見書。

J. Y. Interpretation No.292（February 28, 1992）*

ISSUE: The Judicial Yuan directive requires that in case of bankruptcy, the proceeding for enforcement against the debtor's bankruptcy estate, except for the exercise of exclusionary rights, shall be stayed until the creditors are notified. Is the said directive unconstitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 98, 99 and Article 108, Paragraphs 1 and 2 of the Bankruptcy Act（破產法第九十八條、第九十九條、第一百零八條第一項、第二項）; Article 18, Paragraph 1 of the Compulsory Enforcement Act（強制執行法第十八條第一項）; Rule 9(1) of the Judicial Yuan Directive on Precautionary Matters on Handling Compulsory Enforcement, as amended on October 18, 1982（司法院中華民國七十一年十月十八日修正之辦理強制執行應行注意事項第九則(一)）.

KEYWORDS：

bankrupt（破產、破產人）, debtor（債務人）, creditor（債權人）, claim in bankruptcy（破產債權）, bankruptcy proceeding/procedure（破產程序）, bankruptcy estate（破產財團）, adjudication of bankruptcy（破產宣告）, right of exclusion（別除權）, compulsory execution enforcement（強制執行）, stay（停止執行）.**

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* Translated by Raymond T. Chu.

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

HOLDING: Article 99 of the Bankruptcy Act providing that "a right of claim in bankruptcy may be exercised only in pursuance of bankruptcy procedure" is intended to enable all creditors of the bankrupt to receive pro rata distribution of the property of the bankruptcy estate unless otherwise provided by law. In case one of the creditors petitions for commencement of or for continued enforcement against such property in a compulsory execution proceeding, the right of the other creditors to pro rata distribution will be impaired. Thus, it is necessary to set a restriction on such petitions, and such a restriction is essential to preventing interference with the exercise of right by other persons and is permissible under Article 23 of the Constitution. Rule 9(1) of the Judicial Yuan Directive on Precautionary Matters on Handling Compulsory Enforcement, as amended on October 18, 1982, prescribes that "where the debtor is adjudged bankrupt, the proceeding for enforcement against any property of the debtor that shall be included in the bankruptcy estate, with the exception of property in which right of exclusion has been

解釋文：破產法第九十九條規定：「破產債權，非依破產程序不得行使」，乃使破產人之全體債權人，除法律別有規定外，得就屬於破產財團之財產，受平均之分配。債權人對於此種財產開始或續行民事強制執行程序，有礙他債權人公平受償，自應予以限制。此項限制，係防止妨礙他人行使權利所必要，為憲法第二十三條規定之所許。司法院於中華民國七十一年十月十八日修正之辦理強制執行事件應行注意事項第九則㈠規定：「債務人如受破產之宣告，其屬於破產財團之財產，除債權人行使別除權者外，應即停止強制執行程序，並通知債權人」，乃提示首開法律及同法第一百零八條規定之意旨，並未就人民權利之行使增設限制，與憲法尚無牴觸。

claimed by a creditor, shall be stayed, and the creditors shall be notified accordingly." Said rule is intended to be a reminder of the essence embodied in Article 99 of the Bankruptcy Act quoted above and Article 108 thereof rather than an imposition of any additional restriction on the exercise of the right of the people and is therefore not in conflict with the Constitution.

REASONING: While a creditor has the right to request the State to compel the debtor to perform in order to materialize his right of claim, the exercise of such right must be carried out according to legal procedures and is subject to legal restrictions in circumstances specified by Article 23 of the Constitution. The property of the debtor is a common security for the claims of all creditors. If the debtor is adjudged bankrupt because his property is insufficient for payment of all debts, all claims against the bankrupt established prior to the adjudication of bankruptcy, with the exception of those with the right of exclusion, shall be claims in bankruptcy under Article 98 of the Bankruptcy

解釋理由書：債權人為實現其債權，雖有請求國家強制債務人履行之權利，惟此項權利之行使，須依法定程序為之。如有憲法第二十三條規定之事由，並得以法律限制之。債務人之財產，為全體債權人債權之共同擔保，如不足清償債務而受破產宣告時，依破產法第九十八條規定，對於破產人之債權，在破產宣告前成立者，除有別除權者外，均為破產債權；同法第一百零八條第一項、第二項規定：「在破產宣告前，對於債務人之財產有質權、抵押權或留置權者，就其財產有別除權」。「有別除權之債權人，不依破產程序而行使其權利」。又依強制執行法第十八條第一項規定：「強制執行程序開始後，除法律另有規定外，不停止執

Act. The Act further provides in Article 108, Paragraphs 1 and 2, that "a person who has a pledge, mortgage, or right of retention on the property of the debtor created or acquired prior to the adjudication of bankruptcy shall have the right of exclusion in respect of such property" and that "a creditor with the right of exclusion is entitled to exercise his right without being subject to the bankruptcy procedure." Furthermore, the Compulsory Enforcement Act prescribes in Article 18, Paragraph 1, thereof that "unless otherwise provided by law, a compulsory enforcement proceeding shall not be stayed after commencement thereof." Conversely, such provisions do not apply where the law says otherwise. Thus, Article 99 of the Bankruptcy Act provides that "a right of claim in bankruptcy may be exercised only in pursuance of bankruptcy procedure" and the provision is intended to enable all creditors without the right of exclusion to receive pro rata distribution of the property of the bankruptcy estate. In case one of the creditors petitions for commencement of or for continued enforcement against such property in a

行」。反之，如法律另有規定，則不在此限。故破產法第九十九條規定：「破產債權，非依破產程序不得行使」，乃使無別除權之全體破產債權人得就屬於破產財團之財產，受平均之分配，債權人對於應屬破產財團之財產開始或續行民事強制執行程序，有礙他債權人公平受償，自應予以限制。此項限制，亦為上述強制執行法所稱「法律另有規定」之法定停止執行事由，係防止妨礙他人行使權利所必要，為上開憲法規定之所許。司法院於中華民國七十一年十月十八日修正之辦理強制執行事件應行注意事項第九則㈠規定：「債務人如受破產之宣告，其屬於破產財團之財產，除債權人行使別除權者外，應即停止強制執行程序，並通知債權人」，乃提示上開破產法及強制執行法各規定之意旨，並未增加人民行使權利之限制或增加人民之義務，與憲法尚無牴觸。

compulsory execution proceeding, the right of other creditors to pro rata distribution will be impaired. Such a restriction provides a statutory cause for a stay of the enforcement proceeding and is essential to preventing interference with the exercise of right by other persons and is permissible under Article 23 of the Constitution. Rule 9(1) of the Judicial Yuan Directive on Precautionary Matters on Handling Compulsory Enforcement, as amended on October 18, 1982, prescribes that "where the debtor is adjudged bankrupt, the proceeding for enforcement against any property of the debtor that shall be included in the bankruptcy estate, with the exception of property in which right of exclusion has been claimed by a creditor, shall be stayed, and the creditors shall be notified accordingly." Said rule is intended to be a reminder of the essence embodied in the above articles of the Bankruptcy Act and the Compulsory Enforcement Act rather than an imposition of any additional restriction on the exercise of the right of the people or an increase in any obligation of the people, and is therefore not in conflict with the Constitution.

J. Y. Interpretation No.293（March 13, 1992）*

ISSUE: Is a legislative council entitled to demand a government-owned bank for relevant information for purpose of supervising such a bank?

RELEVANT LAWS:

Article 22 of the Constitution（憲法第二十二條）; Article 48, Paragraph 2, of the Banking Act（銀行法第四十八條第二項）.

KEYWORDS:

customer（顧客）, deposit（存款）, loan（放款）, remittance（匯款）, central governing authority（中央主管機關）, confidence（秘密）, right of privacy（隱私權）, government-owned bank（公營銀行）, budget（預算）, final account（決算）, legislature（議會）, review（審議）, non-performing loans（逾期放款）, bad debt（呆帳）, supervision（監督）, collection（催收）, accounts receivable（催收款）, account（會計科目）, control（監察）, written off（轉銷）, audit（審計）.**

HOLDING: Article 48, Paragraph 2, of the Banking Act stipulates: "Unless other laws or regulations promul-

解釋文：銀行法第四十八條第二項規定「銀行對於顧客之存款、放款或匯款等有關資料，除其他法律或中央

* Translated by Professor Chun-Jen Chen.

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gated by the central governing authority indicate otherwise, banks shall keep their customers' information regarding deposits, loans and remittances in strictest confidence." This provision was enacted to protect bank customers' confidential information on their individual properties and to prevent banks from freely and unilaterally disclosing such information, with a view to protect the people's right of privacy. However, there is a distinction to be drawn between state-owned banks and their private counterparts. Government-owned banks' budgets and final accounts are by law subject to the legislature's review. Due to the necessity of review, for the state-owned banks' non-performing loans excluding those debts, either listed as bad debts or debts with no possibility of collection, which shall be handled pursuant to current rules and regulations, the legislature may, by way of a resolution, require state-owned banks to provide related information under the conditions of banks' nondisclosure of individual customers' names and the legislature's nondisclosure of such information, when the legislature has a reasonable ground to be-

主管機關另有規定者外，應保守秘密」，旨在保障銀行之一般客戶財產上之秘密及防止客戶與銀行往來資料之任意公開，以維護人民之隱私權。惟公營銀行之預算、決算依法應受議會之審議，議會因審議上之必要，就公營銀行依規定已屬逾期放款中，除收回無望或已報呆帳部分，仍依現行規定處理外，其餘部分，有相當理由足認其放款顯有不當者，經議會之決議，在銀行不透露個別客戶姓名及議會不公開有關資料之條件下，要求銀行提供該項資料時，為兼顧議會對公營銀行之監督，仍應予以提供。

lieve that state-owned banks' non-performing loans were made improperly. In order to balance the people's right of privacy and the legislature's supervision of government-owned banks, when the legislature makes such a resolution and request, government-owned banks shall furnish pertinent information.

REASONING: Article 48, Paragraph 2, of the Banking Act stipulates: "Unless other laws or regulations promulgated by the central governing authority indicate otherwise, banks shall keep their customers' information regarding deposits, loans and remittances in strictest confidence." This provision was enacted and amended on July 17, 1989, to protect bank customers' confidential information on their individual properties and to prevent banks from freely and unilaterally disclosing such information, with a view to protect the people's right of privacy. According to directives issued by the Ministry of Finance, the central governing authority, such a confidential requirement is inapplicable to the requests made by government agencies and authorities in charge of con-

解釋理由書：中華民國七十八年七月十七日修正公布之銀行法第四十八條第二項規定：「銀行對於顧客之存款、放款或匯款等有關資料，除其他法律或中央主管機關另有規定者外，應保守秘密。」旨在保障銀行之一般客戶財產上之秘密及防止客戶與銀行往來資料之任意公開，以維護人民之隱私權。此項保密規定，依中央主管機關財政部歷來函釋，不適用於監察、司法、警察及稅務等機關之必要查證。至於各級民意機關要求所屬公營銀行提供相關資料者，該部七十九年七月十八日臺財融字第七九〇一八九四八五號函說明二、則謂：「立法院及各省市議會召開秘密會議時，各公營銀行仍以提供左列資料為限：㈠ 逾期放款及催收款年度查實及會計科目所列總數。㈡ 個別客戶已完成訴訟程序，收回無望之催收款。

trol, judicature, police, and taxation for their necessary investigations and verifications. With respect to requests for furnishing related information made by the legislature, Ministry of Finance Directive Tai-Tsai-Jon-Tze No. 790189485 of July 18, 1990, Explanation 2, specifies: "When the Legislative Yuan and other county or city councils hold confidential sessions, information to be furnished by government-owned banks is still limited to: (a) the total number of non-performing loans and accounts receivable overdue verified and booked in accounts; (b) individual customers' debt with no possibility of collection after the conclusion of litigation; and (c) account information on bad debts which have been reported to the auditing department and yet been approved to be written off." Though this Directive was issued with a view to the banking business, government-owned banks' budgets and final accounts are by law subject to the legislature's review. Due to the necessity of review, for the government-owned banks' non-performing loans (including those non-performing loans, accounts receivable overdue, and bad debts as so de-

㈢ 已報審計單位而尚未核准轉銷呆帳戶資料。㈣ 已報審計單位並經核准轉銷呆帳戶之資料。」此雖係基於銀行業務上之考慮而設，惟公營銀行之預算、決算依法應受議會之審議，議會因審議上之必要，就公營銀行依規定已屬逾期放款中（包括七十五年一月十日財政部修正發布之「公營銀行逾期放款、催收款及呆帳處理辦法」所稱之逾期放款、催收款及呆帳），除收回無望或已報呆帳部分，仍依現行規定處理外，其餘部分，有相當理由足認其放款顯有不當者，經議會之決議，在銀行不透露個別客戶姓名及議會不公開有關資料之條件下，要求銀行提供該項資料時，為兼顧議會對公營銀行之監督，仍應予以提供。

fined by the Regulation Governing Matters of State-owned Banks' Non-performing Loans, Accounts Receivable Overdue and Bad Debts of January 10, 1986) excluding those debts, either listed as bad debts or debts with no possibility of collection, which shall be handled pursuant to current rules and regulations, the legislature may, by way of a resolution, require state-owned banks to provide related information under the conditions of banks' nondisclosure of individual customers' names and the legislature's nondisclosure of such information, when the legislature has a reasonable ground to believe that government-owned banks' non-performing loans were made improperly. In order to balance the people's right of privacy and the legislature's supervision of government-owned banks, when the legislature makes such a resolution and request, government-owned banks shall furnish the pertinent information.

Justice Chih-Peng Lee filed dissenting opinion.

Justice Rui-Tang Chen filed dissenting opinion, in which Justice Cheng-Tao Chang and Justice Tieh-Cheng Liu joined.

本號解釋李大法官志鵬提出不同意見書；陳大法官瑞堂、張大法官承韜與劉大法官鐵錚共同提出不同意見書。

J. Y. Interpretation No.294（March 13, 1992）*

ISSUE: Is the GIO Guidelines concerning that municipalities authorize the enforcement committee to use the inspection card unconstitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 7, 36 through 43 of the Publication Act（出版法第七條、第三十六條至第四十三條）; Publications Regulation Guidelines（出版品管理工作處理要點）.

KEYWORDS:

Inspection Card（工作檢查證）, Government Information Office（新聞局）, Publications Coordinating & Administrative Task Force（出版品協調執行小組）.**

HOLDING: Article 7 of the Publication Act provides: "The Government Information Office of the Executive Yuan at the central government level and the provincial (municipal) government and county (city) government at the local government level shall be designated as the competent authorities of this Act." The

解釋文：出版法第七條規定：「本法稱主管官署者，在中央為行政院新聞局，在地方為省（市）政府及縣（市）政府。」行政院新聞局於中華民國七十六年七月二十二日發布之「出版品管理工作處理要點」，其中規定，在直轄市成立出版品協調執行會報兼辦執行小組業務，以市政府新

* Translated by Joe Y. C. Wu.

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

Publications Regulation Guidelines of July 22, 1987, promulgated by the Government Information Office of the Executive Yuan, provide the authority to establish a coordinating and enforcement committee in a municipality. The committee shall have the responsibilities, inter alia, of directing an enforcement team of which the Director of the Department of Information of such a city shall be the commissioner. The Director shall have the power to issue an inspection card to the team members, consisting of staff assigned from the Departments of Information, Police, Education, and Social Services. However, the assigned staff can only use such inspection cards for the purpose of identification. By no means does the issuance of an inspection card constitute an authorization of any illegal search or inspection. The power so delegated to issue such inspection cards does not go beyond the scope of the enforcement procedures; therefore, there is no issue of unconstitutionality. Nevertheless, the practice of issuing such inspection cards to persons other than civil officers of the city agencies has been in contraven-

聞處長為召集人，印製工作檢查證，亦由執行小組成員包括市政府所屬新聞處、警察局、教育局及社會局等單位人員使用，此項檢查證僅供市政府所屬機關執行人員識別身分之用，非謂憑此檢查證即可為法所不許之檢查行為，此部分規定，並未逾越執行程序範圍，不生牴觸憲法之問題。至其規定，將工作檢查證發給非市政府所屬機關人員使用部分，則與上開意旨不符，不得再行適用。

tion of the contemplated purpose stated above and shall be discontinued.

REASONING: Article 7 of the Publication Act provides: "The Government Information Office of the Executive Yuan at the central government level and the provincial (municipal) government and county (city) government at the local government level shall be designated as the competent authorities of this Act." Articles 36 through 43 of the Act authorize the competent authorities to impose sanctions on any publication's violation of any rules thereof. The competent authorities may censure, impose a fine, prohibit any sale, distribution, or importation, seize and confiscate publications, suspend publication for a definite period of time, and revoke publication registration. Since publication registration information may touch upon many fields, the Government Information Office of the Executive Yuan promulgated the Publications Regulation Guidelines through an order on July 22, 1987, numbered (76)Ming-Ban-Er-Tze (09225), prescribing the formation of a coordinating and enforcement committee

解釋理由書：出版法第七條規定：「本法稱主管官署者，在中央為行政院新聞局，在地方為省（市）政府及縣（市）政府。」依同法第三十六條至第四十三條規定，出版品如有違反本法規定情形，主管官署得為警告、罰鍰、禁止出售散佈進口或扣押沒入、定期停止發行、撤銷登記等行政處分。而出版品登載事項之內容，牽涉甚廣，行政院新聞局為執行上述法律規定，乃於中華民國七十六年七月廿二日，以（七六）銘版二字第〇九二二五號函發布「出版品管理工作處理要點」，其中規定，在直轄市成立出版品協調執行會報，兼辦執行小組業務，以市政府新聞處長為召集人，印製工作檢查證，交由市政府所屬新聞處、警察局、教育局、社會局等單位所組成執行小組之人員，以為執行出版品管理工作時，識別身分之用，非謂憑此檢查證即可為法所不許之檢查行為。此部分規定，並未逾越執行程序範圍，不生牴觸憲法問題。至上述要點將工作檢查證發給非市政府所屬機關人員使用之規定，則與上開意旨不符，不得再行適用。又本件僅就發給工作檢查證

in a municipality. The committee shall have the responsibilities, inter alia, of directing an enforcement team of which the Director of the Department of Information of the city shall be the commissioner. The Director shall have the power to issue an inspection card to the team members, consisting of staff assigned from the Departments of Information, Police, Education, and Social Services. However, the assigned staff can only use such inspection cards for the purpose of identification. By no means does the issuance of an inspection card constitute an authorization of any illegal search or inspection. The power so delegated to issue such inspection cards does not go beyond the scope of the enforcement procedures; therefore, there is no issue of unconstitutionality. Nevertheless, the practice of issuing such inspection cards to persons other than civil officers of the city agencies has been in contravention of the contemplated purpose above and shall be discontinued. This interpretation is confined to the issuance of the inspection card and any other matters regarding the regulations of publications are not subject to this interpretation.

部分而為解釋，關於出版品管理之其他事項，不在解釋範圍之內，併此說明。

J. Y. Interpretation No.295（March 27, 1992）*

ISSUE: Should the disciplined subject be allowed to bring administrative litigation to appeal for review resolution of the Review Committee on the Discipline of Accountants of the Ministry of Finance?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 1 of the Administrative Appeal Act（訴願法第一條）; Certified Public Accountant Act（會計師法）.

KEYWORDS:

right to bring lawsuits（訴訟權）, accountants' discipline（會計師懲戒）.**

HOLDING: The review resolution of the disciplinary action taken against a specific accountant, made by the Review Committee on the Discipline of Accountants of the Ministry of Finance, is equivalent to the final decision of administrative appeal in essence which cannot be appealed through administrative appeal and re-appeal. The disciplined subject

解釋文：財政部會計師懲戒覆審委員會對會計師所為懲戒處分之覆審決議，實質上相當於最終之訴願決定，不得再對之提起訴願、再訴願。被懲戒人如因該項決議違法，認為損害其權利者，應許其逕行提起行政訴訟，以符憲法保障人民訴訟權之意旨。

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* Translated by Su-Po Kao.

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

should be allowed to bring administrative litigation directly in order to accord with the principle of the people's right of instituting legal proceedings guaranteed by the Constitution, if he deems the said resolution illegal and damaging to his right.

REASONING: The people's right to administrative appeal, guaranteed by the Constitution, aims to make the government authority, which make an administrative act, or its superior, self-monitor its own illegal or inappropriate act to protect the people's right and interest. If other venues of administrative relief, prescribed by the law, are sufficient for such purpose, then they are equivalent to the procedure of administrative appeal in essence and it will be redundant to initiate the said procedure. Article 1 of the Administrative Appeal Act prescribes:" A person, who deems the administrative act of the central or local government authority illegal or inappropriate and whose right or interest suffers in consequence, shall initiate the procedures of administrative appeal and re-appeal in accordance with this Act. But if the rules of other

解釋理由書：憲法保障人民之訴願權，其目的在使為行政處分之機關或其上級機關自行矯正其違法或不當處分，以維護人民之權益，若法律規定之其他行政救濟途徑，已足達此目的者，則在實質上即與訴願程序相當，自無須再踐行訴願程序。訴願法第一條：「人民對於中央或地方機關之行政處分，認為違法或不當，致損害其權利或利益者，得依本法提起訴願、再訴願。但法律另有規定者，從其規定。」其但書規定即係包括上述情形在內，惟並非謂未經提起訴願或再訴願，縱已用盡其他相當於訴願、再訴願之行政救濟程序，亦不得續行行政訴訟。財政部依會計師法規定，設置會計師懲戒委員會及懲戒覆審委員會。會計師懲戒委員會因財政部交付懲戒而對會計師所為懲戒決議，係行政處分，被懲戒之會計師有所不服，對之聲請覆審，實質上與訴願相當。會計師懲戒覆審委員會所為覆審決議，相

laws provide otherwise, then they should have precedence." The "otherwise" situations should include the one above. However, it should not be interpreted to mean that if the procedure of administrative appeal or re-appeal is not initiated in the first place, then the direct proceeding of administrative litigation is also barred, even though all the other procedures of administrative relief equivalent to administrative appeal and re-appeal have been exhausted already. The Ministry of Finance, pursuant to the Certified Public Accountant Act, sets up the Committee on the Discipline of Accountants and the Review Committee on the Discipline of Accountants. The review resolution of the disciplinary action taken against a specific accountant by the Review Committee on the Discipline of Accountants, prosecuted by the Ministry of Finance, is an administrative act. The appeal for review from the disciplined accountant is equivalent to the procedure of administrative appeal in essence. The review resolution of the Review Committee on the Discipline of Accountants is equivalent to the final decision of administrative appeal and it will

當於最終之訴願決定，無須再對之提起訴願、再訴願。依上開說明，被懲戒人如因該項決議違法，認為損害其權利者，應許其逕行提起行政訴訟，以符憲法第十六條保障人民訴訟權之意旨。

be redundant to initiate the normal procedures of administrative appeal and re-appeal against it. According to the above illustration, the disciplined subject should be allowed to bring administrative litigation directly in order to accord with the principle of the people's right of instituting legal proceedings guaranteed by Article 16 of the Constitution, if he deems the said resolution illegal and damaging to his right.

J. Y. Interpretation No.296（March 27, 1992）*

ISSUE: Is the directive of the Ministry of Finance, prescribing that, in calculating the taxable income derived from property transaction due to an auction, the cost and expenses will be deducted from the proceeds of the auction before the balance thereof is added to other income for taxation purposes, in violation of the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 2 and 14, Paragraph 1(7) of the Income Tax Act（所得稅法第二條、第十四條第一項第七類）; The Directive T.T.S.T. No. 37365 dated December 2, 1977, of the Ministry of Finance（財政部六十六年十一月二日臺財稅字第三七三六五號函）.

KEYWORDS:

an auction sale ordered by the courts（法院所為之拍賣）, income derived from the trading of property（財產交易所得）, the duty to pay tax（納稅之義務）.**

HOLDING: Proceeds from an auction sale ordered by the courts under the Compulsory Enforcement Act shall, after the deduction of cost expenditures,

解釋文：法院依強制執行法所為之拍賣，其賣得之價金應依所得稅法第十四條第一項第七類規定，減除成本費用後計算財產交易所得，併同其他

* Translated by Professor Wen-Yeu Wang.

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be calculated as income derived from the trading of property and subject to income tax assessment together with other income in accordance with Article 14, Paragraph 1(7) of the Income Tax Act. The Directive T.T.S.T. No. 37365 dated December 2, 1977, of the Ministry of Finance is intra vires the provisions of the Income Tax Act and not contrary to Article 19 of the Constitution.

各項所得課稅，財政部中華民國六十六年十一月二日臺財稅字第三七三六五號函釋尚未逾越所得稅法之規定，與憲法第十九條並不牴觸。

REASONING: Article 19 of the Constitution provides that everyone has the duty to pay tax in accordance with law. Article 2, Paragraph 1, of the Income Tax Act expressly provides that any persons whose source of income is the Republic of China shall be subject to consolidated income tax assessment on such income derived in the Republic of China in accordance with the provisions of the Income Tax Act. Similarly, Article 14, Paragraph 1, of the Income Tax Act expressly provides that any income derived from the trading of property or entitlement shall be calculated towards the total individual composite income and be subject to consolidated income tax assessment.

解釋理由書：憲法第十九條規定，人民有依法律納稅之義務。凡有中華民國來源所得之個人，應就其中華民國來源所得，依所得稅法之規定，課徵綜合所得稅；又財產及權利因交易而取得之所得，應計入個人之綜合所得總額，課徵綜合所得稅，所得稅法第二條第一項及第十四條第一項，分別著有明文。法院依強制執行法對債務人之財產所為之拍賣，其賣得之價金，於減除原始取得之成本，及因取得、改良及移轉該項資產而支付之一切費用後，如有餘額，仍為財產交易所得，自應依所得稅法第十四條第一項第七類之規定，計入債務人之綜合所得總額，課徵綜合所得稅。財政部中華民國六十六年十一月二日臺財稅字第三七三六五號函，以房屋

When a debtor's property is auctioned by order of the courts under the Compulsory Enforcement Act, the proceeds shall, after the deduction of the original acquisition cost and other expenditures incurred in the acquisition, improvement and transfer of the said property, be deemed as income derived from the trading of property. Any surplus after the deduction shall be calculated towards the total composite income of the debtor and subject to consolidated income tax assessment in accordance with Article 14, Paragraph 1(7) of the Income Tax Act. The Directive T.T.S.T. No. 37365 dated December 2, 1977, of the Ministry of Finance stipulates that proceeds from the auction of property seized by the courts shall nevertheless be subject to the provisions of the Income Tax Act and that the auction price shall, after the deduction of cost expenditures, be calculated as income derived from the trading of property and subject to income tax assessment together with other income. This is intra vires the provisions of the Income Tax Act and not contrary to Article 19 of the Constitution.

為法院查封拍賣，仍應依稅法規定，依拍賣之價額，減除成本費用後計算財產交易所得，併同其他各項所得課稅，尚未逾越所得稅法之規定，與憲法第十九條並不牴觸。

J. Y. Interpretation No.297（April 24, 1992）*

ISSUE: What are the circumstances in which a person injured by a criminal act may institute private prosecution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 228, Paragraph 1, Article 251, Paragraph 1 and Article 319 of the Code of Criminal Procedure（刑事訴訟法第二百二十八條第一項、第二百五十一條第一項、第三百十九條）; J. Y. Interpretation No. 170（司法院釋字第一七〇號解釋）; Supreme Court's Precedent T.S.T. No. 1799 (Sup. Ct. 1981)（最高法院七十年臺上字第一七九九號判例）.

KEYWORDS:

person injured by an act of offense（犯罪之被害人）, public prosecution（公訴）, private prosecution（自訴）, power of criminal punishment（刑罰權）. **

HOLDING: While the people shall have the right of instituting legal proceedings under Article 16 of the Constitution, the manner of conducting the litigation shall be specifically prescribed by law. This concept has been clearly

解釋文：人民有訴訟之權，憲法第十六條固定有明文，惟訴訟如何進行，應另由法律定之，業經本院釋字第一七〇號解釋於解釋理由書闡明在案。刑事訴訟乃實現國家刑罰權之程序，刑事訴訟法既建立公訴制度，由檢察官追

* Translated by Raymond T. Chu.

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expounded in our Interpretation No. 170. A criminal proceeding is a procedure by which the power of criminal punishment of the State may be enforced. The Code of Criminal Procedure has established a public prosecution system, whereby prosecution against criminals is the responsibility of public prosecutors, and the Act further provides in Article 319 that "a person injured by an act of offense may institute a private prosecution." In the absence of a precise statutory definition of "a person injured by an act of offense", the court taking cognizance of the case may use its discretion to determine based on the facts of the particular act of crime. Thus, the views expressed by the Supreme Court in its decision No. Tai-shang Tze 1799 (1981) should not be considered contradictory to the Constitution.

訴犯罪，又於同法第三百十九條規定：「犯罪之被害人得提起自訴」，其所稱「犯罪之被害人」，法律並未明確界定其範圍，自得由審判法院依具體個別犯罪事實認定之，最高法院七十年台上字第一七九九號判例所表示之法律上見解，尚難認與憲法有何牴觸。

REASONING: While the people shall have the right of instituting legal proceedings under Article 16 of the Constitution, the manner of conducting the litigation shall be specifically prescribed by law. This concept has been clearly expounded in our Interpretation No. 170. A

解釋理由書：人民有訴訟之權，憲法第十六條固定有明文，惟訴訟如何進行，應另由法律定之，業經本院釋字第一七〇號解釋於解釋理由書闡明在案。刑事訴訟乃實現國家刑罰權之程序，刑事訴訟法第二百二十八條第一項規定：「檢察官因告訴、告發、自首或

criminal proceeding is a procedure by which the power of criminal punishment of the State may be enforced. The Code of Criminal Procedure provides in Article 228, Paragraph 1, that "if a prosecutor, because of complaint, information, voluntary surrender, or other reasons, knows there is suspicion of an offense having been committed, he shall immediately begin an investigation." Additionally, Article 251, Paragraph 1, of the Code provides that "if a prosecutor obtains during investigation sufficient evidence to make him believe that an accused is suspected of having committed an offense, he shall institute a public prosecution." By these provisions the Act has thus established the public prosecution system, whereby the prosecutor is charged with the duty to prosecute criminal offenses, and a person injured by an act of offense may file a complaint with the prosecutor to enable him to conduct an investigation and institute prosecution by due process of law. The Act further allows private prosecution by providing in Article 319 that "a person injured by an act of offense may institute a private prosecution." In the article cited

其他情事知有犯罪嫌疑者，應即開始偵查。」第二百五十一條第一項規定：「檢察官依偵查所得之證據，足認被告有犯罪嫌疑者，應提起公訴。」既建立公訴制度由檢察官追訴犯罪，犯罪之被害人原得向檢察官告訴，由檢察官依法定程序偵查起訴，而同法第三百十九條又規定：「犯罪之被害人得提起自訴」，其所稱「犯罪之被害人」，係指犯罪之直接被害人而言，但在侵害國家法益或社會法益兼有侵害個人法益之犯罪，何種情形下，個人為直接被害人，法律並未明確界定其範圍，自得由審判法院依具體個別犯罪事實認定之，其不得適用自訴之規定者，當然仍應適用公訴之規定，既無礙於國家刑罰權之實現，亦無訴訟權受限制之問題，最高法院七十年台上字第一七九九號判例稱：「上訴人自訴被告涉嫌刑法上公務員圖利罪，其所保護之法益，為公務員對國家服務之忠信規律及國家之利益，縱其犯罪結果，於私人權益不無影響，但其直接被害者仍為國家法益，而非私人權益。雖因被告之行為致上訴人受有損害，亦屬間接之被害，而非直接被害，依照上開說明，即不得提起自訴」，其所表示之見解，尚難認與憲法有何牴觸。惟犯罪被害人得提起自訴之範圍，

above, "a person injured by an act of offense" refers to a person who is directly injured by a criminal act. However, in a case where the national or social interest and the personal interest are injured by a criminal act, the law does not define the condition in which an individual victim will be considered a person within the meaning of being directly injured. The issue is then left to the discretion of the court taking cognizance of the case to determine based on the facts of the particular criminal act. Where the provisions in respect to private prosecution are found inapplicable, the case will naturally be subject to public prosecution under provisions applicable thereto. In this way, the enforcement of the State's power of criminal punishment is not harmed, nor does it give rise to the problem of the right of instituting legal proceedings being limited. Thus, the Supreme Court decision No. Tai-shang Tze 1799 (1981) is not inconsistent with the Constitution in holding that "in the present case where the Appellant brought a private prosecution against the accused who was suspected of having committed the offense under the Criminal

應妥為檢討，明確規定，併此指明。

Code of a public official seeking to profit from his function, the interest protected by law includes the loyalty of public functionaries in serving the nation and the national interest. Although the crime does result in a certain impact on personal rights and interests, the party directly injured is the State rather than any individual. Although the Appellant has suffered injury from the act of the accused, the injury is indirect, not direct. Accordingly, no private prosecution is allowed." Nevertheless, we have to point out here that the circumstances in which a person injured by a criminal act may institute private prosecution must be carefully reviewed and clearly specified.

Justice Cheng-Tao Chang filed dissenting opinion in part, in which Justice Herbert Han-Pao Ma and Justice Teh-Sheng Chang joined.

Justice Zu-Zan Yang filed dissenting opinion in part.

本號解釋張大法官承韜、馬大法官漢寶與張大法官特生共同提出一部不同意見書；楊大法官日然提出理由一部不同意見書。

J. Y. Interpretation No.298（June 12, 1992）*

ISSUE: Which authority should govern the relief procedure of the disciplinary measures with consequence sufficient to change the status of the public functionaries or with serious impact on such public functionaries?

RELEVANT LAWS:

Article 77 of the Constitution（憲法第七十七條）; J. Y. Interpretation No. 243（司法院釋字第二四三號解釋）.

KEYWORDS:

administrative action（行政訴訟）, order of disposition（處分命令）, disciplinary measures（懲戒處分）, judicial relief（司法救濟）.**

HOLDING: According to Article 77 of the Constitution, the Judicial Yuan shall take charge of cases concerning disciplinary measures against public functionaries. Depending on the nature of the said disciplinary measures, laws may be made to allow top-ranking officials to take such measures, within reasonable scope. However, in cases concerning disciplinary measures with consequence sufficient to

解釋文：憲法第七十七條規定，公務員之懲戒屬司法院掌理事項。此項懲戒得視其性質於合理範圍內以法律規定由其長官為之。但關於足以改變公務員身分或對於公務員有重大影響之懲戒處分，受處分人得向掌理懲戒事項之司法機關聲明不服，由該司法機關就原處分是否違法或不當加以審查，以資救濟。有關法律，應依上述意旨修正之。本院釋字第二四三號解釋應予補

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

change the status of the public functionaries or with serious impact on such public functionaries, the person under order of disposition may file an objection with the judicial organ in charge of disciplinary measures; the said organ will then examine the original disciplinary measures to decide whether there is any contradiction with the law or any other inappropriateness, and whether legal relief shall be offered. Relevant laws shall be amended accordingly, and supplements to Interpretation No. 243 of the Judicial Yuan shall be made. Permission, as provided for in the said Interpretation, for the public functionary punished by removal from office to file an administrative litigation means that the persons under order of disposition may, prior to the amendment of laws concerning disciplinary measures against public functionaries and merit evaluation, appeal for judicial relief.

充。至該號解釋，許受免職處分之公務員提起行政訴訟，係指受處分人於有關公務員懲戒及考績之法律修正前，得請求司法救濟而言。

REASONING: Article 77 of the Constitution stipulates: "The Judicial Yuan shall be the highest judicial organ of the State and shall take charge of civil, criminal, and administrative cases and of

解釋理由書：憲法第七十七條規定：「司法院為國家最高司法機關，掌理民事、刑事、行政訴訟之審判及公務員之懲戒」，由是可知司法院為公務員懲戒之最高機關，非指國家對公務員

cases concerning disciplinary measures against public functionaries." Therefore, the Judicial Yuan is the highest organ taking charge of cases concerning disciplinary measures against public functionaries. However, this does not mean that the Judicial Yuan shall in exercising its rights to discipline public functionaries, take direct charge of all cases concerning disciplinary measures against public functionaries. "Disciplinary measures against public functionaries" means sanctions against law breaking and negligence by public functionaries. Such disciplinary measures are necessary for maintaining supervisory rights of top-ranking officials and therefore, depending on the nature of the said disciplinary measures, laws may be made to allow top-ranking officials to take such measures, within reasonable scope. However, in cases concerning disciplinary measures with serious impact on the public functionaries, the person under order of disposition may file an objection with the judicial organ in charge of disciplinary measures; the said organ will then examine the original disciplinary measures to decide whether there is any con-

懲戒權之行使，一律均應由司法院直接掌理。公務員之懲戒乃國家對其違法、失職行為之制裁，此項懲戒為維持長官監督權所必要，自得視懲戒處分之性質，於合理範圍內，以法律規定由長官為之。但關於足以改變公務員身分或對於公務員有重大影響之懲戒處分，受處分人得向掌理懲戒事項之司法機關聲明不服，由該司法機關就原處分是否違法或不當加以審查，以資救濟。有關公務員懲戒及公務員考績之法律，應依上述意旨修正之。本院釋字第二四三號解釋應予補充。至該號解釋，許受免職處分之公務員提起行政訴訟，係指受處分人於有關法律修正前，得請求司法救濟之程序而言。又具法定資格始得任用，並受身分保障之公務員，因受非懲戒性質之免除現職處分，經循行政程序未獲救濟時，受處分之公務員，仍得依本院釋字第二四三號解釋意旨，依法提起行政訴訟，請求救濟，併此指明。

tradiction with the law or any other inappropriateness, and whether legal relief is to be offered. Laws concerning disciplinary measures against public functionaries and their merit evaluation shall be amended accordingly. Supplements to Interpretation No. 243 of the Judicial Yuan shall also be made. Permission, as provided for in the said Interpretation, for the public functionary punished by removal from office to file an administrative litigation shall mean that the person under order of disposition may, prior to the amendment of relevant laws, appeal for judicial relief. It shall also be pointed out that, with statutory qualification as a prerequisite for employment as a public functionary and for the guarantee of such status, in the case where a public functionary is dismissed from a current position through punishment other than disciplinary measures and fails to obtain legal remedy through administrative procedures, the said public functionary may still apply to Interpretation No. 243 of the Judicial Yuan and, in accordance with the laws, file an administrative litigation to appeal for relief.

Justice Chung-Sheng Lee filed dissenting opinion in part.

Justice Yu-Ling Yang filed dissenting opinion in part.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官鐘聲提出一部不同意見書；楊大法官與齡提出部分不同意見書；鄭大法官健才提出理由一部不同意見書；李大法官志鵬提出不同意見書。

J. Y. Interpretation No.299（June 26, 1992）*

ISSUE: What are the implication of the J. Y. No. 282 in holding that a delegate to the National Assembly should receive " no emolument'' and "may receive remuneration under certain circumstances''?

RELEVANT LAWS:

Article 27, 28, 29 and 30 of the Constitution（憲法第二十七條、第二十八條、第二十九條、第三十條）; J.Y. Interpretation No. 282（司法院釋字第二八二號解釋）.

KEYWORDS:

delegates of the National Assembly（國民大會代表）, remuneration and compensation（待遇及報酬）, the regime of compensation-by-law of elected representatives（民意代表依法支領待遇之制度）.**

HOLDING: In order to establish the regime of compensation-by-law of the elected representatives, the appropriate categories and standards of remuneration or compensation of national representatives shall be promulgated by law according to the nature of their positions so that a budget may be implemented for such payment. This has been interpreted in J.Y.

解釋文：中央民意代表之待遇或報酬，應視其職務之性質，分別以法律規定適當之項目與標準，始得據以編列預算支付之，以建立民意代表依法支領待遇之制度，本院釋字第二八二號解釋已明示其旨。該解釋所稱國民大會代表為無給職，係指國民大會代表非應由國庫經常固定支給歲費、公費或相當於歲費、公費之給與而言，並非在任何情

* Translated by David Yang and Mark Tu of Baker&Mckenzie Law Offices, Taipei.

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Interpretation No. 282. The clause "the positions of delegates of the National Assembly are without pay" as mentioned in J.Y. Interpretation No. 282, shall mean that no payment of periodic compensation of an annual retainer or honorarium or other similar payments shall be made to the delegates of the National Assembly. Such interpretation does not mean that the delegates of the National Assembly shall not receive any payment under any circumstance. Illustration has been made that the statement "delegates of the National Assembly may receive compensation under specific circumstances" mainly means that the delegates of the National Assembly may be paid for reasonable compensation when exercising their duty during the session. As to under what specific circumstances the delegates of the National Assembly may be compensated, such matter shall be decided by the Legislative Yuan based on the reasonable categories and standards of such compensation as the basis of payment along with the payment of other necessary expenses that have direct bearing with the exercise of their duty. The same principle shall be followed.

形下，均毫無報酬之意。其所稱國民大會代表在特定情形下得受領報酬，主要係指集會行使職權時得受領各項合理之報酬，故舉以為例。至其他何種特定情形得受領報酬，係屬立法裁量問題，應由立法機關本此意旨，於制定有關國民大會代表報酬之法律時，連同與其行使職權有直接關係而非屬於個人報酬性質之必要費用，如何於合理限度內核實開支，妥為訂定適當項目及標準，以為支給之依據。於修訂其他民意代表待遇之法律時，亦同。本院上開解釋，應予補充。

lowed when amending legislations dealing with the compensation of other elected representatives. Supplement is hereby made to J.Y. Interpretation No. 282.

REASONING: Questions have been raised by the Legislative Yuan and the National Assembly as to the meaning of the phrases "without pay" and "may receive compensation under specific circumstances" in J. Y. Interpretation No. 282, and application for supplementary interpretation has been filed. The applications shall be accepted according to Resolution No. 118 of the Grand Justices Council and Article 4, Paragraph 1, Subparagraph 1, of the Act Governing the Adjudication of the Grand Justices Council.

解釋理由書：本件立法院及國民大會因適用本院釋字第二八二號解釋，對該解釋所稱「無給職」及「特定情形下得受領報酬」發生疑義，先後聲請補充解釋，依本院大法官會議第一一八次會議決議及司法院大法官會議法第四條第一項第一款規定，應予受理；又該解釋係專就中央民意代表之待遇或報酬而為，合先說明。

The remuneration or compensation of national representatives, no matter under what kind of designation, is relative to the tax burden of the people and is an important issue of the country. The categories and standards of such compensation shall be regulated by law so that a budget can be drawn up for the payment. The law

中央民意代表之待遇或報酬，無論名稱為何，均涉及人民之納稅負擔，且為國家之重要事項，應視其職務之性質，分別先以法律規定適當之項目與標準，始得據以編列預算支付之，而國民大會代表之報酬，迄今尚無法律依據，其他中央民意代表之待遇，雖於四十餘年前有「立法委員暨監察委員歲費公費

is silent on the compensation of the delegates of the National Assembly. While the compensation of the other national representatives is stipulated by the Provisional Act Governing Legislators' and Ombudsmen's Annual Pay and Pay for Duty-Related Expenses enacted more than forty years ago, the actual compensation paid is not consistent with that law. Thus, an overall review is necessary so as to set up the regime of compensation-by-law of elected representatives. That is the intention and purpose of J.Y. Interpretation No. 282. In order to provide sufficient time for the enactment and amendment of relevant legislations, it is decided that the Interpretation shall come into force on January 1, 1992. The clause "the positions of delegates of the National Assembly are without pay" shall mean that no payment of periodic compensation of an annual retainer or honorarium or other similar payments shall be made to the delegates of the National Assembly. Such interpretation does not mean that the delegates of the National Assembly shall not receive any payment under any circumstance. Although the frequency of temporary meet-

支給暫行條例」之制定，然與實際支給情形亦不相符，均待通盤檢討修訂，以建立民意代表依法支領待遇之制度，中華民國八十年七月十二日公布之本院釋字第二八二號解釋即係本此意旨。該解釋為預留立法所需之時間，特定自八十一年一月一日起生效。其所稱國民大會代表為無給職，係指國民大會代表非應由國庫經常固定支給歲費、公費或相當於歲費、公費之給與而言，並非在任何情形下，均毫無報酬之意。國民大會臨時集會之次數及其職權，雖因憲法增修條文之規定而有所變動，然國民大會代表在憲法上職務之性質，基本上並無變更，所稱國民大會代表在特定情形下得受領報酬，主要係指集會行使職權時得受領各項合理之報酬，故舉以為例。至其他何種特定情形得受領報酬，係屬立法裁量問題，應由立法機關本此意旨，於制定有關國民大會代表報酬之法律時，連同與其行使職權有直接關係之郵電、交通等非屬於個人報酬性質之必要費用，及在任期內保險費用之補助，如何於合理限度內核實開支，妥為訂定適當項目及標準，以為支給之依據。於修訂其他民意代表待遇之法律時，亦同。本院上開解釋應予補充。又依動員戡亂時期臨時條款增加名額選出之國民大會

ing and the powers of the delegates of the National Assembly have been changed with the revisions and amendments of the Constitution, the nature of the duty of the delegates of the National Assembly under the Constitution has not been changed. The clause "the delegates of the National Assembly may receive compensation under specific circumstances" mainly means that the delegates of the National Assembly may be paid for reasonable compensation when exercising their power during the session. As to under which circumstances the delegates of the National Assembly may be compensated, such matter shall be decided by the Legislative Yuan based on the reasonable categories and standards of the compensation as the basis of payment along with the payment of other necessary expenses that have direct bearing with the exercise of their duty, such as fees for postage, telecommunication, and insurance. The same principle shall be followed when amending legislations dealing with the compensation of the other elected representatives. Supplement is hereby made to Interpretation No. 282. Moreover, although the compensation

代表，於八十年十二月三十一日以前已受領之報酬，雖與第一屆國民大會代表相同，惟其於八十一年一月一日以後，既與第二屆國民大會代表共同行使職權，依上開解釋意旨應建立民意代表依法支領待遇之制度，基於公益與平等原則之考量，其得受領之報酬，自應與第二屆國民大會代表相一致，併此說明。

received by the delegates of the National Assembly elected under the Provisional Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (hereinafter the "Provisional Provisions") before December 31, 1991, is equivalent to the compensation of the first-term delegates of the National Assembly, considering the need to establish a regime of compensation-by-law as interpreted in the above and based on the principle of public interest and equality, the delegates elected under the Provisional Provisions shall be compensated the same as the second-term delegates since they exercise their powers together.

J. Y. Interpretation No.300（July 17, 1992）*

ISSUE: Is Article 71 of the Bankruptcy Act constitutional in empowering the court to extend the detention of the debtor while saying nothing about the limit on the number of extensions limit?

RELEVANT LAWS:

Article 8 of the Constitution（憲法第八條）; Article 71, Paragraph 1 and 2, Article 152 through 159 of the Bankruptcy Act （破產法第七十一條第一項、第二項、第一百五十二條至第一百五十九條）; Article 22 and 24 of the Compulsory Enforcement Act（強制執行法第二十二條、第二十四條）; Articles 101 and 108 of the Code of Criminal Procedure（刑事訴訟法第一百零一條、第一百零八條）.

KEYWORDS:

detention, to detain（羈押）, writ of detention（押票）, trustee in bankruptcy, bankruptcy trustee（破產管理人）, bankruptcy estate（破產財團）, take into custody（管收）, physical freedom（身體自由）.**

HOLDING: The Bankruptcy Act provides in Article 71, Paragraph 1, that "where there is probability that the bankrupt may abscond from creditors or con-

解釋文：破產法第七十一條第一項規定「破產人有逃亡或隱匿、毀棄其財產之虞時，法院得簽發押票將破產人羈押。」為保全破產財團之財產，維

* Translated by Raymond T. Chu.

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

ceal, destroy or dispose of his property, the court may issue a writ to have the bankrupt detained." While detention of the bankrupt may be necessary in order to protect the interests of all creditors by preserving the property of the bankruptcy estate, and thereby to ensure that the bankruptcy procedure may be satisfactorily completed, a time limit is prescribed by Paragraph 2 of the same article, which reads: "The period of detention shall not exceed one month, provided that the court may grant extensions thereof for up to one month each time upon good reasons presented by the bankruptcy trustee." We have noticed, however, that the proviso does not specify a reasonable limit on the number of extensions that may be granted. This is contrary to the essence of the Constitution in protecting the physical freedom of the people, and must be amended as promptly as practicable, but by no means later than one year from the date of pronouncement of this Interpretation, on which date said proviso shall cease to be operative. Before the law is amended, the foregoing proviso must be applied in a cautious manner consistent with our views

護全體債權人之權益，俾破產程序得以順利完成，固有此必要。惟同條第二項「羈押期間不得超過一個月，但經破產管理人提出正當理由時，法院得准予展期，每次展期以一個月為限」之規定，其中但書對羈押展期之次數未加適當限制部分，與憲法保障人民身體自由之本旨不合，應儘速加以修正，至遲應於本解釋公布之日起屆滿一年時停止適用。在法律修正前適用上開現行規定，應斟酌本解釋意旨，慎重為之。至破產人有破產法第一百五十二條至第一百五十九條犯罪嫌疑者應移送檢察官偵查，於有必要時由檢察官依法羈押，乃另一問題，併此說明。

herein expressed. With regard to the situation where a bankrupt is suspected of having committed any of the crimes under Articles 152 through 159 of the Bankruptcy Act, this is a different matter, and we opine that the case shall be sent to the prosecutor for investigation, who may order the bankrupt to be lawfully detained if necessary.

REASONING: The Bankruptcy Act provides in Article 71, Paragraph 1, that "where there is probability that the bankrupt may abscond from creditors or conceal, destroy or dispose of his property, the court may issue a writ to have the bankrupt detained." While detention of the bankrupt may be necessary in order to protect the interests of all creditors by preserving the property of the bankruptcy estate, and thereby to ensure that the bankruptcy procedure may be satisfactorily completed, a time limit is prescribed by Paragraph 2 of the same article, which reads: "The period of detention shall not exceed one month, provided that the court may grant extensions thereof for up to one month each time upon good reasons pre-

解釋理由書：破產法第七十一條第一項「破產人有逃亡或隱匿、毀棄其財產之虞時，法院得簽發押票將破產人羈押」之規定，旨在保全破產財團之財產，維護全體債權人之權益，俾破產程序得以順利完成，固其有必要。惟同條第二項則規定「羈押期間不得超過一個月，但經破產管理人提出正當理由時，法院得准予展期，每次展期以一個月為限」。按對人民身體自由之拘束，除因犯罪受無期徒刑之宣告確定者外，現行法律中有關人身自由之拘束，均有期間之限制。例如強制執行程序中對於債務人顯有逃亡之虞或就應供強制執行之財產有隱匿或處分之情事者，強制執行法第二十二條規定執行法院對於債務人無相當擔保者，得拘提管收之。同法第二十四條則規定，管收期限不得逾三

sented by the bankruptcy trustee." It must be noted that restraint on the physical freedom of any person, with the exception of those found guilty of crimes and sentenced to life imprisonment by irrevocable judgments, is subject to limited periods of time as prescribed by existing statutes. For instance, while a debtor in a compulsory execution proceeding may be arrested and taken into custody by the court under Article 22 of the Compulsory Enforcement Act on the ground that there is apparently a probability that he will abscond from the creditors or has concealed or disposed of his property which is subject to enforcement, and that he has failed to furnish reasonable security required, such custody may not last over three months and thereafter he may be again taken into custody only once if there is new cause for custody. Moreover, in criminal proceedings, Article 101 of the Code of Criminal Procedure authorizes the court to detain the accused whenever necessary if it believes or is made to believe by the occurrence of any event that there is probability that the accused may flee from justice, or destroy, falsify, or alter

個月，且有管收新原因發生而對債務人再行管收時，以一次為限。又刑事訴訟程序中，對於被告如認有逃亡或有事實足認為有逃亡之虞者，或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等情形之一時，刑事訴訟法第一百零一條規定於必要時得羈押之。同法第一百零八條則規定，羈押被告，偵查中不得逾二月，審判中不得逾三月，但有繼續羈押之必要者，延長羈押期間每次不得逾二月，偵查中以一次為限，如所犯最重本刑為十年以下有期徒刑以下之刑者，審判中第一審第二審以三次為限，第三審以一次為限。破產法上之羈押，其主要目的既在保全破產財團之財產，該法第七十一條第二項但書關於羈押展期次數未加限制之規定，與上開其他法律規定兩相比較，顯欠妥當，易被濫用，有違憲法保障人民身體自由之本旨。應就羈押之名稱是否適當、展期次數或總期間如何限制，以及於不拘束破產人身體自由時，如何予以適當管束暨違反管束時如何制裁等事項通盤檢討，儘速加以修正，至遲應於本解釋公布之日起屆滿一年時停止適用。在法律修正前適用上開現行規定，應斟酌本解釋意旨，慎重為之。至破產人有破產法第一百五十二條至第一百五十九

evidence, or engage in collusion with an accomplice or a witness. However, Article 108 of the Code provides that detention of the accused shall not exceed two months during the process of investigation and three months during trial, that if it is necessary to continue to detain the period thus extended shall not exceed two months each time, that only one extension may be ordered during an investigation, and that if the crime is punishable by a maximum principal penalty of imprisonment for not more than ten years the detention during the trial may be extended up to three times by the court of the first instance and the court of the first appeal, and not more than once by the court of the second appeal. Inasmuch as the primary purpose of detention in a bankruptcy procedure is to preserve the property of the bankruptcy estate, the proviso to Paragraph 2 of Article 71 of the Bankruptcy Act, saying nothing about a limit on the number of times for which detention may be extended, is obviously inappropriate and susceptible to abuse when compared with the other statutes quoted above, and is thus against the intent of the Constitution in protecting the

條犯罪嫌疑者應移送檢察官偵查，於有必要時由檢察官依法羈押，乃另一問題，併此說明。

physical freedom of the people. To put it right, said provision must be amended as promptly as practicable upon an overall review to be carried out in respect of such matters as relating to the suitability of the term "detention," restrictions on the number of times or the aggregate number of days for which extensions may be ordered, what reasonable measures of control may be exercised over the bankrupt without having to place him under physical restraint, and what sanctions may be imposed in case of violation of the measures of control. The amendment shall be made within one year from the date of pronouncement of this Interpretation, on which date said provision shall cease to be operative. Before the law is amended, the foregoing proviso must be applied in a cautious manner consistent with our views herein expressed. With regard to the situation where a bankrupt is suspected of having committed any of the crimes under Articles 152 through 159 of the Bankruptcy Act, this is a different matter, and we opine that the case shall be sent to the prosecutor for investigation, who may order the bankrupt to be lawfully detained if necessary.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官志鵬提出不同意見書。

J. Y. Interpretation No.301（July 24, 1992）*

ISSUE: Is it provision of the Educators Appointment Act, prescribing that a teacher may not serve as such if he or she is suspended from duties due to a cause that remains in existence, in violation of the Constitution?

RELEVANT LAWS:

Article 15 and 165 of the Constitution（憲法第十五條、第一百六十五條）; Article 31 of the Educators Appointment Act（教育人員任用條例第三十一條）.

KEYWORDS:

educators（教育人員）, general public interest（公共利益）, criminal wrongdoing（刑事責任）, administrative violations（行政責任）, educational responsibilities（教育職務）, written notices（書面通知）, competent educational administration authorities（主管教育行政機關）.**

HOLDING: As stipulated by Subparagraph 3, Article 31, of the Educators Appointment Act concerning the suspension of duties during involvement in an ongoing court case, any individual currently involved in an ongoing legal

解釋文：教育人員任用條例第三十一條第三款關於因案停止職務，其原因尚未消滅者，不得為教育人員之規定，乃因其暫不適宜繼續執行教育職務，此為增進公共利益所必要，與憲法並無牴觸。惟因案停止職務之教師，於

* Translated by Professor Cing-Kae Chiao.

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case in a court of law may not resume work as an educator. This ban is constitutionally permissible, in that under the aforementioned circumstances, an individual may temporarily be unable to sustain his/her capacity as an educator, and to also safeguard the general public interest. However, should the contracted work period of the suspended educator expire, and the educator later be exonerated from any criminal wrongdoings or administrative violations by the judicial process and subsequently rehabilitated by the original employer, arrangements for compensation or recovery of benefits for the lost time shall be determined by the competent authorities.

聘期屆滿後，經法定程序確定為無刑事及行政責任，並經原學校依規定再予聘任者，其中斷期間所失之權益，如何予以補償，應由主管機關檢討處理之。

REASONING: Paragraph 3, Article 31, of the Educators Appointment Act concerning suspension of duties stipulates that any individual currently involved in an ongoing court case may not resume work as an educator. There may be situations in which the aforementioned individual will be unfit to carry out educational responsibilities, as individuals under these circumstances may not be able

解釋理由書：教育人員任用條例第三十一條第三款關於因案停止職務，其原因尚未消滅者，不得為教育人員之規定，乃因此等人員在停職期間，難以專心任職，足以影響教育工作之正常進行，有暫不適宜繼續執行教育職務之情形存在。故上開規定，為增進公共利益所必要，與憲法並無牴觸。惟依現行法律規定，學校教師有採聘任制度者，其因案停止職務之教師於聘期屆滿

to concentrate on their duties due to the disruptive nature of such events. On the basis of the aforementioned stipulation, as well as the necessity to uphold the interest of the general public, such a suspension does not conflict with the Constitution. In the event that the suspended educator was appointed by contract by the school and was then subsequently reinstated by the school after being cleared of any criminal wrongdoings or administrative violations by a court of law, any arrangements for recovery of benefits or compensation for the lost time shall be determined by the competent authority, as there are currently no laws governing such occurrences. Paragraph 1, Article 19, of the Enforcement Rules of the Educators Appointment Act stipulates: "Schools at all levels which decide not to extend the appointment of an educator upon nearing the end of the latter's appointment, shall send a written notice to the concerned educator one month before the completion of employment and notify the competent educational administration authorities." Therefore, the procedures governing the non-extension of appointments are clearly

後，經法定程序確定為無刑事及行政責任，並經原學校再予聘任者，足證事已澄清，自原聘期屆滿至再予聘任之一段期間，其所失之權益，如何補償，現行法令未設規定，有所疏漏，應由主管機關檢討處理之。至教育人員任用條例施行細則第十九條第一項規定：「各級學校對聘約期限屆滿之教師不予續聘時，應於聘期屆滿一個月前，書面通知當事人，並報經主管教育行政機關備查」，乃規定學校對於聘約期限屆滿之教師不予續聘之程序，以督促學校對於教師之不續聘，應審慎辦理。此種情形，業經本院釋字第二〇三號解釋認與憲法並無牴觸在案，適用此項規定之見解，亦不屬憲法解釋範圍，併予說明。

provided for the schools, and are to be adhered to. Such an instance has already been deemed to be consistent with the Constitution, as previously reasoned in J.Y. Interpretation No. 203.

J. Y. Interpretation No.302（August 14, 1992）*

ISSUE: Does the Code of Criminal Procedures, in limiting the appeal to the court of the third instance to the judgment contrary to law, violate the Constitution?

RELEVANT LAWS:

Articles 16 and 23 of the Constitution（憲法第十六條及第二十三條）; Article 377 of the Code of Criminal Procedure（刑事訴訟法第三百七十七條）.

KEYWORDS:

court of the third instance（第三審法院）, legislative discretion（立法裁量）, legal review（法律審查）.**

HOLDING: Article 377 of the Code of Criminal Procedure provides, "An appeal may not be made to a court of the third instance except for the reason that the judgment is contrary to law." Such provision is enacted for the purpose of reasonable use of legal proceedings in order to increase the public interest. It neither transgresses the scope of legislative discretion nor contradicts Article 16 of the Constitution.

解釋文：刑事訴訟法第三百七十七條規定：「上訴於第三審法院，非以判決違背法令為理由，不得為之」，旨在合理利用訴訟程序，以增進公共利益，尚未逾越立法裁量範圍，與憲法第十六條並無牴觸。

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* Translated by John C. Chen.

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REASONING: Article 16 of the Constitution provides that the people shall have the right to initiate legal proceedings. However, the legislature shall have the discretion in deciding what proceedings shall be available for the exercise of such right, the division of the court of instances, and whether the court of the third instance shall be restricted to performing legal review, and such matters shall be prescribed into law by the legislature. Article 377 of the Code of Criminal Procedure provides that an appeal may not be made to a court of the third instance except for the reason that the judgment is contrary to law. The limitation on the reasons to appeal to the court of the third instance is made under the aforesaid principle and is necessary to increase the public interest. It does not transgress the scope of legislative discretion and thus is permitted under the provision of Article 23 of the Constitution. As such, Article 377 of the Code of Criminal Procedure does not contradict the principle of the protection of the people's litigation rights under Article 16 of the Constitution.

解釋理由書：憲法第十六條固規定人民有訴訟之權，惟此項權利應依如何之程序行使，審級如何劃分，應否將第三審法院定為法律審，使司法訴訟程序之利用臻於合理，屬立法裁量問題，應由立法機關以法律妥為規定。刑事訴訟法第三百七十七條規定：「上訴於第三審法院，非以判決違背法令為理由，不得為之」。其限制第三審上訴之理由，即係基於上述意旨，為增進公共利益所必要，並未逾越立法裁量範圍，為憲法第二十三條之所許，與憲法第十六條保障人民訴訟權之本旨並無牴觸。

J. Y. Interpretation No.303（August 14, 1992）*

ISSUE: Is the requirement of filing an application for registration on any change in the particulars, which had been duly registered with the authority, by the responsible corporate officer with the authority within the prescribed period constitutional?

RELEVANT LAWS:

Articles 9, Paragraph 2, 387 and 403, Paragraphs 1 and 2 of the Company Act（公司法第九條第二項、第三百八十七條及第四百零三條第一項、第二項）.

KEYWORDS:

registration of change（變更登記）, authority（主管機關）, responsible person（負責人）.**

HOLDING: Article 403, Paragraph 1, of the Company Act stipulates that "[i]n case of any change in any of the particulars registered with the authority, every domestic and foreign company shall, within fifteen days after such change, file an application with such authority for registration of such change." Pursuant to the essence of Paragraph 2 of

解釋文：公司法第四百零三條第一項規定：「公司及外國公司登記事項如有變更時，應於變更後十五日內，向主管機關申請為變更之登記」，此項變更登記，依同條第二項之意旨，應由公司負責人申請，乃因公司為法人，自應由其代表人為之，以確保交易安全，與憲法並無牴觸。

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* Translated by Professor Spenser Y. Hor.

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the abovementioned Article, the responsible corporate person shall apply for said registration of change since such representative of a company, a juristic person, shall act for said registration to ensure the safety of the transactions, which provision does not contradict the Constitution.

REASONING: As an independent entity entitling rights and obligations, in case of any change, for example, in structure, capital, etc., a company shall comply with legal procedures by publishing said change in the gazettes or pamphlets as set forth by the competent authority in order that the public can examine or copy same in files. Article 403, Paragraph 1, of the Company Act provides that "[i]n case of any change in any of the particulars registered with the authority, every domestic and foreign company shall, within fifteen days after such change, file an application with such authority for registration of such change." Pursuant to the essence of Paragraph 2 of the abovementioned Article and Article 387, said registration of change shall be person since said representative of a com

解釋理由書：公司為獨立之權利義務主體，其組織及資金等事項，如有變更，應依法定程序登載於主管機關設置之簿冊，以備公眾閱覽抄錄。公司法第四百零三條第一項規定：「公司及外國公司登記事項如有變更時，應於變更後十五日內，向主管機關申請為變更之登記」，此項變更登記，依同條第二項及第三百八十七條之意旨，應由公司負責人申請，乃因公司為法人，自應由其代表人為之，以確保交易安全，與憲法並無牴觸。至公司負責人申請登記事項如有虛偽情事，乃其應否依公司法第九條第二項負刑事責任之問題，併予指明。

applied for by the responsible corporate pany, a juristic person, shall conduct such registration to ensure the safety of the transactions, which provision does not contradict the Constitution. It is also noted here that any false entry for any matter of registration by the responsible person of a company is a question concerning whether such responsible corporate person shall be criminally liable in accordance with Article 9, Paragraph 2, of the Company Act.

J. Y. Interpretation No.304（August 14, 1992）*

ISSUE: Do the proviso to Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No.1446, which maintain that superficies or other rights to use and collect benefits created after the registration of a mortgage should not affect the mortgagee's right, contradict the people's property rights guaranteed by the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 866 of the Civil Code（民法第八百六十六條）; J. Y. Interpretation Yuan-tze No. 1446（司法院院字第一四四六號解釋）.

KEYWORDS:

mortgage registration（抵押權設定登記）, real property（不動產）, superficies（地上權）, rights to use and collect benefits（使用收益權）.**

HOLDING: Article 866 of the Civil Code stipulates that, "After the creation of a mortgage, the owner of a real property may create superficies and other rights on the same real property provided that the mortgage shall not be affected

解釋文：民法第八百六十六條規定：「不動產所有人設定抵押權後，於同一不動產上得設定地上權及其他權利。但其抵押權不因此而受影響」，如其抵押權因設定地上權或其他權利而受影響者，本院院字第一四四六號解釋認

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thereby." If the mortgage is affected because of the creation of superficies or other rights, according to J. Y. Interpretation Yuan-tze No. 1446, such superficies or rights shall not be effective against the mortgagee, and the Enforcement Court can directly enforce the execution of an auction for the mortgaged real property upon the mortgagee's application. Because the mortgage is a right over things and will become public upon registration, the superficies or other rights to use and collect benefits on the mortgaged real property, which were obtained after the registration of the mortgage, shall not affect the mortgage registered prior to such superficies and rights. Such superficies or other rights to use and collect benefits may continue to exist if neither affects the mortgage. The rights of the one who obtains such superficies and other rights after the registration of the mortgage have been taken into consideration. Thus, the aforesaid Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No. 1446 do not contradict the Constitution.

為對於抵押權人不生效力，抵押權人聲請拍賣抵押物時，執行法院自可依法逕予執行，乃因抵押權為物權，經登記而生公示之效力，在登記後就抵押物取得地上權或其他使用收益之權利者，自不得使登記在先之抵押權受其影響，如該項地上權或其他使用收益之權利於抵押權無影響時，仍得繼續存在，已兼顧在後取得權利者之權益，首開法條及本院解釋與憲法並無牴觸。

REASONING: Article 866 of

解釋理由書：民法第八百六十

the Civil Code stipulates that "After the creation of a mortgage, the owner of a real property may create superficies and other rights on the same real property provided that the mortgage shall not be affected thereby." If the mortgage is affected because of the creation of superficies or other rights, according to J. Y. Interpretation Yuan-tze No. 1446, such superficies or rights shall not be effective against the mortgagee, and the Enforcement Court can directly enforce the execution of an auction for the mortgaged real property upon the mortgagee's application. Because the mortgage is a right over things and will become public upon registration, the superficies or other rights to use and collect benefits on the mortgaged real property, which were obtained after the registration of the mortgage, shall not affect the mortgage registered prior to such superficies and rights. If the mortgage is affected by the superficies or other rights to use and collect benefits which were created by the owner on the mortgaged real property after the creation of the mortgage, and where the mortgagee applies for the auction of the mortgaged real

六條規定：「不動產所有人設定抵押權後，於同一不動產上得設定地上權及其他權利。但其抵押權不因此而受影響」，如其抵押權因設定地上權或其他權利而受影響者，本院院字第一四四六號解釋認為對於抵押權人不生效力，抵押權人聲請拍賣抵押物時，執行法院自可依法逕予執行，乃因抵押權為物權，經登記而生公示之效力，在抵押權登記後就抵押物取得地上權或其他使用收益之權利者，自不得使登記在先之抵押權受其影響。故所有人於抵押權設定後，在抵押物上所設定之地上權或其他使用收益之權利於抵押權有影響者，在抵押權人聲請拍賣抵押物時，發生無人應買或出價不足清償抵押債權之情形，即須除去該項權利而為拍賣，並於拍定後解除被除去權利者之占有而點交於拍定人，乃為使抵押權人得依抵押權設定時之權利狀態而受清償所必要。反之，如該項地上權或其他使用收益之權利於抵押權無影響時，仍得繼續存在，已兼顧在後取得權利者之權益。民法第八百六十六條但書之規定及本院院字第一四四六號解釋，與憲法保障人民權利之意旨，並無牴觸。

property, and no person proposed a purchase, or where the proposed purchase price is insufficient for the repayment of the claim secured by such mortgage, the Enforcement Court shall then enforce an auction by removing said rights and, after the real property is auctioned, release the possession of the party whose rights had been removed to the buyer. This is necessary for the mortgagee to be repaid in the same status as when the mortgage was created. In contrast, such superficies or other rights to use and collect benefits will continuously exist where neither of these affects the mortgage. The rights of the one who obtains such superficies and other rights after the registration of the mortgage have been taken into consideration. Thus, the aforesaid provision in Article 866 of the Civil Code and J. Y. Interpretation Yuan-tze No. 1446 do not contradict the principle of the protection of the people's rights under the Constitution.

J. Y. Interpretation No.305（October 2, 1992）*

ISSUE: Is the precedent holding that a publicly owned enterprise established pursuant to the Company Act does not have the capacity to be sued in an administrative litigation constitutional?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 249 and 469 of the Code of Civil Procedure（民事訴訟法第二百四十九條、第四百六十九條）; Article 1 of the Administrative Proceedings Act（行政訴訟法第一條）; Article 1 of the Administrative Appeal Act（訴願法第一條）; Article 27 of the Company Act（公司法第二十七條）; J. Y. Interpretation No. 269（司法院釋字第二六九號解釋）.

KEYWORDS:

administrative court（行政法院）, civil court（民事法院）, public legal person（公法人）, jurisdiction（審判權）, reject（駁回）, right to institute legal proceedings（訴訟權）, infringe（侵害）, final and binding judgment（確定終局裁判）, precedent（判例）, in contravention to（牴觸）, different opinion（岐異見解）, state-owned enterprise（公營事業）, state-owned company（公營公司）, private corporate body（私法人）, contractual relationship（契約關係）, dispute（爭執）, capacity to be a party（當事人能力）, assign

* Translated by Professor Chun-Jen Chen.

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

autonomy（企業自主）, separation of ownership and control（指派）, appoint（任用）, official rank（官等）, corporate（企業所有與企業經營分離）, mandate（委任）, remove（解任）, public authority（公權力）, expression of intent（意思表示）, appointment and removal（任免）, evaluation（考核）,supervisory relationship（監督關係）.**

HOLDING: People who bring suits to the administrative court and the civil court, respectively, based on the same incident and whose suits are rejected by both courts for lack of jurisdiction may file petitions to this Court for our interpretations if there is a question of whether the final and binding judgment handed down by one of the courts applied a precedent which was in contravention to the Constitution and hence caused the infringement of the constitutional guarantee of the right to institute legal proceedings. After we grant certiorari, we may make a unified interpretation to resolve different opinions among courts relating to the precedent at issue. The different opinions of jurisdiction between the precedent relied upon by the administrative court and the final and

解釋文：人民就同一事件向行政法院及民事法院提起訴訟，均被以無審判之權限為由而予駁回，致其憲法上所保障之訴訟權受侵害，而對其中一法院之確定終局裁判所適用之判例，發生有牴觸憲法之疑義，請求本院解釋，本院依法受理後，並得對與該判例有牽連關係之歧異見解，為統一解釋。本件行政法院判決所適用之判例與民事法院確定終局裁判，對於審判權限之見解歧異，應依上開說明解釋之。

binding judgment handed down by the civil court shall be resolved according to the foregoing.

Those state-owned enterprises that are formed according to the Company Act are private corporate bodies, and their relationships with their employees are contractual ones under private law. When there is a dispute over the termination of the contractual relationship between such state-owned enterprise and its employee, it shall be resolved in accordance with civil proceedings. The Supreme Administrative Court's Precedent T.T. 232 (Supreme Administrative Court, 1971) stating that the abovementioned state-owned enterprise has no capacity to be a party shall be interpreted as meaning that the administrative courts have no jurisdiction over issues rising from such state-owned enterprises; therefore, it is not in contravention to the Constitution. Nevertheless, with respect to those who are assigned by state or other public legal persons to serve the companies on their behalf according to Article 27 of the Company Act and those who are directly appointed and awarded

公營事業依公司法規定設立者，為私法人，與其人員間，為私法上之契約關係，雙方如就契約關係已否消滅有爭執，應循民事訴訟途徑解決。行政法院六十年度裁字第二三二號判例，認為此種公司無被告當事人能力，其實質意義為此種事件不屬行政法院之權限，與憲法尚無牴觸。至於依公司法第二十七條經國家或其他公法人指派在公司代表其執行職務或依其他法律逕由主管機關任用、定有官等、在公司服務之人員，與其指派或任用機關之關係，仍為公法關係，合併指明。

official ranks by the agencies-in-charge to serve the companies, their relationships with government agencies who assign or appoint them are still relationships of public law.

REASONING: People who bring suits to the administrative court and the civil court, respectively, based on the same incident and whose suits are rejected by both courts for lack of jurisdiction may file petitions to this Court for our interpretations if there is a question of whether the final and binding judgment handed down by one of the courts applied a precedent which was in contravention to the Constitution and hence caused the infringement of the constitutional guarantee of the right to institute legal proceedings. After we grant certiorari, we may make a unified interpretation to resolve different opinions among courts relating to the precedent at issue. The different opinions of jurisdiction between the precedent relied upon by the administrative court and the final and binding judgment handed down by the civil court shall be resolved according to the foregoing.

解釋理由書：人民就同一事件向行政法院及民事法院提起訴訟，均被法院以無審判之權限為由而予駁回，致其憲法上所保障之訴訟權受侵害，而對其中一法院之確定終局裁判所適用之判例，發生有牴觸憲法之疑義，請求本院解釋，本院依法受理後，並得對與該判例有牽連關係之歧異見解，為統一解釋。本件行政法院判決所適用之判例與民事法院確定終局裁判，對於審判權限之見解有所歧異，應依上開說明解釋之。

State-owned enterprises may be created in various forms. If the agencies-in-charge deem it appropriate to have the business decision-making process applicable to a given state-owned enterprise, they may decide to incorporate it based on the spirit of corporate autonomy and the principle of the separation of ownership and control. Though those state-owned enterprises formed according to the Company Act may be shorthanded as state-owned companies, legally they are private corporate bodies with independent legal personalities, capable of enjoying legal rights and of assuming legal obligations. Thus, state-owned companies as private corporate bodies may follow their own recruitment processes to mandate (appoint, retain or hire) their employees and enter into private law contractual relationships with them. Their acts of removing their employees from office are not the results of exercising public authority but the expressions of intent to terminate the employment contracts under private law, and their contractual relationships are therefore terminated accordingly. In spite of the fact that there are laws and regula-

公營事業之組織形態不一。如決策上認某種公營事業應採公司組織之形態，則係基於該種公營事業，適於以企業理念經營之判斷，自應本於企業自主之精神及企業所有與企業經營分離之原則為之。而在法律上，公營事業依公司法規定設立公司者，雖可簡稱為公營公司，但其性質仍為私法人，具有獨立之人格，自為權利義務之主體，享受權利，負擔義務。因之，公營公司與其人員間，係以私法人地位依其人事規章，經由委任（選任、聘任或僱用）之途徑，雙方成立私法上之契約關係，其對於人員之解任行為，並非行使公權力之結果，而係私法上終止契約之意思表示，契約關係因而消滅。縱令公營公司人員之任免考核事項，法令定為應由政府機關參與決定，此種內部行為亦係政府機關與公營公司間之另一監督關係，並不影響公營公司與其人員間契約關係之存在。倘雙方就此契約關係已否消滅有爭執，自應循民事訴訟途徑解決，而不屬行政法院之權限範圍。行政法院六十年度裁字第二三二號判例，認此種公營公司，無行政訴訟之被告當事人能力，係本於以往僅中央或地方機關，始有行政訴訟被告當事人能力之見解，此種見解，與本院釋字第二六九號解釋意

tions stipulating that government agencies shall take part in appointments, removals and evaluations of employees of state-owned companies, such participations reflect the supervisory relationships between government agencies and state-owned companies and will not affect the existence of the contractual relationships between state-owned companies and their employees. When there is a dispute over the termination of the contractual relationship between a state-owned enterprise and its employee, it shall be resolved in accordance with the civil proceedings, not administrative ones. The Supreme Administrative Court's Precedent T.T. 232 (Supreme Administrative Court, 1971) stipulates that the state-owned company has no capacity to be a party because the court at that time viewed only central or local agencies as having the capacities to be parties in administrative proceedings. Such a view has been overruled by us in J.Y. Interpretation No. 269 and the part of the Supreme Administrative Court's Precedent T.T. 232 in contravention to J.Y. Interpretation No. 269 shall no longer be applicable. Accordingly, the Supreme

旨不符部分，已不再援用，其實質意義，為此種事件不屬行政法院之權限範圍，既未限制人民民事訴訟之救濟途徑，與憲法尚無牴觸。至於依公司法第二十七條經國家或其他公法人指派在公司代表其執行職務或依其他法律逕由主管機關任用、定有官等、在公司服務之人員，與其指派或任用機關之關係，仍為公法關係，合併指明。

Administrative Court's Precedent T.T. 232 shall be interpreted as deeming that the administrative courts have no jurisdiction over issues arising from state-owned companies; therefore, it is not in contravention to the Constitution because it does not prevent people from instituting civil proceedings to redress their grievances. Nevertheless, with respect to those who are assigned by state or other public legal persons to serve the companies on their behalf according to Article 27 of the Company Act and those who are directly appointed and awarded official ranks by the agencies-in-charge to serve the companies, their relationships with government agencies who assign or appoint them are still relationships of public law.

Justice Chien-Hua Yang filed dissenting opinion in part.

Justice Rui-Tang Chen filed dissenting opinion in part.

本號解釋楊大法官建華、陳大法官瑞堂分別提出一部不同意見書。

J. Y. Interpretation No.306（October 16, 1992）*

ISSUE: Where a defense trial counsel in a criminal action brings an appeal under the Code of Criminal Procedure for the benefit of the accused, but fails to state in the appellate brief to the effect that the appeal is filed in the name of the accused, is such a defect in formality unalterable by amendment and does the court err in dismissing the appeal outright without first ordering an amendment to be made within a fixed time limit?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 338 of the Code of Criminal Procedure of the Republic of China promulgated on January 1, 1935 (re-named the Code of Criminal Procedure and re-numbered Article 346 by amendment made on January 28, 1967)（中華民國二十四年一月一日公布之中華民國刑事訴訟法第三百三十八條（五十六年一月二十八日修正時改為刑事訴訟法，條次改為第三百四十六條）; provisos to Articles 362, 367 and 384, respectively, of the current Code of Criminal Procedure（現行刑事訴訟法第三百六十二條但書、第三百六十七條但書、第三百八十四條但書）; J. Y. Interpretation Yuan-Je-Tze No. 3027（司法院院解字第三〇二七號解釋）; Supreme Court Precedent T.S.T. 2617 (Supreme Court 1964)（最高法院五十三年台上

* Translated by Raymond T. Chu.

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

字第二六一判例）; Supreme Court Precedent T.F.T. No. 20 (Supreme Court, 1980)（最高法院六十九年台非字第二〇號判例）.

KEYWORDS:

accused（刑事被告）, defense counsel at trial below（被告之原審辯護人）, matter of formality（程式問題）, appellate brief（上訴書狀）, unalterable（不可補正）, order an amendment（命為補正）, public defender（公設辯護人）, right of appeal（上訴權）, independent appeal（獨立上訴）, second trial（第二審）, defect in formality（程式欠缺）.**

HOLDING： It is held by our Interpretation Yuan-Je-Tze No. 3027 and by the Supreme Court Precedent T.S.T. 2617 (Supreme Court 1964) that an appeal brought for the benefit of the accused by the defense counsel at trial below must be filed in the name of the accused, and to that extent the holdings are not against the intent of the Constitution in protecting the right of action of the people. It has been pointed out in said holdings, however, that this is an issue of formality. In the event where the defense counsel at trial below has filed an appeal for the benefit of the accused but has only failed to put in the

解釋文： 本院院解字第三〇二七號解釋及最高法院五十三年台上字第二六一七號判例，謂刑事被告之原審辯護人為被告之利益提起上訴，應以被告名義行之，在此範圍內，與憲法保障人民訴訟權之意旨，尚無牴觸。但上開判例已指明此係程式問題，如原審辯護人已為被告之利益提起上訴，而僅未於上訴書狀內表明以被告名義上訴字樣者，其情形既非不可補正，自應依法先定期間命為補正，如未先命補正，即認其上訴為不合法者，應予依法救濟。最高法院與上述判例相關連之六十九年台非字第二〇號判例，認該項程式欠缺之情形為無可補正，與前述意旨不符，應不予

appellate brief such words as state that the appeal is brought in the name of the accused, the situation is not unalterable, and, that being so, the court must first order an amendment to be made within a specified period in pursuance of law. If, without first ordering such an amendment, the appeal is held outright to be non-conformable to law, a legal remedy must be allowed. A priori, the Supreme Court Precedent T.F.T. No. 20 (Supreme Court, 1980), which is related with the aforesaid Precedent, holding that such a defect in formality is unalterable, is inconsistent with the opinion given above and must be rendered unauthoritative.

援用。

REASONING: Article 338 of the Code of Criminal Procedure of the Republic of China promulgated on January 1, 1935 (re-named the Code of Criminal Procedure and re-numbered Article 346 when amended on January 28, 1967) provided: "An agent or counsel for the accused at trial below may appeal for the benefit of the accused unless such appeal is contrary to the clearly expressed intention of the accused." Based on this statute,

解釋理由書：中華民國二十四年一月一日公布之中華民國刑事訴訟法第三百三十八條（五十六年一月二十八日修正時名稱改為刑事訴訟法，條次改為第三百四十六條）規定：「原審之代理人或辯護人得為被告之利益而上訴。但不得與被告明示之意思相反。」司法院據此於三十四年十一月二十二日作成院解字第三〇二七號解釋：「刑事被告之原審辯護人，雖得依刑事訴訟法第三百三十八條，為被告利益提起上訴，但

the Judiciary Yuan delivered its Interpretation Yuan-Je-Tze No. 3027 on November 22, 1945, quoting: "While a counsel for the accused at trial below may appeal for the benefit of the accused under Article 338 of the Code of Criminal Procedure , it is not an independent appeal. Thus, the appeal must be filed in the name of the accused irrespective of whether the counsel is a public defender." Additionally, the Supreme Court held in its Precedent T.S.T. 2617 (Supreme Court, 1964): "While a counsel for the accused at trial below may appeal for the benefit of the accused, it is not an independent appeal. Thus, the appeal must be filed in the name of the accused. An appeal filed by the counsel in his own name is one non-conformable to the legally required formality." To that extent, the accused is not only subject to no restraint on his right of appeal, but may also save efforts and expenses and minimize the possibility of unnecessary delay by the appeal filed on his behalf by the counsel at trial below. It is therefore not against the intent of the Constitution in protecting the right of action of the people. Nevertheless, such an

既非獨立上訴，無論是否為公設辯護人，其上訴均應以被告名義行之。」最高法院五十三年台上字第二六一七號判例要旨亦謂：「刑事被告之原審辯護人雖得為被告利益提起上訴，但既非獨立上訴，其上訴應以被告名義行之。若以自己名義提起上訴，即屬違背法律上之程式。」在此範圍內，被告之上訴權，非僅未受限制，且因有原審辯護人之代為上訴，而可節省勞費、減少貽誤，與憲法保障人民訴訟權之意旨，尚無牴觸。但此種由原審辯護人以被告名義提起之上訴，係該辯護人之行為，而非被告之行為。其上訴書狀已否表明以被告名義上訴字樣，非被告所能注意。如上訴書狀未為此表明，上開判例亦指明乃係違背程式，其情形既非不可由原為上訴行為之該辯護人補正，依現行刑事訴訟法第三百六十二條但書、第三百六十七條但書、第三百八十四條但書等有關規定，法院或審判長，自仍應定期間先命補正。以免僅因辯護人對於上訴程式之疏忽，而使被告之上訴權受不測之損害。如未先命補正，即認其上訴為不合法而逕予駁回者，自應予以依法救濟。最高法院與上開判例相關連之六十九年台非字第二〇號判例謂：「原第二審選任之辯護律師，雖得為被告利益提起上

appeal, being filed by the counsel at trial below, albeit in the name of the accused, is an act of the counsel rather than of the accused, who has no way of examining the brief to see if it contains such words as indicate an appeal filed in his name. If the appellate brief contains no such words, it constitutes a noncompliance with the statutory formality as clearly indicated by the precedent cited above, and, to the extent that the situation is not unalterable by amendment to be made by the counsel initiating the act of appeal, it goes without saying that the court or the presiding judge must first order an amendment to be made within a specified time limit under the provisos to Articles 362, 367 and 384, respectively, of the current Code of Criminal Procedure , to avoid unexpected infringements upon the right of appeal of the accused simply because of the counsel's negligence in the form of the appeal. If, without first ordering such an amendment, the appeal is dismissed outright on the ground of non-compliance with law, a legal remedy must be allowed. A priori, the Supreme Court Precedent T.F.T. No.20 (Supreme Court, 1980), which is

訴，但其上訴係本於代理權作用，並非獨立上訴。乃竟不以被告名義行之，而以其自己名義提起，其上訴即難謂為合法。既無可補正，原第二審法院未定期間先命補正，亦難謂於法有違。」其中認該項程式欠缺之情形為無可補正部分，與前述意旨不符，應不予援用。

related with the aforesaid Precedent, holding that "while counsel at the second trial below is entitled to institute an appeal for the benefit of the accused, such an appeal is one based on agency rather than an independent appeal. Since the appeal in question was filed in the counsel's own name instead of in the name of the accused, it was not cognizable as a lawful appeal. As the defect is unalterable, the court of the second trial below did not err in law despite its having not first ordered an amendment to be made within a specified time limit" is inconsistent with the opinion given above insofar as the part of the decision holding that such defect in formality is unalterable is concerned and must therefore be rendered unauthorittive.

J. Y. Interpretation No.307（October 30, 1992）*

ISSUE: May the provincial or *hsien* governments set expenditure budgets for matters of the police administration, over which the central government shall exercise the power of legislation and administration, or may the power of administration be delegated to the provincial and *hsien* governments, according to the Constitution?

RELEVANT LAWS:

Article 108, Paragraph 1, Subparagraph 17; Article 109, Paragraph 1, Subparagraph 10; and Article 110, Paragraph 1, Subparagraph 9 of the Constitution（憲法第一百零八條第一項第十七款、第一百零九條第一項第十款、第一百十條第一項第九款）; Article 16, Paragraphs 1 and 2, of the Police Act（警察法第十六條第一項、第二項）.

KEYWORDS:

police system（警察制度）, jurisdiction of the central government（中央權限）, jurisdictional dispute（權限爭議）, budget（預算）.**

HOLDING: With respect to the police system, the central government shall exercise the power of legislation and administration, or may delegate the power

解釋文：警察制度，依憲法第一百零八條第一項第十七款規定，由中央立法並執行之或交由省縣執行之，中央就其交由省縣執行之事項，自得依法

* Translated by Pijan Wu.

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

of administration to the provincial and hsien governments, pursuant to Article 108, Paragraph 1, Subparagraph 17, of the Constitution. For the matters over which the central government delegates the power of administration to the provincial or hsien governments, the central government shall cover such matters in its own budget according to the legal procedures. Therefore, the provincial or hsien governments shall not repeatedly set budgets for the same matters. However, pursuant to Article 109, Paragraph 1, Subparagraph 10, and Article 110, Paragraph 1, Subparagraph 9, of the Constitution, the provincial government has jurisdiction over the administration of provincial police, while hsien governments have jurisdiction over hsien police and security. Therefore, the provincial or hsien governments shall cover such matters in the budget according to the legal procedures. In the event of any shortfall, the provincial government may apply with the central government, and the hsien government may apply with the provincial government, for subsidy according to Article 16, Paragraph 2, of the Police Act.

定程序編列預算，省縣無須重複編列。但省警政及縣警衛之實施，依憲法第一百零九條第一項第十款、第一百十條第一項第九款規定，則屬省縣之權限，省縣得就其業務所需經費依法定程序編列預算，如確屬不足時，得依警察法第十六條第二項規定呈請補助，省（直轄市）由中央補助，縣（市）由省補助。

REASONING: This issue is related to the interpretation of the jurisdictional dispute arising from the matters provided in Articles 108 to 110 of the Constitution. No judicial review for constitutionality is involved herein.

解釋理由書：本件係屬憲法第一百零八條至第一百十條列舉事項權限爭議之解釋，非關違憲審查問題，合先說明。

With respect to the police system, the central government shall exercise the power of legislation and administration, or may delegate the power of administration to the provincial and hsien governments, pursuant to Article 108, Paragraph 1, Subparagraph 17, of the Constitution. For the matters over which the central government delegates the power of administration to the provincial or hsien governments, the central government shall cover such matters in its own budget according to the legal procedures. Therefore, the provincial or hsien governments shall not set budgets for the same matters.

警察制度，依憲法第一百零八條第一項第十七款規定，由中央立法並執行之或交由省縣執行之，中央就其交由省縣執行之事項，自得依法定程序編列預算支付之，省縣無須重複編列。

With respect to the provincial police matters, the provincial government shall exercise the power of legislation and administration, or may delegate the power of administration to the hsien governments,

憲法第一百零九條第一項第十款規定「省警政之實施」，由省立法並執行之或交由縣執行之；第一百十條第一項第九款規定「縣警衛之實施」，由縣立法並執行之。省警政及縣警衛之實施

pursuant to Article 109, Paragraph 1, Subparagraph 10, of the Constitution. Furthermore, the hsien governments shall exercise the power of legislation and administration over the hsien police and security, pursuant to Article 110, Paragraph 1, Subparagraph 9, of the Constitution. Since the provincial and hsien governments have jurisdiction over the administration of their police security, respectively, the provincial and hsien governments shall cover such matters in the budget according to legal procedures. Nevertheless, the administration of certain provincial or hsien police matters requires nationwide consistency and involves the jurisdiction of the central government. Therefore, Article 16, Paragraph 1, of the Police Act, which was enacted by the central government under Article 108, Paragraph 1, Subparagraph 17, of the Constitution, provides that "the central government shall stipulate the budget standard for local police agencies according to the conditions of the respective areas." This is the standard by which the provincial and hsien governments set the expenditure budget for the police administration.

事項，既屬省縣之權限，省縣自得就其業務所需經費，依法定程序編列預算。惟省警政及縣警衛之實施，其中有須全國一致或涉及中央權限者，因此，中央依憲法第一百零八條第一項第十七款制定之警察法第十六條第一項規定：「地方警察機關預算標準，由中央按各該地區情形分別規劃之。」省警政及縣警衛之實施，其所需經費之預算，須依上述標準編列，如確屬不足時，得依同條第二項規定呈請補助，省（直轄市）由中央補助，縣（市）由省補助。地方對於此項補助，雖不得變更其用途，省（直轄市）縣（市）議會仍得依法監督其執行。

In the event of any shortfall, the provincial government may apply with the central government, and the hsien government may apply with the provincial government, for subsidy according to Article 16, Paragraph 2, of the Police Act. While the local governments may not use the subsidies other than for the designated purpose, the provincial and hsien councils may monitor the allocation of such subsidies according to the law.

Justice Chien-Hua Yang filed dissenting opinion.

本號解釋楊大法官建華提出不同意見書。

J. Y. Interpretation No.308（November 13, 1992）*

ISSUE: Are public schools teachers in the category of public functionaries as referred to the Public Functionary Service Act?

RELEVANT LAWS:

Article 24 of the Public Functionary Service Act（公務員服務法第二十四條）; J. Y. Interpretation Yuan-je Tze No. 2986（司法院院解字第二九八六號解釋）; Article 34 of the Educators Appointment Act（教育人員任用條例第三十四條）.

KEYWORDS:

public functionaries（公務員）, public schools teachers（公立學校聘任之教師）, teachers serving concurrently as administrators of school affairs（兼任學校行政職務之教師）.**

HOLDING: Public schools teachers are not in the category of public functionaries as referred to in Article 24 of the Public Functionary Service Act. However, the Public Functionary Service Act shall apply to teachers who serve concurrently as administrators of school affairs in their administrative offices. The

解釋文：公立學校聘任之教師不屬於公務員服務法第二十四條所稱之公務員。惟兼任學校行政職務之教師，就其兼任之行政職務，則有公務員服務法之適用。本院院解字第二九八六號解釋，應予補充。至專任教師依教育人員任用條例第三十四條規定，除法令另有規定外，仍不得在外兼職。

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* Translated by John C. Chen, Attorney at Law.

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Interpretation Yuan-je Tze No. 2986 is hereby supplemented. Under Article 34 of the Educators Appointment Act, full-time teachers are not permitted to undertake other employment while employed in that capacity unless otherwise provided for by laws.

REASONING: Unlike public functionaries who serve in accordance with applicable laws and obey their supervisors, teachers in public schools are engaged under a contract of appointment to perform educational and research work and therefore do not belong to the category of public functionaries as referred to in Article 24 of the Public Functionaries Service Act. However, if teachers also serve concurrently as administrators of school affairs, the Public Functionaries Service Act shall apply to these teachers in respect of their administrative offices. The Interpretation Yuan-je Tze No. 2986 states that teachers of public primary and secondary schools and salaried municipal librarians are public functionaries as referred to in Article 24 of the Public Functionary Service Act, but public schools

解釋理由書：公立學校聘任之教師係基於聘約關係，擔任教學研究工作，與文武職公務員執行法令所定職務，服從長官監督之情形有所不同，故聘任之教師應不屬於公務員服務法第二十四條所稱之公務員。惟此類教師如兼任學校行政職務，就其兼任之行政職務，仍有公務員服務法之適用。本院院解字第二九八六號解釋：「委任之公立中小學校教職員及縣立圖書館長受有俸給者，均為公務員服務法上之公務員，其聘任之教職員則否。」其中關於聘任之教師部分，應予補充。至教師之行為仍受國家其他有關法令及聘約之拘束，並應有其倫理規範。專任教師依教育人員任用條例第三十四條規定，除法令另有規定外，不得在外兼課或兼職。

teachers are not, requires further supplementation to clarify the position of appointed teachers. Teachers' behavior shall be governed by applicable laws and the appointment contracts and regulated by the rules of ethics. Unless otherwise provided by laws, full-time teachers are not permitted to hold other employment concurrently under Article 34 of the Educators Appointment Act.

Justice Chien-Hua Yang filed dissenting opinion.

本號解釋楊大法官建華提出不同意見書。

J. Y. Interpretation No.309（November 27, 1992）*

ISSUE: Is Article 83-1 of the Income Tax Act constitutional in granting the taxing authority the power to investigate the net worth, funds flow and business data of a taxpayer suspected of material tax evasion?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 83-1 of the Income Tax Act（所得稅法第八十三條之一）.

KEYWORDS:

tax evasion（逃漏稅）, taxing authority（稽徵機關）, burden of proof（舉證責任）, rebuttal evidence（反證）, net asset value（資產淨值）, funds flow（資金流程）, irregular course of business（不合營業常規）, indirect evidence（間接證據）.**

HOLDING: The Income Tax Act as amended on December 30, 1982, provides in Article 83-1: "If an officer appointed by a taxing authority or the Ministry of Finance finds in the course of investigation that the taxpayer is suspected of material tax evasion, he may, subject to approval of the Ministry of

解釋文：中華民國七十一年十二月三十日修正公布之所得稅法第八十三條之一規定：「稽徵機關或財政部指定之調查人員進行調查時，如發現納稅義務人有重大逃漏稅嫌疑，得視案情需要，報經財政部核准，就納稅義務人資產淨值、資金流程及不合營業常規之營業資料進行調查。」「稽徵機關就前項

* Translated by Raymond T. Chu.

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Finance, conduct an investigation of the net asset value, funds flow, and the business data relating to any irregular course of business of the taxpayer to the extent necessary under the circumstances of the case." And furthermore:" Where the taxing authority, as a result of the investigation carried out under the preceding paragraph, proves that the taxpayer has committed an act of tax evasion, the taxpayer shall bear the burden of proof to show such facts as he may allege in his favor." These provisions are intended to prescribe by law in explicit words how to conduct the investigation in case of suspicion of material tax evasion and to allow the taxpayer the opportunity to produce rebuttal evidence to protect his right and interest if the result of the investigation makes the taxing authority believe that there is sufficient evidence of tax evasion. We do not find such provisions to be in conflict with the Constitution.

資料調查結果，證明納稅義務人有逃漏稅情事時，納稅義務人對有利於己之事實，應負舉證之責。」係對有重大逃漏稅嫌疑之案件，以法律明定其調查方法，如依調查結果，認為足以證明有逃漏稅情事時，並許納稅義務人提出反證，以維護其權益，與憲法尚無牴觸。

REASONING: The Income Tax Act as amended on December 30, 1982 provides in Article 83-1: "If an officer appointed by a taxing authority or the

解釋理由書：中華民國七十一年十二月三十日修正公布之所得稅法增列第八十三條之一規定：「稽徵機關或財政部指定之調查人員進行調查時，如

Ministry of Finance finds in the course of investigation that the taxpayer is suspected of material tax evasion, he may, subject to approval of the Ministry of Finance, conduct an investigation of the net asset value, funds flow, and the business data relating to any irregular course of business of the taxpayer to the extent necessary under the circumstances of the case." And furthermore: "Where the taxing authority, as a result of the investigation carried out under the preceding paragraph, proves that the taxpayer has committed an act of tax evasion, the taxpayer shall bear the burden of proof to show such facts as he may allege in his favor." These provisions are intended to prescribe by law in explicit words that that the taxing authority may, in case of suspicion of material tax evasion, conduct an investigation of such indirect evidence as the net asset value, funds flow, and the business data relating to any irregular course of business of the taxpayer for the purpose of assessing and determining the income thereof, and that, if the result of the investigation, upon reasonable judgment, makes the taxing authority believe that

發現納稅義務人有重大逃漏稅嫌疑，得視案情需要，報經財政部核准，就納稅義務人資產淨值、資金流程及不合營業常規之營業資料進行調查。」「稽徵機關就前項資料調查結果，證明納稅義務人有逃漏稅情事時，納稅義務人對有利於己之事實，應負舉證之責。」係對有重大逃漏稅嫌疑之案件，以法律明定稽徵機關得就納義務人之資產淨值、資金流程及不合營業常規之營業資料等間接證據進行調查，而核算其所得額，如依調查結果，經合理之判斷，認為足以證明有逃漏稅情事時，並許納稅義務人就有利於己之事實提出反證，以維護其權益，與憲法尚無牴觸。此項規定僅為發見真實而設，不生溯及既往問題，併此指明。

there is sufficient evidence of tax evasion, the taxpayer is allowed the opportunity to produce rebuttal evidence with respect to such facts as he may allege in his favor in order to protect his right and interest. We do not find such provisions to be in conflict with the Constitution. Apropos, the provisions are designed for the purpose of finding the truth, and do not give rise to any problem of retroactive application.

J. Y. Interpretation No.310（December 11, 1992）*

ISSUE: Is the interpretative letter issued by the Ministry of Interior, which states that the labor insured who, upon his retirement, had received old-age benefits, shall not be entitled to make further claim for injury and sickness benefits, constitutional?

RELEVANT LAWS:

Articles 20, 33 and 58, Paragraph 1 of the Labor Insurance Act（勞工保險條例第二十條、三十三條、第五十八條第一項）.

KEYWORDS:

labor insurance（勞工保險）; injury benefits（普通傷害補助費）; illness benefits（普通疾病補助費）; old-age benefits（老年給付）.**

HOLDING: The injury and illness benefits stipulated in the Labor Insurance Act are subsidies payable to workers who cannot work and subsequently are unable to receive their original wages due to injury and illness, while the old-age retirement benefits are for those workers retiring from their jobs who con-

解釋文：勞工保險條例規定之傷病給付，乃對勞工因傷病不能工作，致未能取得原有薪資所為之補助，與老年給付係對勞工因退職未能獲取薪資所為之給付，兩者性質相同，其請領老年給付者，自不應重複請領傷病給付。內政部中華民國六十九年六月十三日臺內社字第一七七三一號函示：「被保險人

* Translated by Mr. Cing-Kae Chiao.

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sequently will no longer receive their wages. Both types of benefits are of the same nature and thus those workers applying for old-age benefits are disqualified from concurrent application for injury and illness benefits. The interpretative letter issued by the Ministry of Interior titled Tai-Ney-Sheh-Tzeyh No. 17731 on June 13, 1980, states that "those workers retiring from their jobs and withdrawing from the Labor Insurance Program in accordance with related regulations and applying for old-age benefits are not allowed to apply for injury and illness benefits as stipulated in Article 20 of the Labor Insurance Act." The letter is in line with the above meaning and reasoning, and therefore, cannot be deemed as contrary to the Constitution.

退職，依規定退保，並請領老年給付者，自不得再依勞工保險條例第二十條規定，請領傷病給付」，與上述意旨相符，尚不牴觸憲法。

REASONING: In accordance with Article 33 of the Labor Insurance Act which stipulates that "in case an insured person is unable to work and cannot receive his regular wages due to an ordinary injury and illness for which he (or she) is hospitalized and under medical treatment, he (or she) shall receive ordi-

解釋理由書：依勞工保險條例第三十三條規定：「被保險人遭遇普通傷害或普通疾病住院診療不能工作，以致未能取得薪資，正在治療中者，自不能工作之第四日起，發給普通傷害補助費及普通疾病補助費」，顯見傷病給付，乃對勞工因傷病不能工作，致未能取得原有薪資所為之補助。而同條例第

nary injury or illness benefits upon the fourth day on which he (or she) is unable to work." It is clear that injury or illness benefits are subsidies for those workers who are unable to work and subsequently unable to receive their regular wages. Besides, Article 58, Paragraph 1, of the same Act also stipulates that once a certain level of seniority has been reached by a person who enrolls in the Labor Insurance Program, the insured person is entitled to retire from his (or her) job. The old-age benefits, which an insured person is qualified to apply for, are also a payment given to a worker who is retiring from his (or her) job. Both types of benefits are of the same nature, and those workers who are applying for old-age benefits are disqualified from concurrent application for injury or illness benefits. Article 20, Paragraph 1, first sentence, of the Labor Insurance Act, stipulates that "an insured person is entitled to enjoy the rights of insurance benefits within one year after the validity of his (or her) insurance has ended, if the incident of the injury or illness occurred during the period his (or her) insurance coverage was valid, and he (or she) has

五十八條第一項各款規定，被保險人參加保險之年資合計達一定年限，而退職者，得請領之老年給付，亦係對勞工因退職未能獲取薪資所為之給付，兩者性質相同，其請領老年給付者，自不能重複請領傷病給付。至勞工保險條例第二十條第一項前段規定「被保險人在保險有效期間所發生之傷病事故，於保險效力停止後，必須連續請領傷病給付或住院診療給付者，一年內，仍可享有該項保險給付之權利」，其中所稱保險效力之停止，並非以退職為唯一原因，如被保險人退職，且已請領老年給付者，自應依前開說明辦理。內政部中華民國六十九年六月十三日臺內社字第一七七三一號函示：「被保險人退職，依規定退保，並請領老年給付者，自不得再依勞工保險條例第二十條規定，請領傷病給付」，與上述意旨相符，尚不牴觸憲法。

continuously applied for injury or illness benefits or received hospitalization for medical treatment." The end of the validity of insurance referred to above does not specify leaving one's job as an exclusive cause. Therefore, if an insured person is retiring from his (or her) job and has applied for old-age benefits, he (or she) is obliged to make the adjustments based on the abovementioned statements. Accordingly, the interpretative letter issued by the Ministry of Interior on June 13, 1980, titled Tai-Ney-Sheh-Tzyh No. 17731, states that "those workers retiring from their jobs and withdrawing from the Labor Insurance Program in accordance with related regulations and applying for old-age benefits are not allowed to apply for injury and illness benefits as stipulated in Article 20 of the Labor Insurance Act." The letter is in line with the above meaning and reasoning and, therefore, is not contrary to the Constitution.

J. Y. Interpretation No.311（December 23, 1992）*

ISSUE: Where an heir is late in declaring and paying the estate tax and as a result the market price of the estate inherited by him has become higher than the value of the property at the date of death of the decedent, is it constitutional for the Estate and Gift Taxes Act to require that estate tax be levied on the basis of such increased value?

RELEVANT LAWS:

Article 13 of the Constitution（憲法第十三條）; Article 10, Paragraph 1, first sentence and Article 44 of the Estate and Gift Taxes Act（遺產及贈與稅法第十條第一項前段、第四十四條）; Article 48-1, Paragraph 1, proviso of the Tax Levy Act（稅捐稽徵法第四十八條之一第一項但書）; Article 31, Paragraph 2 of the Land Tax Act（土地稅法第三十一條第二項）; Article 38, Paragraph 2, second sentence of the Equalization of Land Rights Act（平均地權條例第三十八條第二項後段）.

KEYWORDS:

estate tax（遺產稅）, value of the estate（遺產價值）, market price（時價）, late declaration（逾期申報）, double punishment（重複處罰）, passive interest（消極利益）, land value increment tax（土地增值稅）, government-declared value of land（土地公告現值）, Directorate General of Postal Remittances and Saving Bank（郵政儲金匯業局）.**

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* Translated by Raymond T. Chu.

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HOLDING: The Estate and Gift Taxes Act provides, in Article 10, Paragraph 1, first sentence, that for the purpose of imposition of estate tax, the value of the estate is determined according to its market price prevailing at the time of death of the decedent. In the case of late declaration of the estate tax, however, the proviso to the same paragraph makes the market price at the date of overdue declaration the value of the estate if it is higher than the market price at the date of death of the decedent. While the legislative purpose of this provision is to prevent the taxpayer from adopting tricky wait-and-see tactics, the fact that this provision, requiring that the market price subsequent to increase of the value of the estate be taken as the basis for assessment of the value of the estate, is incorporated in the same Act in parallel with the penal provisions laid down in Article 44 thereof, gives rise to the doubt of double punishment, and must therefore be reviewed and amended promptly. As regards the proviso to Paragraph 1, Article 48-1, of the Tax Levy Act, whereby interest is made accruable and collectible together with the

解釋文：遺產稅之徵收，其遺產價值之計算，以被繼承人死亡時之時價為準，遺產及贈與稅法第十條第一項前段定有明文。對逾期申報遺產稅者，同項但書所為：如逾期申報日之時價，較死亡日之時價為高者，以較高者為準之規定，固以杜絕納稅義務人取巧觀望為立法理由，惟其以遺產漲價後之時價為遺產估價之標準，與同法第四十四條之處罰規定並列，易滋重複處罰之疑慮，應從速檢討修正。至稅捐稽徵法第四十八條之一第一項但書規定加計利息，一併徵收，乃因納稅義務人遲繳稅款獲有消極利益之故，與憲法尚無牴觸。

tax, we hold it is not contrary to the Constitution as the taxpayer, by late payment of the tax, has earned passive interest therefrom.

REASONING: Inheritance commences upon death of the decedent, and the heir thereupon begins to assume all obligations and rights with respect to the property of the decedent. This is also the time the obligation of the heir to pay estate tax occurs, and it explains the reason that the Estate and Gift Taxes Act provides in Article 10, Paragraph 1, first sentence, that for the purpose of imposition of estate tax, the value of the estate is determined according to its market price prevailing at the time of death of the decedent. In the case of late declaration of the estate tax, however, the proviso to the same paragraph makes the market price at the date of overdue declaration the value of the estate if it is higher than the market price at the date of death of the decedent. While the legislative purpose of this provision is to prevent the taxpayer from adopting tricky wait-and-see tactics, the fact that this provision, requiring that the

解釋理由書：繼承因被繼承人死亡而開始，被繼承人死亡，繼承人即承受被繼承人財產上之一切權利義務，繼承人繳納遺產稅之義務亦應自此時發生，遺產及贈與稅法第十條第一項前段規定：遺產價值之計算，以被繼承人死亡時之時價為準，即係本此意旨。對逾期申報遺產稅者，同項但書所為：如逾期申報日之時價，較死亡日之時價為高者，以較高者為準之規定，固以杜絕納稅義務人取巧觀望為其立法理由。惟其將繼承人已取得遺產權利後所增加之財產價值，亦列入遺產範圍，從高估價，與同法第四十四條另規定納稅義務人未依限辦理遺產稅申報者，按核定應納稅額加處一倍至二倍之罰鍰，兩者並列，又未設擇一適用之規定，易滋重複處罰之疑慮。而因繼承取得之土地，再行移轉者，就其土地漲價之部分徵收土地增值稅，依土地稅法第三十一條第二項及平均地權條例第三十八條第二項後段，則又以繼承開始時公告現值為計算之基準，相關法令應如何配合，均應從速檢

value of the property increased after the heir acquired the right to the estate be included in the estate for higher assessment, is incorporated in the same Act in parallel with Article 44, which imposes on the taxpayer who fails to declare the estate tax within the specified time limit a penalty in sum equal to or twice the amount of the tax payable, without allowing any choice of application between them, gives rise to the doubt of double punishment. In contrast, in the case of re-transfer of land acquired by inheritance, a land value increment tax is levied on the amount of increase in the land value. Under Article 31, Paragraph 2, of the Land Tax Act and Article 38, Paragraph 2, second sentence, of the Equalization of Land Rights Act, however, land value increment tax is computed on the basis of the government-declared value of the land at the time of commencement of the inheritance. Thus, the relevant laws must be reviewed and amended for the purpose of reconciliation promptly. As regards the proviso to Paragraph 1, Article 48-1, of the Tax Levy Act, which states: "An interest shall be paid together with the tax amount made

討修正。至稅捐稽徵法第四十八條之一第一項但書規定：「其補繳之稅款，應自該項稅捐原繳納期限截止之次日起，至補繳之日止，就補繳之應納稅捐，依原應繳納稅款期間屆滿之日郵政儲金匯業局之一年期定期存款利率，按日加計利息，一併徵收」，乃因納稅義務人遲繳稅款獲有消極利益之故，與憲法尚無牴觸。

up by the taxpayer, for each day in arrears from the date following the last day of the initial time limit for the payment of such tax until the date of such make-up payment, at the interest rate paid by the Directorate General of Postal Remittances and Savings Bank for one-year time deposit and prevailing at the date of expiration of the initial time limit for payment of such tax," we hold it is not contrary to the Constitution as the taxpayer, by late payment of the tax, has earned passive interest therefrom.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

Justice Rui-Tang Chen filed dissenting opinion.

本號解釋鄭大法官健才提出一部及理由不同意見書；陳大法官瑞堂提出不同意見書。

J. Y. Interpretation No.312（January 29, 1993）*

ISSUE: May a public functionary seek remedy through administrative appeals and litigation with respect to infringement of his/her public-law property right, i.e., the government agency's rejection of his/her application for the mutual assistance fund?

RELEVANT LAWS:

Article 15 and 83 of the Constitution（憲法第十五條及第八十三條）; the Regulation Governing the Fringe Benefits and Mutual Assistance for Civil and Teaching Personnel of Central Government（中央公教人員福利互助辦法）; J. Y. Interpretations Nos.187, 201 and 266（司法院釋字第一八七號、第二〇一號、第二六六號解釋）; Administrative Court Precedent 53-Pan-No.229（行政法院五十三年判字第二二九號判例）.

KEYWORDS:

public functionary（公務人員）, property right（財產權）, public-law（公法）, retirement（退休）, fringe benefits and mutual assistance fund（福利互助金）, administrative appeal（訴願）, administrative litigation（行政訴訟）.**

HOLDING: In the event a public functionary's property right under the public law is infringed, remedies may be

解釋文：公務人員之公法上財產請求權，遭受損害時，得依訴願或行政訴訟程序請求救濟。公務人員退休，

* Translated by Pijan Wu.

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sought through the procedures of administrative appeal or litigation. The application for the mutual assistance fund, according to the law, upon a public functionary's retirement is his/her exercise of property right under the public law. Any dispute related thereto should be resolved through the abovementioned procedures. Interpretations Nos.187, 201 and 266 shall be supplemented by this Interpretation.

依據法令規定請領福利互助金，乃為公法上財產請求權之行使，如有爭執，自應依此意旨辦理。本院釋字第一八七號、第二〇一號及第二六六號解釋應予補充。

REASONING：The protection of the people's property rights is clearly provided in Article 15 of the Constitution. Such rights should not be compromised even if the person is appointed as a public functionary and the public-law relationship of dutiful services for the state is created. The property rights of a public functionary, whether based on public law or private law, shall be protected by the state and legal remedies should be available in the event of infringement. Therefore, public functionaries may enjoy stable lives and dedicate themselves to public service. Thus, the purpose of Article 83 of the Constitution to safeguard the property rights of public functionaries may be

解釋理由書：人民之財產權應予保障，憲法第十五條定有明文。此項權利不應因其被任命為公務人員，與國家發生公法上之忠勤服務關係而受影響。公務人員之財產權，不論其係基於公法關係或私法關係而發生，國家均應予以保障，如其遭受損害，自應有法律救濟途徑，以安定公務人員之生活，使其能專心於公務，方符憲法第八十三條保障公務人員之意旨。

achieved.

The Regulation Governing the Fringe Benefits and Mutual Assistance for Civil and Teaching Personnel of Central Government, as promulgated by the Executive Yuan, and the similar regulations made by other agencies are intended for the administrative purpose of stabilizing the lives of public functionaries. Government funds are also injected into these funds. Therefore, these funds are of the nature of public law. The judicial relief system, as it is now, is divided into civil litigations and administrative litigations. Since a retiring public functionary's application for the mutual assistance fund according to the abovementioned law is the exercise of a public-law property right, the rejection by the relevant authority shall be an infringement of property rights as protected by the Constitution. Therefore, administrative appeal and litigations should be allowed for remedies. Nevertheless, the Administrative Court Precedent 53-Pan-No.229 stated that "an administrative disposition imposed upon a public functionary is strictly within the

行政院發布之中央公教人員福利互助辦法或其他機關自行訂定之福利互助有關規定，係各機關為安定公務人員生活之行政目的而實施之法令，並有提供公款予以補助者，具有公法性質。現行司法救濟程序，既採民事訴訟與行政爭訟區分之制度，公務人員退休，依據上述法令規定，請領福利互助金，乃屬公法上財產請求權之行使，如遭有關機關拒絕，將影響其憲法所保障之財產權，依上開意旨，自應許其提起訴願或行政訴訟，以資救濟。至行政法院五十三年判字第二二九號判例前段所稱：「公務員以公務員身分受行政處分，純屬行政範圍，非以人民身分因官署處分受損害者可比，不能按照訴願程序提起訴願」等語，不問處分之內容如何，一律不許提起訴願，與上述意旨不符，應不再援用，迭經本院解釋在案。本院釋字第一八七號、第二〇一號及第二六六號解釋應予補充。

scope of public administration, and is not analogous to the cases in which the people's right is infringed upon by the government agencies' dispositions; therefore, administrative appeals are not allowed." Since the Precedent does not distinguish the types of dispositions, and administrative appeals are rejected across the board, such precedent is inconsistent with the above principle and shall no longer be applied. The Judicial Yuan has rendered several interpretations on this point. Interpretations Nos.187, 201 and 266 shall be supplemented by this Interpretation.

Justice Chih-Peng Lee filed dissenting opinion.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

本號解釋李大法官志鵬提出不同意見書；鄭大法官健才提出一部不同意見書。

J. Y. Interpretation No.313（February 12, 1993）*

ISSUE: Shall Article 46 of the Regulation Governing the Management of the Business of Civil Aviation be declared unconstitutional?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 87, Subparagraph 7 and 92 of the Civil Aviation Act（民用航空法第八十七條第七款及第九十二條）; Articles 29, Paragraph 1 and 46 of the Regulation Governing the Management of the Business of Civil Aviation（民用航空運輸業管理規則第二十九條第一項及第四十六條）.

KEYWORDS:

imposition of administrative fines（科處行政罰鍰）, administrative law（行政法）.**

HOLDING: The imposition of administrative fines upon any person who violates an obligation under the administrative law involves a restriction on the rights of such person. Therefore, the conditions triggering the sanction and its amount shall be set forth by law. In case the law authorizes the promulgation of a

解釋文：對人民違反行政法上義務之行為科處罰鍰，涉及人民權利之限制，其處罰之構成要件及數額，應由法律定之。若法律就其構成要件，授權以命令為補充規定者，授權之內容及範圍應具體明確，然後據以發布命令，始符憲法第二十三條以法律限制人民權利之意旨。民用航空運輸業管理規則雖係

* Translated by LEE & LI, ATTORNEYS-AT-LAW.

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regulation to supplement such triggering conditions, the contents and scope of such authorization shall be concrete and clear so that the regulation promulgated according to such law may be in compliance with Article 23 of the Constitution, which requires any restriction on the rights of the people to be set forth by law. Though the Regulation Governing the Management of the Business of Civil Aviation (hereinafter the "Regulation") are promulgated in accordance with Article 92 of the Civil Aviation Act (hereinafter the "Act"), for an administrative sanction imposed under Article 46 of the Regulation by reference to Article 87, Subparagraph 7, of the Act against a violation of Article 29, Paragraph 1, of the Regulation, the basis of its legal authorization is not clear, and, therefore, not in compliance with the above-mentioned principle. It shall become null and void no later than one year after this interpretation is issued.

依據民用航空法第九十二條而訂定，惟其中因違反該規則第二十九條第一項規定，而依同規則第四十六條適用民用航空法第八十七條第七款規定處罰部分，法律授權之依據，有欠明確，與前述意旨不符，應自本解釋公布日起，至遲於屆滿一年時，失其效力。

REASONING: The imposition of administrative fines upon any person who violates an obligation under the administrative law involves a restriction on

解釋理由書：對人民違反行政法上義務之行為科處罰鍰，涉及人民權利之限制，其處罰之構成要件及數額，應由法律定之。若法律就其構成要件，

the rights of such person. Therefore, the conditions triggering the sanction and its amount shall be set forth by law. In case the law authorizes the promulgation of a regulation to supplement such triggering conditions, the contents and scope of such authorization shall be concrete and clear so that the regulation promulgated according to such law may be in compliance with Article 23 of the Constitution, which requires any restriction on the rights of the people to be set forth by law. The Regulation was promulgated pursuant to the authorization under Article 92 of the Act. Article 29, Paragraph 1, of the Regulation provides: "The civil aviation business shall not carry passengers who do not hold an ROC visa or entry permit to the ROC." Said Paragraph was added by the Ministry of Transportation and Communications on September 15, 1988, in response to the lifting of Martial Law. A civil aviation business violating this rule is subject to punishment under Article 87, Subparagraph 7, of the Act by virtue of Article 46 of the Regulation. However, there is a lack of clear authorization for such punishment, which, therefore, is not

授權以命令為補充規定者，授權之內容及範圍應具體明確，然後據以發布命令，始符合憲法第二十三條以法律限制人民權利之意旨。民用航空運輸業管理規則雖係依據民用航空法第九十二條授權而訂定，惟其中第二十九條第一項：「民用航空運輸業不得搭載無中華民國入境簽證或入境證之旅客來中華民國」，係交通部於中華民國七十七年九月十五日修正時，為因應解除戒嚴後之需要而增訂。民用航空業因違反此項規定而依同規則第四十六條適用民用航空法第八十七條第七款處罰部分，法律授權之依據，有欠明確，與前述意旨不符，應自本解釋公布日起，至遲於屆滿一年時，失其效力。至民用航空法第八十七條第七款規定：「其他違反本法或依本法所發布命令者」，一律科處罰鍰（同法第八十六條第七款亦同），對應受行政罰制裁之行為，作空泛而無確定範圍之授權，自亦應一併檢討，併此指明。

in compliance with the abovementioned principle. It shall become null and void no later than one year after this interpretation is issued. As to Article 87, Subparagraph 7, of the Act, which imposes administrative fines against "any other violation of this law or regulations promulgated pursuant to this law" (See also Article 86, Subparagraph 7), this provision contains a broad authorization without definitive scope with respect to the acts subject to such administrative sanction. Therefore, it should also be reviewed.

J. Y. Interpretation No.314（February 25, 1993）*

ISSUE: Shall the National Assembly, during any extraordinary session not convened for the purpose of amending the Constitution, nevertheless exercise the power to amend the Constitution?

RELEVANT LAWS:

Articles 29, 30 and 174 of the Constitution（憲法第二十九條、第三十條、第一百七十四條）; Paragraphs 4 and 5 of the Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion（動員戡亂時期臨時條款第四項、第五項）; Articles 6 and 11 of the Amendments to the Constitution（憲法增修條文第六條、第十一條）.

KEYWORDS:

extraordinary session of the National Assembly（國民大會臨時會）, amendments to the Constitution（修憲）.**

HOLDING: Given that the Constitution is the fundamental basis and supreme law of the country, any amendment thereof greatly affects the stability of constitutional order and the well-being of all the people. Consequently, the people

解釋文：憲法為國家根本大法，其修改關係憲政秩序之安定及國民之福祉至鉅，應使國民預知其修改之目的並有表達意見之機會。國民大會臨時會係依各別不同之情形及程序而召集，其非以修憲為目的而召集之臨時會，自

* Translated by Wei-Feng Huang of THY Taiwan International Law Offices.

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should be provided with an opportunity to know the purpose of any amendment to the Constitution and have the opportunity to express their opinions prior to such amendment to the Constitution. Extraordinary sessions of the National Assembly are convened pursuant to different requirements and procedures; hence, the National Assembly, during any extraordinary session not convened for the purpose of amending the Constitution, may nevertheless not exercise the power to amend the Constitution. Interpretation No. 29 of this Yuan should thus be further supplemented.

不得行使修改憲法之職權，本院釋字第二十九號解釋應予補充。

REASONING: Interpretation No. 29 of this Yuan clearly states that "In the event one of the circumstances enumerated under Article 30 of the Constitution occurs and the National Assembly convokes an extraordinary session, the authority discharged is nevertheless part of the power and duty of the National Assembly and the National Assembly convoked in accordance with Article 29 of the Constitution may naturally exercise such authority." This interpretation is

解釋理由書：國民大會遇有憲法第三十條列舉情形之一，召集臨時會時，其所行使之職權，仍係國民大會職權之一部分，依憲法第二十九條召集之國民大會，自得行使之，前經本院釋字第二十九號解釋釋示在案。該項解釋係就國民大會依憲法第二十九條定期集會時得行使之職權所為之釋示，非謂國民大會臨時會不問召集之原因及程序如何，均得行使國民大會之全部職權。

merely an elucidation of how the National Assembly may exercise its power during an annual assembly in accordance with Article 29 of the Constitution, but it does not mean that all the powers of the National Assembly may be exercised during any of the extraordinary sessions regardless of what the grounds and procedures of convocation are.

The Constitution is the fundamental basis and supreme law of the country and as such, any material and substantial matters of the nation, including but not limited to, the state system, the governmental forms, matters involving the rights and obligations of the people, and the division of powers between the central and local governments, shall be regulated by the Constitution. Consequently, given that any amendment to the Constitution would greatly affect the stability of constitutional order and the well-being of all the people, the people should, therefore, be provided with an opportunity to know the purpose of any amendment to the Constitution and have the opportunity to express their opinions prior to such amendment to the Con-

憲法為國家根本大法，舉凡國體、政體、人民之權利義務及中央與地方權限之劃分等重大事項，均賴憲法有所明定。故憲法之修改關係憲政秩序之安定及國民之福祉至鉅，應使全國國民預知其修改之目的並有表達意見之機會，國民大會代表亦得藉此瞭解民意之所在，俾其行使職權能符合全國國民之合理期待與信賴。憲法第一百七十四條第二款規定，立法院擬定提請國民大會複決之憲法修正案，應於國民大會開會前半年公告之。行憲以來國民大會於中華民國三十七年五月十日公布之動員戡亂時期臨時條款第四項明定，第一屆國民大會應由總統至遲於三十九年十二月二十五日以前召集臨時會，討論有關修改憲法各案；四十九年三月十一日修改之同條款第四項及第五項規定，由總統

stitution. Furthermore, members of the National Assembly should take the will of the public into consideration in the exercise of their power so as to live up to the reasonable expectation and trust of all the people. Subparagraph 2 of Article 174 of the Constitution stipulates that the constitutional amendments proposed by the Legislative Yuan and submitted to the National Assembly for a referendum shall be published half a year before the convention of the National Assembly. Paragraph 4 of the Temporary Provisions Effective during the Period of National Mobilization for Suppression of the Communist Rebellion, promulgated by the National Assembly on May 25, 1950, required that no later than December 25, 1950, the First National Assembly should be convened in the form of an extraordinary session by the president to discuss each and every proposed amendment to the Constitution. Paragraphs 4 and 5 of the said Temporary Provisions were amended on March 11, 1960, to provide that the President should choose a date to convene an extraordinary session of the National Assembly to discuss each and

擇期召集國民大會臨時會討論有關修改憲法各案；憲法增修條文第六條規定，國民大會應於第二屆國民大會代表選出後三個月內由總統召集臨時會修改憲法，及第十二條第二項規定，總統、副總統選舉之方式，由總統於中華民國八十四年五月二十日前召集國民大會臨時會以憲法增修條文定之，均係本此意旨而為。國民大會依憲法第一百七十四條第一款修改憲法，固無集會前半年公告之規定，但國民大會臨時會係依各別不同之情形及程序而召集，與國民大會依憲法第二十九條所定之定期集會不同。若其召集之目的非為修改憲法，自不得於因其他事項召集之臨時會，規避憲法關於召集程序之限制而逕行修改憲法。從而總統依憲法增修條文第十一條第一項、第二項及第十五條所召集之國民大會臨時會，不得行使修改憲法之職權，本院釋字第二十九號解釋，應予補充。

every proposed amendment to the Constitution. Article 6 of the Amendments to the Constitution provides that within three months after the members of the Second National Assembly are elected, the President shall convene an extraordinary session of the National Assembly to amend the Constitution. Additionally, Article 12, Paragraph 2, of the said Amendments provides that the procedures for electing the president and vice president should be regulated by the amendments to be approved by the National Assembly during an extraordinary session to be convened by the president before May 20, 1995. The abovementioned Amendments are in line with the spirit of the constitutional intent. Pursuant to Paragraph 1 of Article 174 of the Constitution, it is not required that an amendment to the Constitution be published half a year before the Assembly convenes, but convening an extraordinary session pursuant to different circumstances and procedures is, however, different from convening a regular session under Article 29 of the Constitution. Extraordinary sessions of the National Assembly not convened for the purpose of

amending the Constitution may not forthwith be used to amend the Constitution, thereby disregarding the restriction imposed on the procedures of convocation of Assembly purposefully regulated by the Constitution. Therefore, extraordinary sessions of the National Assembly convened by the president and in compliance with Paragraphs 1 and 2 of Articles 11 and 15 of the Amendments to the Constitution may not be used to exercise the power to amend the Constitution. This Yuan hereby provides supplemental interpretation for J.Y. Interpretation No. 29.

J. Y. Interpretation No.315（March 12, 1993）*

ISSUE: Are the ordinances of the Executive Yuan and the Ministry of Finance contrary to the constitutional principle of taxation by law in denying tax exemption to non-productive enterprises for premium on stocks issued above par value?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 25 of the Act of Encouragement of Investment（獎勵投資條例第二十五條）; Articles 3, 4, and 24, Paragraph 1 of the Income Tax Act（所得稅法第三條、第四條、第二十四條第一項）; Articles 238, 239, Paragraph 1, proviso, and Article 241 of the Company Act（公司法第二百三十八條、第二百三十九條第一項但書、第二百四十一條）; Executive Yuan Ordinance Tai-Ching-Tze No. 9494 (December 7, 1967)（行政院五十六年十二月七日台經字第九四九四號令）; Ministry of Finance Ordinance Tai-Tsai- Shui-Fa-Tze No. 13055 (December 10, 1967)（財政部五十六年十二月十日台財稅發字第一三〇五五號令）.

KEYWORDS:

premium（溢價、溢額）, face value（票面金額）, productive enterprise（生產事業）, surplus（公積）, tax-exempt；tax exemption（免稅）, capital surplus（資本公積）, doctrine of taxation per legislation（租稅法律主義）.**

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* Translated by Raymond T. Chu.

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

HOLDING: Whether the income from the premium received by a corporation through the issuance of stocks above the face value may be exempt from tax and the extent of exemption, if any, are problems subject to reasonable discretion to be made by the legislature under the principle of taxation by law. Article 25 of the Act of Encouragement of Investment provides merely: "Where the premium realized by a productive enterprise through the issuance of stocks above the face value is set aside as surplus under the Company Act, such premium may be excluded from its income amount." As interpreted by the Executive Yuan Ordinance Tai-Ching-Tze No. 9494 (December 7, 1967) and the Ministry of Finance Ordinance Tai-Tsai- Shui-Fa-Tze No. 13055 (December 10, 1967), there being no law granting businesses other than productive enterprises tax exemption on such premium, it is not tax exempt. And we do not find such ordinances contrary to the principle of taxation by law.

解釋文：關於公司超過票面金額發行股票之溢額所得，應否免稅及免稅之範圍如何，立法機關依租稅法律主義，得為合理之裁量。獎勵投資條例第二十五條僅規定：「生產事業依公司法規定，將發行股票超過票面金額之溢價作為公積時，免予計入所得額」，行政院中華民國五十六年十二月七日臺經字第九四九四號令及財政部同年月十日臺財稅發字第一三〇五五號令乃釋示，非生產事業之上述溢額所得並無免稅規定，不在免稅之列，與憲法所定之租稅法律主義尚無牴觸。

REASONING：All business enterprises operating inside the territory of

解釋理由書：依所得稅法第三條第一項及第四條規定，凡在中華民國

the Republic of China are liable under the Income Tax Act to payment of business income tax for all categories of income earned thereby with the exception of income for which tax is exempted by law. Inasmuch as the income from the premium received by a corporation through the issuance of stocks above the face value, when viewed by taking into account the provisions of the Income Tax Act, Article 24, Paragraph 1, and the Company Act, Article 239, Paragraph 1, proviso, and Article 241 as a whole, is what has exceeded the registered capital of the corporation and may accumulate to form the capital surplus, which in turn may be applied to the issuance of new stocks, it should be categorized as income of the corporation, and the legislature is certainly entitled to exercise reasonable discretion with respect to the issue of whether it should be tax exempt and, if yes, the extent of such exemption. Article 25 of the Act of Encouragement of Investment provides merely: "Where the premium obtained by a productive enterprise through the issuance of stocks above the face value is set aside as surplus under

境內經營之營利事業，其各項所得，除法律有免稅之規定外，應依所得稅法課徵營利事業所得稅。公司超過票面金額發行股票所得之溢額，就所得稅法第二十四條第一項及公司法第二百三十九條第一項但書、第二百四十一條規定綜合觀之，既超出公司登記資本額之範圍，而彙積為資本公積，此項公積又可供發給新股之用，應屬公司之所得。立法機關自得就其應否免稅及免稅之範圍如何，為合理之裁量。獎勵投資條例第二十五條僅規定：「生產事業依公司法規定，將發行股票超過票面金額之溢價作為公積時，免予計入所得額」，行政院中華民國五十六年十二月七日臺經字第九四九四號令及財政部同年月十日臺財稅發字第一三〇五五號令釋示：「公司法第二百三十八條對資本公積，並無免稅之規定，至其他法律如獎勵投資條例對某類事業某種所得有免稅條款者，方得據以免稅」，符合上開意旨，與憲法第十九條所定租稅法律主義尚無牴觸。至其後公布之促進產業升級條例，將免稅範圍擴大至不以生產事業為限，係配合經濟發展之新情勢而為之立法裁量，亦不得因而認在前之立法裁量為違憲。

the Company Act, such premium may be excluded from its income amount." As interpreted by the Executive Yuan Ordinance Tai-Ching-Tze No. 9494 (December 7, 1967) and the Ministry of Finance Ordinance Tai-Tsai-Shui-Fa-Tze No. 13055 (December 10, 1967), "Article 238 of the Company Act being silent with respect to tax exemption for capital surplus, it may be tax exempt only if there is a clause in any other law such as the Act of Encouragement of Investment allowing tax exemption to a specific type of business for a specific category of income." And we hold that said ordinances are consistent with what we have just stated above and are not contrary to the principle of taxation by law as embodied in Article 19 of the Constitution. As to the subsequent broadening of the scope of tax exemption under the Act for Upgrading Industries to include businesses other than productive enterprises, it is the result of legislative discretion exercised to meet the contemporary situation of economic development, and should not be taken to render the previous legislative discretion unconstitutional.

Justice Chien-Tsai Cheng filed concurring opinion.

Justice Zu-Zan Yang filed concurring opinion.

Justice Chien-Hua Yang filed dissenting opinion, in which Justice Chih-Peng Lee, Justice Rui-Tang Chen, Justice Tieh-Cheng Liu and Justice Geng Wu joined.

本號解釋鄭大法官健才、楊大法官日然分別提出協同意見書；楊大法官建華、李大法官志鵬、陳大法官瑞堂、劉大法官鐵錚與吳大法官庚共同提出不同意見書。

J. Y. Interpretation No.316（May 7, 1993）*

ISSUE: Does the interpretative letter issued by the Ministry of Civil Service conflict with the Constitution, which indicates that the insured who became disabled by accident during the covered period and now is comatose is not entitled to claim disability benefits if his physical condition requires continuous medical care?

RELEVANT LAWS:

Articles 3, 13, Paragraph 5, Subparagraph 4 and 14 of the Government Employee Insurance Act（公務人員保險法第三條、第十三條第五項第四款及第十四條）; Articles 51, Paragraph 2 and 58, Paragraph 1 of the Enforcement Rules of the Government Employee Insurance Act（公務人員保險法施行細則第五十一條第二項及第五十八條第一項）; Article 155 of the Constitution（憲法第一百五十五條）.

KEYWORDS:

insured event（保險事故）, social insurance（社會保險）. **

HOLDING: The illness, injury and disability as referred to in Article 3 of the Public Functionaries Insurance Act

解釋文：公務人員保險法第三條規定之疾病、傷害與殘廢，乃屬不同之保險事故。被保險人在保險有效期間

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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

belong to a different subcategory of insurance peril. In the case where the insured becomes disabled by accident during the covered period, the insured shall be entitled to disability benefits in accordance with Article 14 of the same Act. It is another matter regarding the conditions under which the insurer shall bear medical costs for the insured. If there is no error in the permission to terminate medical treatment for pathological changes of the cerebrum of a comatose person as mentioned in a letter dated October 6, 1990, from the Ministry of Civil Service, Ref. No. 79-Tai-Hwa-Teh-Yi-0470777, then such case qualifies for disability benefits. However, citing a resulting complication which requires further treatment as reason for denying disability benefits confuses disability benefits with medical indemnity for illness and injury, and adds more terms and conditions than prescribed by the laws. The aforesaid contradicts the intention of the Constitution with regard to implementing social insurance to take care of the disabled and to guarantee the rights of the citizens and, therefore, the said letter shall no longer apply. Medical

發生殘廢事故時，自應依同法第十四條予以殘廢給付。其於領取殘廢給付後，承保機關在何種情形下仍應負擔其醫療費用，係另一問題。銓敘部七十九年十月六日七九臺華特一字第〇四七〇七七七號函謂「植物人」之大腦病變可終止治療，如屬無誤，則已合於殘廢給付之條件，乃又以其引起之併發症無法終止治療為由而不予核給，將殘廢給付與疾病、傷害給付混為同一保險事故，增加法律所無之條件，與憲法實施社會保險照顧殘廢者生活，以保障人民權利之意旨尚有不符，應不再援用。惟「植物人」之大腦病變縱可終止治療，其所需治療以外之專門性照護，較殘廢給付更為重要，現行公務人員保險就專業照護欠缺規定，應迅予檢討改進。又大腦病變之「植物人」於領取殘廢給付後，如因大腦病變以外之其他傷病而有治療之必要者，既非屬同一傷病之範圍，承保機關仍應負擔醫療費用，乃屬當然，併予說明。

treatment for pathological changes of the cerebrum of a comatose person may be terminated, but special care for the said individual weighs more heavily than disability benefits. The current lack of regulations, in insurance for government employees, regarding professional medical care shall be promptly examined and rectified. Furthermore, after obtainment of disability benefits, if a comatose person with pathological changes of the cerebrum needs medical treatment for injury or illness other than pathological changes of the cerebrum, the medical costs incurred shall, justifiably, still be borne by the insurer because such medical condition is under a different covered subcategory.

REASONING: Insurance for public functionaries is one type of social insurance. As stated in Article 155 of the Constitution, "The State, in order to promote social welfare, shall establish a social insurance system. To the aged and the infirm who are unable to earn a living, the State shall give appropriate assistance and relief." The approval of claims for disability benefits involves the guaranty of con-

解釋理由書：公務人員保險為社會保險之一種。國家為謀社會福利，應實施社會保險制度，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，為憲法第一百五十五條所明定。而得否請領殘廢保險給付，涉及憲法上人民權利之保障。公務人員保險法第三條就保險事故之範圍，分為生育、疾病、傷害、殘廢、養老、死亡及眷屬喪葬七項，其中疾病、

stitutional rights of the citizen. In Article 3 of the Public Functionaries Insurance Act, there are seven subcategories of insurance perils: childbirth, illness, injury, disability, annuity, death, and funeral arrangements for family members; among them, illness, injury, and disability, respectively, belong to a different subcategory. According to Article 58, Paragraph 1, in the Enforcement Rules of the said Act, if the insured is disabled due to an insurance peril and there is no possibility for rehabilitation after termination of medical treatment, and thus (diagnostically) he/she is confirmed as permanently disabled, then the insured shall be paid with cash indemnity in accordance with disability criteria as prescribed in Article 14 of the same Act. The aforesaid has no connection with Article 3, Paragraph 5, Subparagraph 4, of the same Act, which stipulates that after payment of disability benefits for a disability caused by injury or illness, the insured shall not claim medical indemnity for the same injury or illness; that is, the insurer shall not be responsible for the insured regarding medical costs incurred for the same injury or

傷害與殘廢，乃不同之保險事故。依同法施行細則第五十八條第一項規定，被保險人發生保險事故，致成殘廢，經醫治終止，無法矯正，確屬成為永久殘廢者，即應依同法第十四條規定，按殘廢之標準予以現金給付。同法第十三條第五項第四款，雖限制因傷病而致殘廢經領取殘廢給付後，不得以同一傷病再申請診療，亦即承保機關就同一傷病不再負擔其醫療費用。惟此乃另一疾病或傷害保險事故之保險給付問題，與已發生殘廢之保險事故應予以殘廢之給付無關，且上述法律規定之「同一傷病」，同法施行細則第五十一條第二項則採列舉規定，其內容為㈠傷病部位與原殘廢部位相同者㈡傷病名稱與原殘廢之傷病名稱相同者㈢傷病情況尚未超過原殘廢等級編號範圍者。並未將非同一傷病之各種感染及併發症，亦併列為「同一傷病」之範圍，且各種疾病與傷害，如在非殘廢人亦可能發生者，更無從擴張解釋為「同一事故」。銓敘部七十九年十月六日七九臺華特一字第〇四七〇七七七七號函謂「植物人」之大腦病變可終止治療，如屬無誤，則已合於殘廢給付之條件，乃又以其引起之併發症無法終止治療為由而不予核給，將殘廢給付與疾病、傷害給付混為同一保險事

illness. However, the aforesaid is indemnity under a different subcategory of covered injury or illness, and has no connection with statutory disability benefits for the insurance peril that already happened. Furthermore, the content of "same injury or illness" as referred to in the aforesaid Act is itemized in Article 51, Paragraph 2, in the Enforcement Rules of the same Act as: (1) the part suffering injury or illness is the same as the original disabled part; (2) the medical term of the injury or illness is the same as that of the original injury or illness which caused the disability; and (3) severity of the injury or illness has not yet exceeded the covered scope regarding the original disability. The aforesaid does not put infections and complications not relating to the same injury or illness in the covered scope for the "same injury or illness." Besides, if the various infections and complications can also affect able-bodied people, then there is no justification for expanding interpretation for such as the "same injury or illness." If there is no error in the permission to terminate medical treatment for pathological changes of the cerebrum of a comatose

故，增加法律所無之條件，與憲法實施社會保險照顧殘廢者生活，以保障人民權利之意旨尚有不符，應不再援用。惟「植物人」之大腦病變縱可終止治療，其所需治療以外之專門性照護，較殘廢給付更為重要，現行公務人員保險就專業照護欠缺規定，應迅予檢討改進。又大腦病變之「植物人」於領取殘廢給付後，如因大腦病變以外之其他傷病而有治療之必要者，既非屬同一傷病之範圍，承保機關仍應負擔醫療費用，乃屬當然，併予說明。

person as mentioned in a letter dated October 6, 1990, from the Ministry of Civil Service No. 79-Hwa-Teh-Yi-0470777, then such case qualifies for disability benefits. However, citing a resulting complication which requires further treatment as a reason for denying disability benefits confuses disability benefits with medical indemnity for illness and injury, and adds more terms and conditions than prescribed by the laws. The aforesaid contradicts the intention of the Constitution with regard to social insurance concerning taking care of the disabled and guaranteeing rights of the citizen and, therefore, the said letter shall no longer apply. Medical treatment for pathological changes of the cerebrum of a comatose person may be terminated, but special care for said individual weighs more heavily than disability benefits. The current lack of regulations, in insurance for government employees, regarding professional medical care shall be promptly examined and rectified. Furthermore, after obtainment of disability benefits, if a comatose person with pathological changes of the cerebrum needs medical treatment for injury or illness other than pathologi-

cal changes of the cerebrum, the medical costs incurred shall, justifiably, still be borne by the insurer because such medical condition belongs to a different subcategory of injury and illness.

J. Y. Interpretation No.317（May 21, 1993）*

ISSUE: Is Article 111 of the Income Tax Act constitutional in stipulating a sanction against tax withholders for violating their legal obligations?

RELEVANT LAWS:

Article 7, Paragraph 5, Article 88, Article 89, Paragraph 3, Article 92 and Article 111, Paragraph 2 of the Income Tax Act（所得稅法第七條第五項、第八十八條、第八十九條第三項、第九十二條、第一百十一條第二項）.

KEYWORDS:

tax withholder（扣繳義務人）, tax withholding（扣繳）.**

HOLDING： Paragraph 2 of Article 111 of the Income Tax Act, which was amended and promulgated on December 30, 1987, stipulates that any private entity or enterprise that fails to prepare and file a report within the prescribed time limit or fails to make a truthful report as required by the provision of Paragraph3 of Article 89 of this Act shall be subject to a fine of NT$ 500. This stipulation is a

解釋文： 中華民國七十六年十二月三十日修正公布之所得稅法第一百十一條第二項，關於私人團體或事業，違反第八十九條第三項之規定，未依限填報或未據實申報者，處該團體或事業五百元罰鍰之規定，係對稅款扣繳義務人違反法律上作為義務所為之制裁，以確實掌握課稅資料，為增進公共利益所必要，與憲法並無牴觸。

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* Translated by John C. Chen, Attorney at Law.

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

sanction against tax withholders for violating their legal obligations. The purpose of this stipulation is to obtain precise and relevant tax information and is necessary to increase the public interest. Therefore, such stipulation does not contradict the Constitution.

REASONING: Under the Income Tax Act, the term "tax withholder" refers to a person who is required to withhold income tax from his payment to be made to a taxpayer. For a taxpayer having any income, the tax withholder involved is required to withhold tax payable at the time of payment as per the prescribed tax rates or withholding procedures, pay the tax withheld to the national treasury, and complete withholding certificates and submit them to the tax collection authority. If tax is not withheld because the amount paid does not reach the minimum amount of income that is subject to tax withholding, the tax withholder is required to file the name and relevant information of the recipients to the tax collection authority before the prescribed time limit expires. These have been exp-

解釋理由書：依所得稅法規定，應自付與納稅義務人之給付中扣繳所得稅款之人，為扣繳義務人。扣繳義務人應就納稅義務人之所得，於給付時依規定之扣繳率或扣繳辦法扣取稅款，在法定之期限內，向國庫繳清，並開具扣繳憑單彙報該管稽徵機關，其未達起扣點者，並應依限將受領人之姓名及相關資料向該管稽徵機關申報，中華民國七十六年十二月三十日修正公布之所得稅法第七條第五項、第八十八條、第九十二條、第八十九條第三項規定甚明。

licitly provided for in Paragraph 5 of Article 7, Articles 88 and 92, and Paragraph 3 of Article 89 of the Income Tax Act, which were amended and promulgated on December 30, 1987.

The stipulation of Paragraph 2 of Article 111 of the Income Tax Act, which provides that any private entity or enterprise that fails to prepare and file a report within the prescribed time limit or fails to make a truthful report as required by the provisions of Paragraph 3 of Article 89 of this Act shall be subject to a fine of NT$ 500, is a sanction against tax withholders who do not perform their legal obligations. Such withholding and filing obligations are prescribed by law to ensure the acquisition of relevant tax information by the government and are necessary to increase the public interest and do not contradict the Constitution.

同法第一百十一條第二項，關於私人團體或事業，違反第八十九條第三項之規定，未依限填報或未據實申報者，處該團體或事業五百元罰鍰之規定，係對扣繳義務人未盡其法律上應盡之義務時所為之制裁。此項扣繳或申報義務，乃法律規定之作為義務，其目的在使國家得以確實掌握課稅資料，為增進公共利益所必要，與憲法並無牴觸。

J. Y. Interpretation No.318（May 21, 1993）*

ISSUE: Are the Income Tax Act provisions constitutional in requiring a taxpayer and his/her spouse to file joint tax returns for their consolidated income, even if the amount of tax so paid exceeds what would have to be paid if they filed separate returns?

RELEVANT LAWS:

Article 15 and Article 17, Paragraph 1, of the Income Tax Act as amended on January 29, 1963（中華民國五十二年一月二十九日修正公布之所得稅法第十五條、第十七條第一項）.

KEYWORDS:

joint tax return（合併申報）, consolidated income tax（綜合所得稅）, principle of equal taxation（租稅公平原則）, dependents（受扶養親屬）, tax exemption（免稅額）, tax deduction（扣除額）.**

HOLDING: The provisions of Article 15 and Article 17, Paragraph 1, of the Income Tax Act as amended on January 29, 1963, requiring that a taxpayer file a joint return to include therein the income, if any, of his or her spouse and other dependents for the purpose of taxa-

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十五條、第十七條第一項，關於納稅義務人應與其有所得之配偶及其他受扶養親屬合併申報課徵綜合所得稅之規定，就申報之程序而言，與憲法尚無牴觸。惟合併課稅時，如納稅義務人與有所得之配

* Translated by Raymond T. Chu.

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tion on his or her consolidated income, are not in conflict with the Constitution insofar as the procedure of filing the return is concerned. Nevertheless, when tax is imposed on the basis of such joint return, if the tax payable by a taxpayer as computed in conjunction with the income of his or her spouse and other dependents exceeds the amount payable if it were separately computed, thereby increasing his or her taxation, the situation is contrary to the principle of fair taxation. Although such articles were partially amended on December 30, 1989, it is still advisable that review and improvements be made from time to time by competent authorities to the relevant laws by taking into consideration the social and economic conditions.

偶及其他受扶養親屬合併計算稅額，較之單獨計算稅額，增加其稅負者，即與租稅公平原則有所不符。首開規定雖已於中華民國七十八年十二月三十日作部分修正，主管機關仍宜隨時斟酌相關法律及社會經濟情況，檢討改進。

REASONING: The provisions of Article 15 and Article 17, Paragraph 1, of the Income Tax Act as amended on January 29, 1963, requiring that a taxpayer file a joint return to include therein the income, if any, of his or her spouse and other dependents for the purpose of taxation on his or her consolidated income, are intended to reduce the number

解釋理由書：中華民國五十二年一月二十九日修正公布之所得稅法第十五條、第十七條第一項關於綜合所得稅之納稅義務人應與其有所得之配偶及其他受扶養之親屬合併申報課稅之規定，乃以減少申報及稽徵件數，節省徵納雙方勞費為目的。就合併申報之程序而言，為增進公共利益所必要，與憲法尚無牴觸。惟合併課稅時，如納稅義務

of tax returns to be filed and the cases of tax collection so as to save the government and the taxpayers the cost as well as the time and effort involved. The provisions are thus essential to the furtherance of the public interest insofar as the procedure of filing the return is concerned and are not in conflict with the Constitution. Nevertheless, when tax is imposed on the basis of such joint return, if the tax payable by a taxpayer as computed in conjunction with the income of his or her spouse and other dependents exceeds the amount payable if it were separately computed, thereby increasing his or her taxation, the situation is contrary to the principle of fair taxation. Although such articles were partially amended on December 30, 1989, it is still advisable that overall review and improvements be made from time to time by competent authorities to provisions related to the amounts of exemption and deduction available to such taxpayers by taking into consideration the social and economic conditions.

人與有所得之配偶及其他受扶養親屬合併計算稅額，較之單獨計算稅額，增加其稅負者，即與租稅公平原則有所不符。首開規定雖已於中華民國七十八年十二月三十日作部分修正，主管機關仍宜隨時斟酌相關法律及社會經濟情況，就其免稅額及扣除額等規定，通盤檢討改進。

Justice Geng Wu filed dissenting opinion, in which Justice Cheng-Tao Chang joined.

本號解釋吳大法官庚、張大法官承韜共同提出不同意見書。

J. Y. Interpretation No.319（June 4, 1993）*

ISSUE: Are the regulations denying the request for re-grading examination answers, for reasons other than obvious errors (which may be found by formal check), by the participants of examinations held by the relevant authority consistent with the Constitution?

RELEVANT LAWS:

Article 23 of the Act Governing the Administration of Examination（典試法第二十三條）; Act for Examination Supervision（監試法）; Articles 7 and 8 of the Regulation Governing the Review of the Grades upon the Application of Civil Service Test Participants（應考人申請複查考試成績處理辦法第七條、第八條）.

KEYWORDS:

examination（考試）, review of grades（複查成績）.**

HOLDING: For the examinations held by the relevant authority, the grading members give the grades while the names on the answer sheets are covered to ensure the examinees' privacy. Once the seal is removed, the answer

解釋文：考試機關依法舉行之考試，其閱卷委員係於試卷彌封時評定成績，在彌封開拆後，除依形式觀察，即可發見該項成績有顯然錯誤者外，不應循應考人之要求任意再行評閱，以維持考試之客觀與公平。考試院於中華民

* Translated by Pijan Wu.

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

sheet should not be re-graded upon the request of the examinee unless there is any obvious error regarding the grades, which can be found by formal check. The purpose is to maintain the impartiality and fairness of examinations. Article 8 of the Regulation Governing the Review of the Grades upon the Application of Civil Service Test Participants, as revised by the Examination Yuan on November 12, 1986, provides that "for the review of the examination grade, the applicant may not request re-grading, model answers, or the viewing/copying of the answer sheets; also, the applicant may not request the identity of any grader or other relevant information." Such rule is to uphold the abovementioned principle and is consistent with Article 23 of the Act Governing the Administration of Examination regarding the "confidentiality requirement for the persons administering examinations," and is not in contravention with the Constitution. However, the review of examination grades is relevant to the interest of the participants, and, therefore, should be made clear by law.

國七十五年十一月十二日修正發布之「應考人申請複查考試成績處理辦法」，其第八條規定「申請複查考試成績，不得要求重新評閱、提供參考答案、閱覽或複印試卷。亦不得要求告知閱卷委員之姓名或其他有關資料」，係為貫徹首開意旨所必要，亦與典試法第二十三條關於「辦理考試人員應嚴守秘密」之規定相符，與憲法尚無牴觸。惟考試成績之複查，既為兼顧應考人之權益，有關複查事項仍宜以法律定之。

REASONING: For the examinations held by the relevant authority, examination commissions are established to set the standards for test questions, grading, evaluating, admission and review of grades. Furthermore, the Control Yuan assigns ombudsmen to monitor the custody of test questions, the sealing of answer sheets, the check of the seal, the review of grades and the posting/announcement of test results. The ombudsmen shall report to the Control Yuan upon the finding of any collusion, switching answer sheets or other cheating behavior. These rules are made clear in the Act Governing the Administration of Examination and the Act for Examination Supervision.

解釋理由書：考試機關依法舉行之考試，設典試委員會以決定命題標準、評閱標準、審查標準、錄取標準以及應考人考試成績之審查等事項，並由監察院派監察委員監試，在監試委員監視下，進行試題之封存，試卷之彌封、點封，應考人考試成績之審查以及及格人員之榜示與公布。如發現有潛通關節、改換試卷或其他舞弊情事，均由監試人員報請監察院依法處理之，此觀典試法及監試法有關規定甚明。

For the abovementioned examinations, the graders correct the examination papers while the names on the answer sheets are covered to protect the examinees' privacy. Once the seal is removed, the answer sheet should not be re-graded upon the request of the examinee unless there is any obvious error regarding the grades, which can be found by formal

前項考試，其閱卷委員係於試卷彌封時評定成績，在彌封開拆後，除依形式觀察，即可發見該項成績有顯然錯誤者外，如循應考人之要求，任意再行評閱，縱再行彌封，因既有前次閱卷委員之計分，並可能知悉應考人為何人，亦難以維持考試之客觀與公平。考試院於中華民國七十五年十一月十二日修正發布之「應考人申請複查考試成績處理

check. The reasons are that the grading by the previous grader may have been seen and that the identity of the examinee may have been known. Under such circumstances, it is difficult to maintain the impartiality and fairness of examinations. Article 8 of the Regulation Governing the Review of the Grades upon the Application of Civil Test Participants, as revised by the Examination Yuan on November 12, 1986, provides that "for the review of the examination grade, the applicant may not request re-grading, model answers, or the viewing/copying of the answer sheets; nor may the applicant request the identity of the grader or other relevant information." Such rule is to uphold the impartiality and fairness of the examination. Also, it is necessary to maintain respect for the academic evaluation of the grader and is consistent with Article 23 of the Act Governing the Administration of Examination regarding the "confidentiality requirement for the persons administering examinations." In the event there is any obvious error such as failure to grade certain answers, Article 7 of the abovementioned Regulation provides for appropriate

辦法」，其第八條規定「申請複查考試成績，不得要求重新評閱、提供參考答案、閱覽或複印試卷。亦不得要求告知閱卷委員之姓名或其他有關資料」，係為維護考試之客觀與公平及尊重閱卷委員所為之學術評價所必要，亦與典試法第二十三條關於「辦理考試人員應嚴守秘密」之規定相符，而如發見有試卷漏閱等顯然錯誤之情形，該辦法第七條又設有相當之補救規定，與憲法尚無牴觸。惟考試成績之複查，既為兼顧應考人之權益，有關複查事項仍宜以法律定之。

remedies. Therefore, the Regulation is not in contravention with the Constitution. However, the review of examination grades is relevant to the interest of the participants, and, therefore, should be made clear by law.

Justice Yueh-Sheng Weng filed dissenting opinion in part, in which Justice Zu-Zan Yang, Justice Geng Wu joined.

本號解釋翁大法官岳生、楊大法官日然與吳大法官庚共同提出一部不同意見書。

J. Y. Interpretation No.320（June 18, 1993）*

ISSUE: Is the provision of the Enforcement Rules of the Act Governing Land Grants to Anti-Communist and Anti-Soviet Combatants, which prescribes a base day for the issuance of disability benefits, unconstitutional?

RELEVANT LAWS:

Article 172 of the Constitution（憲法第一百七十二條）; Articles 2, 5 and 11-II of the Act Governing Land Grants to Anti-Communist and Anti-Soviet Soldiers（反共抗俄戰士授田條例第二條、第五條、第十一條第二項）; Articles 1, 3-I and 10 of the Act Governing the Handling of Land Grant Certificates to Soldiers,（戰士授田憑據處理條例第一條、第三條第一項、第十條）; Article 3, Paragraph 1, Subparagraph 3, of the Enforcement Rules of the Handling Act Governing the Handling of Land Grant Certificates to Soldiers（戰士授田憑據處理條例施行細則第三條第一項第三款）.

KEYWORDS:

land grant certificates to soldiers（戰士授田憑證）, restrictions on disability benefits（補償金發給之限制）, retroactivity（溯及既往）.**

HOLDING: The Act Governing the Handling of Land Grant Certificates to

解釋文：戰士授田憑據處理條例，係為收回已依反共抗俄戰士授田條

* Translated by Vincent C. Kuan.

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Soldiers (hereinafter the "Handling Act") is enacted to make compensation according to various bases that are determined by different situations for the purpose of recovering the land grant certificates for soldiers already received by eligible soldiers pursuant to the Act Governing Land Grants to Anti-Communist and Anti-Soviet Soldiers (hereinafter the "Land Grant Act"). Although the Land Grant Act did not come into force until October 18, 1951, the provisions of Article 5 and Article 11, Paragraph 2, thereof do not set limits by stating that the war-induced physical injuries and disabilities contemplated thereunder should have occurred subsequent to that date. Article 3, Paragraph 1, of the Enforcement Rules of the Act Governing the Handling of Land Grant Certificates to Soldiers provides that disability benefits will not be issued to the personnel whose disability occurred after October 18, 1951, thus ruling out the opportunity of those who were injured and disabled during war before that date and have already had land grant certificates to receive disability benefits based on the criteria set forth in the Handling

例領取之戰士授田憑據，分別情形給予不同基數之補償金而制定。該授田條例雖於中華民國四十年十月十八日生效，但依其第五條、第十一條第二項規定之意旨，關於作戰受傷致成殘廢，並不以該日以後發生者為限。戰士授田憑據處理條例施行細則第三條第一項謂殘廢以四十年十月十八日以後發生者，始發給殘廢標準之補償金，致在該日以前作戰受傷致成殘廢，而已領有授田憑據之人員，失其依該條例所定殘廢標準領取補償金之機會，與法律規定不符，有違憲法保障人民權利之意旨，應不予適用。至此項人員負傷所由致之作戰，其範圍如何，應由主管機關依各該條例立法意旨予以界定，乃屬當然。

Act. The said provision is inconsistent with the law and violates the intent of the Constitution to protect the rights of the people and, therefore, should not be applied. In respect of the scope of war from which the injury sustained by the respective soldiers or soldiers resulted, the competent authorities should, as a matter of course, set limits according to the legislative intent of the respective laws.

REASONING： Article 1 of the Act Governing the Handling of Land Grant Certificates to Soldiers, as enacted and promulgated on April 23, 1990, provides, "This Act is enacted to recover the land grant certificates for soldiers previously issued upon repeal of the Act Governing Land Grants to Anti-Communist and Anti-Soviet Soldiers and the Enforcement Rules thereof." Article 3, Paragraph 1, of the same Act further provides, "A compensation for each land grant certificate for soldiers shall be given according to a base number from one to ten; and the amount for each base is fifty thousand New Taiwan dollars (NT$50,000). Other than the dependent(s) of a soldier killed in

解釋理由書： 中華民國七十九年四月二十三日制定公布之戰士授田憑據處理條例第一條規定：「反共抗俄戰士授田條例及其施行細則廢止後，為收回戰士授田憑據，特制定本條例」。同條例第三條第一項本文並規定：「每份戰士授田憑據發給一至十個基數之補償金；每一個基數之金額為新臺幣五萬元，除陣亡或公亡戰士之家屬及作戰受傷致成殘廢及年逾五十五歲未享退休給與、未輔導就養、就業之自謀生活者，給與最高十個基數外，餘由行政院就補償對象分別訂定之」。該授田條例雖於中華民國四十年十月十六日公布，十八日生效，但其中關於發給授田憑據時，有無殘廢之認定，依該授田條例第五條、第十一條第二項規定之意旨，並不

action or killed in the line of duty, or a soldier disabled due to injury during war, or a soldier over the age of fifty living on his own without any retirement benefits, or assistance and counsel in care or employment, who shall receive the maximum of ten bases, the number of bases for the remaining soldiers shall be determined by the Executive Yuan on a case-by-case basis." Although the Land Grant Act was promulgated on October 16, 1951, and came into force on October 18 of the same year, the provisions of Article 5 and Article 11, Paragraph 2, thereof do not set any limit by stating that the war-induced physical injury and disability contemplated thereunder should have occurred subsequent to that date when it is a matter of determining whether a disability existed at the time of issuance of the land grant certificate. Furthermore, the Handling Act is originally designed and intended to deal with the pre-existing fact that such land grant certificates were previously received by certain people and the fact that a land grant certificate is presumed to be issued under Article 10 thereof by making compensation under

限於以該日以後發生之狀況為準。而戰士授田憑據處理條例本係就以前已領有授田憑據之既存事實或依其第十條視同已發給授田憑據擬制之既存事實，賦予依一定程序發給補償金之效果，別無所謂溯及既往之問題。其關於殘廢之既存事實，該處理條例亦無僅以四十年十月十八日以後發生者為限之限制。乃該處理條例施行細則第三條第一項第三款竟規定：「作戰受傷致成殘廢之戰士，指於四十年十月十八日反共抗俄戰士授田條例公布日後，作戰受傷，經核定為三等殘以上，並辦理傷殘撫卹有案者」，致在該日以前作戰受傷致成殘廢，而已領有授田憑據之人員，失其依上述殘廢標準領取補償金之機會，與法律規定不符，有違憲法保障人民權利之意旨，應不予適用。至此項人員負傷所由致之作戰，其範圍如何，應由主管機關斟酌上述授田條例第二條關於戰士之定義及處理條例第三條第一項但書關於總補償金額之限制等整體意旨，予以界定，乃屬當然。

certain procedures and, therefore, there should be no issue concerning retroactivity. With respect to the pre-existing fact that a disability occurred, the Handling Act does not impose any restrictions by limiting the benefit to such disability as has occurred subsequent to October 18, 1951. Article 3, Paragraph 1, Subparagraph 3, of the Enforcement Rules of the Handling Act abruptly provides, "A soldier injured and disabled during war should mean one who was so injured subsequent to the date of promulgation of the Act Governing Land Grants to Anti-Communist and Anti-Soviet Soldiers, and whose injury was determined to be a level three disability or above, and whose application for injury and/or disability compensation was duly recorded." Accordingly, any opportunity for those who were injured and disabled during war before that date and have already had land grant certificates to receive disability benefits based on the criteria set forth in the Handling Act is ruled out. Such provision is inconsistent with the law and violates the intent of the Constitution to protect the rights of the people and, therefore, should

not be applied. In respect of the scope of war from which the injury sustained by the relevant soldiers or soldiers resulted, the competent authorities should, as a matter of course, set limits by taking into consideration the legislative intent of the respective laws, including the definition of soldiers as prescribed under Article 2 of the Land Grant Act and the limitations on the total amount of compensation as set forth in the proviso of Article 3, Paragraph 1, of the Handling Act.

J. Y. Interpretation No.321（June 18, 1993）*

ISSUE: Is the Customs Act constitutional in providing that a taxpayer who fails to make full payment of the customs duties or to lodge an appropriate security therefor within the specified time limit shall be deprived of the opportunity of seeking administrative remedy?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 23 of the Customs Act（關稅法第二十三條）; J. Y. Interpretations Nos. 224 and 288（司法院釋字第二二四號及第二八八號解釋）.

KEYWORDS:

customs duties（關稅）, Customs House（海關）, security（擔保）, administrative（行政救濟）, right of action（訴訟權）, legal remedy（法律救濟）, tariff number（稅則號別）, duty-paying value（完稅價格）, review（複查）.**

HOLDING: The provision of Article 23 of the Customs Act as amended on June 29, 1986, to the effect that a taxpayer who fails to make full payment of the customs duties assessed by the Cus-

解釋文：中華民國七十五年六月二十九日修正公布之關稅法第二十三條之規定，使納稅義務人未能按海關核定稅款於期限內全數繳納或提供相當擔保者，喪失行政救濟之機會，係對人民

*Translated by Raymond T. Chu.

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toms or to lodge an appropriate security therefor within the specified time limit will be deprived of the opportunity to seek administrative remedy constitutes an unnecessary restraint on the people's right of instituting legal proceedings, and is inconsistent with the essence of Article 16 of the Constitution in protecting the people's right of instituting legal proceedings.

訴訟權所為不必要之限制，與憲法第十六條保障人民訴訟權之意旨有所牴觸。

REASONING: It has been made clear by this Yuan in J. Y. Interpretations Nos. 224 and 288 that a provision requiring the payment of a portion of the tax or the lodgment of a security as a condition upon which a petition for review may be filed in a tax case makes a person unable to pay the tax or to furnish a security lose his opportunity of seeking legal remedy, thereby constituting an unnecessary restraint on the people's right to institute administrative appeal and suit, and is thus inconsistent with the essence of Article 16 of the Constitution. Article 23 of the Customs Act as amended on June 29, 1986, provides: "Where a taxpayer is dissatisfied with the tariff number, duty-paying value, amount of make-up duty payable or

解釋理由書：有關稅捐案件申請複查時，以繳納一定比例之稅款或提供擔保為條件之規定，使未能繳納稅款或擔保之人喪失法律救濟之機會，係對人民訴願及訴訟權所為不必要之限制，與憲法第十六條之意旨有所不符，業經本院釋字第二二四號及第二八八號分別釋示在案。中華民國七十五年六月二十九日修正公布之關稅法第二十三條第一項：「納稅義務人如不服海關對其進口貨物核定之稅則號別、完稅價格或應補繳稅款或特別關稅者，得於收到海關填發稅款繳納證之日起十四日內，按稅款繳納證所列稅額繳納全部稅款，依規定格式，以書面向海關聲明異議，請求複查。但納稅義務人得經海關核准，提供相當擔保，免繳上開稅款」，第二項：「納稅義務人未依前項規定期限繳納稅

special duties, as the case may be, assessed by the Customs on his import goods, he may, upon full payment of the duty payable as shown in the certificate of duty payment, to be made within fourteen days from the date of receipt of such certificate issued by the Customs, file with the Customs a written statement of objection in the required form and apply for review. However, subject to approval by the Customs, the taxpayer may lodge an appropriate security in lieu of payment of the foregoing duty." And the second paragraph of said article states: "A taxpayer who fails to pay the duty or lodge a security within the period specified in the preceding paragraph shall be deemed to have not applied for review." While such provisions are designed to prevent frivolous applications for review for the purpose of delaying the payment of duty, they have no significance under our current system of administrative remedy, because the institution of the remedial proceeding has no effect in staying the enforcement of the original administrative act. They do, nevertheless, deprive those taxpayers who are unable to make full payment of the duty

款或提供擔保者，視為未請求複查」之規定，雖為防止受處分人任意請求複查以拖延繳納稅款，但依我國行政救濟制度，提起行政救濟並無停止原處分執行之效力，致上述規定，徒使未能於規定期限內繳納全部稅款或提供相當擔保之納稅義務人喪失行政救濟之機會，係對人民訴訟權所為不必要之限制，與憲法第十六條保障人民訴訟權之意旨有所牴觸。

or to put up an appropriate security within the specified time limit of the opportunity to seek administrative remedy, and impose an unnecessary restraint on the people's right of instituting legal proceedings, and are thus inconsistent with the essence of Article 16 of the Constitution in protecting the people’s right of instituting legal proceedings.

Justice Chien-Tsai Cheng filed dissenting opinion.

Justice Chung-Sheng Lee filed dissenting opinion.

本號解釋鄭大法官健才、李大法官鐘聲分別提出不同意見書。

J. Y. Interpretation No.322（June 18, 1993）*

ISSUE: Is the directive issued by the Ministry of Interior, prescribing that the request for simultaneous expropriation of the residual portions of the land shall be made within one year of the completion of the expropriation at issue, constitutional?

RELEVANT LAWS:

Articles 217 and 219 of the Land Act（土地法第二百十七條、第二百十九條）.

KEYWORDS:

expropriation（公用徵收）.**

HOLDING: Article 217 of the Land Act, as amended on April 29, 1946, provides that, where the land to be expropriated in an eminent domain proceeding involves residual, odd-lot space that is too small or of such an unusual shape as to allow reasonable use, the owner of the land may request that such land also be expropriation within one year under Article 219 of the same Act, the Ministry of Interior in its letter dated October 9, 1979,

解釋文：中華民國三十五年四月二十九日修正公布之土地法第二百十七條規定：「徵收土地之殘餘部分面積過小，或形勢不整，致不能為相當之使用時，所有權人得要求一併徵收」，對於要求一併徵收之期間未予明定，內政部為貫徹同法第二百十九條關於徵收完畢後限一年內使用之意旨，六十八年十月九日臺內地字第三〇二七四號函謂：「要求一併徵收，宜自協議時起，迄於徵收完畢一年內為之，逾期應不受

*Translated by Lawrence S. Liu.

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stated that, expropriated. But there is no explicit provision regarding the deadline for this ancillary request for expropriation. To fulfill the legislative purpose for completing the "in the case of an ancillary request, it is appropriate that such request be made within the period extending from one year after the beginning of negotiations until one year after the completion of the expropriation, without further extension of time to entertain such request. This rule is necessary so as to fulfill the requirements of Article 217 of the Land Act cited above, and is therefore not in contravention of the Constitution.

理」，係為執行上開土地法第二百十七條所必要，與憲法並無牴觸。

REASONING：Article 217 of the Land Act, as amended on April 29, 1946, provides that, where the land to be expropriated in an eminent domain proceeding involves residual, odd-lot space that is too small or of such an unusual shape as to allow reasonable use, the owner of the land may request that such land also be expropriated. But there is no explicit provision regarding the deadline for this ancillary request for expropriation. Nevertheless, Article 219 of the same Act

解釋理由書：中華民國三十五年四月二十九日修正公布之土地法第二百十七條規定：「徵收土地之殘餘面積過小，或形勢不整，致不能為相當之使用時，所有權人得要求一併徵收」，對於要求一併徵收之期間則未予明定，惟同法第二百十九條規定：「徵收私有土地後，不依核准計畫使用，或於徵收完畢一年後不實行使用者，其原土地所有權人得照原徵收價額收回其土地」（上述土地法條文均已於七十八年十二月二十九日修正），是以土地所有權人要求

provides that, where there is no approved use of the expropriated private land, or where the expropriated land is not put to use within one year from the completion of the expropriation, the original owner of the land may repurchase the land at the expropriation price. As a result, it obviously is not permissible to provide no deadline for owners of land to make an ancillary request. (The above-cited provision was amended on December 29, 1989.) Otherwise, land administration agencies will be unable to put the expropriated land to approved use within such statutory deadline. Such a result would obstruct the public interest and expeditious determination of the right of citizens. To fulfill the legislative purpose for completing the expropriation within one year under Article 219 of the same Act, the Ministry of Interior in its letter dated October 9, 1979, stated that, "in the case of an ancillary request, it is appropriate that such request be made within the period extending from one year after the beginning of negotiations until one year after the completion of the expropriation, with out further extension of time to entertain

一併徵收，自不能無期間之限制，其期間亦不能較第二百十九條所定者為長，否則需地機關無從於法定期間內依核准之徵收計畫實行使用，於增進公共利益，迅速確定人民權利，均有妨礙，內政部為貫徹上開第二百十九條之意旨，六十八年十月九日臺內地字第三〇二七四號函謂：「要求一併徵收，宜自協議時起，迄於徵收完畢一年內為之，逾期應不受理」，係為執行上開土地法第二百十七條所必要，與憲法並無牴觸。

such request." This rule is necessary so as to fulfill the requirements of Article 217 of the Land Act cited above, and is therefore not in contravention of the Constitution.

J. Y. Interpretation No.323（June 18, 1993）*

ISSUE: Is the precedent holding to the effect that a person dissatisfied with the appointment review conducted by the competent authority in charge of personnel matters regarding his or her disqualification or demotion may not initiate an administrative litigation in violation of the Constitution?

RELEVANT LAWS:

Articles 16 and 18 of the Constitution（憲法第十六條、第十八條）.

KEYWORDS:

personnel review（人事審查）, administrative litigation（行政訴訟）.**

HOLDING: If persons who wish to serve as civil servants with various government agencies receive a review by the agencies in charge of personnel that determine such persons should not be qualified or should be demoted, this decision materially adversely affects the constitutional guarantees of serving in the government. If these persons undergo a

解釋文：各機關擬任之公務人員，經人事主管機關任用審查，認為不合格或降低原擬任之官等者，於其憲法所保障服公職之權利有重大影響，如經依法定程序申請復審，對復審決定仍有不服時，自得依法提起訴願或行政訴訟，以謀求救濟。行政法院五十九年度判字第四〇〇號判例，與上開意旨不符部分，應不再援用。

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* Translated by Lawrence S. Liu.

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

legal procedure for reconsideration and still challenge the same determination of the reconsideration proceedings, they surely may seek administrative appeal or litigation as a redress under the law. To the extent Judicial Precedent 59-Pan-400 is inconsistent with the above-cited view, it shall cease to be applied.

REASONING: Whether a civil servant receiving an administrative sanction may bring an administrative litigation depends on the nature of the sanction. If it is one that is sufficient to change his or her status as a civil servant, or one that constitutes a material disciplinary sanction of a civil servant, then the civil servant subject to such a sanction may seek relief with the competent judicial authorities. This position is clear from our previous Interpretations Nos. 187, 201, 243, 266, 298 and 312. If persons who wish to serve as civil servants with various government agencies receive a review by the agencies in charge of personnel that determine that such persons should not be qualified or should be demoted, this decision materially adversely affects the constitutional

解釋理由書：因公務員身分受行政處分得否提起行政爭訟，應視處分之內容而定，其足以改變公務員身分或對於公務員有重大影響之懲戒處分，受處分之公務員並得向該管司法機關聲明不服，業經本院釋字第一八七號、第二〇一號、第二四三號、第二六六號、第二九八號及第三一二號解釋分別釋示在案。各機關擬任之公務人員，經人事主管機關任用審查，認為不合格或降低原擬任之官等者，於其憲法所保障服公職之權利有重大影響，如經依法定程序申請復審，對復審決定仍有不服時，自得依法提起訴願或行政訴訟，以謀求救濟。行政法院五十九年度判字第四〇〇號判例：「人事主管機關對於公務員任用資格所為之審定及任用之准駁，非官署對人民之行政處分可比，公務員對之如有不服，自可向其本機關長官轉請復

guarantees of serving in the government. If these persons undergo a legal procedure for reconsideration and still challenge the same determination of the reconsideration proceedings, they surely may seek administrative appeal or litigation as a redress under the law. Judicial Precedent 59-Pan-400 holds that: "a determination of the qualifications of a would-be civil servant and a decision to hire or not to hire a civil servant by the agencies in charge of personnel are not administrative sanctions by a government agency against private citizens. If a civil servant disagrees with such a decision, other than seek a reconsideration from a more senior official in his or her agency, he or she may not seek administrative appeal." To the extent this Judicial Precedent is inconsistent with our above-cited view, it shall cease to be applied.

審外，不得對之提起訴願」，與上開意旨不符部分，應不再援用。

As to that part of the petitioner's application that arises from Article 10, Paragraph 5 of the Enforcement Rules of the Act Governing the Replacement Test of the Reserve Military Personnel for Civil Positions, we do not review it because it

至本件聲請人就有關後備軍人轉任公職考試比敘條例施行細則第十條第五項部分，未經確定終局裁判，核與規定不合，應不受理，併此說明。

has not received a final and nonappealable judgment and, therefore, does not comply with rules governing our review.

J. Y. Interpretation No.324（July 16, 1993）*

ISSUE: Does Article 26 of the Regulation Governing the Customs Supervision of Containers violate Article 23 of the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 26 of the Regulation Governing the Customs Supervision of Containers（海關管理貨櫃辦法第二十六條）; Articles 51 and 63 of the Navigation Business Act（航業法第五十一條、第六十三條）.

KEYWORDS:

container yard（貨櫃集散站）, shortage（貨物）, customs import duty（海關進口稅）, suspense of application（停止受理）.**

HOLDING: The aim of the first sentence of Article 26 of the Regulation Governing the Customs Supervision of Containers amended and promulgated by the Ministry of Finance on June 18, 1985, which stipulates that "the Customs may suspend the application of a storage business for a period of time in case any

解釋文：財政部中華民國七十四年六月十八日修正發布之海關管理貨櫃辦法，其第二十六條前段，關於貨櫃集散站由於非人力所不能抗拒之原因，致貨物短少時，海關得於一定期間停止受理其申報進儲業務之規定，旨在確保海關對於存站貨物之監視效果，防止走私，為增進公共利益所必要。惟上述一

* Translated by Assistant Professor Y.K.Huang.

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shortages not beyond human control occurred in the container yard ", is to ensure the Customs' effective supervision of the goods stored therein and to prevent smuggling, which is necessary to promote the public interest. However, as to the said "period of time," since the above Article does not stipulate the longest period of limitation, it shall be made by law or rules authorized by law by referring to Article 63 of the Navigation Business Act and shall be so stipulated and come into force before December 31, 1994. The above provision shall be void in case the time limit has expired. Furthermore, as to the issues on public law contracts involved in the said Regulation, their basic norms shall be promptly legislated and properly regulated by the relevant authorities.

定期間，未設最長期間之限制，究須如何規範，應參酌航業法第六十三條之規定，以法律或法律授權之命令定之，並應於中華民國八十三年十二月三十一日以前制定施行，逾期上開規定應停止適用。又該辦法尚涉及公法契約之問題，關於公法契約之基本規範，亦宜由有關機關儘速立法，妥為訂定。

REASONING: It is stipulated in Article 51 of the Navigation Business Act that a container yard business, in addition to having a license approved and issued by the Ministry of Transportation and Communications, shall also be registered by Customs. Since a close relationship exists between the container yard and

解釋理由書：貨櫃集散站之營業，除須由交通部核發許可證外，並應經海關登記，航業法第五十一條設有規定。因其與海關通關查驗及緝私之職務執行有密切關連，故財政部訂有海關管理貨櫃辦法，定明以貨櫃裝運之進口貨物，卸存於貨櫃集散站者，集散站對之負保管責任，受關員之監視或抽核。放

Customs in executing the Customs clearance process, and the examination and prevention of smuggling, the Ministry of Finance enacted the Regulation Governing the Customs Supervision of Containers providing that the imported containerized cargos which are discharged and stored in the container yard shall be supervised and spot-checked by the Customs officer. The cargos shall not be released from the container yard without evidentiary documents approved by the Customs, and the business operator of the container yard shall pay to the Customs a guarantee deposit to guarantee that he will comply with the regulations provided in said Regulation. Article 26 of the Regulation Governing the Customs Supervision of Containers amended and promulgated by the Ministry of Finance on June 18, 1985, stipulates that "a container yard operator shall be responsible for the keeping of the cargos stored therein. In the case where it is found that the cargos have been moved or replaced fraudulently, changes of marks, number, or packaging have been made, documents have been forged or any other matters have occurred

行時，應憑海關核准之文件，始得提貨出站。並由業者向海關立具保結，表示遵守該辦法之有關規定。財政部於中華民國七十四年六月十八日修正發布該辦法，於其第二十六條前段規定：「貨櫃集散站對存站貨物負保管責任。如發現有冒領、頂替、變更標記、號碼、包裝或偽造證件矇混提運出站，或其他非人力所不能抗拒之原因，致貨物短少時，除應由貨櫃集散站負責繳納進口稅捐及依海關緝私條例或其他有關法令規定處理外，並得於一定期間停止受理其申報貨櫃及貨物之進儲業務。」就其「停止受理」部分言，此種存站貨物短少之情形一旦發生，即有發生走私等不法情事之可能。海關為確保其對於存站貨物之監視抽核，防止走私，自得為此「停止受理」之處分，以促使集散站改善其設施或管理，避免損害之繼續發生或擴大。既為增進公共利益所必要，亦為海關執行其通關查驗及緝私之法定職務所當為。惟該辦法就「停止受理」之一定期間，未設最長期間之限制，究須如何規範，應參酌航業法第六十三條之規定，以法律或法律授權之命令定之，以符合憲法第二十三條之意旨。此項法律應於八十三年十二月三十一日以前制定施行，逾期上開關於「停止受理」之規

not beyond human control which thus resulted in a shortage of cargos, then the container yard operator shall pay import tax and handling in such cases in accordance with the respective provisions of the Customs Smuggling Control Act and other laws or regulations, and the application for container and cargo storage business shall also be suspended for a period of time." To the suspension of application, in case the shortage matters on the instored cargos occur, illegal matters such as smuggling may happen thereof. The Customs, to ensure the effective supervision of the goods stored therein and to prevent smuggling, may order such "suspension of application" in order to compel the container yard operator to improve his facilities or management and to prevent further or aggravating damage, which is necessary to promote the public interest and is to be done legally subject to the statutory duty of the Customs in executing the Custom clearance process, and the examination and prevention of smuggling. However, as to the said "period of time", since the above Article does not stipulate the longest period of limitation, it shall be

定，即停止適用。又業者既須向海關立具保結，尚涉及公法契約問題，關於公法契約之基本規範，亦宜由有關機關儘速立法，妥為訂定，俾符依法行政原則。至上開規定內關於由集散站負責繳納進口稅捐部分，以該短少之貨物，集散站為「短少」事故發生當時之持有人，自應依本院釋字第二一九號解釋辦理，毋庸再作解釋，併予指明。

made by law or rules authorized by law by referring to Article 63 of the Navigation Business Act to comply with the aim of Article 23 of the Constitution. The said Act shall be so stipulated and come into force before December 31, 1994, and the provision of "suspension of application" shall be void in case the time limit has expired. Furthermore, the guarantee given by the business operator of the container yard to the Customs is a matter involving a public law contract. The basic norm of public law contracts shall be promptly legislated and properly regulated by the relevant authorities in order to comply with the principle of administrative justice. As to the section in the abovementioned provision stating that the container yard operator shall pay the import tax, it shall be dealt with subject to J. Y. Interpretation No. 219 since the container yard was the holder of the shorted cargos at the time the shortage occurred, for which no further interpretation is necessary.

Justice Geng Wu filed concurring opinion.
Justice Chien-Tsai Cheng filed concurring opinion.

本號解釋吳大法官庚、鄭大法官健才分別提出協同意見書；李大法官志鵬提出不同意見書。

Justice Chih-Peng Lee filed dissenting opinion.

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

ISSUE: Article 15 of the Amendment to the Constitution provides that from the second term thereafter the Members of the Control Yuan should be nominated by the President and confirmed by the National Assembly. Shall the Control Yuan continue to be characterized as a part of the congress? If not, shall its investigative power be transferred to the Legislative Yuan?

RELEVANT LAWS:

Articles 57, Subparagraph 1, 67, Paragraph 2, 80, 88, 95 and 96 of the Constitution（憲法第五十七條第一款、第六十七條第二項、第八十條、八十八條、九十五條及九十六條）; Article 15 of the Amendment to the Constitution （憲法增修條文第十五條）; J. Y. Interpretations No. 13 and 76（司法院釋字第十三號及第七十六號解釋）.

KEYWORDS:

central representative authorities（中央民意機關）, democratic country（民主國家）, congress（國會）, impeachment power （彈劾權）, investigation power （調查權）.**

HOLDING: Interpretation No. 76 of the Judicial Yuan states that the Control Yuan together with other central

解釋文：本院釋字第七十六號解釋認監察院與其他中央民意機構共同相當於民主國家之國會，於憲法增修條

* Ttanslated by David T. Liou.

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representative authorities are deemed equivalent to the congress of a democratic country. Such interpretation is no longer applicable to the Control Yuan since, after the implementation of Article 15 of the Amendment to the Constitution, the Control Yuan is not considered a central representative authority; moreover, its position and power have been changed as a result thereof. However, the Five-Yuan system under the Constitution has not been changed. The Amendment does not make changes to the impeachment power, censure power, rectification power, etc., which originally fell within the powers of the Control Yuan, and the investigative power accorded by Articles 95 and 96 of the Constitution for the exercise of the said powers. As such, this power of investigation shall nevertheless be exercised by the Control Yuan exclusively. In order to exercise the many powers granted by the Constitution, in addition to proceeding in accordance with Article 57, Subparagraph 1, and Article 67, Paragraph 2, of the Constitution, the Legislative Yuan may, after resolution by the general meeting or a committee meeting of the Legislative

文第十五條規定施行後，監察院已非中央民意機構，其地位及職權亦有所變更，上開解釋自不再適用於監察院。惟憲法之五院體制並未改變，原屬於監察院職權中之彈劾、糾舉、糾正權及為行使此等職權，依憲法第九十五條、第九十六條具有之調查權，憲法增修條文亦未修改，此項調查權仍應專由監察院行使。立法院為行使憲法所賦予之職權，除依憲法第五十七條第一款及第六十七條第二項辦理外，得經院會或委員會之決議，要求有關機關就議案涉及事項提供參考資料，必要時並得經院會決議調閱文件原本，受要求之機關非依法律規定或其他正當理由不得拒絕。但國家機關獨立行使職權受憲法之保障者，如司法機關審理案件所表示之法律見解、考試機關對於應考人成績之評定、監察委員為糾彈或糾正與否之判斷，以及訴訟案件在裁判確定前就偵查、審判所為之處置及其卷證等，監察院對之行使調查權，本受有限制，基於同一理由，立法院之調閱文件，亦同受限制。

Yuan, request the relevant authorities to provide reference materials for issues involved in the subject matter. Where necessary, the Legislative Yuan may request for review of the original documents after resolution by the general meeting or committee meeting of the Legislative Yuan, and the authority being so requested may not decline such request unless in accordance with the laws or for other justifiable reasons. However, where the independent exercise of powers by the government authorities is protected by the Constitution, for example, legal opinions enumerated by the judicial authorities when adjudicating cases, performance evaluation of examinees by the examination authorities, determination by the members of the Control Yuan on whether to impeach or rectify, and the dealings of investigation and adjudication in litigation cases prior to the final and binding judgments as well as the files and evidence thereof, the exercise of investigative power by the Control Yuan with respect thereto is subject to constraints from the outset. Based on the same reason, the request for document review by the Legisla-

tive Yuan is subject to the same constraint.

REASONING: The Constitution of our country does not provide for the notion of "Congress". There was a quandary as to which government authority should represent the congress where contact with other countries is required to be made in the name of the congress, and the Judicial Yuan has made an Interpretation No. 76 pursuant to a request. The Interpretation provides that "the National Assembly, the Legislative Yuan, and the Control Yuan together are deemed equivalent to the congress in a democratic country." In addition, the basic reasoning for such interpretation is based on the fact that all of the above are comprised of the members or representatives directly/indirectly elected by the general public, and that, as far as their positions and the nature of their authorities under the Constitution are concerned, they shall be deemed as the equivalent of congress in democratic countries. Since the Constitution perceives that the members of the Control Yuan are indirectly elected by the people,

解釋理由書：我國憲法並無國會之名稱，前以國際聯繫有須用國會名義者，究應由何機關代表國會發生疑義，本院依聲請作成之釋字第七十六號解釋，亦祇謂「國民大會、立法院、監察院共同相當於民主國家之國會」，並以其均由人民直接間接選舉之代表或委員所組成，就憲法上之地位及職權性質而言，應認為相當於民主國家之國會，作為解釋之基本理由。茲憲法關於監察委員由人民間接選舉產生，對司法院、考試院之人事同意權以及因中央民意代表身分所享有之言論免責權等規定，因憲法增修條文第十五條之規定而停止適用。基於上述憲法增修條文之規定，監察院第二屆監察委員係由總統提名經國民大會同意後任命，已非中央民意機構，其地位及職權亦有所變更，上開解釋自不再適用於監察院。

the provisions regarding approval power with respect to the personnel of the Judicial Yuan and Examination Yuan, and legislative immunity accorded by virtue of having the identity as the central people's representatives are no longer applicable by reason of Article 15 of the Amendment to the Constitution. Based on the above amended provision in the Amendment, the second-term members of the Control Yuan are commissioned after the approval by the National Assembly following nomination by the President. As such it is not a central representative authority and its position and powers are also altered. Consequently, the above Interpretation shall no longer be applicable to the Control Yuan.

In addition to the National Assembly, the Constitution has established five yuans to be in charge of the executive, legislative, judicial, examination, and control powers, all of which are the highest authorities of the country, and their respective powers are mainly delineated by the Constitution. This is not entirely similar to the separation-of-powers system

憲法於國民大會之外，設立五院分掌行政、立法、司法、考試、監察五權，均為國家最高機關，彼此職權，並經憲法予以劃分，與外國三權分立制度，本不完全相同，其中何者相當於民主國家之國會，於五院職權之劃分並無必然之關連，憲法增修條文既未對五院體制有所改變，亦未增加立法院之職權，則監察院對於中央及地方公務人員

adopted in other countries. The question as to which entity is the equivalent of a "congress" in a democratic country is not necessarily intrinsically related to the delineating of powers amongst the five yuans. The amended provision in the Amendment has not made changes to the five-yuan system, nor has it enlarged the powers of the Legislative Yuan. Since no amendment is made to the censure and impeachment powers exercisable by the Control Yuan where it considers the central or local public servants negligent or in breach of law, the power of rectification which is confined to the Executive Yuan and its relevant divisions and the investigative power granted by Articles 95 and 96 of the Constitution for the exercise of the said power, such power should nevertheless be exercised exclusively by the Control Yuan.

認為有失職或違法情事，得提出之糾舉、彈劾及限於對行政院及其有關部會得提出之糾正，以及為行使此等職權，依憲法第九十五條、第九十六條具有之調查權，既未修改，自仍應專由監察院行使。

In order for the Legislative Yuan to maximize its functions, Article 57, Subparagraph 1, of the Constitution states that "The Executive Yuan has the duty to present to the Legislative Yuan a statement of its administrative policies and a report

為使立法院發揮其功能，憲法於第五十七條第一款規定，「行政院有向立法院提出施政方針及施政報告之責，立法委員在開會時有向行政院院長及行政院各部會首長質詢之權」，於第六十七條第二項規定，「各種委員會得邀請

on its administration. The legislators have the right to interpellate the premier of the Executive Yuan and the ministers of the divisions thereof whilst the meeting is in session." Article 67, Paragraph 2, provides that "the various committees may invite government officials and interested parties to attend the meeting and to answer questions." As such the legislators can be questioned or can raise questions at the meetings and acquire an understanding of the relevant matters from the explanations or opinions proffered by the persons being so questioned or the attendees in response to the subject matter in question. Where something is still not clear, they can, through resolution by the general meeting or committee meeting of Legislative Yuan, request the relevant authorities to provide reference materials with respect to issues involved in the subject matter under discussion. Where necessary, the Legislative Yuan may request for review of the original documents so as to comply with the constitutional provisions with respect to the exercise of powers by the legislators in meetings. The authority being so requested may not decline such

政府人員及社會上有關係人員到會備詢」，則立法委員本得於開會時為質詢或詢問，經由受質詢人或應邀列席人員就詢問事項於答覆時所說明之事實或發表之意見，而明瞭有關事項。如仍不明瞭，得經院會或委員會之決議，要求有關機關就議案涉及事項提供參考資料，必要時並得經院會決議調閱文件原本，以符憲法關於立法委員集會行使職權之規定，受要求之機關非依法律規定或其他正當理由不得拒絕。但國家機關獨立行使職權受憲法之保障者，例如法官依據法律獨立審判，不受任何干涉，考試委員、監察委員獨立行使職權，憲法第八十條、第八十八條、憲法增修條文第十五條第六項均有明文保障；而檢察官之偵查與法官之刑事審判，同為國家刑罰權正確行使之重要程序，兩者具有密切關係，除受檢察一體之拘束外，其對外獨立行使職權，亦應同受保障。本院釋字第十三號解釋並認實任檢察官之保障，除轉調外，與實任推事（法官）同，可供參證。上述人員之職權，既應獨立行使，自必須在免於外力干涉下獨立判斷。故如司法機關審理案件所表示之法律見解、考試機機對於應考人成績之評定、監察委員為糾彈或糾正與否之判斷，以及訴訟案件在裁判確定前就偵

request unless in accordance with the laws or for other justifiable reasons. However, the independent exercise of powers by the government authorities is protected by the Constitution, for example, independent adjudication by a judge in accordance with the laws and free from any interference, and the independent exercise of powers by the members of the Examination Yuan and Control Yuan are all clearly prescribed in Articles 80 and 88 of the Constitution and Article 15, Paragraph 6, of the Amendment. The prosecutor's investigation and the judge's criminal trial are both important procedures for the proper exercise of the country's punishment powers, and the two are closely linked. Except for the constraint of "the consistency of prosecution," the independent exercise of powers with respect to others shall similarly be subject to protection. Interpretation No. 13 of the Judicial Yuan provides some reference that the protection afforded to the current prosecutor shall be the same as that of the judge except in matters concerning transfer. Since the powers of the abovementioned persons shall be exercised independently,

查、審判所為之處置及其卷證等，監察院對之行使調查權，本受有限制，基於同一理由，立法院之調閱文件，亦同受限制。

independent judgment shall be arrived at whilst free from external interference. Hence, with respect to legal opinions enumerated by the judicial authorities when adjudicating cases, performance evaluation of examinees by the examination authorities, determination by the members of Control Yuan on whether to impeach or rectify, and the dealings of investigation and adjudication in litigation cases prior to the final and binding judgment as well as the files and evidence thereof, the exercise of investigative power by the Control Yuan is subject to constraints from the outset. Based on the same reason, the request for document review by the Legislative Yuan is subject to the same constraint.

J. Y. Interpretation No.326（October 8, 1993）*

ISSUE: Is a naturally created river and the "vicinity of watercourses" announced as a result thereof qualified as a land for public facilities?

RELEVANT LAWS:

Articles 3, 32, and 42, Paragraph 1, Subparagraph 1 of the Urban Planning Act（都市計畫法第三條、第三十二條、第四十二條第一項第一款）; Article 83 of the Water Conservancy Act（水利法第八十三條）.

KEYWORDS:

urban planning（都市計畫）, the vicinity of watercourses（行水區）, watercourses（河道）, river（河流）, land for public facilities（公共設施用地）.**

HOLDING: The so-called watercourses described in Subparagraph 1 of Paragraph 1 of Article 42 of the Urban Planning Act refer to those watercourses which are set under the planned development of the important facilities in the city and the reasonable planning according to the provision of Article 3 of this Act. As

解釋文：都市計畫法第四十二條第一項第一款所稱之河道，係指依同法第三條就都市重要設施作有計畫之發展，而合理規劃所設置之河道而言。至於因地勢自然形成之河流，及因之而依水利法公告之原有「行水區」，雖在都市計畫使用區之範圍，仍不包括在內。

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* Translated by Jer -Shenq Shieh.

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

for the rivers naturally formed by the geographical features, and the "vicinity of watercourses" therefore announced according to the Water Conservancy Act, though they are within the zone for use in the urban planning, they do not belong to the aforesaid watercourses.

REASONING: Urban planning refers to the planned development in some specific areas of the important facilities for the economy, transportation and communications, hygiene, security, national defense, literature and education, recreation, etc. of urban life, and the reasonable planning for land use. This is clearly provided in Article 3 of the Urban Planning Act. The so-called watercourses described in Subparagraph 1 of Paragraph 1 of Article 42 of this Act refer to those watercourses which are set under reasonable planning according to the above-mentioned provision and belong to those "suitable public-owned lands which shall be first taken to be utilized" according to the provision of Paragraph 2 of this Article. It could be perceived that lands through which these watercourses flow

解釋理由書：都市計畫係指在一定地區內有關都市生活之經濟、交通、衛生、保安、國防、文教、康樂等重要設施，作有計畫之發展，並對土地使用作合理之規劃而言，都市計畫法第三條定有明定。同法第四十二條第一項第一款所稱之河道，係指依首開規定合理規劃所設置，且依其第二項規定「應儘先利用適當之公有土地」之河道。足見此種河道所使用之土地原非河道，依都市計畫之設置始成為河道之公共設施用地，至由於地理形勢自然形成之河流及因之而依水利法公告之原有行水區土地，雖在都市計畫使用區之範圍，既非依都市計畫法所設置，自不屬上述之公共設施用地，縱將之改稱為河道，亦同。其依都市計畫法第三十二條所劃定之使用區或特定專用區，乃為使用管制事項而設，與公共設施用地之設置，二者並不相同。

did not belong to the aforesaid watercourses in origin, and they became the watercourses belonging to the lands for public facilities due to being set under the urban planning. As for the rivers naturally formed by the geographical features, and the lands therefore announced as being the vicinity of watercourses according to the Water Conservancy Act, though they are within the zone for use in the urban planning, since they were not thus set according to the Urban Planning Act, they do not belong to the above-mentioned lands for public facilities, nor would they even if they were designated as watercourses. Separating the zone for use or zone for specific use according to Article 32 of the Urban Planning Act is for the land use control, and this is different from the setting of the lands for public facilities.

Justice Rui-Tang Chen filed dissenting opinion.

本號解釋陳大法官瑞堂提出不同意見書。

J. Y. Interpretation No.327（October 8, 1993）*

ISSUE: Does the first sentence of Subparagraph 2, Article 114 of the Income Tax Act provide for excessive fines and thus contradict the Constitution?

RELEVANT LAWS:

Articles 92 and 114, Subparagraph 2, the first sentence of the Income Tax Act（所得稅法第九十二條及第一百十四條第二款前段）.

KEYWORDS:

tax withholder（扣繳義務人）.**

HOLDING: The first sentence of Subparagraph 2, Article 114, of the Income Tax Act provides that, for a tax withholder who has withheld and paid taxes in accordance with this Act but failed to submit or issue the tax-withholding certificates within the time limit prescribed in Article 92, the tax withholder shall, in addition to being requested to submit or issue the same within the time limit ordered by the authority, be

解釋文：所得稅法第一百十四條第二款前段：「扣繳義務人已依本法扣繳稅款，而未依第九十二條規定之期限按實填報或填發扣繳憑單者，除限期責令補報或填發外，應按扣繳稅額處百分之二十之罰鍰，但最低不得少於一千五百元；逾期自動申報或填發者，減半處罰」，旨在掌握稅源資料，維護租稅公平，就違反此項法律上作為義務應予制裁部分，為增進公共利益所必要，與憲法尚無牴觸。惟對於扣繳義務人已將

* Translated by Chun-yih Cheng, Attorney at Law & Assistant Professor of Law.

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fined at the rate of twenty per cent of the tax amount to be withheld. The amount of the fine, however, shall not be less than NT$ 1,500. If the certificate is submitted or issued after the deadline as a result of the tax withholder's own initiative, the fine shall be reduced by fifty per cent. The purposes of the aforesaid provision are to obtain the relevant tax source information and to preserve fair taxation. The imposition of a fine upon the tax withholder for his/her noncompliance with the duties is necessary to protect the public interest, and such provision does not contradict the Constitution. However, the authority-in-charge shall review and revise the provision under which the tax withholder would be fined at a fixed rate of the tax amount to be withheld without reasonable ceiling even though the tax withholder has paid the withholding tax within the prescribed time limit but only failed to submit or issue the tax-withholding certificates within the prescribed time limit.

所扣稅款依限向國庫繳清，僅逾期申報或填發扣繳憑單者，仍依應扣繳稅額固定之比例處以罰鍰，又無合理最高額之限制，應由有關機關檢討修正。

REASONING: The first sentence of Subparagraph 2, Article 114, of the Income Tax Act provides that, for a

解釋理由書：中華民國七十八年十二月三十日修正公布之所得稅法第一百十四條第二款前段：「扣繳義務人

tax withholder who has withheld and paid taxes in accordance with this Act but failed to submit or issue the tax-withholding certificates within the time limit prescribed in Article 92, the tax withholder shall, in addition to being requested to submit or issue the same within the time limits ordered by the authority, be fined at the rate of twenty per cent of the tax amount to be withheld. The amount of the fine, however, shall not be less than NT$ 1,500. If the certificate is submitted or issued after the deadline as a result of the tax withholder's own initiative, the fine shall be reduced by fifty per cent. The provision is to punish the tax withholder for his/her noncompliance with the submitting or issuing requirements within the prescribed time limit. The purpose of imposing sanctions upon the non-compliant is to maintain the tax withholding system by compelling the tax withholder to perform his/her obligations. Such provision is necessary for the authority-in-charge to obtain the relevant tax source information, to preserve fair taxation, and to ensure revenue for the Treasury, rather than to place unnecessary bur-

已依本法扣繳稅款，而未依第九十二條規定之期限按實填報或填發扣繳憑單者，除限期責令補報或填發外，應按扣繳稅額處百分之二十之罰鍰，但最低不得少於一千五百元；逾期自動申報或填發者，減半處罰。」乃對扣繳義務人未於法定期限填報或填發之制裁規定。其就違反義務者，課以一定之制裁，係為貫徹扣繳制度，督促扣繳義務人善盡其應盡之作為義務，俾稽徵機關得以掌握稅源資料，達成維護租稅公平並確保國庫收入之必要手段，並非徒然增加扣繳義務人之負擔，就違反此項法律上作為義務應予制裁部分而言，為增進公共利益所必要，與憲法尚無牴觸。惟對於扣繳義務人已將所扣繳稅款依限向國庫繳清，僅逾期申報或填發扣繳憑單者，仍依應扣繳稅額固定之比例處以罰鍰，又無合理最高額之限制，有導致處罰過重之情形，應由有關機關檢討修正。

den upon the tax withholder. In this regard, the imposition of fine upon the tax withholder for his/her noncompliance with the duties is necessary to protect the public interest, and such provision does not contradict the Constitution. However, the authority-in-charge shall, in order to prevent the imposition of excessive punishment, review and revise the provision under which the tax withholder should be fined at a fixed rate of the tax amount to be withheld without reasonable ceiling even though the tax withholder has paid the withholding tax within the prescribed time limit but only failed to submit or issue the tax-withholding certificates within the prescribed time limit.

Justice Chien-Hua Yang g filed dissenting opinion in part.

Justice Zu-Zan Yang filed dissenting opinion in part, in which Justice Teh-Sheng Chang joined.

Justice Chien-Tsai Cheng filed dissenting opinion in part.

本號解釋楊大法官建華提出一部不同意見書；楊大法官日然與張大法官特生共同提出一部不同意見書；鄭大法官健才提出一部不同意見書。

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

ISSUE: What are the boundaries of the national territory of the R.O.C.?

RELEVANT LAWS:

Article 4 of the Constitution（憲法第四條）.

KEYWORDS:

political question（政治問題）, separation of powers（權力分立）.**

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

解釋文：中華民國領土，憲法第四條不採列舉方式，而為「依其固有之疆域」之概括規定，並設領土變更之程序，以為限制，有其政治上及歷史上之理由。其所稱固有疆域範圍之界定，為重大之政治問題，不應由行使司法權之釋憲機關予以解釋。

REASONING: How to delimit

解釋理由書：國家領土之範圍

* Translated by Professor J. P. Fa.

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the national territory is a purely political question. It may also be called by some scholars an act of state. This question is not subject to judicial review according to the constitutional principle of separation of powers. Article 4 of the Constitution provides: “The territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly.” Instead of enumerating the components of the R.O.C., a general provision was adopted and concurrently provided a special procedure for any change of national territory. It is understandable that this legislative policy was based upon political and historical reasons. Since the meaning of “according to its existing national boundaries” is closely related to the delimitation of national territory, accordingly, it is a significant political question. Based on the above explanation, this application for interpretation is denied.

如何界定，純屬政治問題；其界定之行為，學理上稱之為統治行為，依權力分立之憲政原則，不受司法審查。我國憲法第四條規定，「中華民國領土，依其固有之疆域，非經國民大會之決議，不得變更之」，對於領土之範圍，不採列舉方式而為概括規定，並設領土變更之程序，以為限制，有其政治上及歷史上之理由。其所稱「固有之疆域」究何所指，若予解釋，必涉及領土範圍之界定，為重大之政治問題。本件聲請，揆諸上開說明，應不予解釋。

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

ISSUE: What is the meaning of "treaty" in the Constitution? Which kind of international agreement should be sent to the Legislation Yuan for deliberation?

RELEVANT LAWS:

Articles 4, 38, 58, Paragraph 2 and 63 of the Constitution（憲法第四條、第三十八條、第五十八條第二項、第六十三條）.

KEYWORDS:

treaty（條約）, agreement（協定）, ratification（批准）, Legislative Yuan（立法院）, Executive Yuan（行政院）. **

HOLDING: Within the Constitution, "treaty" means an international agreement concluded between the R.O.C. and other nations or international organizations whose title may apply to a treaty, convention or an agreement. Its content involves important issues of the Nation or rights and duties of the people and its legality is sustained. Such agreements, which employ the title of "treaty," "con-

解釋文：憲法所稱之條約係指中華民國與其他國家或國際組織所締約之國際書面協定，包括用條約或公約之名稱，或用協定等名稱而其內容直接涉及國家重要事項或人民之權利義務且具有法律上效力者而言。其中名稱為條約或公約或用協定等名稱而附有批准條款者，當然應送立法院審議，其餘國際書面協定，除經法律授權或事先經立法院同意簽訂，或其內容與國內法律相同者

* Translated by Dr.F.T.Liao.

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vention" or "agreement" and have ratification clauses, should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or pre-determined by the Legislative Yuan, should also be sent to the Legislative Yuan for deliberation.

外，亦應送立法院審議。

REASONING: According to the Constitution, the president has the power to conclude treaties. The premier and ministers shall refer those treaties that should be sent to the Legislation Yuan for deliberation to the Committee of the Executive Yuan. The Legislative Yuan has the power to review those treaties. All of these procedures are explicitly enshrined in Article 38, Article 58, Paragraph 2, and Article 63 of the Constitution, respectively. Treaties concluded according to the above procedures hold the same status as laws. Therefore, the term "treaty" in the Constitution means an international agreement concluded between the R.O.C., including those institutions and groups authorized by governmental agencies, and other nations, including their authorized institutions and groups or international

解釋理由書：總統依憲法之規定，行使締結條約之權；行政院院長、各部會首長，須將應行提出於立法院之條約案提出於行政院會議議決之；立法院有議決條約案之權，憲法第三十八條、第五十八條第二項、第六十三條分別定有明文。依上述規定所締結之條約，其位階同於法律。故憲法所稱之條約，係指我國（包括主管機關授權之機構或團體）與其他國家（包括其授權之機關或團體）或國際組織所締結之國際書面協定，名稱用條約或公約者，或用協定等其他名稱而其內容直接涉及國防、外交、財政、經濟等之國家重要事項或直接涉及人民之權利義務且具有法律上效力者而言。其中名稱為條約或公約或用協定等名稱而附有批准條款者，當然應送立法院審議，其餘國際書面協定，除經法律授權或事先經立法院同意簽訂，或其內容與國內法律相同（例如

organizations, that employ the title of "treaty," "convention" or "agreement"; is involved directly in important national issues such as defense, diplomacy, finance, the economy or people's rights and duties, and has legal effect. Agreements that employ the title of "treaty," "convention" or "agreement," and have ratification clauses should be sent to the Legislative Yuan for deliberation. Other international agreements, except those authorized by laws or pre-determined by the Legislation Yuan, should also be sent to the Legislative Yuan for deliberation. Those international agreements, which do not need to be sent to the Legislative Yuan for deliberation or cannot be regarded as treaties concluded by governmental agencies or their authorized institutions or groups, should be processed by responsible governmental agencies compliant with legislative or normal executive procedure. It is obvious that the "Procedural Regulation on Treaties and Agreements" enacted by the Ministry of Foreign Affairs should be amended in accordance with this interpretation.

協定內容係重複法律之規定，或已將協定內容訂定於法律）者外，亦應送立法院審議。其無須送立法院審議之國際書面協定，以及其他由主管機關或其授權之機構或團體簽訂而不屬於條約案之協定，應視其性質，由主管機關依訂定法規之程序，或一般行政程序處理。外交部所訂之「條約及協定處理準則」，應依本解釋意旨修正之，乃屬當然。

According to Article 4 of the Constitution, treaties that alter the territory of the R.O.C. within its existing national boundaries should also be resolved by the National Assembly. Agreements concluded between Taiwan and mainland China are not international agreements to which this interpretation relates. It should also be noted that whether or not these agreements should be sent to the Legislation Yuan for deliberation is not included in this interpretation.

至條約案內容涉及領土變更者，並應依憲法第四條之規定，由國民大會議決之。而臺灣地區與大陸地區間訂定之協議，因非本解釋所稱之國際書面協定，應否送請立法院審議，不在本件解釋之範圍，併此說明。

Justice Teh-Sheng Chang filed dissenting opinion in part.

Justice Yu-Ling Yang filed dissenting opinion.

Justice Chih-Peng Lee filed dissenting opinion.

Justice Chung-Sheng Lee filed dissenting opinion.

本號解釋張大法官特生提出一部不同意見書；楊大法官與齡、李大法官志鵬與李大法官鐘聲分別提出不同意見書。

J. Y. Interpretation No.330（December 24, 1993）*

ISSUE: Where the decedent was declared dead by court judgment, is it constitutional to specify in the Enforcement Rules of the Estate and Gift Taxes Act that the six-month statutory period for filing estate tax declaration begins to run from the date of declaration of such judgment?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 6 of the Civil Code（民法第六條）; Articles 1, Paragraph 1, and 10, 23, Paragraph 1, the first sentence of the Estate and Gift Taxes Act（遺產及贈與稅法第一條第一項、第十條、第二十三第一項前段）; Article 21 of the Enforcement Rules of the Estate and Gift Taxes Act（遺產及贈與稅法施行細則第二十一條）; J. Y. Interpretation No. 311（司法院釋字第三一一號解釋）.

KEYWORDS:

declared death（宣告死亡）, natural death（自然死亡）, competent taxing authority（主管稽徵機關）, place of household registration（戶籍所在地）, nature of the thing（事件之本質）, missing person（失蹤人）, presumed to be dead（推定死亡）, taxing power（核課權）. **

* Translated by Raymond T. Chu.

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

HOLDING: The Estate and Gift Taxes Act provides in Article 23, Paragraph 1, the first sentence, that where a decedent has left an estate upon his death, the person liable for payment of estate tax shall make a declaration of estate tax to the competent taxing authority at the place of his household registration within six months from the date of death of the decedent. In the case where the decedent was declared to be dead by a court judgment, Article 21 of the Enforcement Rules of the Estate and Gift Taxes Act sets out that the period specified for declaring the estate tax shall run from the date such judgment was declared, as the taxpayer was not in a position to make the estate tax declaration before the date on which the death was declared by the court. The provision is consistent with the legislative intent of the law and the nature of the thing (Natur der Sache) regarding the declaration of estate tax in case of judicial declaration of death of the decedent, and is therefore consistent with the essence of Article 19 of the Constitution.

解釋文：遺產及贈與稅法第二十三條第一項前段規定，被繼承人死亡遺有財產者，納稅義務人應於被繼承人死亡之日起六個月內，向戶籍所在地主管稽徵機關辦理遺產稅申報。其受死亡之宣告者，在判決宣告死亡前，納稅義務人無從申報，故同法施行細則第二十一條就被繼承人為受死亡之宣告者，規定其遺產稅申報期間應自判決宣告之日起算，符合立法目的及宣告死亡者遺產稅申報事件之本質，與憲法第十九條意旨，並無牴觸。

REASONING: That the legal

解釋理由書：人之權利能力，

capacity of a person begins from the moment of birth and terminates at the moment of death and that, in case a deceased person has left property, the competent taxing authority is legally entitled to levy estate tax upon such property, are respectively prescribed by Article 6 of the Civil Code and Article 1, Paragraph 1, of the Estate and Gift Taxes Act. While judicial declaration of death is different from natural death, both are causes by which the legal capacity of a person terminates. Where a decedent has left property, the Estate and Gift Taxes Act provides in Article 23, Paragraph 1, the first sentence, that the person liable to payment of estate tax shall make a declaration of estate tax to the competent taxing authority at the place of his household registration within six months from the date of death of the decedent. In the case of a missing person declared to be dead, he is presumed to have been dead from the date determined in the judgment, and this presumed time of death must have been earlier than the time the court declares its judgment. Before the court makes such declaration, however, it is not yet certain whether the

始於出生，終於死亡，其死亡遺有財產者，主管稽徵機關應依法對之課徵遺產稅，為民法第六條、遺產及贈與稅法第一條第一項所明定。死亡宣告固與自然死亡有別，然其亦為人之權利能力消滅之原因，則無不同。遺產及贈與稅法第二十三條第一項前段規定，被繼承人死亡遺有財產者，納稅義務人應於被繼承人死亡之日起六個月內，向戶籍所在地主管稽徵機關辦理遺產稅申報，而失蹤人受死亡之宣告，係以判決內所確定死亡之時，推定其為死亡，其時間必在法院判決宣示之前。在判決宣示前，失蹤人之財產是否遺產猶未確定，其遺產稅納稅義務人無從辦理遺產稅申報，稽徵機關之核課權，亦不能開始行使。故遺產及贈與稅法施行細則第二十一條規定：「本法第二十三條規定之遺產稅申報期間，如被繼承人為受死亡之宣告者，應自判決宣告之日起計算」，以便徵納雙方遵循，符合立法之目的及宣告死亡者遺產稅申報事件之本質（事物之本質 Natura Rerum，Natur der Sache，Nature of things），與憲法第十九條意旨，並無牴觸。惟被繼承人受死亡之宣告者，其繼承人申報遺產稅期間之起算日，以及遺產估價之基準，既均與人民依法納稅之義務有關，宜以法律定之，

property of the missing person is an estate. Thus, the person liable to payment of estate tax is not yet in a position to proceed with the declaration of the estate tax, nor can the taxing authority begin to exercise its taxing power. For this reason, Article 21of the Enforcement Rules of the Estate and Gift Taxes Act states: "Where the decedent was declared to be dead by court judgment, the period specified in Article 23 of the Estate and Gift Taxes Act for filing the estate tax declaration shall run from the date such judgment was declared." The provision, being intended to be applicable to both the taxpayer and the taxing authority, is consistent with the legislative intent of the law and the nature of the thing (Natur der Sache) regarding the declaration of estate tax in case of judicial declaration of death of the decedent by court judgment, and is therefore consistent with the essence of Article 19 of the Constitution. Nevertheless, where the decedent was declared to be dead, matters regarding the date from which the period of estate tax declaration begins to run and the basis on which the estate is evaluated, having to do with the people's duty to pay

以杜爭議。至關於遺產及贈與稅法第十條第一項但書牴觸憲法疑義部分，本院釋字第三一一號解釋已有釋示，併予說明。

tax under law, would be more appropriately prescribed by law to avoid possible controversies. As regards the doubt of whether the proviso to Paragraph 1 of Article 10 of the Estate and Gift Taxes Act may be in conflict with the Constitution, we have given our opinions in Interpretation No. 311. No further interpretation is needed here.

Justice Chien-Hua Yang filed dissenting opinion in part.

本號解釋楊大法官建華提出一部不同意見書。

J. Y. Interpretation No.331（December 30, 1993）*

ISSUE: Article 69, Paragraph 2, of the Public Officials Election and Recall Act provides: "to those elected pro rata based upon the votes won by each political party, the provisions governing recall procedure are not applicable." Is said exclusion in conflict with the Constitution, thus being null and void?

RELEVANT LAWS:

Article 133 of the Constitution（憲法第一百三十三條）; Articles 1, 2 and 4 of the Amendments to the Constitution（憲法增修條文第一條、第二條及第四條）; Article 69, Paragraph 2, of the Public Officials Election and Recall Act（公職人員選舉罷免法第六十九條第二項）; Article 30, Paragraph 1, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第三十條第一項）.

KEYWORDS:

congressmen（中央民意代表）, recall（罷免）, election（選舉）, National Assembly（國民大會）, Legislative Yuan（立法院）.**

HOLDING: According to Article 4 of the Amendments to the Constitution, congressmen representing overseas Chi-

解釋文：依中華民國憲法增修條文第四條規定，僑居國外國民及全國不分區之中央民意代表，係按該次選舉

* Translated by Lawrence S. Liu.

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nese and the National Sector shall be elected pro rata based on the total ballots won by each political party in a particular election, rather than on votes cast by eligible voters in a precinct concerned. Thus, such congressmen shall not be recalled by means of balloting of the eligible voters in the precinct concerned. Article 69, Paragraph 2, of the Public Officials Election and Recall Act, which reads: "Provisions governing the recall procedure shall not apply to those elected to represent overseas Chinese and the National Sector," is therefore not in conflict with the Constitution. Nonetheless, if any of said congressmen should lose his membership in the political party from which he is elected, it is certain that he will also be deprived of his eligibility for a position in the Congress, since only then can the constitutional intent of introducing such a system be met. In addition, a law governing such a procedure of replacement of congressmen, so as to fill the vacancy left by the deposed, shall be enacted accordingly.

政黨得票總數比例方式產生，而非由選舉區之選民逕以投票方式選出，自無從由選舉區之選民以投票方式予以罷免，公職人員選舉罷免法第六十九條第二項規定：「全國不分區、僑居國外國民選舉之當選人，不適用罷免之規定」，與憲法並無牴觸。惟此種民意代表如喪失其所由選出之政黨黨員資格時，自應喪失其中央民意代表之資格，方符憲法增設此一制度之本旨，其所遺缺額之遞補，應以法律定之。

REASONING: It is provided in

解釋理由書：中華民國憲法增

Article 4 of the Amendments to the Constitution that the election and recall of members of the National Assembly and the Legislative Yuan shall be arranged in accordance with provisions set forth in the Public Officials Election and Recall Act. Since said members representing overseas Chinese and the National Sector shall be elected by means of party-list proportional representation, rather than by votes cast by eligible voters in a precinct concerned, it follows that they shall not be recalled by the balloting of eligible voters in the precinct concerned, as stipulated in Article 133 of the Constitution. Under such a circumstance, the people's right to recall is restricted. Article 69, Paragraph 2, of the Public Officials Election and Recall Act, which reads: "Provisions governing the recall procedure shall not apply to those elected to represent overseas Chinese and the National Sector," follows the above-mentioned constitutional intent and is therefore not in conflict with the Constitution.

修條文第四條規定，國民大會代表、立法院立法委員之選舉罷免，依公職人員選舉罷免法之規定辦理之。僑居國外國民及全國不分區名額，採政黨比例方式選出之。僑居國外國民及全國不分區名額選出者，既係按政黨比例方式產生，而非由選舉區之選民逕以投票方式選出，自無從依憲法第一百三十三條規定，由原選舉區選民以投票方式，予以罷免。人民之罷免權亦因此而受限制。公職人員選舉罷免法第六十九條第二項規定：「全國不分區、僑居國外國民選舉之當選人，不適用罷免之規定」，即係本於上述意旨，與憲法並無牴觸。

Articles 1, 2 and 4 of the Amendment to the Constitution introduced the

憲法增修條文第一條、第二條及第四條增設按政黨比例方式選出僑居國

system of party-list proportional representation for the election of congressmen who represent overseas Chinese and the National Sector. The legislative intent of such Articles is to ensure that a certain portion of congressmen, while they are exercising the power conferred, do not yield to the will of regional voters in particular precincts, so that they may learn the genuine will of the people as a whole and preserve national interests; in addition, said Articles also are meant to prompt political parties to nominate the most talented, virtuous and reputable members to be said congressmen within the quota proportionate to total ballots won in a particular election and allocated to each party, so that such congressmen may serve their country. Nonetheless, if any of said congressmen should lose his membership in the political party from which he is elected, it is certain that he will also be deprived of his eligibility for the position in the Congress, since the legal foundation of his election is forfeited. Only then can the constitutional intent of introducing such a system be met (See Article 30, Paragraph 1, of the Con-

外國民及全國不分區中央民意代表之規定，旨在使中央民意機關有部分代表，於行使職權時，不為地區民意所侷限；而能體察全國民意之所在，發揮維護國家整體利益之功能；並使政黨在其所得選票總數比例分配之全國不分區當選名額內，選出才德俱優，聲譽卓著之黨員任中央民意代表，為國家民主憲政建設，貢獻其心力。惟此種民意代表既係由所屬政黨依其得票比例分配名額而當選，如喪失其所由選出之政黨黨員資格時，即失其當選之基礎，自應喪失其中央民意代表之資格（參照司法院大法官審理案件法第三十條第一項，關於被宣告解散之政黨，其依政黨比例方式產生之民意代表喪失其資格之規定），方符憲法增設此一制度之本旨。至其所遺缺額之遞補，應由法律定之，以維政黨政治之正常運作。

stitutional Interpretation Procedure Act, which provides that where a political party is declared dissolved, its congressmen elected on the basis of party-list proportional representation shall be disqualified as such.) In addition to the aforesaid, a law governing such a procedure of replacement of congressmen, in order to fill the vacancy left by the deposed, shall be enacted accordingly so as to maintain the due course of operation of political parties under democracy.

J. Y. Interpretation No.332（December 30, 1993）*

ISSUE: Does the term "continued service" under Article 6 of the Act Governing the Retirement of School Teachers and Staff mean that by the time of retirement, school teachers or principals shall have remained employed continuously for 20 years?

RELEVANT LAWS:

Articles 5, 6 of the Act Governing the Retirement of School Teachers and Staff（學校教職員退休條例第五條、第六條）.

KEYWORDS:

retirement（退休）, school teachers and staff（學校教職員）, continued service（連續任職）.**

HOLDING: The term "continued service" as referred to in Article 6 of the Act Governing the Retirement of School Teachers and Staff means that by the time of retirement, school teachers or principals shall have remained employed continuously for 20 years.

解釋文：學校教職員退休條例第六條所稱「繼續服務」，係指學校之教員或校長，於辦理退休時之職務，與其連續任職二十年之資歷相銜接而無間斷之情形而言。

REASONING: Article 6 of the

解釋理由書：學校教職員退休

* Translated by Alex C. Y. Tsai, Esq. and Chien Yeh Law Offices.

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

Act Governing the Retirement of School Teachers and Staff states that: "School teachers or principals who have served in a school for 30 years, been employed continuously for 20 years, and have received distinctions in merit evaluations and are still employed may apply for retirement and receive the lump-sum retirement payment, and its units may be increased in accordance with Article 5, provided that the maximum of said units shall be no greater than 81; while the receipt of the retirement fund is by monthly payment, such increase has an upper limit of 95% of the retirement fund." Compared to the restriction on the highest amount of general retirement fund that can be granted to public functionaries, the said lump-sum retirement payment can be increased up to a maximum of 20 units, while the upper limit for the monthly retirement payment can be increased by up to an additional 5% of the original retirement fund. The reason for the difference is because the upper limit of credit basis for the general retirement fund granted to public functionaries for such lump sum retirement payment is 61 units, which such public

條例第六條規定：「教員或校長服務滿三十年，並有連續任職二十年之資歷，成績優異而仍繼續服務者，一次退休金之給與，依第五條之規定，增加其基數，但最高總數以八十一個基數為限；月退休金之給與，以增至百分之九十五為限」與一般公務員退休給與之最高總數限制相較，一次退休金最多可增加二十個基數，月退休金最多可增加原定計算百分比之百分之五。乃因一般公務員退休給與之最高總數，一次退休金為六十一個基數，服務年資滿三十年者，即可獲得，再繼續服務，於退休給與並無增益。故增設上述增加退休給與之規定，使服務已滿三十年之教員或校長，祇須繼續服務，每繼續服務一年，即可增加一次退休金二個基數。全部服務年資達四十年，並合於「連續任職二十年之資歷，成績優異而仍繼續服務」之條件時，共可增加二十個基數，連同原有之六十一個基數，合計為八十一個基數，以鼓勵教員或校長，秉持敬業精神，久於其任，並藉以防止其他人員，於將欲退休時，中途轉任教員或校長，以圖獲得較優之退休給與。條文中以「成績優異而仍繼續服務」一語，緊接於「並有連續任職二十年之資歷」之後，即係此意。從而，其所稱「繼續服

functionaries will be entitled to receive if their period of service has reached 30 years, and there will be no further increase if such public functionaries remain continuously employed. Therefore, the abovementioned Act includes this Article 6 for those school teachers or principals who have served for 30 years and as long as such school teachers or principals continue to provide service, they will receive an additional 2 units in one lump-sum retirement payment for every additional year of service. In the event that such school teachers or principals after completion of a total of 40 years satisfy the requirements of "continuous employment for 20 years with distinctions in merit evaluation and continue to provide service," they will receive an additional 20 units, which along with the original entitlement of 61 units, will make a total of 81 units. The purpose of the above provision is to encourage school teachers or principals to remain at their position and prevent those who are not currently school teachers or principals from seeking employment (when they have almost reached retirement age) as school teachers or prin-

務」，自係指學校之教員或校長，於辦理退休時之職務，與其連續任職二十年之資歷相銜接而無間斷之情形而言。至於前已連續任職教員或校長二十年之後，轉任督學或其他具有專業性之教育行政工作，嗣再任教員或校長辦理退休者，應否另設規定，則係立法問題，併予指明。

cipals in order to secure a better retirement fund. The phrase "with distinctions in merit evaluation and continuing to provide service" after the term "continuously employed for 20 years" is for the aforesaid purpose. Accordingly, the term "continued service" as referred to therein means that by the time of retirement, school teachers or principals shall have been continuously employed for 20 years. Whether those persons who have served continuously for 20 years and then transfer to supervisory or other education administrative positions to perform professional work are entitled to the abovementioned additional lump-sum retirement payment credit units is a question for the Legislative Yuan and is hereby pointed out.

J. Y. Interpretation No.333（January 14, 1994）*

ISSUE: Is it in contravention of the Constitution to recognize the previous service years of a childcare worker, who has the qualification of kindergarten teacher, in computing or advancing his or her salary one level, after the fulfillment of a respective full year of service, up to the permissible maximum when such childcare worker has transferred from the position of a childcare worker (having previously served at all levels of a government-owned childcare center) to that of a public school kindergarten teacher?

RELEVANT LAWS:

Article 12 of the Preschool Education Act（幼稚教育法第十二條）.

KEYWORDS:

salary level（薪資水準）, childcare worker（教保人員）, kindergarten（幼稚園）.**

HOLDING: Explanatory Letter (79) Jen-Tze No. 22064, issued by the Ministry of Education on May 15, 1990, prescribes that "A person who has previously served as a childcare worker at all

解釋文：教育部於中華民國七十九年五月十五日發布之（七九）人字第二二〇六四號函釋：「曾任各級政府設立之托兒所教保人員，服務當時如已具幼稚園教師資格，其服務年資於轉任

*Translated by Eleanor Y.Y. Chin, Esq. and Chien Yeh Law Offices.

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levels of a government-owned childcare center and has been qualified as a kindergarten teacher, when transferring to a teaching position at a public school kindergarten, may advance one salary level after the fulfillment of every full year of service, and shall be limited in accordance with the maximum level for that position." That aforesaid recognition of the previous service years is restrictedly applied to those with the qualification of kindergarten teacher and is not in contravention of the Constitution.

公立幼稚園教師時，得每滿一年提敘一級支薪，並應受本職最高薪之限制。」其就提敘以具有幼稚園教師資格者之服務年資為限，與憲法並無牴觸。

REASONING: Although the purpose of both childcare centers and kindergartens is to nurture the physical and mental development of preschool children, the difference between a childcare center and a kindergarten is that the former shall also introduce the concepts of health, life and moral conduct. The qualifications of a kindergarten teacher are regulated in Article 12 of the Preschool Education Act as promulgated on November 6, 1981. Therefore, only those persons with the statutorily stipulated qualifications can assume the position of a

解釋理由書：托兒所與幼稚園雖均關係兒童學前階段身心健全之發展，惟幼稚園尚應實施學前之健康、生活與倫理教育，與托兒所之任務有所不同，而幼稚園教師之資格，於中華民國七十年十一月六日公布之幼稚教育法第十二條設有明文規定，故擔任公立托兒所教保人員，以具有上述法律規定之資格者為限，其年資於轉任公立幼稚園教師時，始得據以提敘。教育部於民國七十九年五月十五日發布之（七九）人字第二二〇六四號函釋：「曾任各級政府設立之托兒所教保人員，服務當時如已具幼稚園教師資格，其服務年資於轉任

childcare worker in the public childcare center; and should s/he transfer to a public school kindergarten, his or her previous years of service can accordingly be recognized. Explanatory Letter (79) Jen-Tze No. 22064, issued by the Ministry of Education on May 15, 1990, states: "A person who has previously served as a childcare worker at all levels of a government-owned childcare center and has qualified as a kindergarten teacher, when transferring to a public school kindergarten to be a teacher, may advance one salary level after the fulfillment of every full year of service, and shall be limited in accordance with the maximum level for that position." The abovementioned Letter conforms to the foregoing Interpretation and hence is not in contravention of the Constitution.

公立幼稚園教師時，得每滿一年提敘一級支薪，並應受本職最高薪之限制」，符合上述意旨，與憲法並無牴觸。

J. Y. Interpretation No.334（January 14, 1994）*

ISSUE: Shall the broad definition of the term "bond" have the same meaning as the term "bond" defined under the Central Government Development Bonds Issuance Act, and shall it be further stipulated pursuant to the laws?

RELEVANT LAWS:

Articles 2 and 6 of the Central Government Development Bonds Issuance Act（中央政府建設公債發行條例第二條、第六條）; Article 34 of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第三十四條）; Articles 7, Paragraph 1, Subparagraph 1 and 13, Paragraph 1 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第七條第一項第一款、第十三條第一項）.

KEYWORDS:

bond（公債）, development bonds（建設公債）, public debts（公共債務）, upper limit of borrowings（舉債之上限）, treasury bill（國庫券）, fiscal crisis（財政危機）.**

HOLDING: The broad definition of the term "bond" shall include any governmental borrowings for each and every

解釋文：廣義之公債，係指包括政府賒借在內之一切公共債務而言。而中央政府建設公債發行條例所稱之公

* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

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public indebtedness, while the term "bond" under the Central Government Development Bonds Issuance Act shall mean the issuance of development bonds by way of bonds and bills pursuant to law. In order to maintain national fiscal soundness, it is suggested that the upper limit of all borrowings for the State be stipulated in accordance with the laws after taking into account the totality of circumstances involved.

債，則指依法以債票方式發行之建設公債。惟為維護國家財政之健全，國家全部舉債之上限，宜綜合考量以法律定之，併予指明。

REASONING: In connection with the application of Article 2 of the Central Government Development Bonds Issuance Act, the Legislative Yuan and Executive Yuan have adopted different views ex officio and have petitioned the Judicial Yuan for a uniform interpretation, which they hence will accept in accordance with Article 7, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act. Furthermore, pursuant to Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act, the Judicial Yuan has informed the applicant, the Legislative Yuan, and the relative party, the Executive Yuan, to ap-

解釋理由書：本件係立法院因與行政院間，就其職權上適用中央政府建設公債發行條例第二條所持之見解，彼此有異，聲請本院統一解釋，符合司法院大法官審理案件法第七條第一項第一款之規定，應予受理，並經本院依同法第十三條第一項通知聲請機關立法院及關係機關行政院指派代表，於中華民國八十二年十二月二十三日到場，在憲法法庭行言詞辯論，並邀請財經學者到庭陳述意見，合先說明。

point designated representatives to attend hearings and argue before the Constitution Court on December 23, 1993, and has invited financial economics scholars to appear at the said Court to express their opinions on this matter. The allegations of the applicant are briefly summarized as follows:

Article 2 of the Central Government Development Bonds Issuance Act sets forth the total residual amount of the issuance of debts, which nature is the upper limit of indebtedness, a burden undertaken by the government, which has promised such ceiling to the people. The said purpose is to prevent any heavy tax burden upon citizens and to avoid a fiscal crisis. If the more-than-one-year borrowing of the government is not included in the abovementioned non-payable total residual amount, the upper limit restriction as stated in such Act will be pointless, the governmental expenditures will be without limitation and consequently the government may evade the supervision of the Legislative Yuan. As far as Article 34 of the Act Governing the Allocation of Gov-

本件聲請解釋機關主張略稱：現行中央政府建設公債發行條例第二條對公債發行總餘額設有限制，性質上乃政府就其債務負擔對人民承諾之上限，旨在防止人民稅負過重及避免政府之財政危機。如政府一年以上之賒借，不列入上述條例之公價未償總餘額內，則將使法律設限之規定，形同具文，政府支出亦將因此而漫無限制，且得以逃避立法機關之監督。至於財政收支劃分法第三十四條之規定，係強調各級議會之職權，不得作為一年以上賒借之法源依據，政府支應建設及軍事採購等支出，而向銀行賒借一年以上之借款數額，應受中央政府建設公債發行條例第二條上限規定之限制等語。

ernment Revenues and Expenditures is concerned, it is to emphasize the authority of every level of council and shall not be the source of law for more-than-one-year borrowings; thus, such more-than-one-year bank loans shall be governed by the limitation under Article 2 of the Central Government Development Bonds Issuance Act.

The response of the relative party is in the following:

The term “bond” under the Central Government Development Bonds Issuance Act, pursuant to the legislative purpose and construction of its literal meaning, shall refer to the bonds issued in accordance with such Act. The upper limit so set forth therein only applies toward these development bonds, exclusive of those from borrowings. Bonds and more-than-one-year borrowings are separately listed under Article 34, Paragraph 1, of the Act Governing the Allocation of Goernment Revenues and Expenditures, which clearly indicates that they shall not be commingled. Accordingly, more-than-one-year borrowings of the Central Gov-

關係機關主張略稱：中央政府建設公債發行條例所稱之公債，依立法意旨及文義解釋，當然係指依該條例發行之公債而言。其所設上限，自亦僅對此種建設公債有其適用，並不及於賒借。且財政收支劃分法第三十四條第一項，將公債與一年以上賒借並列，亦足見兩者不可混為一談，中央政府一年以上賒借即係依該法規定編入預算與公債收入分列科目，一併送請立法院審議，並無不受立法機關監督或藉故規避之情形等語。

ernment shall be compiled under the item of budget and separate from revenue arising from bonds, and as such shall be submitted to the Legislative Yuan for review. Every situation will be supervised by the Legislative Yuan and there will not be any attempt to evade the aforesaid supervision.

After considering the points asserted by the applicant and the relative party as well as opinions rendered by the scholars, this Court has found the following:

If deficit and imbalance of the budget should occur, for the fiscal needs and the term promise to pay the principal and premium, the broad definition of the term "bond" shall include any borrowings from individuals, commercial entities, financial institutions, foreign governments or international organizations, while the narrow definition of the same term shall mean the raising of funds from the issuance of bonds and bills. Different countries have various systems for governing of fund-raising methods as well as those rules and regulations public debts should be subject thereto. With respect to the issuance of

本院斟酌聲請機關及關係機關之主張暨學者陳述之意見，作成本解釋，其理由如左：

按政府在預算收支上發生入不敷出，不能平衡時，基於財政上之需要，並於承諾定期還本付息之條件下，向個人、商業團體、金融機構、外國政府或國際組織借款，均屬廣義之公債，而狹義之公債，則指以發行債票方式之募款而言，政府舉債方法以及應受之法律規範各國有其不同之制度。我國關於公債之發行，訂有中央政府建設公債發行條例及其他為特定建設制定之公債發行條例（例如中央政府興建台灣北部區域第二高速公路建設公債發行條例）；國庫券之發行，除國庫法外，尚有國庫券發行條例；對國外借款則另行制定政府發展經濟社會向國外借款及保證條例；一

bonds here, there are the Central Government Development Bonds Issuance Act and other statutes of issuing bonds for special constructions (for instance, the Act for Issuing Second Freeway Development Bonds in the Northern Taiwan Region by the Central Government); the issuance of treasury bills can be found not only in the Treasury Act, but in the Act for the Issuance of Treasury Bills as well; and in regard to foreign borrowings, there is the Act Governing Foreign Loans and Guarantee for Government to Develop Economy and Society; as to borrowings for more than one year, they are regulated by the Act Governing the Allocation of Government Revenues and Expenditures. Among the above, the Central Government Development Bonds Issuance Act is set forth to issue, pursuant to law, bonds or bills, bearer or registered, or other receipts for the purposes of raising development capitals for the Central Government (as per Article 6 of such Act). According to said Article 2, the so-called "non-payable total amount" shall mean the residual unpaid total sum of such development bonds which are issued in ac-

年期以上之賒借，則見諸財政部收支劃分法之規定。其中中央政府建設公債發行條例係專就中央政府為籌集建設資金，而依法發行之無記名式或記名式債票或其他憑證（該條例第六條參照）所設規定，該條例第二條所稱「未償總餘額」，自係指根據上述方式發行之建設公債未償總餘額，並不包括中央政府依其他法律發行之短期債票或聲請解釋機關所指政府向銀行賒借一年以上之借款在內。惟賒借與發行公債均屬政府之公共債務，其為政府財政之工具實質上並無差異，而政府發行建設公債、短期債票或向國外借款均有特為制定之法律加以規範，並訂有最高額度或依年度總預算訂有比例上之限制。中央政府一年以上之賒借，雖係依財政收支劃分法第三十四條第一項之規定，編列預算送由立法院審議，完成法定程序後，向銀行等機構借貸，但賒借最高數額既不適用中央政府建設公債發行條例上限之規定，又無其他法律之限制，將使中央政府建設公債發行條例上限之規定，形同具文，與前述政府其他舉債須受不同法律限制之情形相較，亦有失均衡。此項一年以上之賒借僅以編列年度預算方式，接受立法機關之審議，難免有捨發行公債以規避法律限制之情形。為維護國家

cordance with the above mentioned method, but shall exclude those short-term bonds or bills issued pursuant to other laws by the Central Government, or the debts, greater than one year, loaned by the banks to the government as indicated by the applicant herein. However, either loan or issuance of bonds will fall under the public debts of the government, which in substance makes no difference as and for governmental fiscal instruments. There are specific laws or regulations that prescribe the issuance of development bonds, short-term bonds or bills, or foreign borrowings, wherein the maximum amount or upper limit pursuant to the annual total budget is set forth. As for those more-than-one-year loans arranged by the Central Government, Article 34, Paragraph 1, of the Act Governing the Allocation of Government Revenues and Expenditures stipulates the preparation of the budget for scrutiny by the Legislative Yuan, and once the legal procedures have been concluded, then loans from the banks and other institutions can be arranged. Provided that the lending limit is not applicable in accordance with the ceiling set forth

財政之健全，國家全部舉債之上限，宜綜合考量以法律定之，併予指明。

in the Central Government Development Bonds Issuance Act and there is no other law so regulated, the upper limit restriction as stated in said Act will be pointless, which is unbalanced in comparison to the other governmental borrowings mentioned above that have to be limited by several other laws. The above more-than-one-year borrowings only need to be included in annual budgeting and be subject to the review of the Legislative Yuan, which process to avoid the issuance of bonds will be hard to say without evasion of law. Therefore, in order to maintain fiscal healthiness, it is suggested that the upper limit of all permissible debts for the State be prescribed in accordance with the laws after taking all circumstances into consideration.

Justice Chien-Tsai Cheng filed dissenting opinion, in which Justice Tieh-Cheng Liu joined.

本號解釋鄭大法官健才、劉大法官鐵錚共同提出不同意見書。

J. Y. Interpretation No.335（January 28, 1994）*

ISSUE: Should the Enforcement Rules of the Lodgment Act, providing that the title to unclaimed property will pass to the National Treasury notwithstanding the failure of the public lodgment office to act in compliance with the legal requirement of service or publication of a notice of lodgment, be reviewed and revised to better protect the people's property right under the Constitution?

RELEVANT LAWS:

Articles 327, Paragraph 2, and 330 of the Civil Code（民法第三百二十七條第二項、第三百三十條）; Articles 8, 10, Paragraphs 2 and 3 of the Lodgment Act（提存法第八條、第十條第二項、第三項）; Articles 7, first sentence, and 15 of the Enforcement Rules of the Lodgment Act（提存法施行細則第七條前段、第十五條）; State Compensation Act（國家賠償法）.

KEYWORDS:

lodgment（提存）, lodged property（提存物）, the Treasury（國庫）, notice of lodgment（提存通知書）, state compensation（國家賠償）. **

HOLDING: Article 330 of the Civil Code provides that: "The right of the

解釋文：民法第三百三十條規定：「債權人關於提存物之權利，自提

* Translated by Raymond T. Chu.

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

creditor to the property lodged is extinguished by prescription if not exercised within ten years from the date of lodgment, and in such a case the ownership of the property lodged shall pass to the National Treasury." Additionally, the first sentence of Article 7 of the Enforcement Rules of the Lodgment Act provides that: "The period of prescription set forth in Article 330 of the Civil Code shall begin from the day after the date of lodgment." The above provisions are intended to determine as early as possible the status of the right to the property lodged so as to maintain a stable social order, and are not in contradiction with the Constitution. Passing the title to the property to the National Treasury, however, will affect the creditor's property right. For this reason, the party making the lodgment is required by law to notify the creditor of the fact that the property has been lodged or, alternatively, a notice of lodgment must be served upon the creditor or published by the public lodgment office. If this process is not followed, a remedial action must be taken by serving upon the creditor or publishing such a notice within a reasonable

存後十年間不行使而消滅，其提存物屬於國庫」、提存法施行細則第七條前段規定：「關於民法第三百三十條所規定之期間，自提存之翌日起算」，旨在使提存物之權利狀態早日確定，以維持社會秩序之安定，與憲法並無牴觸。惟提存物歸屬國庫，影響債權人之財產權，故提存之事實應由提存人依法通知債權人或由提存所將提存通知書送達或公告，其未踐行上述程序者，應於前述期間屆滿前相當期間內，補行送達或公告。上開施行細則應通盤檢討修正，以保障人民之財產權。

time before the expiry of the period of prescription mentioned above. Accordingly, the aforesaid enforcement rules must undergo an overall review and a revision to insure that the property right of the people will be protected.

REASONING: Article 330 of the Civil Code provides that: "The right of the creditor to the property lodged is extinguished by prescription if not exercised within ten years from the date of lodgment, and in such a case title to the property lodged shall pass to the National Treasury." Additionally, the first sentence of Article 7 of the Enforcement Rules of the Lodgment Act provides that: "The period of prescription set forth in Article 330 of the Civil Code shall begin from the day after the date of lodgment." The underlying reason for the legislation is that failure on the part of the creditor to take delivery of the property lodged, which he is entitled to take delivery of at any time after the lodgment, will not only leave the property in the custody of the public lodgment office for an indefinite time but also place the right in an uncertain state

解釋理由書：民法第三百三十條規定：「債權人關於提存物之權利，自提存後十年間不行使而消滅，其提存物屬於國庫」、提存法施行細則第七條前段規定：「關於民法第三百三十條所規定之期間，自提存之翌日起算」，乃因提存之後，債權人本得隨時受取提存物，若竟久不受取，不特提存所須為無期限之保管，且使權利狀態久不確定，對於社會經濟亦有不良影響。上開規定，旨在使提存物之權利狀態早日確定，為維持社會秩序所必要，與憲法並無牴觸。惟依民法第三百二十七條第二項規定，提存人於提存後應即通知債權人；提存法第八條規定，聲請提存，如係清償提存，應附具提存通知書；同法第十條第二項、第三項規定，提存所接到提存書後，認為應予提存者，應將提存通知書送達債權人，如應為公示送達而提存人不為聲請者，應由提存所公告之；同法施行細則第十五條規定，不能

for an unduly prolonged period, with adverse influence on the economy. The above provisions are therefore necessary in order to determine as early as possible the status of the right to the property lodged so as to maintain a stable social order, and are not in contradiction with the Constitution. However, the Civil Code provides, in Article 327, Paragraph 2, that the person who makes lodgment must notify the creditor promptly after the lodgment has been made. Article 8 of the Lodgment Act requires that in case of lodgment for payment of debt a notice of lodgment must be attached to the application for lodgment, and Article 10 of the same Act provides in Paragraphs 2 and 3 thereof that if the public lodgment office, upon receipt of the document of lodgment, deems it appropriate to accept the lodgment, it shall cause the notice of lodgment to be served upon the creditor or, alternatively, to have it published if service by publication is legally required but the person making the lodgment has failed to file an application therefor. Additionally, Article 15 of the Enforcement Rules of the Lodgment Act prescribes

確知孰為債權人而為提存者，提存所應將提存通知書公告之。因提存物歸屬國庫，影響債權人之財產權，故提存之事實應由提存人通知債權人或由提存所將提存通知書送達或公告，其未踐行上述程序者，應於前述期間屆滿前相當期間內，補行送達或公告。其未補行者提存物雖仍屬於國庫，但如合於國家賠償法之規定者，債權人仍得依法請求國家賠償。上開施行細則應依上述意旨並斟酌有關事項，通盤檢討修正，以保障人民之財產權。

that, in case lodgment is made because the creditor is not known for certain, the public lodgment office shall have the notice of lodgment published. Since passing the title to the property to the National Treasury will affect the creditor's property right, the Act requires that the party making the lodgment notify the creditor of the fact that the property has been lodged and that, alternatively, a notice of lodgment must be served upon the creditor or published by the public lodgment office. If this process is not followed, a remedial action must be taken by serving upon the creditor or publishing a notice within a reasonable time before the expiry of the period of prescription mentioned above. While title to the lodged property will pass to the National Treasury notwithstanding the failure of the public lodgment office to take remedial action as required, the creditor is entitled to claim state compensation under the State Compensation Act where applicable. In conclusion, the aforesaid enforcement rules must undergo an overall review and a revision based on our opinion given above and by taking into consideration other related matters, so

that the property right of the people will be protected.

J. Y. Interpretation No.336（February 4, 1994）*

ISSUE: Does Article 50 of the Urban Planning Act, which does not require the government to procure land reserved for public facilities within a limited period, violate the Constitution?

RELEVANT LAWS:

Articles 23 and 143 of the Constitution（憲法第二十三條、第一百四十三條）; Article 214 of Land Act（土地法第二百十四條）; Articles 5, 6, 26, 27, 28, 29, 49, 50, 50-1, 51 of the Urban Planning Act（都市計畫法第五條、第六條、第二十六條、第二十七條、第二十八條、第二十九條、第四十九條、第五十條、第五十條之一、第五十一條）.

KEYWORDS:

public interest（公共利益）, urban planning（都市計畫）, reserved land for public facilities（公共設施保留地）.**

HOLDING: The Amendment to Article 50 of the Urban Planning Act which was amended and promulgated on July 15, 1988, does not require the government to take land reserved for public facilities within a limited period. It is to maintain the integrity of urban planning,

解釋文：中華民國七十七年七月十五日修正公布之都市計畫法第五十條，對於公共設施保留地未設取得期限之規定，乃在維護都市計畫之整體性，為增進公共利益所必要，與憲法並無牴觸。至為兼顧土地所有權人之權益，主管機關應如何檢討修正有關法律，係立

*Translated Jer-Shenq Shieh.

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

and is necessary for enhancing the public interest, and does not violate the Constitution. As for protection of property owners' interest, whether the competent authority should review the statutes and regulations concerned and make the necessary amendments is a matter of legislation.

REASONING: To ensure the planned growth envisaged in urban planning, the competent authority sets aside land for public facilities within an urban planning area according to the Urban Planning Act to be the backbone of city development. Before such land is set aside, it is called land reserved for public facilities. Articles 6 and 51 and other relevant stipulations prevent property users from using property as an obstruction of a reserved purpose. Planning by estimation of the next 25 years of city development, urban planning has its integrity, and this is obvious in the stipulation of Article 5. For this reason, land reserved for public facilities as mentioned above, when compared to urban planning as a whole, is a relation of a part urban plan, it is impossible to require that to a whole. Unless there is a

法問題。

解釋理由書：主管機關為實現都市有計畫之均衡發展，依都市計畫法在都市計畫地區範圍內設置公共設施用地，以為都市發展之支柱。此種用地在未經取得前，為公共設施保留地。同法第六條、第五十一條等有關規定，限制土地使用人為妨礙保留目的之使用。而都市計畫有其整體性，乃預計二十五年內之發展情形訂定之，同法第五條規定甚明。足見上述公共設施保留地與都市計畫之整體，具有一部與全部之關係。除非都市計畫變更，否則殊無從單獨對此項保留地預設取得之期限，而使於期限屆滿尚未取得土地時，視為撤銷保留，致動搖都市計畫之整體。而都市計畫之變更，同法第二十六條至第二十九條設有一定之程序，非「取得期限之預設」所能取代。此與土地法第二百十四條所定保留徵收期滿不徵收時，視為撤銷之情形，有所不同，兩者更無特別法

change in an such land be reserved for public facilities within a limited period, and, without acquiring the land before the expiration of that period, this will cause abolition of reservation, and alter the whole urban plan. For a change in an urban plan, Articles 26 to 29 stipulate a specific procedure, which is not replaceable by a "preset plan within a limited period." This is different from Article 214 of Land Act, which stipulates that not taking the land before the expiration of the reserved period will cause abolition of the reservation. There is also no relation here of specific law and general law. Thus, Article 50 of the Act, which was amended and promulgated on July 15, 1988, does not require the government to take land reserved for public facilities within a limited period. This is to maintain the integrity of urban planning, and urban planning is necessary for enhancing public interest, and does not violate Articles 23 and 143 of the Constitution. Since urban planning is developed by estimation of the next 25 years of city development, it should be reviewed comprehensively at least every 5 years according to Article 26 of the Urban

與普通法之關係可言。是同法於中華民國七十七年七月十五日修正公布之第五十條，對於公共設施保留地未設取得期限之規定，乃在維護都市計畫之整體性，而都市計畫之實施，則為增進公共利益所必要，與憲法第二十三條及第一百四十三條並無牴觸。至都市計畫既係預計二十五年內之發展情形而為訂定，依都市計畫法第二十六條規定，每五年至少應通盤檢討一次。其中公共設施保留地，經通盤檢討，如認無變更之必要，主管機關本應儘速取得之，以免長期處保留狀態。若不為取得（不限於徵收一途），則土地所有權人既無法及時獲得對價，另謀其他發展，又限於都市計畫之整體性而不能撤銷使用之管制，致減損土地之利用價值。其所加於土地所有權人之不利益將隨時間之延長而遞增。雖同法第四十九條至第五十條之一等條文設有加成補償、許為臨時建築使用及免稅等補救規定，然非分就保留時間之久暫等情況，對權利受有個別損害，而形成特別犧牲（Sonderopfer）者，予以不同程度之補償。為兼顧土地所有權人之權益，如何檢討修正有關法律，係立法問題，合併指明。

Planning Act. When a plan to reserve land for public facilities, having been reviewed comprehensively, is considered unnecessary to change, the competent authority should acquire said land quickly, to avoid reserving it for too long. If it is not acquired (not limited to expropriation), the property owner not only can not receive the payment in time to conduct other business, but also can not abolish the land use control for the integrity of the urban plan and this will cause diminution of the property value. The interest burden on the property owner will also increase as time passes. Though Article 49 to Article 50-1 provide the compensatory stipulation of overcompensation, temporary building permit and tax exemption, they do not differentiate the period of reservation, and provide different compensation for those who suffer specific injury and make special sacrifices. Thus, for the protection of the property owners' interest, whether the competent authority should review the statutes and regulations concerned and make the necessary amendments is a matter of legislation.

J. Y. Interpretation No.337（February 4, 1994）*

ISSUE: Is the Ministry of Finance directive consistent with the Business Tax Act and the Constitution in holding a business operator who has purchased goods liable to a fine for tax evasion as prescribed in the said Act regardless of whether he has made false entries of the tax payment on such purchases for tax evasion?

RELEVANT LAWS:

Article 51, Paragraph 1 and Article 51, Paragraph 1, Subparagraph 5 of the Business Tax Act（營業稅法第五十一條第一項、第五十一條第一項第五款）; Article 44 of the Tax Levy Act（稅捐稽徵法第四十四條）; J. Y. Interpretation No. 252（司法院釋字第二五二號解釋）; Ministry of Finance directive Tai-Tsai-Shui-Tze No. 7637376 (May 6, 1987)（財政部七十六年五月六日臺財稅字第七六三七三七六號函）; Ministry of Finance in its directive (69) Tai-Tsai-Shui- Tze No. 36624 (August 8, 1980)（財政部六十九年八月八日臺財稅字第三六六二四號函）.

KEYWORDS:

business tax（營業稅）, false entries of tax payment on purchases（虛報進項稅額）, tax evasion（逃漏稅款）, amount of tax evaded（漏稅額）, voucher（憑證）, uniform invoice（統一發票）, direct purchaser/seller（直接買受人／出賣人）, behavioral punishment（行為罰）, punishment for tax evasion（漏稅罰）, administrative objective（行政上之目的）.**

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* Translated by Raymond T. Chu.

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

HOLDING: The Business Tax Act provides in Article 51, Subparagraph 5, that a taxpayer who makes false entries of tax payment on purchases shall be liable to a penalty in a sum equal to five to twenty times the amount of the tax evaded besides being required to pay the principal tax, and may additionally be ordered to discontinue his business operation. In essence, the article makes the taxpayer liable to payment of the principal tax plus penalty only if he has made false entries of tax payment on purchases and has thereby evaded the payment of tax. The Ministry of Finance directive Tai-Tsai-Shui-Tze No. 7637376 (May 6, 1987), which requires that penalty be imposed under the aforesaid clause on a business operator so long as he is found to have purchased goods regardless of whether he has made false entries of tax payment on such purchases and has thereby evaded the payment of tax, should be made no longer operative to the extent that it is inconsistent with the essence of the above article and is contrary to the purpose of the Constitution in protecting the right and interest of the people. As regards the stan-

解釋文：營業稅法第五十一條第五款規定，納稅義務人虛報進項稅額者，除追繳稅款外，按所漏稅額處五倍至二十倍罰鍰，並得停止其營業。依此規定意旨，自應以納稅義務人有虛報進項稅額，並因而逃漏稅款者，始得據以追繳稅款及處罰。財政部中華民國七十六年五月六日臺財稅字第七六三七三七六號函，對於有進貨事實之營業人，不論其是否有虛報進項稅額，並因而逃漏稅款，概依首開條款處罰，其與該條款意旨不符部分，有違憲法保障人民權利之本旨，應不再援用。至首開法條所定處罰標準，尚未逾越立法裁量範圍，與憲法並無牴觸。

dards of penalty set forth by the above article, we do not find that they go beyond the scope of legislative discretion or are in conflict with the Constitution.

REASONING: Punishment for violation of tax legislations may be imposed either because of an act of tax evasion or because of breach of duty under a tax law to act or not to act. The text of Paragraph 1 of Article 51 of the Business Tax Act states: "In any of the following circumstances, the taxpayer shall, in addition to being required to make payment of the principal tax, be liable to a penalty in a sum equal to five to twenty times the amount of the tax evaded, and may additionally be ordered to discontinue his business operation." Essentially, this is a penal provision dealing with acts of tax evasion. Therefore, to impose penalty on the ground of "making false entries of tax payment on purchases" under Subparagraph 5 of the same Article and Paragraph calls for the finding of the element where there exists such an act as a cause of the occurrence of the fact of tax evasion, and the provision is distinguishable from Arti-

解釋理由書：違反稅法之處罰，有因逃漏稅捐而予處罰者，亦有因違反稅法上之作為或不作為義務而予處罰者，營業稅法第五十一條第一項本文規定：「納稅義務人有左列情形之一者，除追繳稅款外，按所漏稅額處五倍至二十倍罰鍰，並得停止其營業。」依其意旨，乃係就漏稅行為所為之處罰規定，因之，對同條項第五款之「虛報進項稅額者」加以處罰，自應以有此行為，並因而發生漏稅之事實為處罰要件，此與稅捐稽徵法第四十四條僅以未給付或未取得憑證為處罰要件，不論其有無虛報進項稅額並漏稅之事實者，尚有不同。財政部七十六年五月六日臺財稅字第七六三七三七六號函未明示上述意旨，對於有進貨事實之營業人，不論是否有虛報進項稅額，並因而逃漏稅款，概依首開條款處罰，其與該條款意旨不符部分有違憲法保障人民權利之意旨，應不再援用。至營業稅法第五十一條之處罰，乃在防止漏稅，以達正確課稅之目的，其處罰標準，尚未逾越立法

cle 44 of the Tax Levy Act, whereby the element required for imposition of penalty is merely the failure to deliver to or obtain from others vouchers regardless of whether there is any false entry of the tax payment on purchase as a cause of tax evasion. The Ministry of Finance directive Tai-Tsai-Shui-Tze No. 7637376 (May 6, 1987), which, without explicitly stating to such effect, requires that penalty be imposed under the aforesaid clause on a business operator so long as he is found to have purchased goods regardless of whether he has made false entries of tax payment on such purchases and has thereby evaded the payment of tax, should be made no longer operative to the extent that it is inconsistent with the essence of the above article and is contrary to the purpose of the Constitution in protecting the right and interest of the people. As regards the standards of penalty set forth by Article 51 of the Business Tax Act, being designed for the purpose of preventing tax evasion and insuring correct taxation, we do not find that they go beyond the scope of legislative discretion or are in conflict with the Constitution.

裁量範圍，與憲法尚無牴觸。

A business entity that has sold goods but failed to issue a uniform invoice to the direct purchaser is punishable under Article 44 of the Tax Levy Act. This is the opinion adopted by the Ministry of Finance in its directive (69) Tai-Tsai-Shui-Tze No. 36624 (August 8, 1980) and has been held to be constitutional by this Yuan in our J. Y. Interpretation No. 252. By the same legal rationale, that a business operator who has purchased goods but failed to obtain a uniform invoice from the direct seller should be held liable for penalty under Article 44 of the Tax Levy Act is consistent with the essence of the Interpretation mentioned above. Such a behavioral punishment differs from a punishment for tax evasion in the purposes of as well as the prerequisites for the punishment, the former being a sanction against the commitment of the act and the latter being a punishment conditioned upon the existence of the fact of tax evasion, which are not necessarily the same thing. It is opportune for us to make it clear here that where the act of breach of duty precedes the occurrence of tax evasion and where the imposition of a

營利事業銷售貨物，不對直接買受人開立統一發票，應依稅捐稽徵法第四十四條規定論處，財政部六十九年八月八日（六九）臺財稅字第三六六二四號函所採之見解，業經本院大法官會議釋字第二五二號解釋，認與憲法並無牴觸。營業人買受貨物，不向直接出賣人取得統一發票，依同一法理，適用稅捐稽徵法第四十四條處罰，與上開解釋意旨相符。此項行為罰與漏稅罰，其處罰之目的不同，處罰之要件亦異，前者係以有此行為即應處罰，與後者係以有漏稅事實為要件者，非必為一事。其違反義務之行為係漏稅之先行階段者，如處以漏稅罰已足達成行政上之目的，兩者應否併罰，乃為適用法律之見解及立法上之問題，併予說明。

penalty for tax evasion is sufficient for meeting of the administrative objective, whether both should be made subject to punishment is a legislative issue as well as a question of opinions on the application of law.

Justice Geng Wu filed dissenting opinion in part.

本號解釋吳大法官庚提出一部不同意見書。

J. Y. Interpretation No.338（February 25, 1994）*

ISSUE: Is the precedent holding to the effect that a person dissatisfied with the determination as to his or her ranking or remuneration may not initiate an administrative litigation in violation of the Constitution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 7 of the Civil Servant（公務人員俸給法第七條）; J. Y. Interpretation No. 323（司法院釋字第三二三號解釋）; Administrative Court Precedent 57-Pan-414（行政法院五十七年判字第四一四號判例）; Administrative Court Precedent 59-Pan-400（行政法院五十九年判字第四〇〇號判例）.

KEYWORDS:

rank and pay scale of civil servants（公務人員俸給）, administrative litigation（行政訴訟）.**

HOLDING: If a government agency makes a determination in a review of civil servants that a civil servant is not qualified to serve or should be demoted, this determination has a material effect on his or her constitutional guarantee to serve

解釋文：主管機關對公務人員任用資格審查，認為不合格或降低原擬任之官等者，於其憲法所保障服公職之權利有重大影響，公務員如有不服，得依法提起訴願及行政訴訟，業經本院釋字第三二三號解釋釋示在案。其對審定

* Translated by Lawrence S. Liu.

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in the government. Therefore, he or she may bring an administrative appeal or administrative litigation in accordance with law. This position is reflected in our Interpretation No. 323. Judicial Precedents 57-Pan-414 and 59-Pan-400 of the Administrative Court shall cease to be applied henceforth. Our Interpretation No. 323 is also hereby amended.

之級俸如有爭執，依同一意旨，自亦得提起訴願及行政訴訟。行政法院五十七年判字第四一四號及五十九年判字第四〇〇號判例應不再援用。本院上開解釋，應予補充。

REASONING: Whether a civil servant receiving an administrative sanction may bring an administrative litigation depends on the nature of the sanction. This position is clear from our previous Interpretations Nos. 187, 201, 243, 266 and 312. If it is one that is sufficient to change his or her status as a civil servant, or one that constitutes a material disciplinary sanction of a civil servant, then the civil servant subject to such a sanction may seek relief with the competent judicial authorities that are charged with reviewing such disciplinary matters. This position is also made clear in our Interpretation No. 298. In addition, if persons who wish to serve as civil servants with various government agencies receive a review

解釋理由書：公務員因其身分而受行政處分者，得否提起訴願及行政訴訟，應就其處分內容分別論斷，迭經本院釋字第一八七號、第二〇一號、第二四三號、第二六六號及第三一二號解釋闡釋在案。關於足以改變公務員身分或對於公務員有重大影響之懲戒處分，受處分人如有不服，得向掌理懲戒事項之司法機關聲明不服，亦經本院釋字第二九八號解釋釋示甚明。又主管機關對公務人員任用資格審查，認為不合格或降低原擬任之官等者，於其憲法所保障服公職之權利有重大影響，公務員如有不服，得依法提起訴願及行政訴訟，業經本院著有釋字第三二三號解釋。其對審定之級俸如有爭執，依同一意旨，自亦得提起訴願及行政訴訟。行政法院五十七年判字第四一四號及五十九年判字

by the agencies in charge of personnel that determine such persons should not be qualified or should be demoted, this decision materially adversely affects the constitutional guarantees of serving in the government. If these persons undergo a legal procedure for reconsideration and still challenge the same determination of the reconsideration proceedings, they surely may seek administrative appeal or litigation. This position is reflected in our Interpretation No. 323. By the same logic, if a civil servant challenges a determination of his or her rank and pay scale, surely he or she may also seek administrative appeal or litigation. Judicial Precedents 57-Pan-414 and 59-Pan-400 of the Administrative Court shall cease to be applied henceforth. Our Interpretation No. 323 is also hereby amended.

第四〇〇號判例應不再援用。本院釋字第三二三號解釋，應予補充。

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋鄭大法官健才提出不同意見書。

J. Y. Interpretation No.339（February 25, 1994）*

ISSUE: Is Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act excessive and contradictory to the Constitution?

RELEVANT LAWS:

Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act（貨物稅條例第十八條第一項第十二款）; Ministry of Finance dated December 20, 1977 (Tai-Tzai-Sue-Zu No. 38572)（財政部六十六年十二月二十日臺財稅字第三八五七二號函）.

KEYWORDS:

tax evasion（漏稅）.**

HOLDING: Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act, as amended and promulgated on January 9, 1971, provides that a fine equal to two to ten times the amount of tax evaded shall be imposed on a taxpayer for failure to affix tax-paid or tax-free certificates on packages or containers for commodities in accordance with the law, regardless of whether there actually

解釋文：中華民國六十年一月九日修正公布之貨物稅條例第十八條第一項，關於同條項第十二款，應貼於包件上或容器上之完稅或免稅照證，不遵規定實貼者，不問有無漏稅事實，概處比照所漏稅額二倍至十倍之罰鍰之規定（現已修正），顯已逾越處罰之必要程度，不符憲法保障人民權利之意旨；財政部六十六年十二月二十日臺財稅字第三八五七二號函釋「凡未按規定貼查驗

* Translated by John C. Chen, Attorney at Law.

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was any tax evasion (this provision has been amended). Such sanction exceeds the necessary degree of punishment and contradicts the purpose of the Constitution, i.e., to protect the rights of the people. The directive of the Ministry of Finance dated December 20, 1977 (Tai-Tzai-Sue-Zu No. 38572), that any failure to affix examination certificates in accordance with the law shall be treated as an evasion of tax and subject to fines under the same provision regardless of whether there actually was any tax evasion, shall be disregarded.

證者，不再問其有無漏稅，均應按該條文規定以漏稅論處」，均應不予援用。

REASONING: Article 18, Paragraph 1, Subparagraph 12 of the Commodity Tax Act, as amended and promulgated on January 9, 1971, provides that a monetary fine equal to from two to ten times the tax amount evaded shall be imposed on a tax payer for failure to affix tax-paid or tax-free certificates on packages or containers for commodities in accordance with the law, regardless of whether there actually was any tax evasion (this provision has been amended). Such provision is for tax assessment pur-

解釋理由書：中華民國六十年一月九日修正公布之貨物稅條例第十八條第一項，關於同條項第十二款，應貼於包件上或容器上之完稅或免稅照證，不遵規定實貼者，沒入其貨物，並處比照所漏稅額二倍至十倍罰鍰之規定（現已修正），固為防止逃漏稅款，以達核實課徵之目的，惟租稅秩序罰，有行為罰與漏稅罰之分，如無漏稅之事實，而對單純違反租稅法上作為或不作為之義務者，亦比照所漏稅額處罰，顯已逾越處罰之必要程度，不符憲法保障人民權利之意旨。財政部六十六年十二月二十

poses and to provide a deterrent to any tax evasion. The sanctions under the tax laws can be divided into sanctions against the commitment of law-violating acts and the evasion of assessable tax. If there is only a violation of the obligations to act or not to act under the tax laws without any tax evasion, the sanction against such violation, being regarded as the same as tax evasion, exceeds the degree of punishment necessary and contradicts the purpose of the Constitution, i.e., to protect the rights of the people. The directive of the Ministry of Finance dated December 20, 1977 (Tai-Tzai-Sue-Zu No. 38572), which stated, pursuant to the above provision of law, that any failure to affix examination certificates in accordance with the law shall be treated as an evasion of tax and be subject to fines under the same provision regardless of whether there actually was any tax evasion, shall therefore be disregarded.

日臺財稅字第三八五七二號函，本於上開規定釋示：「凡未按規定貼查驗證者，不再問其有無漏稅，均應按該條文規定以漏稅論處」，均應不予援用。

J. Y. Interpretation No.340（February 25, 1994）*

ISSUE: Is the relevant provision of the Public Officials Election and Recall Act, which provides to the effect that the guarantee deposit for a party-recommended candidate may be reduced by half, unconstitutional?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Articles 38, Paragraph 2 and 50, Paragraph 5 of the Public Officials Election and Recall Act（公職人員選舉罷免法第三十八條第二項、第五十條第五項）.

KEYWORDS:

right of equality（平等權）, suffrage（參政權）, party-recommended candidate for public office（政黨推薦之公職候選人）, guarantee deposit（保證金）.**

HOLDING: Article 38, Paragraph 2 of the Public Officials Election and Recall Act provides, "The guarantee deposit for a party-recommended area or aboriginal candidate will be reduced by half provided, however, that the same shall be paid in full if the political party

解釋文：公職人員選舉罷免法第三十八條第二項規定：「政黨推薦之區域、山胞候選人，其保證金減半繳納。但政黨撤回推薦者，應全額繳納」，無異使無政黨推薦之候選人，須繳納較高額之保證金，形成不合理之差別待遇，與憲法第七條之意旨有違，應

* Translated by Vincent C. Kuan.

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withdraws its recommendation." The said provision is tantamount to requiring a candidate who is not recommended by a political party to pay a higher amount of guarantee deposit and thus unreasonably discriminates against such a candidate. Therefore, it is contrary to the intent of Article 7 of the Constitution and hence shall no longer apply.

不再適用。

REASONING: All citizens of the Republic of China, irrespective of party affiliation, shall be equal before the law, which is unambiguously provided under Article 7 of the Constitution. While registering his or her interest in running for various public offices, a candidate shall pay a guarantee deposit whose amount will be published by the election commission in advance, provided that a candidate for village head or li head need not pay the same. The foregoing is also clearly set forth in Article 38, Paragraph I of the Public Officials Election and Recall Act as promulgated and amended on August 2, 1991. Nevertheless, Paragraph II of the said article provides, "The guarantee deposit for a party-recommended

解釋理由書：中華民國人民無分黨派，在法律上一律平等，憲法第七條定有明文。人民登記為各類公職候選人時，應繳納保證金，其數額由選舉委員會先期公告，但村里長候選人免予繳納，中華民國八十年八月二日修正公布之公職人員選舉罷免法第三十八條第一項亦有明文規定。同條第二項則規定：「政黨推薦之區域、山胞候選人，其保證金減半繳納。但政黨撤回推薦者，應全額繳納」，無異使無政黨推薦之候選人，須繳納較政黨推薦之候選人為高之保證金。如主管機關公告之保證金過高時，則有意參選者，僅須結合少數人員，即可依法以備案方式成立政黨，再以政黨推薦名義減輕其負擔，反足使小黨林立，無助於政黨政治之健全發展。是上開公職人員選舉罷免法之規定，係

area or aboriginal candidate will be reduced by half provided, however, that the same shall be paid in full if the political party withdraws its recommendation." The said provision is tantamount to requiring a candidate who is not recommended by a political party to pay a higher amount of guarantee deposit than a party-recommended candidate. If and when the amount of the guarantee deposit published by the competent authority is too high, a person intent on running for the public office concerned may simply bring together a handful [or small group] of people and form a political party by means of placing the same on record pursuant to law, and then lessen his or her financial burden in the name of a party-recommended candidate. As a result, smaller parties will be mushrooming, which may not be conducive to a healthy development of party politics. Hence, the aforesaid provision of the Public Officials Election and Recall Act has imposed unnecessary restrictions on the people's suffrage and qualifies as unreasonable discrimination. Therefore, it is contrary to the intent of the aforesaid Article 7 of the

對人民參政權所為不必要之限制，形成不合理之差別待遇，與首開憲法第七條規定意旨不符，應自本解釋公布之日起不再適用。

Constitution and hence shall no longer apply as of the date of this Interpretation.

As an additional note, the second half of Article 50, Paragraph 5 of the Public Officials Election and Recall Act is not found to have infringed upon any constitutionally protected right of the people in providing that the party membership of a candidate who is not recommended by his or her party or whose recommendation is later withdrawn by his or her party will not be published.

至公職人員選舉罷免法第五十條第五項後段，關於未經所屬政黨推薦或經政黨推薦後撤回之候選人，不刊登其黨籍之規定，於人民憲法上所保障之權利並無侵害可言，併此說明。

J. Y. Interpretation No.341（March 11, 1994）*

ISSUE: Are the rules 3 of basic-level specific examination of 1981, providing that the registration, admission and assignment will be conducted and/or determined by district, and that a successful examinee shall serve in his or her original examination district for a certain period, in violation of the Constitution?

RELEVANT LAWS:

Articles 7, 18 of the Constitution（憲法第七條、第十八條）; J.Y. Interpretations Nos. 155 and 205（司法院釋字第一五五號、第二〇五號解釋）; Article 3 of the Regulation for the Taiwan Province Basic-Level 1990 Civil Servants Specific Examination（七十九年特種考試臺灣省基層公務人員考試規則第三條）.

KEYWORDS:

the right of equality（平等權）, Examination Yuan（考試院）. **

HOLDING: The Regulation for the Taiwan Province Basic-Level 1990 Civil Servants Specific Examination were issued by the Examination Yuan based on its statutory authority. Under Section 3 of

解釋文：七十九年特種考試臺灣省基層公務人員考試規則係考試院依其法定職權訂定，該規則第三條規定，本項考試採分區報名、分區錄取及分區分發，並規定錄取人員必須在原報考區

* Translated by Dr. Cheng-Hwa Kwang, Professor of Law, Ming Chuan University.

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

the aforementioned Regulation, the enrollment, qualification and appointment in connection with the examination thereof shall be held and based on separate administrative divisions, and any participant who has satisfied the criteria of the examiners must serve for the required period within the designated administrative division where he or she initially enrolled for the aforementioned examination. Such a policy for the examination, coping with the need of human resources for the position of basic level officers and considering the willingness of those participating in the examination, is deemed a necessary measure and is not inconsistent with the right of equality prescribed in the Constitution.

內服務滿一定期間，係因應基層機關人力需求及考量應考人員志願，所採之必要措施，與憲法第七條平等權之規定，尚無牴觸。

REASONING: The Examination Yuan as the supreme examination institution of this government based on its legal authority may prescribe rules for examination. This power is not in contradiction with the Constitution if such rules are prescribed within its scope of authority or cause no infringement on the right of the people to attend government ex-

解釋理由書：考試院為國家最高考試機關，得依其法定職權訂定考試規則，如未逾越其職權範圍，或侵害人民應考試之權利，即無牴觸憲法之可言，業經本院釋字第一五五號解釋釋示在案。又中華民國人民在法律上一律平等為憲法第七條所明定，人民依同法第十八條應考試服公職之權，在法律上自亦應一律平等。惟此所謂平等，係指實

aminations. This rationale has been illustrated in the holding of Judicial Yuan Interpretation No. 155. All the people are deemed equal before the law as provided in Article 7 of the Constitution. Further, all the people have an equal right to attend examinations in order to be qualified for appointment as governmental employees to civil service positions. Nevertheless, the term "equal" as mentioned above refers to virtual equality. Hence, with a view to coping with the demand in reality and with the purpose of holding an examination, the imposition of certain necessary restrictions may hardly be deemed inconsistent with the said principle of equality as explicitly reasoned in the holding of Judicial Yuan Interpretation No. 205. The Regulation for the Taiwan Province Basic-Level 1990 Civil Servants Specific Examination were issued by the Examination Yuan based on its statutory authority. Under Section 3 of the aforementioned Regulation, the enrollment, qualification and appointment in connection with the examination thereof shall be held and based on separate administrative divisions. Any participant in such an ex-

質上之平等而言，其為因應事實上之需要，及舉辦考試之目的，就有關事項，依法酌為適當之限制，要難謂與上述平等原則有何違背，亦經本院釋字第二〇五號解釋闡釋甚明。七十九年特種考試臺灣省基層公務人員考試規則係考試院依其法定職權訂定，該規則第三條規定，本項考試採分區報名、分區錄取及分區分發，並限定錄取人員必須在原報考區內服務滿一定期間，係因應基層機關人力需求及考量應考人員志願，所採之必要措施，其與考試主管機關，於同一時間在各縣市報考區內，分別為設置於各該區內省級以下之行政機關及公營事業機構進用人員舉行特種考試之情形相當。該項考試典試委員會基於職權，參酌各縣市提報之缺額及應考人員之考試成績，分別決定各考區各類科之錄取標準，致同一類科各考區錄取標準有所不同，乃屬當然，並為應考人員所預知，與憲法第七條平等權之規定，尚無牴觸。

amination who has satisfied the criteria of the examiners must serve for the required period within the designated administrative division where he or she initially enrolled for the aforementioned examination. Such a policy for the examination, coping with the need of human resources for the position of basic level officers and considering the willingness of those participating in the examination, is deemed a necessary measure. The above policy runs parallel to the situation where the examination authority simultaneously holds designated examinations for admitting personnel to the provincial or subordinate administrative institutions and governmental undertakings in each city or hsien (county) based on the need of enrollment for each division for the examination, respectively. The examiners of such an examination exercising their statutory authority and taking into consideration the results of the examination as well as the shortage of personnel reported by each city and hsien (county), respectively, set the criteria of qualifications for various categories of examination of each division, thus resulting in different criteria for

the same category of examination held in each designated division. Therefore, the said policy of which persons participating in the examination are informed in advance constitutes no violation of the right of equality prescribed in Article 7 of the Constitution.

Justice Chien-Tsai Cheng filed dissenting opinion, in which Justice Teh-Sheng Chang joined.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋鄭大法官健才、張大法官特生共同提出不同意見書；劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.342（April 8, 1994）*

ISSUE: Have the Organic Act of the National Security Council, National Security Bureau and Bureau of Personnel Administration of the Executive Yuan been passed by the resolution of the Legislature? Are the disputes subject to the judicial review of this Yuan?

RELEVANT LAWS:

Articles 37, 62, 63, 72, 73 of the Constitution（憲法第三十七條、第六十二條、第六十三條、第七十二條、第七十三條）; Article 13, Paragraph 2, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第十三條第二項）; Article 9 of the Amendments to the Constitution（憲法增修條文第九條）; Articles 12, 13 of the Standard Act for the Laws and Rules（中央法規標準法第十二條、第十三條）.

KEYWORDS:

parliamentary autonomy（國會自治）. **

HOLDING: When reviewing bills of act, the Legislative Yuan shall proceed with the review in accordance with the self-enacted rules of assembly

解釋文：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

* Translated by David T. Liou.

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

whilst remaining within the scope of the Constitution. The issue of whether the review of the bills of act that are submitted by the Legislative Yuan to the President for promulgation follows the review procedures shall not be subject to scrutiny by the authority responsible for interpretation of the Constitution unless it is in clear contravention to the Constitution since it is an internal matter which falls within the scope set by the Legislative Yuan by virtue of the principle of parliamentary autonomy. Therefore, where the President, pursuant to Article 72 of the Constitution, promulgates laws submitted by the Legislative Yuan, despite deviation from the rules of the Legislative Yuan, if it already exists in formality, it shall be effective in accordance with Article 13 of the Standard Act for the Laws and Rules. Where the procedures for enactment of the laws can be determined to be in contravention to the Constitution without investigation into the facts, i.e., where there are palpable material defects which are against the fundamental rules of enactment of laws, the authority responsible for constitutional interpretation may still de-

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。是以總統依憲法第七十二條規定，因立法院移送而公布之法律，縱有與其議事規範不符之情形，然在形式上既已存在，仍應依中央法規標準法第十三條之規定，發生效力。法律案之立法程序有不待調查事實即可認定為牴觸憲法，亦即有違反法律成立基本規定之明顯重大瑕疵者，則釋憲機關仍得宣告其為無效。惟其瑕疵是否已達足以影響法律成立之重大程度，如尚有爭議，並有待調查者，即非明顯，依現行體制，釋憲機關對於此種事實之調查受有限制，仍應依議會自律原則，謀求解決。關於依憲法增修條文第九條授權設置之國家安全會議、國家安全局及行政院人事行政局之組織法律，立法院於中華民國八十二年十二月三十日移送總統公布施行，其通過各該法律之議事錄，雖未經確定，但尚不涉及憲法關於法律成立之基本規定。除此之外，其曾否經議決通過，因尚有爭議，非經調查，無從確認。依前開意旨，仍應由立法院自行認定，並於相當期間內議決補救之。若議決之結果與已公布之法律有異時，仍應更依憲法第七十二條之規定，移送總統公布施

clare it void. Where there is a dispute as to whether the defect is sufficient to affect the enactment of the laws to a grave extent and investigation is required, i.e., where it is not evident and, according to the current regime, the investigation of the facts thereof by the authority responsible for constitutional interpretation is subject to constraints, then the dispute shall be resolved in accordance with the autonomy rule of the Legislative Yuan. With respect to Article 9 of the Amendment to the Constitution which authorizes the establishment of the organizations of the National Security Council, National Security Bureau and Bureau of Personnel Administration of the Executive Yuan, the Legislative Yuan has submitted it to the President for promulgation on December 30, 1993. Although the protocols to the laws passed have not yet been affirmed, they do not involve the fundamental rules of enactment of laws under the Constitution. In addition, whether the protocols have been resolved is controversial and cannot be confirmed without investigation. In accordance with the aforesaid principles, it shall be determined by the Legislative

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Yuan and shall be remedied within an appropriate period. If the resolution is at variance with the promulgated laws, then it shall be resubmitted to the President for promulgation pursuant to Article 72 of the Constitution.

REASONING: In accordance with the general rules of constitutionally democratic countries, the legislative authority of a country rests with the state council. The procedures through which the legislative authority is exercised by the state council can be prescribed in accordance with the self-stipulated rules of assembly so long as they are within the realm of the Constitution. The implementation of the rules of assembly is an internal matter for the state council. Pursuant to the principle of separation of powers, the executive, the judiciary or other state authorities should give respect thereto and this is what is jurisprudentially called self-regulation or parliamentary autonomy of the state council. The rules of assembly of the state council of each country, except for the codified rules, include a variety of uncodified rules. Therefore, when apply-

解釋理由書：依民主憲政國家之通例，國家之立法權屬於國會，國會行使立法權之程序，於不牴觸憲法範圍內，得依其自行訂定之議事規範為之，議事規範如何踐行係國會內部事項。依權力分立之原則，行政、司法或其他國家機關均應予以尊重，學理上稱之為國會自律或國會自治。又各國國會之議事規範，除成文規則外，尚包括各種不成文例規，於適用之際，且得依其決議予以變通，而由作此主張之議員或其所屬政黨自行負擔政治上之責任。故國會議事規範之適用，與一般機關應依法規嚴格執行，並受監督及審查之情形，有所不同。

ing the rules, room for flexibility is necessary depending on the resolutions. The senator who makes the assertion or the party to which he/she belongs shall be politically responsible therefor. Accordingly, the applicability of the assembly rules of the state council differs from the strict execution in compliance with laws in regard to ordinary authorities and the extent to which they are subject to supervision and review.

Article 62 of the Constitution clearly specifies that the Legislative Yuan is the country's highest legislature and is comprised of legislators elected by the people and who act on behalf of the people in the exercise of legislative rights. Although the procedure for the exercise of the aforesaid authorities is not clearly stipulated in the Constitution, the review of bills of act shall follow the rules of assembly which comprise the rules of organization of the Legislative Yuan, the rules of assembly and the customs and practices of assembly. This is not at variance with the self-regulation rights enjoyed by the state council of the constitutionally democratic

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，憲法第六十二條定有明文。立法院行使職權之程序，憲法雖未詳加規定，惟其審議法律案，須依議事規範為之，而議事規範係由立法院組織法、議事規則及議事慣例等構成，與一般民主憲政國家國會所享有之自律權，並無二致。立法院於審議法律案過程中，曾否踐行其議事規範所定程序乃其內部事項，除牴觸憲法者外，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，此在各國實務上不乏可供參考之先例。美國聯邦最高法院一八九〇年裁判認為：法案經國會兩院議長署名送請總統批准並交付國務卿

countries in general. Whether the Legislative Yuan is in compliance with the procedure stipulated in its rules of assembly in its review of bills of act is an internal matter, unless it is in violation of the Constitution, and it shall fall into the scope of the parliamentary autonomy instead of the subject to be reviewed by the authority responsible for the constitutional interpretation which can be seen from the precedents in many countries' practices. The judgment of the United States Federal Supreme Court in 1890 states that bills of act which have been signed by the leaders of both houses and which have been submitted to the President for approval and delivered to the State Secretary shall be considered passed in the state council without having to refer to the meeting minutes or the relevant documents of the two houses. This is based on the principle of separation of powers in that each department is equal and there is mutual respect amongst the departments. As such, the review power of the judiciary authorities with respect to these matters shall be subject to constraints (See Field v. Clark, 143 US 649). A judgment of the Japan

者，即應認該法案已經國會通過，無須審酌國會兩院之議事錄及有關文件。此係基於權力分立，各部門平等，互相尊重之意旨，司法機關就此等事項之審查權應受限制（見 Field v. Clark, 143 U.S. 649）。日本最高裁判所一九六二年裁判認為：警察法修正案既經參眾兩院議決，並循法定程序公布，法院唯有尊重兩院之自主性，不應就上訴論旨所指有關制定該法議事程序之事實加以審理，進而判斷其有效或無效（日本最高裁判所大法庭一九六二年三月七日判決）。德國聯邦憲法法院一九七七年裁判亦認為：議會之議事規範除牴觸憲法者外，有關議事進行及紀律等事項，均屬議會自律之範圍。法律在審議過程中曾經不同黨派之議員參與協商，提付表決時又無基本爭議，則於表決時，不論出席人數如何，若未有至少五人以上議員之質疑，而經確認其無決議能力，即於決議之效力不生影響(BVerfGE44, 308ff.)。此等判例所含國會議事實務之細節，雖因各國制度有異，難期一致，然其尊重議會自律之理念，則並無不同。是以總統依憲法第七十二條規定，因立法院移送而公布之法律，縱有與其議事程序不符之情形，然在形式上既已存在，依中央法規標準法第十三條之規定，仍生效

Supreme Court in 1962 states that since the Amendment to the Police Act has been resolved by both houses and has been promulgated in accordance with the legal procedures, the court shall respect the self-regulating nature of the two houses and shall not adjudicate the facts pertaining to the stipulation of the rules of assembly which are referred to in the notion of appeal in determining the validity or invalidity thereof (Judgment of the Japan Supreme Court, March 7, 1962). The judgment of the German Federal Constitutional Court in 1977 also states that unless the rules of assembly are in violation of the Constitution, matters relating to the progress of the meeting and the discipline thereof shall fall within the domain of the self-regulation of the state council. If during the review process there is participation by members from different parties and there is no fundamental dispute at the time of the voting, and, at the time of the voting, irrespective of the number of persons in attendance, if no more than five members raise any objections thus confirming that there is no support for a resolution, then the effect of the resolution

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would not be affected (BverfGe 44, 308ff). Although the particulars of the practical affairs of the state council contained in the above rulings differ depending on the systems of each country and are difficult to harmonize, the credence in respect to the parliamentary autonomy of the state council is the same. Therefore, the President, pursuant to Article 72 of the Constitution, shall decide that laws which have been submitted by the Legislative Yuan and promulgated thereby, despite deviation from the rules of assembly, exist in terms of formality, and shall be effective in accordance with Article 13 of the Standard Act for the Laws and Rules.

Laws shall be considered void by reason of contradiction with the Constitution. This is not confined to contradiction in substance with the Constitution. In other words, where material defects can be found in the legislative process which can be deemed in contradiction with the Constitution without investigation into the facts thereof (for example, failure to comply with the resolution procedures contained in Article 63 of the Constitution),

法律因牴觸憲法而無效，固不以其內容牴觸憲法者為限，即其立法程序有不待調查事實即可認定為牴觸憲法之重大瑕疵者（如未經憲法第六十三條之議決程序），則釋憲機關仍得宣告其為無效。然如其瑕疵是否已達足以影響法律成立之重大程度，尚有爭議，並有待於調查者，則事實尚未明顯。依司法院大法官審理案件法第十三條第二項規定，大法官解釋憲法得準用憲法法庭之規定行言詞辯論，乃指法律問題之辯

the authority responsible for the interpretation of the Constitution may declare it void. However if there is a dispute as to whether the defect is sufficient to affect the enactment of law to a great extent and investigation is required, then the facts are not yet clear. Pursuant to Article 13, Paragraph 2, of the Constitutional Interpretation Procedure Act, when interpreting the Constitution, the Grand Justices may apply mutatis mutandis the rules for verbal debate stipulated for the constitutional court. This refers to debate on legal issues and is different from the verbal debate involved in declaring matters which are in contradiction with the Constitution by the political party and which may require investigation for evidence thereof. This cannot be subject to the review and scrutiny by the authority responsible for constitutional interpretation. Moreover, if, for purposes of investigating facts, legislators of different stances are subpoenaed to appear in court for exposition, then undoubtedly this is a transfer of dispute over political issues to the judicial authority and is in contravention to the purpose of Article 73 of the Constitution. This shall

論，與宣告政黨違憲事件得調查證據之言詞辯論，有所不同，即非釋憲機關所能審究，且若為調查事實而傳喚立場不同之立法委員出庭陳述，無異將政治議題之爭議，移轉於司法機關，亦與憲法第七十三條之意旨有違，應依議會自律原則，仍由立法院自行認定之。關於依憲法增修條文第九條授權設置之國家安全會議、國家安全局及行政院人事行政局三機關，其組織應以法律定之。行政院提出各該機關組織之法律草案後，立法院於同條第三項所定期限屆滿前審議，並經總統於中華民國八十二年十二月三十日依立法院同日（八二）院臺議字第四〇一八、四〇一九及四〇二〇號咨文公布施行。其通過各該法律之議事錄，雖未經確定，但非議事日程上之討論事項，尚不涉及憲法關於法律成立之基本規定，亦即並非足以影響各該法律成立之重大瑕疵。至除此之外，其瑕疵是否已達重大程度，則尚有爭議，立法院當時議事情形混亂，導致議事錄迄未確定，各該法律案曾否經實質議決，自非明顯，更無公眾週知之可言。依前開說明，應由立法院於相當期間內議決補救之。若議決之結果與已公布之法律有異時，應更依憲法第七十二條之規定，移送總統公布施行。其生效日期，則得

be determined by the Legislative Yuan in accordance with the autonomy rules of the state council. With respect to Article 9 of the Amendment to the Constitution which authorizes the establishment of the three organizations of the National Security Council, National Security Bureau and Bureau of Personnel Administration of the Executive Yuan, the Constitution thereof shall be stipulated by the law. After the Executive Yuan submits the draft bills to the organization of each authority, the Legislative Yuan completes its review before the time period prescribed in Paragraph 3 of the same Article and, in the case of said law, the President promulgated it on December 30, 1993, in accordance with the submittal of (82) Yuan-Tai-Yi-Tze 4018, 4019 and 4020 of the Legislative Yuan. Although the protocols to the laws passed have not yet been affirmed, if they are not items for discussion for the meeting itinerary and do not involve the fundamental rules of enactment of laws under the Constitution, they do not constitute material defects which are sufficient to affect the enactment of the laws. In addition, there was a dispute as to whether

依中央法規標準法第十二條及第十三條之規定決定之。

the defect was extensive in its scale and the chaotic situation of the meeting at that time in the Legislative Yuan resulted in the protocols not being confirmed. As such, it is not self-evident whether the passage of each law proposal has been resolved in substance, let alone is it evident to the public. In accordance with the aforesaid elucidation, the Legislative Yuan shall remedy the situation within an appropriate period. If the resolution is at variance with the promulgated laws, then it shall be resubmitted to the President for promulgation pursuant to Article 72 of the Constitution. Its effective date shall be determined in accordance with Articles 12 and 13 of the Standard Act for the Laws and Rules.

Justice Herbert Han-Pao Ma filed concurring opinion.

Justice Chien-Hua Yang filed dissenting opinion.

本號解釋馬大法官漢寶提出協同意見書；楊大法官建華提出不同意見書。

J. Y. Interpretation No.343（April 22, 1994）*

ISSUE: Is the directive issued by the Ministry of Finance to the effect that a privately built road is not the kind of thing eligible for tax payment consistent with the Constitution?

RELEVANT LAWS:

Articles 19 and 23 of the Constitution（憲法第十九條、第二十三條）； Article 30, Paragraph 2, of the Estate and Gift Taxes Act（遺產及贈與稅法第三十條第二項）; Article 43 of the Enforcement Rules of the Estate and Gift Taxes Act（遺產及贈與稅法施行細則第四十三條）； Directive Ref. No. (71)-TTST-37277 issued on October 4, 1982, by the Ministry of Finance（財政部七十一年十月四日 (七一) 台財稅字第三七二七七號函）.

KEYWORDS:

estate tax（遺產稅）, approval of tax payment in kind（實物抵繳之核准）. **

HOLDING: According to Article 30, Paragraph 2, of the Estate and Gift Taxes Act, the estate tax shall be paid in cash and shall not be paid in kind unless paying the tax in cash is indeed difficult.

解釋文：依遺產及贈與稅法第三十條第二項規定，遺產稅本應以現金繳納，必須現金繳納確有困難時，始得以實物抵繳。是以申請以實物抵繳，是否符合上開要件及其實物是否適於抵

* Translated by Vincent C. Kuan.

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

Hence whether an application for making tax payment in kind should be granted is a question for the tax collection authorities to answer after making due investigation as to whether the requirements mentioned above are satisfied and whether the kind of thing at issue is suitable for tax payment. Article 43 of the Enforcement Rules of the Estate and Gift Taxes Act provides that the kind of thing suitable for tax payment should be limited to one that is readily resalable or easily kept safe, and that no other right or encumbrance has been created thereon. The Directive Ref. No. (71)-TTST-37277 issued on October 4, 1982, by the Ministry of Finance states to the effect that a piece of land that is not reserved for road use under an urban plan but already has a privately built road on it is not the kind of thing eligible for tax payment because such land is not readily resalable. The said directive is consistent with the intent of the law mentioned above, which is designed to carry out the provisions of the applicable tax laws and to nurture a general environment in which taxpayers fulfill their duties to pay tax in good faith. Therefore, the above provi-

繳，自應由稅捐稽徵機關予以調查核定。同法施行細則第四十三條規定，抵繳之實物以易於變價或保管，且未經設定他項權利者為限。財政部中華民國七十一年十月四日（七一）臺財稅字第三七二七七號函謂已成道路使用之土地，非經都市計畫劃為道路預定地，而由私人設置者，不得用以抵繳遺產稅，係因其變價不易，符合上開法律規定之意旨，均為貫徹稅法之執行，並培養誠實納稅之風氣所必要，與憲法尚無牴觸。

sions and directive are not unconstitutional.

REASONING: Article 30, Paragraph 2, of the Estate and Gift Taxes Act provides that "where the taxable amount for estate tax or gift tax exceeds three hundred thousand New Taiwan dollars (NT$300,000), the taxpayer may, within the tax-paying period as prescribed in the preceding paragraph, apply with the relevant supervising tax collection authorities for payments thereof in two to six installments, the interval of which shall not exceed two months, and such payment may be made in kind in lump sum if such taxpayer indeed has difficulty paying cash in lump sum." The said provision makes clear that the estate tax shall be paid in cash and shall not be paid in kind unless paying the tax in cash in lump sum is indeed difficult. Accordingly, since making tax payment in kind is conditioned on the fact that making such payment in cash in lump sum is indeed difficult, the relevant supervising tax collection authorities should make due investigation as to whether the requirements mentioned

解釋理由書：遺產及贈與稅法第三十條第二項「遺產稅或贈與稅應納稅額在三十萬元以上，納稅義務人確有困難，不能一次繳納現金時，得於前項規定納稅期限內，向該管稽徵機關申請核准，分二期至六期繳納，每期間隔以不超過二個月為限，並得以實物一次抵繳」之規定，明示遺產稅本應以現金繳納，必須現金繳納確有困難，始得以實物抵繳。是以實物抵繳，既有現金繳納確有困難之前提要件，稅捐稽徵機關就此前提要件是否具備，及其實物是否適於抵繳，自應予以調查核定，而非謂納稅義務人不論在何種情形下，均得指定任何實物以供抵繳。而以實物抵繳之目的，原在可期待其變為現金，使其結果與以現金繳納同。同法施行細則第四十三條因之設有「納稅義務人依本法第三十條第二項規定申請抵繳稅款之實物，以易於變價或保管，且未經設定他項權利者為限」之規定，意指在可供扣押之實物中，有易於變價與不易於變價之分時，應以易於變價者而為抵繳。其中所謂「易於變價」，雖與「保管」同列，然非擇一即可，而排除稅捐稽徵機關之

above are satisfied and whether the kind of thing at issue is suitable for tax payment. A taxpayer is not entitled to designate anything for tax payment in kind under any circumstances. Furthermore, the original purpose of such payment in kind is to expect such kind of objects to be easily converted into cash and the end results thereof are no different from payment in cash. Thus, Article 43 of the Enforcement Rules of the Estate and Gift Taxes Act provides, "The kind of object for tax payment as applied for by a taxpayer under Article 30, Paragraph 2, of the Act should be limited to one that is readily resalable or easily kept safe, and that no other right or encumbrance has been created thereon," which means that where there is a difference between resalable and non-resalable things that are attachable, the resalable ones should be used for tax payment in kind. Despite the fact that "readily resalable" and "safekeeping" are both enumerated therein, it is not meant to rule out the power and authority of the tax collection authorities to make proper determinations by forcing such authorities to make a choice between the two. In the

認定權限。倘其實物雖非不易於保管，但無從變價以供抵繳遺產稅之用者，如許抵繳，則國家反增無意義之保管負擔，即與母法意旨相違。財政部七十一年十月四日（七一）臺財稅字第三七二七七號函釋說明「本部（七一）臺財稅字第三一六一〇號函釋『納稅義務人申請以遺產中之道路預定地或既成道路土地抵繳遺產稅款者，無論該土地是否已經當地縣市政府列入徵收補償計畫，均准予抵繳』，其所稱既成道路土地，係指依都市計畫劃為道路預定地，且事實上已形成道路使用之土地而言，至非經都市計畫劃為道路預定地，而由私人設置之道路土地，不得比照辦理」，亦係基於同一意旨。其就非經都市計畫劃為道路預定地，而由私人設置之道路土地，所以認為不得比照辦理，乃因該項土地既非都市計畫中之道路預定地，主管機關並無徵收之義務，即屬不易出售變價之物。自無許其抵繳遺產稅之理。上開規定及財政部函釋，均為貫徹上開稅法之執行，並培養誠實納稅之風氣所必要，與憲法尚無牴觸。至納稅義務人之實物除禁止扣押者外，如全部均為不易於變價者，則已無易於變價與不易於變價之分，此時得否以實物抵繳，係於調查核定時，另一應考量之問題，合併

event that an object that is easily kept safe is nonetheless in no way resalable so as to serve as payment for the estate tax, the state, on the contrary, would be further charged with the burden of safekeeping of such thing if the payment in kind is approved, which is not in line with the intent of the Act. The Directive Ref. No. (71)-TTST-37277 issued on October 4, 1982, by the Ministry of Finance states, "It is explained in the Directive Ref. No. (71)-TTST-31610 that 'in respect of the application filed by the taxpayer for payment in kind for the estate tax by means of land reserved for road use or land as preexisting road, the application would be approved regardless of whether such land is already subject to an expropriation and compensation program executed by the local county or municipal government.' The "preexisting road" referred to therein means a piece of land that is reserved for road use under an urban plan and is already used for a road; the kind of land that is not reserved for road use under an urban plan but is privately built and used for a road is not the kind of road contemplated thereunder and, thus, the aforesaid

指明。

rule is not applicable." The said directive shares the same intent as the provisions of the Enforcement Rules of the Estate and Gift Taxes Act described earlier. The reason behind the said directive stating to the effect that a piece of land that is not reserved for road use under an urban plan but has a privately built road on it is not the kind of thing eligible for tax payment in kind is that such land is not readily or easily resalable since the competent authorities are not obligated to expropriate any land that is not reserved for road use under an urban plan, and that, as such, it should not be eligible for the tax payment in kind. The foregoing provisions, as well as the said directive of the Ministry of Finance, are both meant to carry out the provisions of the applicable tax laws and to nurture a general environment in which taxpayers fulfill their duties to pay tax in good faith, and, therefore, do not contradict the Constitution. Excluding those possessions of the taxpayer which are not subject to attachment, it would be pointless to differentiate between resalable and non-resalable things if nothing is easily resalable. Whether, under such circum-

stances, the tax payment in kind should be allowed is another issue that needs to be considered while making investigations and determinations.

Justice Chien-Hua Yang filed dissenting opinion, in which Justice Tieh-Cheng Liu joined.

Justice Herbert Han-Pao Ma filed dissenting opinion.

本號解釋楊大法官建華、劉大法官鐵錚共同提出不同意見書；馬大法官漢寶提出不同意見書。

J. Y. Interpretation No.344（May 6, 1994）*

ISSUE: Is the provision of the applicable standards prescribed by the Taipei City Government in respect of compensation for crops, lumber and fish, which imposes restrictions on the quantities of such crops, lumber or fish as are eligible for compensation, constitutional?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 215, Paragraph 1, Subparagraph 4, and Article 215, Paragraph 3, and 241 of the Land Act（土地法第二百十五條第一項第四款、第三項、第二百四十一條）; Appraisal Standards of Compensation for Crops, Lumber and Fish in the Case of Taipei City's Exercise of Eminent Domain（臺北市辦理徵收土地農林作物及魚類補償遷移費查估基準）.

KEYWORDS:

appraisal of compensation for eminent domain（徵收補償費之查估）, just compensation（公平補償）, unfair advantage（不當利益）. **

HOLDING: The Appraisal Standards of Compensation for Crops, Lumber and Fish in the Case of Taipei City's Ex-

解釋文：臺北市辦理徵收土地農林作物及魚類補償遷移費查估基準，係臺北市政府基於主管機關之職權，為

* Translated by Vincent C. Kuan.

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

ercise of Eminent Domain were prescribed by the Taipei City Government based on its power as the competent authority to enforce the provisions of Article 241 of the Land Act. The provisions thereof, which limit the quantities of flowers and plants grown per acre and make no compensation for those exceeding the quantities so set forth, are prescribed to limit those landowners who, in order to gain unfair advantage, purposely start planting or over-planting prior to the expropriation. Such provisions are necessary to achieve the objective of just compensation and thus are not in conflict with the Constitution. Nevertheless, if there is any valid evidence to prove that the actual or normal planting and growing conditions differ substantially from the prescribed standards, the competent authorities should still, as a matter of course, make adequate and careful determinations on a case-by-case basis according to its expertise and experience.

執行土地法第二百四十一條之規定而訂定，其中有關限制每公畝種植花木數量，對超出部分不予補償之規定，乃為防止土地所有人於徵收前故為搶植或濫種，以取得不當利益而設，為達公平補償目的所必要，與憲法並無牴觸。但如有確切事證，證明其真實正常種植狀況與基準相差懸殊時，仍應由主管機關依據專業知識與經驗，就個案妥慎認定之，乃屬當然，併此說明。

REASONING: The state may, in the interests of the public, expropriate land from the people by law and, accord-

解釋理由書：國家為公益之目的，依法徵收人民之土地，其土地改良物被一併徵收時，依土地法第二百四十

ing to Article 241 of the Land Act, the relevant supervising land administration authorities of the city or county government shall, jointly with the other relevant authorities concerned, appraise the value of the compensation for any land ameliorants to be expropriated together with such land. Since appraisal is required, naturally the actual conditions of the land ameliorants to be expropriated should be examined. However, Article 215, Paragraph 1, Subparagraph 4, and Article 215, Paragraph 3, of the Land Act provide that "those land ameliorants whose species or quantities are planted and grown under substantially different from normal conditions" will not be expropriated together with the land. From time to time, landowners or other people using the land, with the intent to gain unfair advantage, purposely start planting or over-planting when they know the land ameliorants will be expropriated. The Taipei City Government, according to its power as the competent authority, has enacted the Appraisal Standards of Compensation for Crops, Lumber and Fish in the Case of Taipei City's Exercise of Eminent Do-

一條規定，應受之補償費，由該管市、縣地政機關會同有關機關估定之。既須估定，自應就被徵收之土地改良物實際具體狀況為之。但因土地法第二百十五條第一項第四款及第三項有「農作改良物之種類、數量顯與正常種植情形不相當者」，不予一併徵收之規定，而土地所有人或其他使用土地之人，間有於知悉其土地改良物將被徵收時，故為搶植或濫種，意圖取得不當利益之情事，臺北市政府基於主管機關之職權，為執行上述法律規定，訂定臺北市辦理徵收土地農林作物及魚類補償遷移費查估基準，其中關於限制每公畝種植花木數量，對超出部分不予補償之規定，乃為防止上述情事，以達公平補償目的所必要，與憲法並無牴觸。惟該基準限制之數量，乃係斟酌一般情形而為規定，在個別案件，如有確切事證，證明其與真實正常種植狀況相差懸殊時，仍應由主管機關依據專業知識與經驗，審究其有無搶植或濫種之情形，妥慎認定，乃屬當然，併此說明。

main to enforce the aforesaid provisions of the law. The provisions thereof, which limit the quantities of flowers and plants grown per acre and make no compensation for those exceeding the quantities so set forth, are prescribed to prevent the situations mentioned above. Such provisions are necessary to achieve the objective of just compensation and thus are not in conflict with the Constitution. Nevertheless, the quantities prescribed thereunder have been set forth by taking into consideration the general conditions. And, if there is any valid evidence in a particular case to prove that the actual or normal planting and growing conditions differ substantially from such standards, the competent authorities should still, as a matter of course, make adequate and careful determinations as to whether purposeful planting or over-planting indeed exists according to its expertise and experience.

J. Y. Interpretation No.345（May 6, 1994）*

ISSUE: Are the relevant provisions of the Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit, which impose various exit restrictions, unconstitutional?

RELEVANT LAWS:

Article 10 or Article 23 of the Constitution（憲法第十條、第二十三條）; Article 24, Paragraph 3 of the Tax Levy Act（稅捐稽徵法第二十四條第三項）; Article 25-1, Paragraph 3 of the Customs Act（關稅法第二十五條之一第三項）; Articles 2, Paragraph 1, and 5 of the Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit（限制欠稅人或欠稅營利事業負責人出境實施辦法第二條第一項、第五條）.

KEYWORDS:

delinquency in tax payment（欠繳稅款）, exit restrictions（出境限制）.**

HOLDING: Enabled by Article 24, Paragraph 3, of the Tax Levy Act and

解釋文：行政院於中華民國七十三年七月十日修正發布之「限制欠稅

* Translated by Vincent C. Kuan.

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

Article 25-1-III of the Customs Act, the Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit were amended and promulgated by the Executive Yuan on July 10, 1984. The provisions of Article 2, Paragraph 1, thereof do not go beyond the objective and scope of the aforesaid laws and, pursuant to Article 5 thereof, the exit restrictions imposed on a taxpayer shall be lifted if one of the six situations set forth therein occurs, which also consider the rights and interests of the taxpayer. The aforesaid measures are necessary to ensure tax revenues and promote public interest and thus do not contradict the Constitution.

人或欠稅營利事業負責人出境實施辦法」，係依稅捐稽徵法第二十四條第三項及關稅法第二十五條之一第三項之授權所訂定，其第二條第一項之規定，並未逾越上開法律授權之目的及範圍，且依同辦法第五條規定，有該條所定六款情形之一時，應即解除其出境限制，已兼顧納稅義務人之權益。上開辦法為確保稅收，增進公共利益所必要，與憲法尚無牴觸。

REASONING: Article 24, Paragraph 3, of the Tax Levy Act provides, "If a taxpayer's delinquency in tax payment involves a certain amount, the judicial authorities or the Ministry of Finance may request in writing that the Entry and Exit Service Bureau of the Ministry of the Interior prohibits the taxpayer or, in the case of a profit-seeking enterprise, the respon-

解釋理由書：稅捐稽徵法第二十四條第三項規定：「納稅義務人欠繳應納稅捐達一定金額者，得由司法機關或財政部，函請內政部入出境管理局，限制其出境；其為營利事業者，得限制其負責人出境，但其已提供相當擔保者，應解除其限制。其實施辦法，由行政院定之。」關稅法第二十五條之一第三項亦有相同意旨之規定，行政院於中

sible person thereof, from leaving the country, provided that such restriction shall be lifted if adequate guaranty is furnished by such taxpayer. The implementing rules in respect thereof shall be prescribed by the Executive Yuan." Article 25-1, Paragraph 3, of the Customs Act also provides to the same effect. The Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit was amended and promulgated by the Executive Yuan on July 10, 1984, under the express delegation of the aforesaid laws. Article 2, Paragraph 1, thereof provides, "Where an individual residing in the ROC or a profit-seeking enterprise located within the ROC defaults on tax payments or customs duties whose amount is determined within the time limit prescribed by applicable laws, and the aggregate amount of such overdue tax payments and the determined fine imposed thereon, if any, reaches five hundred thousand New Taiwan dollars (NT$500,000) in the case of an individual, or one million New Taiwan Dollars (NT$1,000,000) in the case of a

華民國七十三年七月十日修正發布之「限制欠稅人或欠稅營利事業負責人出境實施辦法」，即係依上開法律明文授權所訂定。其第二條第一項規定：「在中華民國境內居住之個人或在中華民國境內之營利事業，其已確定之應納稅捐或關稅，逾法定繳納期限尚未繳納，其欠繳稅款及已確定之罰緩單計或合計，個人在新臺幣五十萬元以上，營利事業在新台幣一百萬元以上者，由稅捐稽徵機關或海關報請財政部，函請內政部入出境管理局，限制該欠稅人或欠稅營利事業負責人出境」，並未逾越上開法律授權之目的及範圍，且依同辦法第五條規定，有該條所定六款情形之一時，應即解除其出境限制，已兼顧納稅義務人之權益。上開辦法限制出境之規定，為確保稅收，增進公共利益所必要，與憲法第十條、第二十三條規定，均無牴觸。

profit-seeking enterprise, the tax collection authorities or the customs concerned shall report to the Ministry of Finance, which shall, in turn, request the Entry and Exit Service Bureau of the Ministry of the Interior in writing to prohibit the tax-delinquent individual or responsible person of a profit-seeking enterprise from leaving the country." The foregoing provisions do not go beyond the objective and scope of the aforesaid laws and, pursuant to Article 5 of the same Regulation, the exit restrictions imposed on a taxpayer shall be lifted if one of the six situations set forth therein occurs, which also consider the rights and interests of the taxpayer. The aforesaid regulations are necessary to ensure tax revenues and promote public interest and thus do not contradict either Article 10 or Article 23 of the Constitution.

J. Y. Interpretation No.346（May 6, 1994）*

ISSUE: Is it constitutionally permissible for a statute to establish a statutory authorization on taxation obligation for particular purpose, if the obligation is established in statutory provisions clearly defined and within the application scope specifically set out?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Article 16, Paragraph 1, Subparagraph 3, of the Civil Education Act（國民教育法第十六條第一項第三款）; Article 18, Paragraph 1, of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第十八條第一項）.

KEYWORDS:

taxation obligation（納稅義務）, statutory authorization（法律授權）, local tax（地方稅）, tax rate（稅率）, a constitution violation；a violation of the Constitution（違憲）, compulsory education（國民教育）, special tax for education（教育捐）.**

HOLDING: Article 19 of the Constitution provides: "The people shall bear a taxation obligation in accordance

解釋文：憲法第十九條規定人民有依法律納稅之義務，係指有關納稅之義務應以法律定之，並未限制其應規

* Translated by TSAI Chiou-ming, Head Public Prosecutor.

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

with law. In this provision, the Constitution mandates that, should any taxation obligation be imposed upon the people, it shall be specified by a statute. The Constitution does not require, however, in which statute or in what title of statute such an obligation should be set forth. It is constitutionally permissible to have a statute whose provisions establish an authorization on taxation obligation for a particular purpose, but only if the obligation is established in statutory provisions clearly defined and within the application scope specifically set out. There is no constitutional violation in the provisions authorizing the imposition of the special tax for education in Article 16, Paragraph 1, Subparagraph 3, of the Civil Education Act and Article 18, Paragraph 1, of the Act Governing the Allocation of Government Revenues and Expenditures, pursuant to the reasoning given above.

定於何種法律。法律基於特定目的，而以內容具體、範圍明確之方式，就徵收稅捐所為之授權規定，並非憲法所不許。國民教育法第十六條第一項第三款及財政收支劃分法第十八條第一項關於徵收教育捐之授權規定，依上開說明，與憲法尚無牴觸。

REASONING: Article 19 of the Constitution imposes upon the people a taxation obligation which is set out by law. The implication of this Article was manifested in J.Y. Interpretation No. 217.

解釋理由書：憲法第十九條規定人民有依法律納稅之義務，前經本院釋字第二一七號解釋釋明其意旨。有關納稅義務之事項，固宜於名為稅法之法律中規定之，惟憲法並未限制其應規定

It is more appropriate for the taxation provisions to be set forth in a statute in a title of act regulating certain categories of taxes. Yet the Constitution does not require that there be a specific type of statute for setting forth such an obligation. The Legislative Yuan is constitutionally permitted to authorize the administrative agency in charge of taxation affairs to decide the issue of imposing certain types of tax through statutory provisions which are clearly defined and specifically orientated. To cope with the financial needs of compulsory education, the Civil Education Act provides in Article 16, Paragraph 1, Subparagraph 3: "The provincial (special city) government may collect necessary funds within the limited amount framed by tax statutes and the Act Governing the Allocation of Government Revenues and Expenditures in respect to provincial (special city) or prefecture (municipal) local tax, by permission of the Executive Yuan. Those measures will not be subject to the restrictions indicated in the proviso clause of Article 18, Paragraph 1, of the Act Governing the Allocation of Government Revenues and Expenditures. The

於何種法律，而立法機關就某種稅捐是否課徵，認為宜授權主管機關裁量，因而以目的特定、內容具體及範圍明確之方式，所為之授權規定，亦非憲法所不許。國民教育法為支應辦理國民教育所需經費，於其第十六條第一項第三款規定：「省（市）政府就省（市）、縣（市）地方稅部分，在稅法及財政收支劃分法規定限額內籌措財源，逕報行政院核定實施，不受財政收支劃分法第十八條第一項但書之限制。」財政收支劃分法第十八條第一項但書規定：「但直轄市、縣（市）（局）為籌措教育科學文化支出財源，得報經行政院核准，在第十六條所列縣（市）（局）稅課中不超過原稅捐率百分之三十徵收地方教育捐。」依其立法意旨，係因法律所定有關地方稅之稅捐率，有其伸縮彈性，本已由地方民意機關通過決定，無須於徵收不超過原稅捐率百分之三十地方教育捐時，再經地方民意機關同意，以免發生困難。並非謂行政機關可提高其經地方民意機關通過決定之原稅捐率；而祇係授權主管機關在法律所定不超過原稅捐率百分之三十之範圍內，得逕行核定實施而已。其情形合於上述目的特定、內容具體及範圍明確之授權要件，與憲法尚無牴觸。至為籌措國民教育經費來

said proviso clause provides: "However, the provincial (special city) or prefecture (municipal)(bureau) government may, with the permission of the Executive Yuan, impose a special tax for education not exceeding 30 percent against the original rate for the tax imposed by the prefecture (municipal)(bureau) under this Article. The rationale is based on the flexibility of the local tax rate manifested by law: since the local tax rate has been reviewed and passed by local councils, to save time and effort, the imposition of a special tax for education need not be reviewed again by the councils. Nevertheless, this does not mean that the local administrations may raise the tax rate which has been reviewed and passed by local councils. It only means that the local administrations may authorize the agencies-in-charge to decide upon and execute the imposition of the special tax for education within the scope of 30 percent against the original tax rate. Since the measures are consistent with the authorization requirements in general, i.e., specification in purpose, concreteness in contents and clarity in scope, they are by no means contrary to

源，是否祇對多種地方稅中之某種稅加徵一定比率之教育捐，則屬行政機關在法律授權範圍內依法裁量之問題，應由行政機關通盤斟酌並隨時檢討改進之，乃屬當然，合併指明。

the constitutional requirements. As to whether the fund collection in the name of the special tax for education is aimed at only one of the various local taxes by percentage, this is a question of administrative discretion within the range of legal authorization. To be noted accordingly, the discretion should be subject to an overall consideration, constant review and necessary improvement.

J. Y. Interpretation No.347（May 20, 1994）*

ISSUE: Is the provision of the Precautionary Matters on the Submission of Application and Issuance of Self-Tilling Certificates, which determines the ability to engage in self-tilling based on the location of a tiller's residence and farmland, unconstitutional?

RELEVANT LAWS:

Articles 5 and 23 of the Constitution（憲法第五條、第二十三條）；Article 30 of the Land Act（土地法第三十條）; Article 19 of the Act Governing Reduction of Farm Rent to 37.5 Percent（耕地三七五減租條例第十九條）; Section 3, Subparagraph 4 and 6, Paragraph 1, Subparagraph 2 of the Precautionary Matters on the Submission of Application and Issuance of Self-Tilling Certificates（自耕能力證明書之申請及核發注意事項第三點第四款、第六點第一項第二款）.

KEYWORDS:

issuance of self-tilling certificates（自耕能力證明書之核發）, restrictions on the location of a till's residence and farmland（耕作人住所與農地位置之限制）, farmland for farmers（農地農有）, land policies（土地政策）, agricultural development policies（農業發展政策）. **

* Translated by Vincent C. Kuan.

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

HOLDING: The Precautionary Matters on the Submission of Application and Issuance of Self-Tilling Certificates were amended and issued by the Ministry of the Interior on November 25, 1986 and June 22, 1990, respectively, based on its power as the competent authority to enforce the provisions of Article 30 of the Land Act and Article 19 of the Act Governing Reduction of Farm Rent to 37.5 Percent. The provisions contained therein, which impose certain restrictions on the applicant's residence and the location of the farmland transferred to or recovered by such applicant, were set forth as guidelines so that the relevant authorities could carry out the measures contemplated thereby in light of the then current land policies of "farmland for self-tilling farmers" while also taking into account the general usage of farming tools. Such provisions are not found to be in conflict with the Constitution. In respect of those provisions contained in the said Precautionary Matters, which determine the ability of a tiller to engage in self-tilling based on whether the tiller's residence or existing farmland and the transferred farmland are

解釋文：內政部中華民國七十五年十一月二十五日及七十九年六月二十二日修正發布之自耕能力證明書之申請及核發注意事項，係基於主管機關之權限，為執行土地法第三十條及耕地三七五減租條例第十九條等規定而訂定，其中關於申請人住所與所承受農地或收回農地之位置，有所限制，係本於當時農地農有並自耕之土地政策，兼顧一般耕作工具之使用狀況而設，作為承辦機關辦理是項業務之依據，與憲法尚無牴觸。至上開注意事項所定以住所或現耕農地與所承受之農地是否屬同一縣市或毗鄰鄉鎮，為認定能否自耕之準據，仍應斟酌農業發展政策之需要、耕作方式及交通狀況之改進，隨時檢討修正，以免損害實際上有自耕能力農民之權益，併此說明。

located within the same county /municipality or in an adjoining township/town, such other factors as the policy of agricultural development, the improvement of farming methods and traffic conditions, etc., should also be taken into consideration, and review and modification thereof be made from time to time so as not to adversely affect the rights and interests of those farmers who, in fact, have the ability to engage in self-tilling.

REASONING: The transferee of any private farmland shall be limited to one who has the ability to engage in self-tilling; and the lessor of such farmland who takes back the land is required to have the ability to engage in self-tilling, which are clearly prescribed in Article 30 of the Land Act and Article 19 of the Act Governing Reduction of Farm Rent to 37.5 Percent, respectively. For the purpose of enforcing the applicable provisions of the aforesaid laws and the Agricultural Development Act, the Ministry of the Interior, based on its power as the competent authority, has prescribed the Precautionary Matters on the Submission of Application and Issuance of Self-

解釋理由書：私有農地之移轉，其承受人以能自耕者為限，又收回出租農地，自耕之出租人須有自任耕作之能力，分別為土地法第三十條、耕地三七五減租條例第十九條所明定。內政部基於主管機關之權限，為執行上述法律及農業發展條例等規定，訂有自耕能力證明書之申請及核發注意事項，其中關於申請人住所與所承受農地或收回農地之位置，有所限制，並於修訂前述注意事項時，屢經調整。中華民國七十五年十一月二十五日修正發布之上開注意事項第三點第四款規定：申請人之住所與其承受農地非在同一或毗鄰鄉（鎮、市、區）者，視為不能自耕，不准核發證明書，但交通路線距離在十五公里以

Tilling Certificates. The provisions contained therein have imposed certain restrictions on the applicant's residence and the location of the farmland transferred to or recovered by such applicant, and modifications of such restrictions have been repeatedly made while amending the said Precautionary Matters. Section 3, Subparagraph 4, of the said Precautionary Matters as amended and issued on November 25, 1986, provided, "If the applicant's residence and the farmland transferred to him are not located in the same or adjoining township(s) (town(s), city(-ies), or precinct(s)), he shall not be deemed to have the ability to engage in self-tilling and thus no certificate shall be issued, provided, however, that the traveling distance between the two locations is within fifteen kilometers. The said provision was later amended on June 22, 1990, as Section 6, Paragraph1, Subparagraph 2, thereof, which reads as follows: "No certificate shall be issued unless the residence of the applicant and the farmland transferred to him are located in the same county/municipality or, if not in the same county/municipality, in the adjoining town-

內者，不在此限。此項規定嗣於七十九年六月二十二日修正為第六點第一項第二款，其內容為：承受農地與申請人之住所應在同一縣市或不同縣市毗鄰鄉（鎮、市、區）範圍內者，始得核發證明書，均係本於當時農地農有並自耕之土地政策，兼顧一般耕作工具之使用狀況而設，作為承辦機關辦理是項業務之依據，與憲法尚無牴觸。至上開注意事項所定以住所或現耕農地與所承受之農地是否在同一縣市或毗鄰鄉鎮，為認定能否自耕之準據，仍應斟酌農業發展政策之需要、耕作方式及交通狀況之改進，隨時檢討修正，以免損害實際上有自耕能力農民之權益，併此說明。

ships (towns, cities, or precincts).” The foregoing provisions are set forth as guidelines so that the relevant authorities could carry out the measures contemplated thereby in light of the then current land policies of “farmland for self-tilling farmers” while also taking into account the general usage of farming tools. They are not found to be in conflict with the Constitution. In respect of those provisions contained in the said Precautionary Matters, which determine the ability of a tiller to engage in self-tilling based on whether the tiller’s residence or existing farmland and the transferred farmland are located within the same county /municipality or in an adjoining township/town, such other factors as the policy of agricultural development, the improvement of farming methods and traffic conditions, etc., should also be taken into consideration, and review and modification thereof be made from time to time so as not to adversely affect the rights and interests of those farmers who, in fact, have the ability to engage in self-tilling.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋李大法官志鵬提出不同意見書。

J. Y. Interpretation No.348（May 20, 1994）*

ISSUE: Are the relevant directions issued by the Ministry of Education, which require that publicly funded medical students of Yang-Ming Medical School accept assignments after their graduation and surrender their professional licenses for safekeeping before expiry of their service terms, unconstitutional?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Sections 13 and 14 of the Implemental Guidelines on Remuneration of Public-Funded Students of National Yan-Ming Medical School and Assignment after Their Graduation（國立陽明醫學院醫學系公費生待遇及畢業後分發服務實施要點第十三點、第十四點）.

KEYWORDS:

administrative contract（行政契約）, publicly funded medical education（公費醫學教育）, principle of good faith（誠信原則）. **

HOLDING: The Implemental Guidelines on Remuneration of Public-Funded Students of National Yan-Ming Medical School and Assignment after

解釋文：行政院中華民國六十七年元月二十七日臺（六七）教字第八二三號函核准，由教育部發布之「國立陽明醫學院醫學系公費學生待遇及畢業

* Translated by Vincent C. Kuan.

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

Their Graduation was issued by the Ministry of Education with the approval of the Executive Yuan per the Directive Ref. No. (67)-TC-823 dated January 27, 1978. The said Directions were prescribed by the competent authority to resolve the difficulties that public health and medical institutions have in filling vacancies, and to serve as a basis upon which an administrative contract may be executed with a student who voluntarily accepts a publicly funded medical education. According to the relevant provisions of the said Directions, such students may enjoy various benefits of publicly funded medical education and medical training for doctors. Therefore, Sections 13 and 14 thereof provide to the effect that publicly funded students shall accept assignments to public health and medical institutions after their graduation and that they shall surrender their professional licenses to the assigned institutions for safekeeping before expiry of their service terms. Such provisions are necessary in order to achieve an administrative objective and are not unreasonable. And, the contents thereof have been made part of the con-

後分發服務實施要點」，係主管機關為解決公立衛生醫療機構醫師缺額補充之困難而訂定，並作為與自願接受公費醫學教育學生，訂立行政契約之準據。依該要點之規定，此類學生得享受公費醫學及醫師養成教育之各種利益，其第十三點及第十四點因而定有公費學生應負擔於畢業後接受分發公立衛生醫療機構服務之義務，及受服務未期滿前，其專業證書先由分發機關代為保管等相關限制，乃為達成行政目的所必要，亦未逾越合理之範圍，且已成為學校與公費學生間所訂契約之內容。公費學生之權益受有限制，乃因受契約拘束之結果，並非該要點本身規定之所致。前開要點之規定，與憲法尚無牴觸。

tract executed between the school and a publicly funded student. The rights and interests of a publicly funded student are restricted under the contract, but not by the provisions of the said Directions per se. The aforesaid provisions are not found to be unconstitutional.

REASONING: For the purpose of achieving a specific administrative objective, an administrative agency may, based on its statutory powers and authorities, enter into an administrative contract with any person under which certain payment or performance shall be provided on its part in consideration of reasonable burden or other counter performance under public law on the part of the person accepting such payment or performance, provided, however, that no law is violated or broken. In order to resolve the difficulties that public health and medical institutions have in filling vacancies, the authorities concerned decided to cultivate talent through publicly funded medical education. Hence, the Ministry of Education submitted its plan to the Executive Yuan, which approved the same on January 27,

解釋理由書：行政機關基於其法定職權，為達成特定之行政上目的，於不違反法律規定之前提下，自得與人民約定提供某種給付，並使接受給付者負合理之負擔或其他公法上對待給付之義務，而成立行政契約關係。有關機關為解決公立醫療機構醫師缺額補充之困難，以公費醫學教育方式，培養人才，教育部遂報奉行政院於中華民國六十七年元月二十七日核准，以臺（六七）教字第八二三號函發布「國立陽明醫學院醫學系公費學生待遇及畢業後分發服務實施要點」，作為處理是項業務之依據。該要點第十三點內規定「服務未期滿，不予核定有關機關頒發之各項證書或有關證明。其專業證書，先由分發機關代為保管」，於第十四點規定「公費畢業生於規定服務期間，不履行其服務之義務者，除依第十三點規定辦理外，並應償還其在學期間所享受之公費」，

1978, and issued the Implemental Guidelines on Remuneration of Public-Funded Students of National Yan-Ming Medical School and Assignment after Their Graduation and the Assignment of Such Students' after Graduation per the Directive Ref. No. (67)-TC-823, as a basis upon which the said plan may be carried out. Section 13 thereof provides to the effect: "Prior to the expiry of the service term, various licenses or relevant certificates will not be awarded or issued; and the professional licenses shall be surrendered to the assigned institutions for safekeeping." And, Section 14 thereof provides, "During the prescribed service term, a publicly funded student who does not perform his obligation to serve shall pay back any and all public funding enjoyed by him during school in addition to the provisions of Section 13 hereof." Such provisions are set forth to ensure that a student who voluntarily accepts public funding will perform his contractual obligations to accept the assignment to a public health and medical institution and to complete his service in such institution so that the aforesaid difficulties may be resolved.

均為確保自願享受公費待遇之學生，於畢業後，照約按受分發公立衛生醫療機構完成服務，以解決上述困難，達成行政目的所必要，亦未逾越合理之範圍。此項規定並作為與自願接受公費醫學教育學生訂立行政契約之準據，且經學校與公費學生訂立契約（其方式如志願書、保證書之類）後，即成為契約之內容，雙方當事人自應本誠信原則履行契約上之義務。從而公費學生之權益受有限制，乃因受契約拘束之結果，並非該要點本身規定之所致。前開要點之規定，與憲法尚無牴觸。

These provisions are necessary in order to achieve an administrative objective and are not unreasonable. And, the contents thereof have been used as a basis upon which an administrative contract with a student who voluntarily accepts publicly funded medical education is made. Upon execution of the contract (in the form of a letter of volunteer or guaranty) between the school and the publicly funded student, such provisions become part of the contract and both parties thereto should perform the obligations thereunder in good faith. Given the above, the rights and interests of a publicly funded student are restricted under the contract, but not by the provisions of the said Directions per se. The aforesaid provisions are not found to be unconstitutional.

Justice Chien-Hua Yang filed concurring opinion, in which Justice Geng Wu joined.

Justice Chih-Peng Lee filed dissenting opinion.

本號解釋楊大法官建華、吳大法官庚共同提出協同意見書；李大法官志鵬提出不同意見書。

J. Y. Interpretation No.349（June 3, 1994）*

ISSUE: Is the precedent holding that a bona fide transferee of a jointly owned property should nevertheless be bound by the original contract of division or management in respect of such property in violation of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 823 of the Civil Code（民法第八百二十三條）; Article 43 of the Land Act（土地法第四十三條）； Precedent T.S.T. No. 1065 (Sup. Ct., 1959) （最高法院四十八年度台上字第一〇六五號判例）.

KEYWORDS:

co-owners（共有人）, severance or separate-management contract（分割或分管契約）, bona fide third parties（善意第三人）, property rights（財產權）, public announcement（公示）.**

HOLDING: Precedent T.S.T. No. 1065 (Sup. Ct., 1959) states that: "Once a separate-management contract of a co-ownership property has been concluded between its co-owners, the sever-

解釋文：最高法院四十八年度台上字第一〇六五號判例，認為「共有人於與其他共有人訂立共有物分割或分管之特約後，縱將其應有部分讓與第三人，其分割或分管契約，對於受讓人仍

* Translated by Professor Wen-Yeu Wang.

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ance or separate-management contract shall remain binding on an assignee even after a co-owner has assigned his/her share of such property to such assignee." This is indeed necessary to maintain the stability of the legal order. However, if the assignee of the relevant share of the property received no notification of the separate-management contract concluded between the co-owners and ought not to have received such notification, the continued binding of that separate-management contract on the assignee may result in possible unforeseeable detriments to bona fide third parties. This is contrary to the Constitution's intent of safeguarding the people's property rights. Hence, with respect to the herein stated category, the abovementioned judgment shall no longer apply. It is also explained herein that, with respect to the question of whether the statutory vacant land of a separately owned building should be "jointly owned and jointly enjoyed" or "jointly owned but with exclusive enjoyment", and the effect of its assignment, these matters should be dealt with by enacting relevant governing legislation as

繼續存在」，就維持法律秩序之安定性而言，固有其必要，惟應有部分之受讓人若不知悉有分管契約，亦無可得而知之情形，受讓人仍受讓與人所訂分管契約之拘束，有使善意第三人受不測損害之虞，與憲法保障人民財產權之意旨有違，首開判例在此範圍內，嗣後應不再援用。至建築物為區分所有，其法定空地應如何使用，是否共有共用或共有專用，以及該部分讓與之效力如何，應儘速立法加以規範，併此說明。

soon as possible.

REASONING: Legal actions under the Civil Code can be classified as actions in personam and actions in rem. Unless specifically provided by law, the former shall have legal effect on persona certa while the later shall, upon notice being given to a third party through means of public announcement, have legal effect on any third party. Hence, means of public announcement, by delivery for movables and by registration for immovables, are essential conditions for the acquisition, forfeiture and alteration of rights and interests. This is to protect bona fide third parties. In the event that the third party actually received or ought to have received notification of the contract, its terms shall have legal effects on the third party notwithstanding that the contract may be in personam. Precedent T.S.T. No. 1065 (Sup. Ct., 1959) states that: "Once a separate-management contract of a co-ownership property has been concluded between its co-owners, the severance or separate-management contract shall remain binding on an assignee even after a

解釋理由書：民法上之法律行為，有債權行為與物權行為，除法律有特別規定外，前者於特定人間發生法律上之效力，後者於以公示方法使第三人得知悉之狀態下，對任何第三人均發生法律上之效力。故動產以交付為公示方法，不動產以登記為公示方法，而以之作為權利取得、喪失、變更之要件，以保護善意第三人。如其事實為第三人明知或可得而知，縱為債權契約，其契約內容仍非不得對第三人發生法律上之效力。最高法院四十八年度台上字第一〇六五號判例，認為「共有人於與其他共有人訂立共有物分割或分管之特約後，縱將其應有部分讓與第三人，其分割或分管契約，對於受讓人仍繼繼存在」，就維持法律秩序之安定性而言，固有其必要，惟應有部分之受讓人若不知悉有分管契約，亦無可得而知之情形，受讓人仍受讓與人所訂分管契約之拘束，有使善意第三人受不測損害之虞，與憲法保障人民財產權之意旨有違，上述判例在此範圍內，嗣後應不再援用。至建築物為區分所有，其法定空地應如何使用，是否共有共用或共有專用，以及該部分讓與之效力如何，應儘速立法加以

co-owner has assigned his/her share of such property to such assignee." This is indeed necessary to maintain the stability of the legal order. However, if the assignee of the relevant share of the property received no notification of the contract of separate management and ought not? to have received such notification, the continued binding of the separate-management contract between the co-owners on the assignee may result in possible unforeseeable detriments to bona fide third parties. This is contrary to the Constitution's intent of safeguarding the people's property rights. Hence, with respect to the herein stated category, the abovementioned judgment shall no longer apply. It is also explained herein that, with respect to the question of whether the statutory vacant land of a separately owned building should be "jointly owned and jointly enjoyed" or "jointly owned but with exclusive enjoyment", and the effect of its assignment, these matters should be dealt with by enacting relevant governing legislation as soon as possible.

規範，併此說明。

Justice Chih-Peng Lee filed concurring opinion.

Justice Teh-Sheng Chang filed dissenting opinion in part, in which Justice Yu-Ling Yang joined.

Justice Chien-Tsai Cheng filed dissenting opinion.

本號解釋李大法官志鵬提出協同意見書；張大法官特生與楊大法官與齡共同提出部分不同意見書；鄭大法官健才提出不同意見書。

J. Y. Interpretation No.350（June 3, 1994）*

ISSUE: Are the provisions of the Guidelines for the Review of Recording of Superficies Acquired by Prescription, which require that the owner be specified at the time of application and that the application be dismissed even if finding out the name, address, etc., of the owner is impossible, consistent with the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; J. Y. Interpretation No. 291（司法院釋字第二九一號解釋）；Articles 768 through 772 of the Civil Code（民法第七百六十八條、第七百六十九條、第七百七十條、第七百七十一條、第七百七十二條）; Articles 48, Subparagraph 2, and 49, Paragraph 1, Subparagraph 4 of the Regulation Governing Land Registration（土地登記規則第四十八條第二款、第四十九條第一項第四款）； Section 8, Paragraph 1 and 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription（時效取得地上權登記審查要點第八點第一項、第二項）.

KEYWORDS:

property rights（財產權）, recording of superficies acquired by prescription（時效取得地上權之登記）, amending（補正）, impossibility（客觀上不能）. **

* Translated by Vincent C. Kuan.

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HOLDING: Section 8, Paragraph 1 and 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription as issued by the Ministry of the Interior per a letter dated August 17, 1988, provides that the current address of the landowner or supervisor shall be specified at the time of the application filed by the possessor. The foregoing provisions, which are necessary in order to protect the rights and interests of a landowner as the superficies is a kind of restrictive right over things that exist in relation to ownership, are not found to be in conflict with the Constitution. Nevertheless, according to Article 48, Subparagraph 2, and Article 49, Paragraph 1, Subparagraph 4, of the Regulation Governing Land Registration, if such information is not specified, an amendment thereof shall be made and, failing such amendment, the application for registration shall be dismissed. It is understood that the aforesaid Guidelines are supplemental to the said Regulation and that, when applied simultaneously, these provisions would prevent an applicant from completing the registration of his superfi-

解釋文：內政部於中華民國七十七年八月十七日函頒之時效取得地上權登記審查要點第八點第一項、第二項規定，占有人申請登記時，應填明土地所有權人之現在住址及登訪簿所載之住址。如土地所有人死亡者，應填明土地所有權人或管理人之姓名及住址等項，係因地上權為存在於所有權上之限制物權，該規定之本身乃保護土地所有權人之權益所必要，與憲法並無牴觸。惟如未予填明，依土地登記規則第四十八條第二款、第四十九條第一項第四款規定，應命補正，不補正者駁回其登記之申請。是前開要點乃為該規則之補充規定，二者結合適用，足使能確實證明在客觀上有不能查明所有權人或管理人之姓名、住址而為補正之情形者，因而無法完成其地上權之登記，即與憲法保障人民財產權之意旨有違，在此範圍內，應不予援用。

cies, who could not make such amendment even though he could prove the impossibility of finding out the name, address, etc., of the landowner or supervisor of the land. The foregoing provisions will then contradict the constitutional intent to protect the property rights of the people and, to such extent, shall not be applied.

REASONING: Articles 768 through 772 of the Civil Code with respect to the acquisition of ownership or other property rights by reason of prescription are intended to promote the public interest by encouraging the original right holder to better fulfill his social responsibility of making positive use of his property and by recognizing the value of the order established through long-term possession. This property right, being acquired by operation of law, shall be guaranteed by the Constitution. The foregoing has been made clear by this Yuan through Interpretation No. 291. Section 8, Paragraph 1 and 2, of the Guidelines for the Review of Recording of Superficies Acquired by Prescription as issued by the Ministry of the Interior per the Letter Ref.

解釋理由書：民法第七百六十八條至第七百七十二條關於因時效而取得所有權或其他財產權之規定，乃為促使原權利人善盡積極利用其財產之社會責任，並尊重長期占有之既成秩序，以增進公共利益而設。此項依法律規定而取得之財產權，應為憲法所保障，業經本院釋字第二九一號解釋闡述甚明。內政部於七十七年八月十七日以臺內地字第六二一四六四號函頒之時效取得地上權登記審查要點第八點第一項、第二項規定：「占有人申請登記時，應填明土地所有權人之現在住址及登記簿所載之住址。如土地所有人死亡者，應填明其繼承人及該繼承人之現住址」；「土地所有權人為祭祀公業、寺廟或神明會，而其管理人已死亡，應俟管理人變更登記後，於申請書內填明新管理人之姓名、住址」，係因地上權為存在於所有

TNTT-621464 dated August 17, 1988, provides respectively, “The current address of the landowner and the one described in the recording and visitation book shall be specified at the time of the application filed by the possessor and that, in case of the death of the landowner, the name and current address of the heir to the landowner shall be specified.” “If the landowner is a sacrifice-offering association, a temple, or a house of worship, and the supervisor thereof is dead, the name and address of the new supervisor shall be specified in the application after the amendment to the registration of such supervisor is made.” The foregoing provisions, which are necessary in order to protect the rights and interests of a landowner as the superficies is a kind of restrictive right over things that exist in relation to ownership, are not found to be in conflict with the Constitution. Nevertheless, according to Article 48, Subparagraph 2, and Article 49, Paragraph 1, Subparagraph 4, of the Regulation Governing Land Registration, if such information is not specified, an amendment thereof shall be made and, failing such amendment, the applica-

權上之限制物權，該規定之本身乃保護土地所有權人之權益所必要，與憲法並無牴觸。惟如未予填明，依土地登記規則第四十八條第二款、第四十九條第一項第四款規定，應命補正，不補正者駁回其登記之申請。是前開要點乃為該規則之補充規定，二者結合適用，足使能確實證明在客觀上有不能查明所有權人或管理人之姓名、住址而為補正之情形者，因而無法完成其地上權之登記，即與憲法保障人民財產權之意旨有違，在此範圍內，應不予援用。

tion for registration shall be dismissed. It is understood that the aforesaid Guidelines are supplemental to the said Regulation and that, when applied simultaneously, these provisions would prevent an applicant from completing the registration of his superficies, who could not make such amendment even though he could prove the impossibility of finding out the name, address, etc., of the landowner or supervisor of the land. The foregoing provisions will then contradict the constitutional intent to protect the property rights of the people and, to such extent, shall not be applied.

Justice Rui-Tang Chen filed dissenting opinion in part.

本號解釋陳大法官瑞堂提出部分不同意見書。

J. Y. Interpretation No.351（June 17, 1994）*

ISSUE: Is the provision of the Act Governing the Conversion of State Owned Enterprises, providing that those workers who will not transfer to the new private enterprise simultaneously shall " receive an additional pay equivalent to six-months' salary," also applicable to those workers who remain in employment?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Article 8 of the Act Governing the Conversion of State Owned Enterprises into Private Enterprises（公營事業移轉民營條例第八條）; Article 16 of the Labor Standards Act（勞動基準法第十六條）.

KEYWORDS:

the conversion of state owned enterprises into private enterprises（公營事業移轉民營）, severance payments（離職給與）, additional payment（加發薪給）, advance-notice salary（預告工資）, settle accounts for years of service（年資結算）, lay off（資遣）. **

HOLDING: Paragraph 2 of Article 8 of the Act Governing the Conversion of State Owned Enterprises into Private

解釋文：公營事業移轉民營條例第八條第二項係就不隨同移轉之從業人員所作之規定，其第三項則係就繼續

* Translated by Fan, Chien-Te.

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Enterprises applies to those employees that do not transfer with the conversion from state owned enterprises into private ones, whereas Paragraph 3 of the same article applies to those who do transfer. As provided in the first half of Paragraph 3, Paragraph 2 is only applicable to the settling of accounts for years of service for those remain with the enterprises when the state owned enterprises are converted into private ones. Considering the provision of the whole statute, the additional six-month payment, which is provided for in Paragraph 2, is not applicable to those who remain with the enterprises, so as to give equitable treatment to those who do not remain.

留用之從業人員所作之規定，依該第三項前段規定，僅在就繼續留用人員之原有年資辦理結算範圍內，始依前項（第二項）所定結算標準辦理。綜觀該條全文立法意旨，在移轉民營當時，對於繼續留用人員之給與，並不包括第二項關於加發六個月薪給在內，以維持不隨同移轉人員與繼續留用人員待遇之平衡。

REASONING: This interpretation is in response to the Letter (82) T.Y.I. No. 2317 of July 5, 1993, a petition for unified interpretation filed by the Legislative Yuan.

解釋理由書：本件依立法院中華民國八十二年七月五日(82) 台院議字第二三一七號函意旨，係聲請統一解釋，合先說明。

According to Paragraph 2 of Article 8 of the Act Governing the Conversion of State Owned Enterprises into Private Enterprises, “Those who are not willing to

公營事業移轉民營條例第八條第二項「公營事業轉為民營型態時，其從業人員不願隨同移轉者或因前項但書約定未隨同移轉者，應辦理離職。其離職

transfer after the conversion from state owned enterprises into private ones shall leave; the severance payments shall be in accordance to the Labor Standards Act, regardless of age or years of service; and six months' additional payment with another month's advance-notice salary shall be paid. Those who were not eligible under the Labor Standards Act shall be eligible in this case." The above provision is for those employees who do not transfer when the state owned enterprises are converted to private ones. Paragraph 3, which states, "The original enterprises shall settle accounts for years of service on the day of transfer for those who remain with the converted enterprises; The settling of accounts shall be in accordance with what is provided in the previous paragraph, but without the advance-notice salary; Those who are laid off within 5 years' time from the conversion shall be entitled to the six-month additional payment with one month advance-notice salary and the best applicable severance payment based on their salary on the day of conversion", is only applicable to those who remain with the enterprises when they are converted from

給與，應依勞動基準法退休金標準給付，不受年齡與工作年資限制，並加發移轉時薪給標準六個月薪給及一個月預告工資；其不適用營動基準法者，得比照適用之」，係就不隨同移轉之從業人員所作之規定。其第三項「移轉為民營後繼續留用人員，得於移轉當日由原事業主就其原有年資辦理結算，其結算標準依前項規定辦理，但不發給預告工資。其於移轉之日起五年內資遣者，按從業人員移轉民營時或資遣時之薪給標準，擇優核給資遣給與，並按移轉民營當時薪給標準加發六個月薪給及一個月預告工資」，則係就繼續留用（隨同移轉）從業人員所作之規定。其中前段既謂「就其原有年資辦理結算，其結算標準依前項（第二項）規定辦理」，而非謂「就其原有年資及加發薪給辦理結算，其結算標準依前項（第二項）規定辦理」，自係限在年資結算範圍內，始依前項（第二項）規定辦理，而非謂連同加發薪給亦應依前項（第二項）規定辦理。又因加發薪給與加發預告工資性質不同，前者並未規定於勞動基準法，後者則已規定於勞動基準法第十六條第三項。而第二項所定之文字，有「應依勞動基準法退休金標準給付，不受年齡與工作年資限制」等語，為表達繼續留

state owned to private ones. The first half of this paragraph states that, "…shall settle accounts for years of service. The settling of accounts shall be in accordance with what is provided in the previous paragraph (Paragraph 2)", but not "…shall settle accounts for years of service with the additional payments. The settling of accounts shall be in accordance with what is provided in the previous paragraph (Paragraph 2)". Moreover, the nature of the additional payment is different from that of the advance-notice salary. The previous is codified in Paragraph 3 of Article 16 of the Labor Standards Act whereas the latter is not. The language of Paragraph 2, "the severance payment shall be in accordance with the Labor Standards Act, regardless of age or years of service", clearly states that the remaining employees are not entitled to the advance-notice salary which is provided in the Labor Standards Act. Paragraph 3 also clearly states, "but without the advance-notice salary". The additional payment is not and need not be included in the language of Paragraph 3, because it is not codified in the Labor Standards Act, thus there is no

用人員，不得依勞動基準法之規定請求加發預告工資之用，故特於第三項前段設「但不發給預告工資」之限制。至於加發薪給則原為勞動基準法之所無，不虞繼續留用人員援該法以請求，即無須於第三項贅增「但不發給六個月薪給」之明文。此種按原有年資辦理結算之繼續留用人員，雖不獲加發薪給及預告工資，但依第三項後段規定，則係於移轉之日起五年內資遣時再一併如數加發之，使原從業人員於移轉民營當時離職者與其後五年內資遣（離職）者，所受之離職優惠給與一致，以維持兩者待遇之平衡。若謂繼續留用者於移轉民營當時辦理原有年資結算之際，亦可如同離職者獲得加發六個月薪給，則祇須於留用後五年內之任何一日（包括留用後之第二日）資遣，均可重複獲得加發六個月薪給，成為雙重離職優惠，無異鼓勵原從業人員於移轉民營當時不離職，而延後於五年內之任何一日再離職（資遣），增加公營事業移轉民營之困擾，顯非立法之本意。本件係就現行法律依其文義及論理所為之統一解釋，不涉及立法問題，併此說明。

concern that the remaining employees will request it according to the Labor Standards Act. Should those who remain, and are thus not entitled to the additional payment, be laid off within 5 years' time, they then will be entitled to such payment, just as those who leave at conversion. Allowing those who remain to receive the six-month additional payment will simply encourage employees to remain and then leave within 5 years' time, so as to receive double the additional payments. This would create problems for the conversion of state owned enterprises into private ones, and is certainly not the purpose of the statute. This interpretation is made concerning the language and the underlying theories of the statute. Therefore, it does not pertain to any legislative issues.

Justice Cheng-Tao Chang filed dissenting opinion.

本號解釋張大法官承韜提出不同意見書。

J. Y. Interpretation No.352（June 17, 1994）*

ISSUE: Are the relevant provisions of the Land Act, providing that a land scrivener shall be licensed after only passing an examination and being evaluated according to law, and that those already engaged in the business prior to the amendment of the said Act may continue the practice under certain transitional conditions, in violation of the Constitution?

RELEVANT LAWS:

Article 86, Subparagraph 2, of the Constitution（憲法第八十六條第二款）; Article 37-1, Paragraph 2, of the Land Act（土地法第三十七條之一第二項）.

KEYWORDS:

land scrivener（土地登記專業代理人）, Ministry of Examination（考選部）. **

HOLDING: The capacity to practice as a land scrivener, a specific profession, as prescribed in Article 86, Subparagraph 2, of the Constitution, shall be designated and accredited by the Ministry of Examination. Article 37-1, Paragraph 2, of the Land Act coincides with the

解釋文：土地登記專業代理人係屬專門職業，依憲法第八十六條第二款規定，其執業資格應依法考選銓定之。中華民國七十八年十二月二十九日修正公布之土地法第三十七條之一第二項規定，符合上開意旨，與憲法並無牴觸。

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* Translated by Dr. Cheng-Hwa Kwang, Professor of Law, Ming Chuan University.

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above rationale and is hence consistent with the Constitution.

REASONING: The registration of land involves the interest of the people in their estate. The land scrivener who is capable of dealing with land registration as a profession on behalf of clients is required to have relevant specific knowledge and expertise. Hence, the position of land scrivener is regarded as a specific profession. As prescribed in Article 86, Subparagraph 2, of the Constitution, the capacity to practice as a professional shall be designated and accredited by the Ministry of Examination. Article 37-1, Paragraph 2, of the Land Act as amended and promulgated on December 29, 1989, prescribes that "the land scrivener shall satisfy the criteria of or be accredited by the examiners for the position of land scrivener provided that, however, prior to the amendment and promulgation of said Act, those who have been practicing as land scriveners and upon whom the government has conferred the certificate of land scrivener or who have been engaging in business and have applied on behalf of

解釋理由書：土地登記涉及人民財產權益，其以代理當事人申辦土地登記為職業者，須具備相關之專業知識與經驗，始能勝任，是故土地登記專業代理人係屬專門職業。憲法第八十六條第二款規定，專門職業人員之執業資格，應依法考選銓定之。中華民國七十八年十二月二十九日修正公布之土地法第三十七條之一第二項規定：「土地登記專業代理人，應經土地登記專業代理人考試或檢覈及格。但在本法修正施行前，已從事土地登記專業代理業務，並曾領有政府發給土地代書人登記合格證明或代理他人申辦土地登記案件專業人員登記卡者，得繼續執業，未領有土地代書人登記合格證明或登記卡者，得繼續執業五年」，旨在建立健全之土地登記專業代理人制度，符合上開憲法規定之意旨。且該法對修正施行前，已從事土地登記專業代理業務，並依照當時法規取得合格證明或登記卡者，准予繼續執業。至於實際上已從事土地登記代理業務，而未取得合格證明或登記卡者，本無合法權利可言。而上開法條既定有五年之相當期間，使其在此期間內，自

others for the registration card of a professional for cases involving land registration shall be allowed to continue in practice. Those who have not received the said certificate or the said registration card may continue to practice for five years." The purport of the above Article is to establish a sound system with respect to the position of land scrivener, thus coinciding with the essence of the relevant stipulation in the Constitution. Further, the said Act allows those who have been engaging in the practice of land registration in the capacity of land scrivener and have acquired pursuant to the relevant law at that time the certificate or registration card for such a qualification to continue to practice. For those who have been engaging in the practice of land registration and have yet to acquire any certificate or registration card for such a qualification, no legitimate right may be sustained. The said Act allows five years as the period of grace, within which those who have not yet obtained a certificate or registration card may decide whether to attend the examination, to apply for accreditation, or to change careers, thus sufficiently taking

行決定是否參加考試或檢覈，或改業，已充分兼顧其利益，並無法律效力溯及既往之問題。綜上所述，前開土地法之規定，與憲法並無牴觸。

their interest into consideration. The doctrine concerning the retrospective effect in the application of law is not an issue involved hereof. To sum up, the said Article of the Land Act is not inconsistent with the Constitution.

J. Y. Interpretation No.353（July 1, 1994）*

ISSUE: Is the Supreme Administrative Court Precedent constitutional in holding that a motion to stay the enforcement of an administrative act may be filed only if an administrative proceeding has already been instituted?

RELEVANT LAWS:

Article 12 of the Administrative Proceedings Act（Article 11 before revision of the Act）（行政訴訟法第十二條（修正前第十一條））; proviso to Article 23 of the Administrative Appeal Act（訴願法第二十三條但書）; Supreme Administrative Court Precedent T. T. 26 (Supreme Administrative Court, 1958)（行政法院四十七年度裁字第二十六號判例）.

KEYWORDS:

motion to stay enforcement（請求停止執行）, *ex officio*（依職權）, temporarily maintain the status quo（定暫時狀態）, take cognizance of（受理）, administrative appeal（訴願）.**

HOLDING: A motion to stay the enforcement of an administrative act may be filed with an administrative court only if an administrative proceeding has al-

解釋文：人民向行政法院請求停止原處分之執行，須已依法提起行政訴訟，在訴訟繫屬中者始得為之，此觀行政訴訟法第十二條（修正前第十一

* Translated by Raymond T. Chu.

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ready been instituted and the case is pending at the court. This is explicitly prescribed by the Administrative Proceedings Act, Article 12 (Article 11 before revision of the Act). The Supreme Administrative Court Precedent T. T. 26 (Supreme Administrative Court, 1958) is consistent with the substance of this statute and does not impose any restraint on the right of the people to sue, and is therefore not in conflict with the Constitution.

REASONING: The Administrative Proceedings Act provides in Article 12 (Article 11 before revision of the Act): "Unless otherwise prescribed by law, the enforcement of an administrative act or decision may not be stayed by reason of the institution of an administrative proceeding, provided, however, that the administrative court or the government agency making such act or decision may, ex officio or upon application of the plaintiff, cause the enforcement to be stayed." Under this provision, a motion to stay the enforcement of an administrative act may be filed with an administrative court only if an administrative proceeding has al-

條）之規定甚明。行政法院四十七年度裁字第二十六號判例與此意旨相符，並未限制人民之訴訟權，與憲法尚無牴觸。

解釋理由書：行政訴訟法第十二條（修正前第十一條）規定：「原處分或決定之執行，除法律另有規定外，不因提起行政訴訟而停止。但行政法院或為處分或決定之機關，得依職權或依原告之請求停止之」。依此規定，人民向行政法院請求停止原處分之執行，須已依法提起行政訴訟，在訴訟繫屬中者，始得為之。在提起行政訴訟前，如認原處分之執行，將發生難於回復之損害，且有急迫情事，而有停止原處分執行之必要時，得依訴願法第二十三條但書規定，聲請原處分機關或受理訴願之機關，停止其執行。如該機關拒絕停止執行或逾法定期間不為停止執行與否之處置，聲請人自得於對原處分或原決定

ready been instituted and the case is pending at the court. If, however, before the institution of an administrative proceeding, it is necessary to stay the enforcement of the administrative act on the grounds that the enforcement of such administrative act will result in irremediable damage and the situation is urgent, a petition for stay of enforcement may be filed under the proviso to Article 23 of the Administrative Appeal Act with the government agency making such administrative act or taking cognizance of the appeal. If the agency refuses to stay the enforcement or fails to decide within the statutory period whether or not to stay the enforcement, the petitioner may of course raise an objection thereto in the principal case together with his dispute over such act or decision and may additionally claim damages under law, without the necessity of first filing with the administrative court a motion for stay of enforcement. The Supreme Administrative Court Precedent T. T. 26 (Supreme Administrative Court, 1958) holds: "A motion to stay the enforcement of an administrative act may be filed with this Yuan only if an administra-

之本案爭訟中一併表示不服，如受有損害，並得依法請求賠償，尚無先行請求行政法院停止其執行之必要。行政法院四十七年度裁字第二十六號判例：「向本院請求停止原處分之執行，須已依法提起行政訴訟在訴訟繫屬中者，始得為之。若事件尚未經再訴願程序，則既不許提起行政訴訟，自更不得向本院請求停止原處分之執行」，與上述意旨相符，並未限制人民之訴訟權，與憲法尚無牴觸。至為謀公共利益與個人利益之調和，而受處分人或利害關係人又能釋明其一經執行將有不能回復之重大損害，應否許其在提起行政訴訟前，聲請行政法院就其所爭執之法律關係定暫時狀態，應於行政訴訟制度改進時，一併循立法途徑解決之，以資兼顧，合併指明。

tive proceeding has already been instituted and the case is pending adjudication. No administrative proceeding may be instituted with respect to a matter without having gone through the procedure of administrative re-appeal, to say the least a motion to be filed with this Yuan for stay of the original administrative act." The decision is consistent with the essence of our view above and does not impose any restraint on the right of the people to sue, and is therefore not in conflict with the Constitution. En passant, whether or not the person to whom the administrative act is addressed or an interested person should be allowed to file with the administrative court, before instituting administrative proceedings, a motion to temporarily maintain the status quo of the legal relations in dispute, for the purpose of bringing the public and personal interests in harmony if the addressee or such interested person is able to explain that the administrative act, once enforced, will cause irremediable and material damage, is a matter to be resolved by way of legislation when initiating improvements to the system of administrative litigation.

J. Y. Interpretation No.354（July 1, 1994）*

ISSUE: Is the provision of the Act Governing the Handling of Land Grant Certificates to Soldiers, providing that a land grant certificate is deemed to have been issued to a retired non-duty officer in Taiwan who is away from his military post, unconstitutional?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 11 of the Act Governing Farmland Grants to Anti-Communist and Anti-Soviet Soldiers（反共抗俄戰士授田條例第十一條）; Article 10 of the Act Governing the Handling of Land Grant Certificates to Soldiers（戰士授田憑據處理條例第十條）; Article 2 of the Regulation Governing the Handling of Armed Forces Non-Duty Officers（陸海空軍無軍職軍官處理辦法第二條）.

KEYWORDS:

retired non-duty officer in Taiwan away from his military post（在臺離職無職軍官）, land grant certificates for soldiers（戰士授田憑證）.**

HOLDING: According to the applicable provisions of the Regulation Governing the Handling of Armed Forces

解釋文：在臺離營之無職軍官，依行政院於中華民國四十八年七月十四日核准由國防部發布之陸海空軍無

* Translated by Vincent C. Kuan.

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Non-Duty Officers, as approved by the Executive Yuan on July 14, 1959, and promulgated by the Ministry of National Defense, a non-duty officer in Taiwan is not eligible for a land grant certificate if he is away from his military post even though his military status is still maintained because the Act Governing Farmland Grants to Anti-Communist and Anti-Soviet Soldiers, as promulgated on October 18, 1951, means that only those soldiers still stationed at their military posts are eligible for such land grant certificates. Article 10 of the Act Governing the Handling of Land Grant Certificates to Soldiers, as promulgated on April 23, 1990, provides, "A land grant certificate is deemed to have been issued to a veteran non-duty officer in Taiwan away from his military post who participated in the anti-communist-and-Soviet conflict prior to the promulgation and implementation of the Act Governing Farmland Grants to Anti-Communist and Anti-Soviet Soldiers and the relevant provisions of this Act shall thus apply, if such officer has received a certificate of retirement / discharge from military service and presently

軍職軍官處理辦法等相關規定，在四十年十月十八日反共抗俄戰士授田條例公布後，雖具有軍籍，但因該條例之授田憑據以在營軍人為發給對象，致此等軍官因未在營而不能領取授田憑據。七十九年四月二十三日公布之戰士授田憑據處理條例第十條：「反共抗俄戰士授田條例公布施行前，曾參加反共抗俄作戰，除因有叛國行為或逃亡而被判有期徒刑以上之刑者外，其餘在臺離營之退除役無職軍官，領有退伍除役證明書，且現居住臺灣地區者，視同已發給授田憑據，依本條例之規定處理」，係就上述情況，公平考量所為之規定，並非針對軍官與士兵身分不同，而作差別待遇，與憲法第七條尚無牴觸。

lives in Taiwan, provided, however, that he has not committed treason or engaged in any rebellious act or has deserted the army, for which a penalty of more than a fixed-term of imprisonment was imposed." Such provision, having equitably taken into consideration the situations described above, does not support any discriminatory treatment based on the status of officer or soldier and, therefore, does not contradict Article 7 of the Constitution.

REASONING: According to Article 2 of the Regulation Governing the Handling of Armed Forces Non-Duty Officers, as approved by the Executive Yuan on July 14, 1959, and promulgated by the Ministry of National Defense on August 13 of the same year, a non-duty officer in Taiwan away from his military post shall mean an officer whose service is suspended, or whose name is off the regular muster roll, or who is laid off, or who, for any other reason, leaves his post without duly completing the applicable procedure related to either retirement/ discharge from military service or a provisional re-

解釋理由書：在臺離營之無職軍官，依行政院於四十八年七月十四日核准由國防部於同年八月十三日發布之陸海空軍無軍職軍官處理辦法第二條之規定，係指因停役、編餘、資遣及其他因故離職而未辦退除役或假退除役等情形之軍官而言。主管機關國防部於四十三年曾為此等人員辦理登記，保留其軍籍，其後並依上開辦法等相關規定列管或辦理退除役，是故上述人員在四十年十月十八日反共抗俄戰士授田條例公布後，雖仍具有軍籍，但因該條例第十一條以「現在陸、海、空軍部隊服務二年以上之戰士」為發給授田憑據之對象，致無職軍官因未在營而不能領取授田憑

tirement / discharge from military service. The competent authority, i.e., the Ministry of National Defense, conducted a registration for such personnel to maintain their military status and, subsequently, either entered their names on a control list or completed the procedure for such personnel's retirement/discharge from military service pursuant to the applicable provisions of the aforesaid Regulation. Consequently, even though such personnel still maintained their military status after the Act Governing Farmland Grants to Anti-Communist and Anti-Soviet Soldiers was promulgated on October 18, 1951, they are not eligible for land grant certificates since they are away from their military posts because, under Article 11 of the said Regulation, a land grant certificate is meant only for those "soldiers who have served either in the Army, the Navy, or the Air Force for two years or more." Article 10 of the Act Governing the Handling of Land Grant Certificates to Soldiers, as promulgated on April 23, 1990, provides, "A land grant certificate is deemed to have been issued to a veteran non-duty officer in Taiwan away from his

據。七十九年四月二十三日公布之戰士授田憑據處理條例第十條：「反共抗俄戰士授田條例公布施行前，曾參加反共抗俄作戰，除因有叛國行為或逃亡而被判有期徒刑以上之刑者外，其餘在臺離營之退除役無職軍官，領有退伍除役證明書，且現居住臺灣地區者，視同已發給授田憑據，依本條例之規定處理」，係就上述情況，公平考量所為之規定，並非針對軍官與士兵身分不同，而作差別待遇，與憲法第七條尚無牴觸。

military post who participated in the anti-communist-and-Soviet conflict prior to the promulgation and implementation of the Act Governing Farmland Grants to Anti-Communist and Anti-Soviet Soldiers and the relevant provisions of this Act shall thus apply, if such officer has received a certificate of retirement / discharge from military service and presently lives in Taiwan, provided, however, that he has not committed treason or engaged in any rebellious act or has deserted the army, for which a penalty of more than a fixed-term of imprisonment was imposed." Such provision, having equitably taken into consideration the situations described above, does not support any discriminatory treatment based on the status of officer or soldier and, therefore, does not contradict Article 7 of the Constitution.

J. Y. Interpretation No.355（July 1, 1994）*

ISSUE: Does the Supreme Court's precedent, which limits the evidence discovered by the litigants and yet to be considered to that which had already come to light before the oral arguments of a trial on matters of fact are concluded, contradict Article 16 of the Constitution?

RELEVANT LAWS:

Precedent T.S.J. No. 1005 (Sup. Ct., 1940)（最高法院二十九年上字第一〇〇五號判例）; Articles 196, 447, 476, Paragraph 1and 492, Paragraph 1, Subparagraph 11 of the Code of Civil Procedure（民事訴訟法第一百九十六條、第四百四十七條、第四百七十六條第一項、第四百九十二條第一項第十一款）; Article 496, Paragraph 1, Subparagraph 13, in the Existing Code of Civil Procedure（現行民事訴訟法第四百九十六條第一項第十三款）; Article 16 of the Constitution（憲法第十六條）.

KEYWORDS:

Supreme Court（最高法院）, precedent（判例）, litigants（當事人）, evidence（證物）, trial on matters of fact（訴訟程序事實）, oral arguments（言詞辯論）, binding（既判力）, irrevocability（不可廢止性）, withhold（不提出、維持）, retrial（再審）.**

* Translated by John C. Chen.

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HOLDING: Precedent T.S.J. No. 1005 (Sup. Ct., 1940) states that: "the evidence discovered by litigants not taken into consideration by the court previously, pursuant to Article 492, Paragraph 1, Subparagraph 11, of the Code of Civil Procedure (Article 496, Paragraph 1, Subparagraph 13, in the Existing Code), denotes the kind of evidence that has already come to light before the oral arguments of a trial on matters of fact are concluded, and the reason that the evidence is not taken into consideration is because the litigants were not aware of the existing evidence until after the oral arguments were concluded. If the evidence does not come to light before the conclusion of the oral arguments of a trial on matters of fact, which cannot be discovered thereafter, the evidence cannot be presented as grounds for a retrial." The purpose of the foregoing precedent is to assure that during the prior litigation, the litigants present all of the existing evidence known to them before the conclusion of oral arguments in a trial on matters of fact, so as to prevent litigants from abusing the right to retrial after judgments are rendered and

解釋文：最高法院二十九年度上字第一〇〇五號判例：「民事訴訟法第四百九十二條第一項第十一款（現行法第四百九十六條第一項第十三款）所謂當事人發見未經斟酌之證物，係指前訴訟程序事實審之言詞辯論終結前已存在之證物，因當事人不知有此，致未經斟酌，現始知之者而言。若在前訴訟程序事實審言詞辯論終結前，尚未存在之證物，本無所謂發見，自不得以之為再審理由。」乃為促使當事人在前訴訟程序事實審言詞辯論終結前，將已存在並已知悉而得提出之證物全部提出，以防止當事人於判決發生既判力後，濫行提起再審之訴，而維持確定裁判之安定性，與憲法並無牴觸。至事實審言詞辯論終結後始存在之證物，雖不得據為再審理由，但該證物所得證明之事實，是否受確定判決既判力之拘束，則應依個案情形定之，併予說明。

become binding; thus the stability of final and irrevocable judgments is maintained and secured in conformance with the Constitution. Alternatively, if evidence comes to light after the conclusion of oral arguments in a trial on matters of fact, though inadmissible as grounds for a re-trial, it must be considered on a case-by-case basis depending on whether the facts proved by the aforementioned evidence may still be bound by the final and irrevocable judgment concerned.

REASONING: The Civil Procedure of the R.O.C. follows the principles of oral adjudication and discretional evidence-admitting order, and according to Article 196 of the Code of Civil Procedure, the litigants may establish means of "attacking" or "defending" before the conclusion of oral arguments. In addition, the litigants may, in accordance with Article 447 of the same Code, raise new claims or defenses before the conclusion of oral arguments of the second instance. Nevertheless, if the lawsuit is to be appealed to the third instance, the court that adjudicates said third instance, pursuant to

解釋理由書：我國民事訴訟採言詞審理主義與自由順序主義，當事人之攻擊或防禦方法，得於言詞辯論終結前提出，為民事訴訟法第一百九十六條所規定。又依同法第四百四十七條意旨，當事人於第二審言詞辯論終結前亦得提出新攻擊或防禦方法。惟事件上訴第三審法院後，依同法第四百七十六條第一項意旨，應以第二審判決確定之事實為判決基礎，不得再行提出新攻擊或防禦方法。故首述言詞辯論終結前，係指事實審言詞辯論終結前而言。法律既許當事人於事實審言詞辯論終結前隨時提出攻擊或防禦方法，就證據言，當事人自應就已存在並已知悉而得提出之證

Article 476, Paragraph 1, of the same Code, should base its judgment upon the facts established in the judgment of the court of the second instance, and the litigants are not permitted to present new means of "attacking" or "defending." Thus, the aforementioned "conclusion of oral arguments" must denote a conclusion of the oral arguments in a trial on matters of fact in view of the evidence. The litigants, as permitted by law, may at any time, make "attacks" or "defenses" before the conclusion of oral arguments in a trial on the matters of fact. The litigants must raise all evidence already existing and known by them before the conclusion of oral arguments in a trial on the matters of fact. The above explains the reason that the time the binding power of an irrevocable final judgment comes into existence is the moment the oral arguments conclude. However, if the litigants, during litigation, deliberately withhold certain evidence already in existence and known by them before the conclusion of oral arguments in a trial on matters of fact, and subsequently file for a retrial by presenting the evidence withheld by the litigants

物，於事實審言詞辯論終結前全部提出。確定終局判決之既判力，其基準時，以事實審言詞辯論終結時為準，即係基於上述原因。若當事人於事實審言詞辯論終結前，將已存在並已知悉而得提出之證物故不提出，留待判決確定後據以提起再審之訴，則係再審制度之濫用，不僅有違訴訟經濟之原則，且足以影響確定終局判決之安定性。最高法院二十九年度上字第一〇〇五號判例：「民事訴訟法第四百九十二條第一項第十一款（現行法第四百九十六條第一項第十三款）所謂當事人發見未經斟酌之證物，係指前訴訟程序事實審之言詞辯論終結前已存在之證物，因當事人不知有此，致未經斟酌，現始知之者而言。若在前訴訟程序事實審言詞辯論終結前，尚未存在之證物，本無所謂發見，自不得以之為再審理由。」乃為促使當事人在前訴訟程序事實審言詞辯論終結前，將已存在並已知悉而得提出之證物全部提出，以防止當事人於判決發生既判力後，任意提起再審之訴，而維持確定裁判之安定性，與憲法並無牴觸。至事實審言詞辯論終結後始存在之證物，雖不得據為再審理由，但該證物所得證明之事實，是否受確定判決既判力之拘束，則應依個案情形定之。若證物係依

after the irrevocable judgment of the foregoing litigation is rendered, it must be deemed an abuse of the retrial system, an action that not only transgresses the principle of judicial economy, but also adversely affects the irrevocability of final judgments. Precedent T.S.J. No. 1005 (Sup. Ct., 1940) states that: "the evidence discovered by litigants who did not take such evidence into consideration previously, pursuant to Article 492, Paragraph 1, Subparagraph 11, of the Code of Civil Procedure (Article 496, Paragraph 1, Subparagraph 13, in the Existing Code), denotes the kind of evidence that has already come to light before the oral arguments in a trial on matters of fact are concluded, where the evidence was not taken into consideration because the litigants were not aware of the existing evidence until after the oral arguments were concluded. Where the evidence only comes to light after the conclusion of the oral arguments in a trial on matters of fact, the concept of discovery stipulated in said Code is naturally not applicable, thus the evidence cannot be presented as grounds for a retrial." The purpose of the foregoing

據事實審言詞辯論終結前已存在之證物而製作者，該製作之證物得否認為係發見未經斟酌之證物，乃為事實認定及適用法律之見解問題，均併說明。

precedent is to assure that during litigation, the litigants present all of the existing evidence known by the litigants before the conclusion of oral arguments in a trial on matters of fact, so as to prevent litigants from deliberately withholding known evidence and abusing the right to retrial after judgments have been rendered and become binding; thus maintaining and securing the irrevocability of judgments without contradicting the Constitution. Alternatively, if evidence comes into existence only after the conclusion of the oral arguments in a trial on matters of fact, though inadmissible as grounds for a retrial, it is to be admitted on a case-by-case basis depending on whether the facts proved by the aforementioned evidence may still be bound by the judgment concerned. Moreover, if evidence is produced which is based upon other evidence already in existence before the conclusion of oral arguments, the outcome may vary, according to the acknowledgment of facts and application of law, as to whether such evidence can be treated as "evidence discovered by litigants who did not take such evidence into consideration previously."

J. Y. Interpretation No.356（July 8, 1994）*

ISSUE: Is Article 49 of the Value-Added and Non-Value-Added Business Tax Act excessive and does it thus contradict the Constitution?

RELEVANT LAWS:

Articles 35 and 49 of the Value-Added and Non-Value-Added Business Tax Act（加值型及非加值型營業稅法第三十五條及第四十九條）.

KEYWORDS:

surcharge for late filing（滯報金）, surcharge for non-filing（怠報金）, tax evasion（逃漏稅捐）.**

HOLDING: Article 49 of the Value-Added and Non-Value-Added Business Tax Act provides that a business entity shall be liable to a surcharge for late filing and/or non-filing in the event that the business entity fails to file the sales amount or a detailed list of issued uniform invoices within the time limit as prescribed in the Act. The purposes of the aforesaid provision are to compel business

解釋文：營業稅法第四十九條就營業人未依該法規定期限申報銷售額或統一發票明細表者，應加徵滯報金、怠報金之規定，旨在促使營業人履行其依法申報之義務，俾能確實掌握稅源資料，建立合理之查核制度。加徵滯報金、怠報金，係對營業人違反作為義務所為之制裁，其性質為行為罰，此與逃漏稅捐之漏稅罰乃屬兩事。上開規定，為增進公共利益所必要，與憲法並無牴

* Translated by Chun-yih Cheng, Attorney at Law & Assistant Professor of Law.

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

entities to comply with obligations of filing so that the supervising authority can obtain the relevant tax source information, and to establish a reasonable tax audit system. The surcharges for late filing and non-filing are imposed upon the business entity for its noncompliance and their intent is to act as a kind of "punishment for misconduct." "Punishment for misconduct" is different from "punishment for tax evasion," which is imposed only when tax-evading acts have been committed. Such provision is necessary to protect the public interest, and does not contradict the Constitution. However, the authority-in-charge should, according to J.Y. Interpretation No. 327, review and revise this provision under which a business entity would be punished by surcharges for late filing and/or non-filing at a fixed rate of the tax payable without reasonable ceiling even though the tax has been paid.

觸。惟在營業人已繳納其應納稅款之情形下，行為罰仍依應納稅額固定之比例加徵滯報金與怠報金，又無合理最高額之限制，依本院大法官釋字第三二七號解釋意旨，主管機關應注意檢討修正，併此說明。

REASONING: With respect to the punishment for breach of tax laws, "punishment for tax evasion" is imposed when a taxpayer evades tax and "punishment for misconduct" is imposed when a

解釋理由書：違反稅法之處罰，有因納稅義務人逃漏稅捐而予處罰者，此為漏稅罰；有因納稅義務人違反稅法上之作為或不作為義務而予處罰者，此為行為罰。營業稅法第三十五條

taxpayer violates the duty to act or not to act under tax laws. Article 35, Paragraph 1, of the Value-Added and Non-Value-Added Business Tax Act provides that, except as otherwise prescribed by the Act, a business entity, whether or not it has conducted sales, shall file with the collection authority-in-charge a bimonthly tax return on a prescribed form for its sales amount and tax payable or refundable for the preceding two months, together with refund or off-set amount and other related documents prior to the fifteenth day of the following filing period. The business tax payable, if any, shall be paid to the Treasury in advance. The receipt for the tax paid shall be enclosed with the tax return. Article 49 thereof stipulates that in the event that a business entity fails to file the sales amount or a detailed list of issued uniform invoices within the time limit as prescribed in the Act, the business entity shall be liable to a surcharge for late filing. The surcharge shall be equivalent to 1% of the tax payable for every two days' overdue, provided that the filing is made within 30 days after the deadline. The fine shall not be less than NT $400. If the fil-

第一項規定：「營業人除本法另有規定外，不論有無銷售額，應以每二月為一期，於次期開始十五日內，填具規定格式之申報書，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。其有應納營業稅額者，應先向公庫繳納後，檢同繳納收據一併申報。」同法第四十九條規定：「營業人未依本法規定期限申報銷售額或統一發票明細表，其未逾三十日者，每逾二日按應納稅額加徵百分之一滯報金，金額不得少於四百元；其逾三十日者，按核定應納稅額加徵百分之三十怠報金，金額不得少於一千元。其無應納稅額者，滯報金為四百元，怠報金為一千元。」旨在促使營業人履行其依法申報之義務，俾能確實掌握稅源資料，建立合理之查核制度。加徵滯報金、怠報金，係對營業人違反作為義務所為之制裁，其性質為行為罰，此與逃漏稅捐之漏稅罰乃屬兩事。上開營業稅法第四十九條之規定，為增進公共利益所必要，與憲法並無牴觸。惟在營業人已繳納其應納稅款之情形下，行為罰仍依應納稅額固定之比例加徵滯報金與怠報金，又無合理最高額之限制，依本院大法官釋字第三二七號解釋意旨，主管機關應注意檢討修正。至行政罰之責任要件，本

ing is made more than 30 days after the deadline, the business entity shall be liable to a non-filing surcharge equivalent to 30% of the tax payable as determined by the relevant authority. The amount of this surcharge shall not be less than NT $1,000. Where there is no tax payable, the surcharge for late filing and non-filing shall be NT$ 400 and NT $1,000, respectively. The purposes of the aforesaid provision are to compel business entities to comply with the obligations of filing so that the supervising authority can obtain relevant tax source information, and to establish a reasonable tax audit system. The surcharges for late filing and non-filing are imposed upon the business entity for its noncompliance with duty and such surcharges act as a kind of "punishment for misconduct." "Punishment for misconduct" is different from "punishment for tax evasion," which is imposed only when tax-evading acts have been committed. Such provision is necessary to protect the public interest and does not contradict the Constitution. However, the authority-in-charge should, according to J.Y. Interpretation No. 327, review and

院釋字第二七五號解釋已有釋示，均併指明。

revise this provision under which a business entity would be punished by surcharges for late filing and/or non-filing at a fixed rate of tax payable without reasonable ceiling even though the tax has been paid. As to the conditions for "punishment for misconduct," they have been elaborated in J. Y. Interpretation No. 275.

J. Y. Interpretation No.357（July 8, 1994）*

ISSUE: Is the Auditor General a political appointee?

RELEVANT LAWS:

Articles 104 and 105 of the Constitution（憲法第一百零四條、第一百零五條）; Article 3 of the Organic Act of the National Audit Office（審計部組織法第三條）.

KEYWORDS:

Auditor General（審計長）, political appointee（政務官）.**

HOLDING: Unlike a political appointee who may be removed on policy grounds or because of a change of ruling party, the status of the Auditor General, as provided by Article 104 of the Constitution, is guaranteed. The six-year tenure of the Auditor-General, as provided in Article 3 of the Organic Act of the National Audit Office, is to ensure the stability of the office in order that its functions may be performed independently and thus not be in violation of the Constitution.

解釋文：依中華民國憲法第一百零四條設置於監察院之審計長，其職務之性質與應隨執政黨更迭或政策變更而進退之政務官不同。審計部組織法第三條關於審計長任期為六年之規定，旨在確保其職位之安定，俾能在一定任期中，超然獨立行使職權，與憲法並無牴觸。

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* Translated by Professor Jyh-Pin Fa.

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

REASONING: The status of the Auditor General of the Control Yuan is stipulated in Article 104 of the Constitution. In addition to the duty, as stated in Article 105 of the Constitution, to submit an auditing report to the Legislative Yuan after reviewing the final accounts of revenues and expenditures of the Executive Yuan, he is authorized to supervise the enforcement of the public budget, review revenues and expenditures, investigate any financial misconduct, etc. Since his major work is closely related to the legislative power of reviewing budgetary bills, the consent of the Legislative Yuan is thus required by Article 104 of the Constitution. In order to maintain the independence of this office and the effective performance of its auditing function, following the common practice in other democracies, we decided to provide a necessary guarantee for auditing officials. They are free from interference; the Audit Act explicitly allows them to perform auditing functions independently. Moreover, Article 8 of the Act Governing the Appointment of Audit Personnel provides that they shall not be suspended, transferred or

解釋理由書：依憲法第一百零四條設置於監察院之審計長，其職權除依憲法第一百零五條規定：「審計長應於行政院提出決算後三個月內，依法完成其審核，並提出審核報告於立法院」外，並依監察院組織法、審計法及審計部組織法之規定，綜理審計業務，監督全國各機關預算之執行、核定收支命令、審核財務收支、稽察財物及財政上之不法或不忠於職務之行為等，職位重要。由於其主要職權為決算之審核，與立法院審議預算之權限，關係密切，憲法第一百零四條後段乃將審計長之任命，賦與立法院同意權，以昭慎重。為維護審計權之獨立行使，充分發揮審計功能，我國法律援民主憲政國家之通例，對審計人員行使職權予以必要之保障，於審計法第十條及審計人員任用條例第八條分別規定：「審計人員依法獨立行使其審計職權，不受干涉。」「審計官、審計、稽察，非有法定原因，不得停職、免職或轉職。」關於審計首長之職位，他國憲法或法律，或定為終身職（如荷蘭王國一九八四年憲法第七七條），或規定相當之任期（如美國一九二一年預算及會計法第三〇三條之十五年、德國一九八五年聯邦審計院法第三條第二項之十二年、日本一九八六年會

removed from office without legal causes as mandated by relevant personnel statutes. As for the tenure of the Auditor-General in other countries, he holds office for life in the Netherlands, 15 years in the United States, 12 years in Germany, and 7 years in Japan. The Organic Act of the National Audit Office in Taiwan provides a term of six years. The Legislative Yuan's purpose is to provide stability to this office and, accordingly, to allow it to function independently. The status of the Auditor General is different from that of other political appointees who may be removed at any time for policy reasons or because of a change of ruling party. Although the salary, pension and other related matters are regulated along with other political appointees by the same statutes, this arrangement is for convenience only and has nothing to do with the different status of the Auditor General. Therefore, the tenure of the Auditor General is not in violation of the Constitution.

計檢查院法第五條之七年）。現行審計部組織法亦於第三條規定：「審計長任期為六年」，以確保審計首長職位之安定，俾能在一定任期中，超然獨立行使職權而無所瞻顧。是審計長職務之性質，自與應隨執政黨更迭或政策變更而進退之政務官不同。至於現行法規將審計長或其他原非政務官而地位與之相當人員之待遇、退職酬勞及財產申報等事項與政務官合併規定，乃為法規制定上之便宜措施，於其非屬應隨執政黨更迭或政策變更而進退之政務官身分不生影響。綜上所述，審計部組織法關於審計長任期之規定，與憲法並無牴觸。

J. Y. Interpretation No.358（July 15, 1994）*

ISSUE: Is the Ministry of Interior directive constitutional in disallowing the partition of a fire escape, vehicle passageway, or frontage of a building for the purpose of recordation?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution（憲法第十五條、第二十三條）; Articles 799, the first sentence and 823, Paragraph 1, the first sentence of the Civil Code（民法第七百九十九條前段、第八百二十三條第一項前段）; Article 72, Subparagraphs 2 and 3 of the Regulation Governing Land Registration（土地登記規則第七十二條第二款、第三款）; Ministry of Interior directive (61) Tai-Nei-Ti-Tze No. 491660 (November 7, 1972)（內政部六十一年十一月七日(六一)台內地字第四九一六六〇號函）; Article 7, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第七條第一項第二款）.

KEYWORDS:

partition of common property（分割共有物）, common area of a building under divided ownership（區分所有建築物共同使用部分）, partitioned for the purpose of recordation（分割登記）. **

* Translated by Raymond T. Chu.

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

HOLDING: While each co-owner is entitled to demand at any time the partition of common property under the Civil Code, Article 823, Paragraph 1, the first sentence, the proviso thereto makes it inapplicable where partition is impossible on account of the purpose for which the property is used. The legislative purpose of the proviso is to avoid unnecessary controversies and to promote the economic efficacy of the common property. The common area of a building under divided ownership is indispensable for all divisional owners to make use of and is by nature a property that cannot be partitioned on account of the purpose for which it is used. The Ministry of Interior directive (61) Tai-Nei-Ti-Tze No. 491660 dated November 7, 1972, whereby areas such as a fire escape, vehicle passageway, and frontage are deemed to be a part of the building and may not be partitioned for the purpose of recordation, is consistent with the provision and is not in conflict with the Constitution.

解釋文：各共有人得隨時請求分割共有物，固為民法第八百二十三條第一項前段所規定。惟同條項但書又規定，因物之使用目的不能分割者，不在此限。其立法意旨在於增進共有物之經濟效用，並避免不必要之紛爭。區分所有建築物之共同使用部分，為各區分所有人利用該建築物所不可或缺，其性質屬於因物之使用目的不能分割者。內政部中華民國六十一年十一月七日（六一）臺內地字第四九一六六〇號函，關於太平梯、車道及亭子腳為建築物之一部分，不得分割登記之釋示，符合上開規定之意旨，與憲法尚無牴觸。

REASONING: Under the Civil Code, Article 799, the first sentence,

解釋理由書：數人區分一建築物而各有其一部者，該建築物及其附屬

where a building is divided up among several persons so that each of them owns a part of it, the common area of the building and its accessories are presumed to be co-owned by all owners. The Code further provides in Article 823, Paragraph 1, the first sentence, that each co-owner is entitled to demand at any time the partition of the common property; however, the proviso thereto makes it inapplicable where partition is impossible on account of the purpose for which the property is used. The legislative purpose of the proviso is to avoid unnecessary controversies and to promote the economic efficacy of the common property. The common area of a building under divided ownership is indispensable for all divisional owners to make use of and is by nature a property that cannot be partitioned on account of the purpose for which it is used. The Regulation Governing Land Registration, Article 72, Subparagraphs 2 and 3, prescribing that ownership of the common area of a building under divided ownership must be transferred to the same person to whom ownership of the building under divided ownership is transferred

物之共同部分，推定為各所有人之共有，民法第七百九十九條前段定有明文。各共有人得隨時請求分割共有物，但因物之使用目的不能分割者，不在此限，亦為同法第八百二十三條第一項所規定。該但書之立法意旨，乃在增進共有物之經濟效用，並避免不必要之紛爭。區分所有建築物之共同使用部分，為各區分所有人利用該建築物所不可或缺，其性質屬於因物之使用目的不能分割之情形。土地登記規則第七十二條第二款及第三款規定，區分所有建築物之共同使用部分之所有權，應於各相關區分所有建築物所有權移轉時，隨同移轉於同一人，不得分割，亦在揭示同一意旨。內政部中華民國六十一年十一月七日（六一）臺內地字第四九一六六〇號函，關於太平梯、車道及亭子腳為建築物之一部分，不得分割登記之釋示，符合上開意旨，與憲法第十五條及第二十三條尚無牴觸。

and shall not be partitioned, is designed for the same purpose. The Ministry of Interior directive (61) Tai-Nei-Ti-Tze No. 491660 dated November 7, 1972, whereby areas such as a fire escape, vehicle passageway, and frontage are deemed to be a part of the building and may not be partitioned for the purpose of recordation, is consistent with the above purpose and is not in conflict with Articles 15 and 23 of the Constitution.

Incidentally, the petitioner's application in this case for unified interpretation does not meet the requirements of Article 7, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act and must therefore be denied.

本件聲請人關於統一解釋部分之聲請，核與司法院大法官審理案件法第七條第一項第二款之規定不合，應不受理，併此說明。

J. Y. Interpretation No.359（July 15, 1994）*

ISSUE: Is the directive of the Ministry of Finance, providing to the effect that a fine equivalent to the total amount of land value increment tax free of collection will be imposed on a farmland transferred to a non-self-tilling farmer or used for non-agricultural purposes without authorization, in line with the Constitution?

RELEVANT LAWS:

Articles 39 and 55-2 of the Land Tax Act（土地稅法第三十九條、第五十五條之二）; Articles 27 and 30 of the Agricultural Development Act（農業發展條例第二十七條、第三十條）.

KEYWORDS:

land tax（土地稅）, agricultural development（農業發展）, land value increment tax（or capital gain tax）（土地增值稅）. **

HOLDING: The Ministry of Finance issued Ordinances Tai-Tsair-Shuey-Dih No. 780437911 on March 15, 1990, Tai-Tsair-Shuey-Dih No. 800128161 on April 20, 1991, and Tai-Tsair-Shuey-Dih

解釋文：財政部中華民國七十九年三月十五日台財稅字第七八〇四三七九一一號、八十年四月二十日台財稅字第八〇〇一二八一六一號及同年六月四日台財稅字第八〇〇一七四〇四一號

* Translated by Dr. Cheng-Hwa Kwang, Professor of Law, Ming Chuan University.

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

No. 800174041 on June 4, 1991, based on its jurisdiction as the authority-in-charge to elaborate the method for assessment of fines stipulated in Article 55-2 of the Land Tax Act. Said Ordinances coincide with the essence of the said Article to prohibit the unlawful conversion of agricultural land, are deemed necessary to promote the public welfare, and hence, are not in violation of the Constitution.

等函，係基於主管機關之職權對於土地稅法第五十五條之二罰鍰數額之計算所為之釋示，符合該法條規定之意旨，為遏阻違法使用農地，以增進公共利益所必要，與憲法並無牴觸。

REASONING: In order to maintain and enhance the scale of farming operations, the government provides the incentive to exempt the capital gain tax for agricultural land to be transferred and cultivated by farmers/transferees themselves within the period when the agricultural land is lawfully assigned for agricultural use. This has been explicitly prescribed in Article 27 of the Agricultural Development Act and Article 37 of the Land Tax Act. However, for the agricultural land which is transferred to farmers not cultivating by themselves or is unlawfully converted for the usage of any non-agricultural purpose, Article 55-2 of the Land Tax Act imposes a fine of twice the

解釋理由書：國家為達成維持及擴大農場經營規模之目的，對於將農業用地在依法作農業使用期間，移轉與自行耕作之農民繼續耕作者，設有免徵土地增值稅之獎勵，農業發展條例第二十七條及土地稅法第三十九條之二規定甚明。但對再移轉與非自行耕作農民或非依法令變更為非農業用地使用者，土地稅法第五十五條之二亦有處以原免徵土地增值稅額二倍罰鍰之明文。而農業發展條例第三十條定有每宗耕地不得分割之原則，其非依法以耕地之一部，改為非農業用地使用，自亦為法所不許。財政部中華民國七十九年三月十五日臺財稅字第七八〇四三七九一一號、八十年四月二十日臺財稅字第八〇〇一二八一六一號及同年六月四日臺財稅字第八

amount of the exempted capital gain tax. Article 30 of the Agricultural Development Act further provides that no lot of agricultural land shall be subdivided nor shall conversion of any part of agricultural land for non-agricultural use be allowed by law. The Ministry of Finance issued Ordinances Tai-Tsair-Shuey-Dih No. 780437911 on March 15, 1990, Tai-Tsair-Shuey-Dih No. 800128161 on April 20, 1991, and Tai-Tsair-Shuey-Dih No. 800174041 on June 4, 1991, to elaborate that the method for assessment of the above fines shall be based on the exempted land value increment tax [or capital gain tax] imposed on the whole lot of land in question, rather than based on the percentage of the portion of the said agricultural land which has been unlawfully converted. This elaboration in dealing with the method for assessment of fines as prescribed in Article 55-2 of the Land Tax Act founded on the jurisdiction of the authority-in-charge coincides with the essence of the said Article and is deemed necessary to prohibit illegal usage of agricultural land and to promote the public welfare; hence, it is not in violation of the

〇〇一七四〇四一號等函，就上述罰鍰之計算，謂應以全部土地原免徵土地增值稅額為準，而不按非依法令變更使用面積與該宗耕地面積之比例計算，係基於主管機關之職權對於土地稅法第五十五條之二罰鍰數額之計算所為之釋示，符合該法條規定之意旨，為遏阻違法使用農地，以增進公共利益所必要，與憲法並無牴觸。惟非依法令變更使用之農地，應否分別情節輕重，科以額度不同之罰鍰，仍應由主管機關予以檢討，併此指明。

Constitution. Note that, however, it is subject to review by the authority-in-charge on the merit of whether or not the amounts of fines imposed in various cases of violation regarding the unlawful conversion of agricultural land should be different.

J. Y. Interpretation No.360（July 29, 1994）*

ISSUE: Are the relevant provisions of the Regulation Governing the Supervision of Land Scriveners, setting forth restrictions on the qualifications of a person who may apply for a land scrivener's certificate, in violation of the Constitution?

RELEVANT LAWS:

Articles 23 and 86, Subparagraph 2, of the Constitution（憲法第二十三條、第八十六條第二款）; Article 37-1, Paragraph 2 and 4 of the Land Act（土地法第三十七條之一第二項、第四項）; Article 4 of the Regulation Governing the Supervision of Land Scriveners（土地登記專業代理人管理辦法第四條）.

KEYWORDS:

professional land registration agents（土地登記專業代理人）, real estate scrivener certificate（土地代書登記證明）, professional agents certificate（專業代理人證書）, land registration professional broker card（代理他人申報土地登記案件專業人員登記卡）. **

HOLDING: Since Article 37-1, Paragraph 2, of the Land Act was enacted in accordance with Article 86, Subpara-

解釋文：土地法第三十七條之一第二項係依憲法第八十六條第二款而制定，與憲法並無牴觸，業經本院釋字

* Translated by Professor Chin-Chin Cheng.

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

graph 2, of the Constitution, it does not contravene the Constitution. This has been upheld in J.Y. Interpretation No. 352. The Ministry of the Interior issued the Regulation Governing the Supervision of Land Scriveners (hereinafter, "the Regulation") based on the authority of Article 37-1, Paragraph 4, of the Land Act on June 29, 1990. Article 4 of the Regulation provides that "Those who meet any of the following qualifications may apply for the professional agent certificate: (1) pass the professional agent examination or pass the review and approval measures for professional agent；(2) receive the real estate scrivener certificate issued by the provincial government (directly or self-governed municipality) or the county/city government；(3) receive the "land registration professional broker card" issued by the provincial government (directly or self-governed municipality) or the county/city government". This regulation neither goes beyond the scope of the legal authority nor contravenes the Constitution.

第三五二號解釋釋示在案。內政部於中華民國七十九年六月二十九日發布之土地登記專業代理人管理辦法，則係依據上開法條第四項授權訂定，其第四條：「合於左列資格之一者，得請領專業代理人證書：一、經專業代理人考試或檢覈及格者。二、領有直轄市、縣（市）政府核發土地代書人登記合格證明者。三、領有直轄市、縣（市）政府核發代理他人申辦土地登記案件專業人員登記卡者」之規定，並未逾越法律授權範圍，與憲法亦無牴觸。

REASONING: According to Article 23 of the Constitution, restrictions

解釋理由書：依憲法第二十三條之規定，國家對於人民之自由及權利

imposed by the government on people's freedom and rights must be regulated by legislation. However, not all issues regarding people's rights and freedoms are regulated by legislation. To enforce a statute, detailed and technical issues can be regulated by administrative orders authorized by the statute. As long as the content of the administrative order authorized by the statute does not exceed the scope of authority and complies with the purposes of the statute, the administrative order is permissible by the Constitution.

有所限制，固應以法律定之。惟法律對於有關人民權利義務之事項，不能鉅細靡遺，一律加以規定，其屬於細節性、技術性者，法律自得授權主管機關以命令定之，俾便法律之實施。行政機關基於此種授權發布之命令，其內容未逾越授權範圍，並符合授權之目的者，自為憲法之所許。

Article 37-1, Paragraph 2, of the Land Act provides that: "The land registration professional agent must pass the Land Registration Professional Agent Examination or pass the review and approval measures for professional agent. Those who have been engaging in the profession of land registration and have received the real estate scrivener certificate issued by the government, or have received the "land registration professional broker card" issued by the government before the enforcement of the Act, are allowed to continue to practice. Those who have not

土地法第三十七條之一第二項規定：「土地登記專業代理人，應經土地登記專業代理人考試或檢覈及格。但在本法修正施行前，已從事土地登記專業代理業務，並曾領有政府發給土地代書人登記合格證明或代理他人申辦土地登記案件專業人員登記卡者，得繼續執業，未領有土地代書人登記合格證明或登記卡者，得繼續執業五年」，係依憲法第八十六條第二款而制定，與憲法並無牴觸，業經本院釋字第三五二號解釋釋示在案。內政部於中華民國七十九年六月二十九日發布之土地登記專業代理人管理辦法，則係依據上開法條第四項

received the certificate or the card mentioned above may continue to practice for another five years." This provision is enacted in accordance with Article 86, Subparagraph 2, of the Constitution. Therefore, it does not contravene the Constitution. This has been upheld in J.Y. Interpretation No. 352. The Ministry of the Interior issued the Regulation Governing the Supervision of Land Scriveners (hereinafter, "the Regulation") based on the authority of Article 37-1, Paragraph 4, of the Land Act on June 29, 1990. Article 4 of the Regulation provides that "those who meet any of the following qualifications may apply for the professional agent certificate: (1) pass the professional agent examination or pass the review and approval measures for professional agent；(2) receive the real estate scrivener certificate issued by the provincial government (directly or self-governed municipality) or the county/city government；(3) receive the "land registration professional broker card" issued by the provincial government (directly or self-governed municipality) or the county/city government." This regulation neither goes beyond the scope of the

授權訂定，其第四條：「合於左列資格之一者，得請領專業代理人證書：一、經專業代理人考試或檢覈及格者。二、領有直轄市、縣（市）政府核發土地代書人登記合格證明者。三、領有直轄市、縣（市）政府核發代理他人申辦土地登記案件專業人員登記卡者」之規定，並未逾越法律授權範圍，與憲法亦無牴觸。

legal authority nor contravenes the Constitution.

J. Y. Interpretation No.361（July 29, 1994）*

ISSUE: Where a Ministry of Finance directive established a standard tax rate for income from the sale of houses in Taipei for the year 1987 pursuant to the Enforcement Rules of the Income Tax Act, is such a directive consistent with the Constitution?

RELEVANT LAWS:

Article 9 of the Income Tax Act（所得稅法第九條）; Articles 17-2 of the Enforcement Rules of the Income Tax Act（所得稅法施行細則第十七條之二）; J. Y. Interpretation No. 218（司法院釋字第二一八號解釋）; Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 770553105（June 27, 1988）（財政部七十七年六月二十七日臺財稅字第七七〇五五三一〇五號函）.

KEYWORDS:

house tax（房屋稅）, taxing authority（稅捐稽徵機關）, principle of taxation per legislation（租稅法定主義）, National Tax Administration Taipei Bureau（臺北市國稅局）, assessed value of house（房屋評定價格）, estimated income（估計所得額）, assessment by imputation（推計核定）, principle of equality in taxation（租稅公平原則）. **

HOLDING: The income from

解釋文：個人出售房屋交易所

* Translated by Raymond T. Chu.

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

the sale of a house owned by an individual is a kind of income from transaction in property under Article 9 of the Income Tax Act. Thus, the provision of Article 17-2 of the Enforcement Rules of the Income Tax Act as amended and promulgated by the Executive Yuan on May 30, 1988, with respect to the method to determine the amounts of income from the sale of houses owned by individuals is not contrary to the principle of taxation per legislation. Under said Article, where an individual having sold a house fails to file a tax return or to present documentary evidence, the competent taxing authority shall propose a standard of such income in light of the actual economic conditions and the housing market situation in that year and submit such proposed standard to the Ministry of Finance for approval, and shall, upon approval by the Ministry, determine the income in line with such standard. Accordingly, upon the standard proposed by the Taipei Bureau of the National Tax Administration on the basis of the results of a survey obtained by taking multiple samples of cases where income was earned from the sale of houses during

得，係所得稅法第九條財產交易所得之一種。行政院於中華民國七十七年五月三十日修正發布之所得稅法施行細則第十七條之二，關於個人出售房屋所得額核定方法之規定，與租稅法定主義並無違背。依該條規定，個人出售房屋未申報或未能提出證明文件者，其所得額由主管稽徵機關參照當年度實際經濟情況及房屋市場交易情形擬訂，報請財政部核定其標準，依該標準核定之。嗣財政部依據臺北市國稅局就七十六年度臺北市個人出售房屋所得額多數個案取樣調查結果擬訂之標準，於七十七年六月二十七日以臺財稅字第七七〇五五三一〇五號函，核定七十六年度臺北市個人出售房屋交易所得，按房屋稅課稅現值百分之二十計算，係經斟酌年度、地區、經濟情況所核定，並非依固定之百分比訂定，符合本院釋字第二一八號解釋之意旨，與憲法並無牴觸。

1987 by individuals residing in the city of Taipei, the Ministry of Finance on June 27, 1988, issued its Directive Tai-Tsai-Shui-Tze No. 770553105, whereby the income from transactions on houses sold by individuals residing in the city of Taipei in the year 1987 was established at twenty percent of the then current value of the particular house as assessed for the purpose of levying the housing tax. The decision of the Ministry of Finance was made by taking into consideration the factors involving year, location, and economic conditions rather than a fixed percentage, and is consistent with the essence of our Interpretation No. 218.We do not find it to be in conflict with the Constitution.

REASONING: Where a taxpayer fails to a file tax return or to present documentary evidence, the taxing authority may determine his income on the basis of the information obtained upon investigation or the standard profits made by others in the same trade. This method of assessment by imputation is not contrary to the Constitution. Nevertheless, when

解釋理由書：所得稅納稅義務人未自行申報或提示證明文件，稽徵機關得依查得之資料或同業利潤標準，核定其所得額。此項推計核定方法，與憲法並不牴觸，惟依此項推計核定方法估計所得額時，應力求客觀、合理，使與納稅義務人之實際所得相當，以維租稅公平原則，至於個人出售房屋，未能提出交易時實際成交價格及原始取得之實

working on an estimate of the income by the method of imputation, the taxing authority must exert all possible efforts to make an objective and reasonable estimation closely corresponding to the actual income of the taxpayer so as to maintain the principle of fair taxation. As to the situation where an individual having sold a house fails to produce documents to prove the actual price of the deal at the time of conclusion of the transaction and the actual cost of the original acquisition thereof, if the amount of the taxpayer's income is imputed at a fixed and invariable percentage of the assessed value of the house regardless of any variation due to year, location, and economic conditions, the resulting figure can hardly be expected to come close to the actual price and is unfair as well as unreasonable. Such method is also inconsistent with the meaning of assessment by imputation as contemplated by the Income Tax Act. This has been made clear in our J.Y. Interpretation No. 218 delivered by this Yuan on August 14, 1987.

際成本之證明文件者，如不問年度、地區、經濟情況如何不同，概按房屋評定價格，以固定不變之百分比，推計納稅義務人之所得額，自難切近實際，有失公平合理，且與所得稅法所定推計核定之意旨未盡相符。業經本院大法官於七十六年八月十四日以釋字第二一八號解釋釋示在案。

The income from the sale of a house

個人出售房屋交易所得，係所得

owned by an individual is a kind of income from transaction in property under Article 9 of the Income Tax Act. Thus, Article 17-2 of the Enforcement Rules of the Income Tax Act as amended and promulgated by the Executive Yuan on May 30, 1988, is not contrary to the principle of taxation by law in providing: "Where an individual sells his house, his income from dealing in such property shall be assessed and determined in pursuance of Article 14, Paragraph 1, Category 7, of the Income Tax Act to the extent as actual earned income if he can produce documentary evidence to prove the price of the deal at the time of conclusion of the transaction and his cost and expenses. If he fails to file a tax return or to present documentary evidence, the income shall be determined by the competent taxing authority pursuant to the standard approved by the Ministry of Finance. The aforesaid standard shall be developed by the competent taxing authority of the province (or municipality under direct jurisdiction of the Executive Yuan) by taking into account the actual economic conditions and the housing market situa-

稅法第九條財產交易所得之一種，行政院於七十七年五月三十日修正發布之所得稅法施行細則第十七條之二規定：「個人出售房屋，如能提出交易時之成交價額及成本費用之證明文件者，其財產交易所得之計算，依本法第十四條第一項第七類規定核實認定；其未申報或未能提出證明文件者，稽徵機關依財政部核定標準核定之。前項標準，由省（直轄市）主管稽徵機關參照當年度實際經濟情況及房屋市場交易情形擬訂，報請財政部核定。」與租稅法定主義並無違背。

tion in that year and submitting the standard to the Ministry of Finance for approval.

"Upon the standard proposed by the National Tax Administration of Taipei in light of the results of a survey obtained by taking multiple samples of cases where income was earned from the sale of houses during 1987 by individuals residing in the city of Taipei (the average income from the sale of houses being 22.02%, with 73% of the total number of transactions realizing 20% or more revenue), the Ministry of Finance on June 27, 1988, issued its Directive Tai-Tsai-Shui-Tze No. 770553105, whereby the income from transactions of houses sold by individuals residing in the city of Taipei in the year 1987 was established at twenty percent of the then current value of the particular house as assessed for the purpose of levying the housing tax. The decision of the Ministry of Finance was made by taking into consideration the factors involving year, location, and economic conditions rather than a fixed percentage, and is consistent with the essence of our Inter-

財政部依據臺北市國稅局就七十六年度臺北市個人出售房屋所得額多數個案取樣調查結果（平均售屋所得標準為百分之二二・〇二，所得標準在百分之二十以上者，占總件數之百分之七十三）擬訂之標準，於七十七年六月二十七日以臺財稅字第七七〇五五三一〇五號函，核定七十六年度臺北市個人出售房屋交易所得，按房屋稅課稅現值百分之二十計算，係經斟酌年度、地區、經濟情況所核定，並非依固定之百分比訂定，符合本院釋字第二一八號解釋之意旨，與憲法並無牴觸。

pretation No. 218.We do not find it to be in conflict with the Constitution.

J. Y. Interpretation No.362（August 29, 1994）*

ISSUE: Is Article 988 of the Civil Code, in providing that a bigamous marriage is void, in conflict with the Constitution?

RELEVANT LAWS:

Article 22 of the Constitution（憲法第二十二條）; Articles 988, Subparagraph 2, 999-1, and 1052, Paragraph 1, Subparagraph 1, Paragraph 2 of the Civil Code（民法第九百八十八條第二款、第九百九十九條之一、第一千零五十二條第一項第一款、第二項）.

KEYWORDS:

bigamy（重婚）, monogamy（一夫一妻婚姻制度）, freedom of marriage（婚姻自由）, good faith（善意（誠實））, final court decision（確定判決）, principle of legitimate expectation（信賴保護原則）, divorce（離婚）. **

HOLDING: Article 988, Subparagraph 2, of the Civil Code stipulates that a bigamous marriage is void. This stipulation seeks to maintain the social order of the monogamous system. Under general circumstances, this stipulation does not conflict with the Constitution. How-

解釋文：民法第九百八十八條第二款關於重婚無效之規定，乃所以維持一夫一妻婚姻制度之社會秩序，就一般情形而言，與憲法尚無牴觸。惟如前婚姻關係已因確定判決而消滅，第三人本於善意且無過失，信賴該判決而與前婚姻之一方相婚者，雖該判決嗣後又經

* Translated by John C. Chen, Attorney at Law.

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ever, where a person's first marriage is dissolved by a final court decision, and a third party, in good faith and without negligence, trusting in the validity of such final court decision, enters into marriage with a party of the previous marriage, and subsequently such final and binding judgment is reversed, the subsequent marriage (between that person and the third party), thus becomes bigamous. This situation differs from general bigamy, and thus, according to the principle of legitimate expectation, the validity of the subsequent marriage should be maintained. Since the said stipulation does not adequately consider the above mentioned situation, it does not conform with the right to freedom of marriage contained in the Constitution. This Law shall be discussed and amended accordingly. During the period prior to the Law being amended however, the above stipulation regarding a marriage entered into with trust in a final and binding judgment should not apply. In a situation where a previous marriage and a subsequent marriage coexist due to the abovementioned situation, the third party may sue for divorce.

變更，致後婚姻成為重婚，究與一般重婚之情形有異，依信賴保護原則，該後婚姻之效力，仍應予以維持。首開規定未兼顧類此之特殊情況，與憲法保障人民結婚自由權利之意旨未盡相符，應予檢討修正。在修正前，上開規定對於前述因信賴確定判決而締結之婚姻部分，應停止適用。如因而致前後婚姻關係同時存在，則重婚者之他方，自得依法請求離婚，併予指明。

REASONING: Article 988, Subparagraph 2, of the Civil Code stipulates that a bigamous marriage is void. The purpose of this stipulation seeks to maintain the social order of the monogamous system. Under general circumstances, this stipulation does not conflict with the Constitution. However, an adult without a spouse is free to enter into marriage and another person is free to enter into marriage with such person. This freedom of marriage, provided in Article 22 of the Constitution, merits protection. If a previous marital relationship between parties has been extinguished by a final and binding judgment (such as a divorce decision), either person may remarry. After the person and a third person entered into marriage (subsequent marriage), the final and binding judgment was reversed by legal proceedings (such as a retrial) and the subsequent marriage became a bigamous marriage. Such bigamy is due to inconsistent decisions rendered by the courts and differs from general bigamy. Where the defect in the previous decision may not have been known or might have been known by parties to the subsequent

解釋理由書：民法第九百八十八條第二款關於重婚無效之規定，乃所以維持一夫一妻婚姻制度之社會秩序，就一般情形而言，與憲法尚無牴觸。惟適婚之人無配偶者，本有結婚之自由，他人亦有與之相婚之自由。此種自由，依憲法第二十二條規定，應受保障。如當事人之前婚姻關係已因法院之確定判決（如離婚判決）而消滅，自得再行結婚，後婚姻之當事人，基於結婚自由而締結婚姻後，該確定判決，又經法定程序（如再審）而變更，致後婚姻成為重婚，既係因法院前後之判決相反所致，究與一般重婚之情形有異。而前判決之潛在瑕疵，原非必為後婚姻之當事人所明知或可得而知，第三人與前婚姻之一方相婚時（即後婚姻成立時），就此瑕疵倘非明知或可得而知，則為善意且無過失。其因信賴確定判決而結婚，依信賴保護原則，該後婚姻之效力，仍應予以維持，以免憲法所保障之人民（尤其是婦女）結婚自由遭受不測之損害。而是否善意且無過失，則屬事實認定問題，有待法院本於調查證據之結果而為判斷，故此種因前後判決相反構成之重婚，應另經法院之判決程序始能認其無效，未經判決無效者仍為有效。上開重婚無效之規定，未兼顧類此之特殊情況

marriage, if at the time when the subsequent marriage was entered into by the third party and the party from the previous marriage did not know or could not know of such defect in the decision, they are deemed to be in good faith and without fault. Since such subsequent marriage was entered into with trust in the final court decision, then according to the principle of legitimate expectation, the validity of the subsequent marriage should be maintained in order to avoid the unpredictable harm to the freedom of marriage provided to the people (especially women) contained in the Constitution. Whether it is in good faith and without negligence is a question of fact that shall be determined by the court after the conclusion of investigation of the evidence. Where a bigamous marriage exists because of inconsistency between the previous decision and the subsequent decision, such marriage should remain valid until and unless adjudged invalid by a court. Where no court has ruled such a marriage invalid, the subsequent marriage should remain valid. Article 988, Subparagraph 2, of the Civil Code regarding the invalidity of a biga-

（除因信賴確定判決所導致之重婚外，尚有其他類似原因所導致之重婚），又未就相關事項，如後婚姻所生之婚生子女身分等，為合理之規定（民法在修正前重婚係得撤銷，而撤銷之效力不溯及既往，故無婚生子女之身分問題。現行民法第九百九十九條之一，則僅解決子女之監護問題，尚有不足），與憲法保障人民權利之意旨，未盡相符，應予檢討修正。在修正前，上開民法規定對於前述善意且無過失之第三人，因信賴確定判決而締結之婚姻部分，應停止適用。如因而致前後婚姻關係同時存在，則重婚者之他方，依民法第一千零五十二條第一項第一款或第二項規定，自得向法院請求離婚，併予指明。

mous marriage does not address the special situation where bigamy results due to a third party's trust in a final and binding judgment and other types of bigamy that result due to other similar causes. Moreover, it does not contain a reasonable stipulation regarding the status and other issues of children born of parents outside of marriage. (Prior to the amendment of the Civil Code, a bigamous marriage can be cancelled by a court decision. The validity of such a cancellation can not be retroactively applied, so there is no issue regarding the status of children born of parents outside of marriage. The current Article 999-1 of the Civil Code only resolves the issue of child custody. This is insufficient.) This does not conform to the intent of the Constitution in the protection of the people's rights. Thus, this should be discussed and amended. The above stipulation of the Civil Code should not apply to a bigamous marriage entered into by a third party who does so in good faith and without negligence, and who trusted in a final court decision. In the event where a previous marriage and a subsequent marriage coexist due to the abovementioned

situation, the third party may sue for divorce in accordance with the provision of Article 1052, Paragraph 1, Subparagraph 1, or Paragraph 2, of the Civil Code.

Justice Chung-Sheng Lee filed dissenting opinion.

本號解釋李大法官鐘聲提出不同意見書。

J. Y. Interpretation No.363（August 29, 1994）*

ISSUE: Does the Notice Regarding Rewards for Investment in the Establishment of Retail Markets in Taipei City promulgated by the Taipei Municipality on July 23, 1981, violate the civil rights of the people as protected by the Constitution and shall it thus not be applicable?

RELEVANT LAWS:

Articles 3 and 58-1, Paragraph 1 of the Act of Encouragement of Investment（獎勵投資條例第三條、第五十八條之一第一項）; Article 53 of the Urban Planning Act（都市計畫法第五十三條）.

KEYWORDS:

public facilities（公共設施）, development of businesses（興闢業）, urban planning（都市計畫）, Encouragement of Investment（獎勵投資）. **

HOLDING: In order to enforce the law, the local administrative agencies may, in their official capacity, issue orders as necessary to supplement the rules, provided however, that such rules shall not violate the law. The Notice Regarding

解釋文：地方行政機關為執行法律，得依其職權發布命令為必要之補充規定，惟不得與法律牴觸。臺北市政府於中華民國七十年七月二十三日發布之臺北市獎勵投資興建零售市場須知，對於申請投資興建市場者，訂有須「持

* Translated by Alex C. Y. Tsai, Esq., of CHIEN YEH LAW OFFICES.

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Rewards for Investment in the Establishment of Retail Markets in Taipei City, as promulgated by the Taipei Municipality on July 23, 1981, shall not be applicable since it stipulates that those applying for investment in establishing market places must be "private parties or groups holding all of the rights of use to the private land as and for the market use", an addition of restriction not present under Article 53 of the Urban Planning Act and thus violating civil rights as protected by the Constitution. Furthermore, the application for the establishment of public facilities during the enforcement period of the Act of Encouragement of Investment shall conform to Article 3 of said Act.

有市場用地內全部私有土地使用權之私人或團體」之條件，係增加都市計畫法第五十三條所無之限制，有違憲法保障人民權利之意旨，應不予適用。至在獎勵投資條例施行期間申請興建公共設施，應符合該條例第三條之規定，乃屬當然。

REASONING: In order to enforce the law, the local administrative agencies may, in their official capacity, issue orders as necessary to supplement the rules, provided however, that such rules shall not violate the law. To enable private parties or groups to use publicly owned land or to acquire rights to land reserved for public use and owned by other people through intervention of gov-

解釋理由書：地方行政機關為執行法律，得依其職權發布命令為必要之補充規定，惟不得與法律牴觸。國家為使有投資意願之私人或團體得使用公有土地或藉政府公權力之介入，取得屬於公共設施保留地之他人土地使用權，加速公共設施之興建，改善都市發展之狀況，於都市計畫法第五十三條特為規定：「獲准投資辦理都市計畫事業之私人或團體，其所需用之公共設施用地，

ernmental power, and thus accelerate the establishment of public facilities to improve urban development, Article 53 of the Urban Planning Act specially provides that "if the land (reserved for public facilities) needed by private parties or groups that are approved for investment in urban planning ventures is publicly owned, an application may be filed to lease said publicly owned land from the authority in charge; if the land is privately owned and an agreement to purchase could not be reached, said purchase price shall be readily prepared, and an application requesting the municipality or county government of that jurisdiction to purchase said land on their behalf shall be filed." There is no prerequisite that applicants have to hold the rights of use to the private land within the public-use land. Article 58-1, Paragraph 1, of the Act of Encouragement of Investment (abrogated on December 31, 1990) provides that with regard to applicants for investment in establishing public facilities: "For investment in developing as yet undeveloped land reserved for public use pursuant to this Act, the proprietor of said land may enjoy priority. However,

屬於公有者，得申請該公地之管理機關租用；屬於私有而無法協議收購者，應備妥價款，申請該管直轄市、縣（市）（局）政府代為收買之），並未以申請投資者應持有公共設施用地全部私有土地使用權為提出申請之條件。獎勵投資條例（已於七十九年十二月三十一日廢止），對於申請投資興建公共設施者，於該條例第五十八條之一第一項規定：「依本條例投資興闢尚未開發之公共設施用地，土地所有權人得優先投資。但經該管地方政府書面通知其投資，滿二個月不為答復或自願放棄者，其他公共設施興闢業得逕行洽購；洽購不成時，得申請該管地方政府調處；調處不成時，得申請該管地方政府按當年期公告現值，並參照毗鄰土地當年期非公共設施保留地地段之公告現值，提交該管地價評議委員會評定後，由申請之公共設施興闢業備妥價款及投資計畫，申請該管地方政府代為照價收買，其收買程序準用平均地權條例之規定」，亦係本於同一意旨。臺北市政府於七十年七月二十三日發布之臺北市獎勵投資興建零售市場須知第二項.款蘭目以「持有市場用地內全部私有土地使用權之私人或團體」為申請投資之條件，增加法律所無之限制，與法律要求各級政府應盡力協

in the event of no response or voluntary relinquishment by said land proprietor upon two months following written notice of the investment opportunity by the local government, other 'public facility development businesses' may negotiate such purchase. If such negotiation should fail, one may apply for the local government to mediate. If such mediation fails, one may apply for the local government to submit the case to the local Land Value Determination Committee for evaluation. When submitting to the said Committee, the local government shall also include the said land's published value, taking into consideration the same-year published value of adjacent land not reserved for public use. After submission to the Land Value Determination Committee, the undertaking making the application shall prepare the purchase price and investment plan, and apply to the local government to make the purchase at said price. Under the same principle, the Equalization of Land Rights Act shall apply to the purchase procedures." As promulgated by the Taipei Municipality on July 23, 1981, Paragraph 2, Subparagraph 1(1) of the

助私人投資興建公共設施，改善都市發展之目的不符，有違憲法保障人民權利之意旨，應不予適用。至依獎勵投資條例第三條規定所獎勵之公共設施興闢業，以從事生產事業之股份有限公司為限，在該條例施行期間申請興建市場，應受該項規定限制，乃屬當然。

Notice Regarding Rewards for Investment in the Establishment of Retail Markets in Taipei City stipulates that applicants for investment shall be "private parties or groups holding all of the rights of use to the private land as and for the market use", which adds a restriction not present in the Act and is inconsistent with the objective of said Act, which is to require all levels of government to assist the people in public facility investment and improve urban development. Therefore, such provision violates the constitutional principal of protecting the rights of the people, and thus shall not be applicable. With regard to the application for the establishment of public facilities during the enforcement period pursuant to Article 3 of the Act of Encouragement of Investment, the applicant shall be a company limited by shares engaging in productive business and shall surely be restricted thereby accordingly.

J. Y. Interpretation No.364（September 23, 1994）*

ISSUE: Is the right of access to the media a kind of freedom of speech protected by Article 11 of the Constitution?

RELEVANT LAWS:

Article 11 of the Constitution（憲法第十一條）.

KEYWORDS:

the right of access to the media（接近使用傳播媒體之權利）, freedom of speech（言論自由）, mass media（大眾傳播）. **

HOLDING: The protection of the freedom of speech described under Article 11 of the Constitution includes the expression of opinion via radio or television broadcast media. To protect this freedom, the state must fairly and reasonably distribute the use of radio wave frequencies and bandwidths. The laws must be enacted in such a way as to respect equal rights to media access provided that the freedom to edit is taken into account.

解釋文：以廣播及電視方式表達意見，屬於憲法第十一條所保障言論自由之範圍。為保障此項自由，國家應對電波頻率之使用為公平合理之分配，對於人民平等「接近使用傳播媒體」之權利，亦應在兼顧傳播媒體編輯自由原則下，予以尊重，並均應以法律定之。

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* Translated by Professor Tsung-Fu Chen.

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REASONING: Freedom of speech is the very foundation of a constitutional democracy. Radio and television broadcasts are important media through which people may state their ideas and commentary, thereby allowing public opinion to be expressed. This results in the reinforcement of democracy, the advancement of knowledge, and the promotion of cultural, moral and economic development. As such, the freedom of speech through radio and television is protected under Article 11 of the Constitution. However, because the messages disseminated via radio waves are boundless, radio and television engender a great and deep impact on society. The enjoyment of this freedom of information dissemination carries with it, under the principle of self-regulation, certain social obligations so as to avoid the abuse of these rights. The state is entitled to enact laws to restrict the freedom of the media should they demonstrate immorality, disturb the public peace, endanger the state, or infringe upon the rights of others.

解釋理由書：言論自由為民主憲政之基礎。廣播電視係人民表達思想與言論之重要媒體，可藉以反映公意強化民主，啟迪新知，促進文化、道德、經濟等各方面之發展，其以廣播及電視方式表達言論之自由，為憲法第十一條所保障之範圍。惟廣播電視無遠弗屆，對於社會具有廣大而深遠之影響。故享有傳播之自由者，應基於自律觀念善盡其社會責任，不得有濫用自由情事。其有藉傳播媒體妨害善良風俗、破壞社會安寧、危害國家利益或侵害他人權利等情形者，國家自得依法予以限制。

Radio wave frequencies are a limited

廣播電視之電波頻率為有限性之

public resource. In order to avoid monopolies, the state must enact laws that govern their distribution. Under such laws, the responsible authority is empowered to work out a fair and reasonable system concerning the lifting of the ban on radio wave frequencies. This system will serve to ensure the balanced development of radio and television and increase the availability of media for the average person.

公共資源，為免被壟斷與獨佔，國家應制定法律，使主管機關對於開放電波頻率之規劃與分配，能依公平合理之原則審慎決定，藉此謀求廣播電視之均衡發展，民眾亦得有更多利用媒體之機會。

In theory, the “right of access to the media” indicates the right to demand the mass media station owner publicly to provide a printed broadcast time schedule. This will serve to promote the truthfulness and fairness of media reports and commentary by enabling the public their rightful opportunity to express their opinions. That is to say, when an individual’s right is infringed upon due to wrongful media reports or commentary, he or she is entitled to offer a response or request the media to revise their reports or commentary. An example of the means by which radio and television media are able to improve the quality of democratic politics is by

至學理上所謂「接近使用傳播媒體」之權利（the right of access to the media），乃指一般民眾得依一定條件，要求傳播媒體提供版面或時間，許其行使表達意見之權利而言，以促進媒體報導或評論之確實、公正。例如媒體之報導或評論有錯誤而侵害他人之權利者，受害人即可要求媒體允許其更正或答辯，以資補救。又如廣播電視舉辦公職候選人之政見辯論，於民主政治品質之提昇，有所裨益。

way of holding impartial political debates during election campaigns.

Nonetheless, granting public access to the media in effect places limitations on media station owners in terms of editing and selection of information. It may serve to deprive media station owners of their right to free editing should they be required to accept unconditionally any individual's demands to express his or her objections through broadcast media. As a result of losing their freedom to edit, media station owners will be subject to excessive compromise and hesitate to report the full truth. Accordingly, the function of the media to report in a true and fair manner will be undermined. Therefore, both the public right to media access and the media's freedom of editing must be simultaneously considered. The law must set conditions on the public's access to the media in order to implement the equal integrity of the public right of access and the media's freedom of editing.

惟允許民眾「接近使用傳播媒體」，就媒體本身言，係對其取材及編輯之限制。如無條件強制傳播媒體接受民眾表達其反對意見之要求，無異剝奪媒體之編輯自由，而造成傳播媒體在報導上瞻前顧後，畏縮妥協之結果，反足影響其確實、公正報導與評論之功能。是故民眾「接近使用傳播媒體」應在兼顧媒體編輯自由之原則下，予以尊重。如何設定上述「接近使用傳播媒體」之條件，自亦應於法律內為明確之規定，期臻平等。

In conclusion, the freedom of expression through radio or television media

綜上所述，以廣播及電視方式表達意見，屬於憲法第十一條所保障言論

is included under the freedom of speech of Article 11 of the Constitution. To protect this freedom, the state must distribute the use of radio wave frequencies in a fair and reasonable manner. The laws must be enacted with a balanced regard for the public's equal right to media access and the media's right to edit freely.

自由之範圍。為保障此項自由，國家應對電波頻率之使用為公平合理之分配，對於人民平等「接近使用傳播媒體」之權利，亦應在兼顧傳播媒體編輯自由原則下，予以尊重，並均應以法律定之。

J. Y. Interpretation No.365（September 23, 1994）*

ISSUE: Article 1089 of the Civil Code provides that in case of inter-parental disagreement in exercising parental rights over a minor, the father shall have the right of final decision. Is the provision of said Article contrary to the Constitution?

RELEVANT LAWS:

Article 7 of the Constitution（憲法第七條）; Article 9, Paragraph 5, to the Amendment（憲法增修條文第九條第五項）; Article 1089 of the Civil Code（民法第一千零八十九條）.

KEYWORDS:

family law（親屬法）, parental rights（親權）, gender equality（男女平等）, gender discrimination（性別歧視）. **

HOLDING: Article 1089 of the Civil Code, which stipulates that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is incompatible with Article 7 of the Constitution, which proclaims that both sexes are equal under the law, as does Ar-

解釋文：民法第一千零八十九條，關於父母對於未成年子女權利之行使意思不一致時，由父行使之規定部分，與憲法第七條人民無分男女在法律上一律平等，及憲法增修條文第九條第五項消除性別歧視之意旨不符，應予檢討修正，並應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

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* Translated by Mr. Cing-Kae Chiao.

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ticle 9, Paragraph 5, to the Amendment ineliminating sexual discrimination. This Article should be examined and amended. This Article shall be void within two years from the day of this Interpretation.

REASONING: Article 7 of the Constitution states: "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 9, Paragraph 5, to the Amendment provides: "The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality." The union of man and woman through marriage, and the children created from that union are subject to the above constitutional obligations. In an exceptional situation, where discrimination based on sex is to be allowed by the Constitution, the exceptional situations must be grounded on biological differences or the differences in societal functions as the consequence of the biological differences in order for the exception to be held valid. Article 1089 of the Civil Code stipulates that "parental

解釋理由書：「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」「國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等」，憲法第七條及憲法增修條文第九條第五項，分別定有明文。由一男一女成立之婚姻關係，以及因婚姻而產生父母子女共同生活之家庭，亦有上述憲法規定之適用。因性別而為之差別規定僅於特殊例外之情形，方為憲法之所許，而此種特殊例外之情形，必須基於男女生理上之差異或因此差異所生之社會生活功能角色上之不同，始足相當。民法第一千零八十九條：「對於未成年子女之權利義務，除法律另有規定外，由父母共同行使或負擔之。父母對於權利之行使意思不一致時，由父行使之。父母之一方不能行使權利時，由他方行使之。父母不能共同負擔義務時，由有能力者負擔之」之規定，制定於憲法頒行前中華民國十九年，有其傳統文化習

rights and duties concerning minors, unless specified by other statutes, shall be borne by both parents. Should there be disagreement in the exercise of parental rights and duties, the father shall be accorded the right of final decision. In cases where one of the parents becomes incapable of exercising these rights, the spouse shall assume the duties. Should it be the case that both parents are incapable of exercising parental rights, the next capable person shall assume those duties." This particular Article was enacted during the nineteenth year of the Republic, the product of cultural traditions and social mores of a bygone era. With widespread education, and equal access to education granted to both sexes, favorable changes in employment conditions, and women having greater career opportunities, conditions are virtually indistinguishable for both men and women; this Article stipulates that in the event of disagreement, the father shall have the final say; the recommended action should be a compromise between the two parents in the interest of preserving gender equality in exercising parental rights, or else, in the event of

俗及當時社會環境之原因。惟因教育普及，男女接受教育之機會已趨均等，就業情況改變，婦女從事各種行業之機會，與男性幾無軒輊，前述民法關於父母意思不一致時，由父行使之規定，其適用之結果，若父母雙方能互相忍讓，固無礙於父母之平等行使親權，否則，形成爭執時，未能兼顧母之立場，而授予父最後決定權，自與男女平等原則相違，亦與當前婦女於家庭生活中實際享有之地位並不相稱。

such a disagreement, the position of the mother will be subordinated to that of the father, which constitutes a gross violation of gender equality, and creates a glaring discrepancy with the actual status of women in today's family.

Based on the above, Article 1089 of the Civil Code, which stipulates that in situations with regard to parental disagreement in exercising parental rights over that of a minor, the father shall have the right of final decision, is therefore incompatible with Article 7 of the Constitution, which states that both sexes are equal under the law, and also with Article 9, Paragraph 5, to the Amendment which prohibits sexual discrimination. This Article should be amended and shall be void within two years from the day of this Interpretation. This problem should be resolved based on the premises of the principle of gender equality and the best interest of minors; in the event that such a disagreement arises, the nearest relative or a conference of relatives, or the family court decision shall have the right of final decision, unless there are extraordinary

綜上所述，民法第一千零八十九條關於父母對於未成年子女權利之行使意思不一致時，由父行使之規定部分，與憲法第七條人民無分男女在法律上一律平等及憲法增修條文第九條第五項消除性別歧視之意旨不符，應予檢討修正，並應自本解釋公布之日起，至遲於屆滿二年時，失其效力。就此問題，應基於兩性平等原則及兼顧未成年子女之最佳利益，規定其解決途徑，諸如父母協調不成時，將最後決定權委諸最近尊親屬或親屬會議或由家事法庭裁判，而遇有急迫情況時，亦宜考慮與正常情形不同之安排。又立法院於本年七月二十六日致本院（八三）臺院議字第二一六二號函係對立法委員未來是否提案修改有違憲疑義之民法第一千零八十九條，預先徵詢本院意見，核與司法院大法官審理案件法第五條第一項第一款所定要件，未盡相符，惟其聲請解釋之法律條文與本件相同，不須另為處理，均併此

circumstances in which steps other than the normal course of action should be considered. Finally, as for the Legislative Yuan's submission of an official letter titled Tai-Yuan-Yi No. 2162 to this Yuan on July 26th of this year (1994), in which the former Yuan sought to obtain this Yuan's opinion on whether Members of that Yuan are qualified to propose future amendments to the unconstitutional Article 1089 of the Civil Code, the request made is not in conformation with Article 4, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act. However, since the Article that the former Yuan is seeking to have interpreted is the same one that this Yuan has just rendered an opinion on in the foregoing Interpretation, it is therefore unnecessary to make a further interpretation. This situation is herein stated concurrently.

說明。

J. Y. Interpretation No.366（September 30, 1994）*

ISSUE: Does combining punishment of several offenses, thus precluding application of Article 41 of the Criminal Code, which permits punishment of not more than six months of detention to be commuted to a fine, conflict with the Constitution?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Articles 41, 50 and 51 of the Criminal Code（刑法第四十一條、第五十條、第五十一條）.

KEYWORDS:

imprisonment（有期徒刑）, execution（執行刑）, converted into fines（易科罰金）, people's freedoms and rights（人民之自由權利）, monetary fine（罰金）. **

HOLDING: Where prior to judicial decisions being finalized, if several offences have resulted in sentences to imprisonment of not more than six months each, then according to Article 41 of the Criminal Code, those sentences may each be converted into a fine. According to Article 51 of the same Code however,

解釋文：裁判確定前犯數罪，分別宣告之有期徒刑均未逾六個月，依刑法第四十一條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，與憲法第二十三條規定未盡相符，上開刑法規定應檢討修正。對於前

* Translated by John C. Chen, Attorney at Law.

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those individual sentences for the offences prior to the above conviction being finalized shall be combined for the purpose of execution. Where the combined sentence to be executed exceeds six months in duration, then such sentence cannot be commuted into a fine. This would create unnecessary restrictions on the people's freedoms and rights, and therefore does not conform to the provisions of Article 23 of the Constitution. The above provisions of the Criminal Code should therefore be reviewed and revised accordingly. With regard to the abovementioned situation where several sentences of imprisonment combined for the purpose of execution exceed six months in duration, the portion of Article 41 of the Criminal Code concerning the restriction that the conversion of terms of imprisonment into fines be limited to imprisonment of less than six months only, shall become void within one year from the date of this Interpretation.

述因併合處罰所定執行刑逾六個月之情形，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，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

REASONING: Due to reasons of policy considerations in the Criminal Code, Article 50 of that Code provides for

解釋理由書：刑法第五十條基於刑事政策之理由，就裁判確定前犯數罪者，設併合處罰之規定，並於其第五

the combination of several sentences for multiple offences, prior to the carrying out of the sentences for these offences being finalized. In addition, Article 51 of the same Code states that where several sentences are announced separately, a single sentence for the purpose of execution shall be imposed. If the individual sentences are imprisonment, then the combined sentence for the purpose of execution shall be greater in duration than the longest of duration of each of the individual sentences, and less than the sum of the durations of all of the individual sentences. The aim of this provision, thus, is clearly to avoid placing an offender at a disadvantage after the combination of the individual sentences. Where the maximum basic sentences prescribed for the various offences do not exceed three years of imprisonment each, and the actual sentences imposed for each offence do not exceed six months of imprisonment, and the execution of the imposed sentences is manifestly difficult due to physical, educational, occupational or family reasons, then according to Article 41 of the Criminal Code, those sentences may each be

十一條明定，分別宣告其罪之刑，而另定其應執行者。其分別宣告之各刑均為有期徒刑時，則於各刑中之最長期以上，各刑合併之刑期以下定其刑期，足見原無使受刑之宣告者，處於更不利之地位之意。如所犯數罪，其最重本刑均為三年以下有期徒刑之刑之罪，而分別宣告之有期徒刑亦均未逾六個月，因身體、教育、職業或家庭之關係，執行顯有困難者，依同法第四十一條規定，本均得易科罰金，而有以罰金代替自由刑之機會。惟由於併合處罰之結果，如就各該宣告刑所定之執行刑逾六個月者，不得易科罰金，致受該項刑之宣告者，原有得易科罰金之機會，得而復失，非受自由刑之執行不可，乃屬對於人民之自由權利所為之不必要限制，與憲法第二十三條之意旨，未盡相符。上開刑法規定，應連同相關問題，如數宣告刑中之一部已執行完畢，如何抵算等，一併檢討修正之。對於前述因併合處罰所定執行刑逾六個月之情形，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，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

commuted into a fine. There thus exists an opportunity to commute imprisonment sentences restricting one's freedom into monetary fines. In the case of combining sentences, however, the various imprisonments as separately announced might be combined to produce a resulting sentence that exceeds six months in duration. The consequence thereof is that the combined sentence cannot be converted into a fine. The offender, who may have been able to convert his/her several sentences of imprisonment into fines prior to the combining of the sentences, has now lost such an opportunity and is forced to accept imprisonment restricting his/her freedom. This clearly creates unnecessary restrictions on people's freedoms and rights, and does not thus conform to the essence of Article 23 of the Constitution. The above mentioned provisions of the Criminal Code, as well as other related problems such as the question of how one already completed sentence, out of several sentences, is to be deducted from the duration of the combined sentence, shall be reviewed and revised accordingly. With regard to the abovementioned situation

where several sentences of imprisonment combined for the purpose of execution exceed six months in duration, the portion of Article 41 of the Criminal Code concerning the restriction that the conversion of terms of imprisonment into fines be limited to imprisonment of less than six months only, shall become void within one year from the date of this Interpretation.

Justice Shau-Hsien Chai filed dissenting opinion.

本號解釋翟大法官紹先提出不同意見書。

J. Y. Interpretation No.367（November 11, 1994）*

ISSUE: Where the taxpaying body required by the Business Tax Act to declare and pay business tax is altered by the Enforcement Rules of the Business Tax Act and the Ministry of Finance Directives for Levying Business Tax, are such Rules and Guidelines constitutional?

RELEVANT LAWS:

Articles 19 and 23 of the Constitution（憲法第十九條、第二十三條）; Article 2, Subparagraphs 1 and 2, Article 35 of the Business Tax Act（營業稅法第二條第一款、第二款、第三十五條）; Article 18, Paragraph 1 of the Act Governing the Allocation of Government Revenues and Expenditures（財政收支劃分法第十八條第一項）; Article 24, paragraph 3 of the Tax Levy Act（稅捐稽徵法第二十四條第三項）; Article 47 of the Enforcement Rules of the Business Tax Act（營業稅法施行細則第四十七條）; Article 25-1, Paragraph 3 of the Customs Act（關稅法第二十五條之一第三項）; Article 16, Paragraph 1, Subparagraph 3 of the Civil Education Act（國民教育法第十六條第一項第三款）; Clause 2-1 of the Directives for Levying Business Tax on Goods Auctioned or Sold by Courts or Customs or Other Authorities（法院、海關及其他機關拍賣或變賣貨物課徵營業稅作業要點第二項之一）;

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* Translated by Raymond T. Chu.

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Regulation Governing the Restriction on the Persons or Representatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit（限制欠稅人及欠稅營利事業負責人出境實施辦法）; J. Y. Interpretations Nos. 210, 217, 268, 274, 313, 345, 346 and 360（司法院釋字第二一〇號、第二一七號、第二六八號、第二七四號、第三一三號、第三四五號、第三四六號、第三六〇號解釋）.

KEYWORDS:

auction sale（拍賣）, sale（變賣）, confiscate（沒收）, forfeit（沒入）, winning bidder（拍定人）, consignees（收貨人）, holders（持有人）, body subject to tax declaration and payment（申報繳納之主體）, principle of taxation by law（租稅法律主義）, supplementary provision（補充規定）, value-added tax（加值稅）.**

HOLDING: The Business Tax Act provides in Article 2, Subparagraphs 1 and 2, that all business operators who sell goods or services and all consignees or holders of imported goods are business tax payers with the duty to declare and pay business tax under Article 35 thereof. Article 47 of the Enforcement Rules of the Business Tax Act, which requires that, in the case of an auction sale of confiscated, forfeited or mortgaged goods held

解釋文：營業稅法第二條第一款、第二款規定，銷售貨物或勞務之營業人、進口貨物之收貨人或持有人為營業稅之納稅義務人，依同法第三十五條之規定，負申報繳納之義務。同法施行細則第四十七條關於海關、法院及其他機關拍賣沒收、沒入或抵押之貨物時，由拍定人申報繳納營業稅之規定，暨財政部發布之「法院、海關及其他機關拍賣或變賣貨物課徵營業稅作業要點」第二項有關不動產之拍賣、變賣由拍定或

by the Customs House or a court, the purchaser winning the bid shall declare and pay business tax therefore, and Clause 2 of the Directives for Levying Business Tax on Goods Auctioned or Sold by Courts or Customs or Other Authorities, which requires the purchaser winning the auction sale or the deal to pay business tax for the real property put up for auction or sale, are against the statute cited above to the extent that they alter the body subject to declaration and payment of the tax, and are contrary to the intent of Articles 19 and 23 of the Constitution in protecting the right of the people. From the date of this interpretation, said Articles shall become void within one year.

成交之買受人繳納營業稅之規定，違反上開法律，變更申報繳納之主體，有違憲法第十九條及第二十三條保障人民權利之意旨，應自本解釋公布之日起至遲於屆滿一年時失其效力。

REASONING: The provision of Article 19 of the Constitution that the people shall have the duty to pay tax in accordance with law means simply that the people shall have the duty to pay tax or the privileges to enjoy the benefits of tax exemption or reduction in pursuance of the prescriptions of law with respect to such matters as taxpaying bodies, tax denominations, tax rates, methods of 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，係指人民僅依法律所定之納稅主體、稅目、稅率、納稅方法及租稅減免等項目而負繳納義務或享受減免繳納之優惠，舉凡應以法律明定之租稅項目，自不得以命令作不同之規定，否則即屬違反租稅法律主義，業經本院釋字第二一七號及第二一〇號著有解釋。

payment, and tax incentives. Accordingly, no provision in administrative ordinances with respect to tax items may depart from the express prescription of law, or it will be in conflict with the principle of taxation by law. This has been held by this Yuan in our Interpretations Nos. 217 and 210.

Article 23 of the Constitution provides in express words that restraints on the freedoms and rights of the people may be imposed only by prescription of law and shall not go beyond the extent of necessity. As the law can not possibly deal with all details, the legislature may of course authorize administrative agencies to issue ordinances for the purpose of making supplementary provisions thereto. The Constitution also permits the authorization by law with respect to restraints to be imposed on the freedoms and rights of the people if such authorization is clear and specific in its purpose, scope and substance. This is the ratio decidenti based on which we have held in our Interpretation No. 345 that the Regulation Governing the Restriction on the Persons or Represen-

有關人民自由權利之限制應以法律定之且不得逾越必要之程度，憲法第二十三條定有明文。但法律之內容不能鉅細靡遺，立法機關自得授權行政機關發布命令為補充規定。如法律之授權涉及限制人民自由權利者，其授權之目的、範圍及內容符合具體明確之條件時，亦為憲法之所許。本院釋字第三四五號解釋認稅捐稽徵法第二十四條第三項及關稅法第二十五條之一第三項授權訂立之限制欠稅人及欠稅營利事業負責人出境實施辦法與憲法尚無牴觸，釋字第三四六號解釋認國民教育法第十六條第一項第三款及財政收支劃分法第十八條第一項，關於徵收教育捐之授權規定係屬合憲，均係本此意旨。若法律僅概括授權行政機關訂定施行細則者，該管行政機關於符合立法意旨且未逾越母法規定之限度內，自亦得就執行法律有關

tatives of Profit-Making-Enterprise Defaulting on Tax Payments to Apply for Exit Permit, established by authority granted under the Tax Levy Act, Article 24, paragraph 3, and the Customs Act, Article 25-1, Paragraph 3, are not in conflict with the Constitution, and in our Interpretation No. 346 that the provisions in respect of the levying of educational dues as authorized by the Civil Education Act, Article 16, Paragraph 1, Subparagraph 3, and of the Act Governing the Allocation of Government Revenues and Expenditures, Article 18, Paragraph 1, are constitutional. In general, where the law authorizes the establishment by administrative agencies of enforcement rules, the competent agency may certainly set out in such rules details and technical matters in relation to the enforcement of the law to the extent that such rules are consistent with the legislative purposes of the law and are within the limits defined by the enabling statute, provided, however, that the substance of such rules shall neither conflict with the enabling statute nor add any restriction on the freedoms or rights of the people that does not exist in the law. This principle must

之細節性、技術性之事項以施行細則定之，惟其內容不能牴觸母法或對人民之自由權利增加法律所無之限制，行政機關在施行細則之外，為執行法律依職權發布之命令，尤應遵守上述原則。本院釋字第二六八號、第二七四號、第三一三號及第三六〇號解釋分別闡釋甚明。

especially be adhered to by ordinances issued ex officio by administrative agencies to give effect to the law other than the enforcement rules thereof. We have made this principle exceedingly clear in our previous Interpretations Nos. 268, 274, 313 and 360.

The Business Tax Act, as amended and promulgated on November 15, 1985, provides in Article 2, Subparagraphs 1 and 2, that all business operators who sell goods or services and all consignees or holders of imported goods are payers of business tax, with the duty to declare and pay business tax under Article 35 thereof. However, the Enforcement Rules of the Business Tax Act promulgated on January 29, 1986, provide in Article 47: "Goods forfeited and sold through auction sale by the Customs House shall be deemed to have been imported by the purchaser winning the bid and shall be dealt with in accordance with Article 41 of the Business Tax Act. Where the forfeited, confiscated or mortgaged goods sold through auction sale by the court and other agencies were owned by a business operator, the pur-

民國七十四年十一月十五日修正公布之營業稅法第二條第一款、第二款規定，銷售貨物或勞務之營業人、進口貨物之收貨人或持有人為營業稅之納稅義務人，依同法第三十五條之規定，負申報繳納之義務。而七十五年一月二十九日發布之營業稅法施行細則第四十七條則規定：「海關拍賣沒入之貨物，視為由拍定人進口，依本法第四十一條之規定辦理。法院及其他機關拍賣沒收、沒入或抵押之貨物如屬營業人所有者，應於拍定時，由拍定人持同拍賣貨物清單，向拍賣機關所在地主管稽徵機關申報繳納營業稅或取具免稅證明。法院及其他機關點交拍定貨物或換發移轉證明時，應驗憑繳稅證明或免稅證明。」顯係將法律明定之申報繳納主體營業人變更為拍定人（即買受人）；財政部於七十五年四月一日以臺財稅字第七五二二二八四號函發布之「法院、海關及其他

chaser winning the bid shall, at the time of close of the sale, file with the competent taxing authority at the locality of the court or the agency holding such auction sale a declaration of business tax and pay the same or obtain therefrom a certificate of tax exemption, as the case may be, by presenting a list of the goods sold at auction. When delivering the goods sold by auction or issuing an instrument of transfer, the court or agency shall inspect the certificate of tax payment or exemption, as the case may require." The provision clearly changes the taxpaying body specifically prescribed by law for the purpose of business tax declaration and payment from the business operator to the person winning the bid at the auction sale (i.e., purchaser). Furthermore, Clause 2(1) of the Directives for Levying Business Tax on Goods Auctioned or Sold by Courts or Customs or Other Authorities, announced by the Ministry of Finance directive Tai-Tsai-Shui-Tze No. 7522284 (April 1, 1986), which requires the purchaser winning the auction sale or the deal to pay business tax for the real property put up for auction sale or sale, is inconsistent

機關拍賣或變賣貨物課徵營業稅作業要點」第二項之(一)有關不動產之拍賣、變賣由拍定或成交之買受人繳納營業稅之手續規定，亦與營業稅法之規定不符，雖因營業稅係採加值稅之型態，營業稅額於售價之外另加而由買受人負擔，上開細則及要點之規定，並未增加額外稅負，但究屬課予買受人申報繳納之義務，均已牴觸營業稅法，有違憲法第十九條及第二十三條保障人民權利之意旨，應自本解釋公布之日起至遲於屆滿一年時失其效力。至主管機關如認為法院及其他機關拍賣或變賣不動產與普通營業人銷售之情形不同，為作業上之方便計，其申報繳納營業稅之義務人有另行規定之必要，亦應逕以法律定之，併此指明。

with the Business Tax Act. Although the provisions of the enforcement rules and guidelines cited above do not increase any tax burden because the business tax is a type of value-added tax, the amount of which is added to the selling price and paid by the purchaser, they do impose on the purchaser the duty to declare and pay the tax, and are thus in conflict with the Business Tax Act and against the purpose of Articles 19 and 23 of the Constitution in the protection of the people's right. From the date of this Interpretation, said Articles shall become void within one year. Incidentally, if the competent authority considers it necessary to regulate separately with respect to the person liable for the declaration and payment of the business tax to facilitate its operation on account of the distinct nature of the auction or sale of real property to be held by the court or other agencies from other sales made by ordinary business operators, it must be dealt with by prescription of law.

J. Y. Interpretation No.368（December 9, 1994）*

ISSUE: Where the legal opinion given in a decision made or an action taken by an administrative agency is held by an Administrative Court judgment to have erred in law, is it legal and constitutional for its supervisory agency to sustain such decision upon re-investigation of the facts and evidence carried out by the original agency?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 4 of the Administrative Proceedings Act（行政訴訟法第四條）; Supreme Administrative Court Precedent P.T. 35 (1971)（行政法院六十年判字第三十五號判例）.

KEYWORDS:

final disposition（終局解決）, jural relations（權利義務關係）, nullify/set aside the decision（撤銷原決定）, binding force/effect（拘束力）.**

HOLDING: Article 4 of the Administrative Proceedings Act providing that: "a judgment of the Administrative Court, insofar as the matter adjudged is concerned, shall have a binding effect upon all related government agencies," is

解釋文：行政訴訟法第四條「行政法院之判決，就其事件有拘束各關係機關之效力」，乃本於憲法保障人民得依法定程序，對其爭議之權利義務關係，請求法院予以終局解決之規定。

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* Translated by Raymond T. Chu.

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

a statute designed to guarantee the people the constitutional right to demand through legal procedure final disposition by the court of their disputes over jural relations. Thus, where the judgment entered by the Administrative Court setting aside an administrative decision or action is one pointing out that the facts of the case are unclear and requiring the defendant government agency to take alternative action upon investigation into the facts and evidence, such agency must conduct an investigation into the facts and evidence either in pursuance of the substance of the judgment or ex officio. If, based upon the facts found in consequence of such further investigation, the previous action is deemed to be free of error in law, the opinions given in support of the previous action may be sustained. If, however, the judgment entered by the Supreme Administrative Court setting aside an administrative decision or action is one that points out an error in law in such administrative action, the judgment must be taken as binding upon its supervisory government agency. The Supreme Administrative Court Precedent P.T. 35 (1971), holding

故行政法院所為撤銷原決定及原處分之判決，如係指摘事件之事實尚欠明瞭，應由被告機關調查事證另為處分時，該機關即應依判決意旨或本於職權調查事證。倘依重為調查結果認定之事實，認前處分適用法規並無錯誤，雖得維持已撤銷之前處分見解；若行政法院所為撤銷原決定及原處分之判決，係指摘其適用法律之見解有違誤時，該管機關即應受行政法院判決之拘束。行政法院六十年判字第三十五號判例謂：「本院所為撤銷原決定及原處分之裁判，如於理由內指明由被告官署另為復查者，該官署自得本於職權調查事證，重為復查之決定，其重為復查之結果，縱與已撤銷之前決定持相同之見解，於法亦非有違」，其中與上述意旨不符之處，有違憲法第十六條保障人民訴訟權之意旨，應不予適用。

that "if it is specifically pointed out in the reasoning of our judgment to nullify an administrative decision or action and that the defendant government agency must review the case, such administrative agency may of course conduct an investigation ex officio into the facts and evidence and make a decision based upon its review, and the result of such investigation, even if of the same opinion as the decision previously nullified, is not against the law," is contrary to Article 16 of the Constitution in protecting the people's right to sue, to the extent that it is inconsistent with the essence of our opinion given above, and must therefore be rendered invalid.

REASONING: Article 16 of the Constitution providing that the people shall have the right to sue means that the people have the right to demand through legal procedure judicial remedy for final disposition of their disputes over jural relations. Thus, Article 4 of the Administrative Proceedings Act providing that: "a judgment of the Administrative Court, insofar as the matter adjudged is con-

解釋理由書：憲法第十六條規定人民有訴訟之權，係指人民有依法定程序，就其權利義務之爭議，請求法院救濟，以獲致終局解決與保障之權利。行政訴訟法第四條規定：「行政法院之判決，就其事件有拘束各關係機關之效力」，即為保障人民依行政訴訟程序請求救濟之權利得獲終局解決。是行政法院所為撤銷原決定及原處分之判決，原機關自有加以尊重之義務；原機關有須

cerned, shall have a binding effect upon all related government agencies," is a statute designed to guarantee the people the opportunity to obtain a final disposition of their right for which a remedy is sought pursuant to administrative proceedings. Accordingly, a judgment of the administrative court to nullify the decision made or the action taken by an administrative agency must be respected by the original agency, and if a new action is ordered to be taken by the original agency, it must be taken in accordance with the substance of the judgment in order to fully protect the plaintiff's constitutional right or interest in seeking remedy through litigation. The Supreme Administrative Court held in its Precedent P.T. 35 (1971) that "if it is specifically pointed out in the reasoning of our judgment to nullify an administrative decision or action and that the defendant government agency must review the case, such administrative agency may of course conduct an investigation ex officio into the facts and evidence and make a decision based on its review, and the result of such review, even if of the same opinion as the decision

重為處分者，亦應依據判決之內容為之，以貫徹憲法保障原告因訴訟而獲得救濟之權利或利益。行政法院六十年判字第三十五號判例謂：「本院所為撤銷原決定及原處分之裁判，如於理由內指明由被告機關另為復查者，該官署自得本於職權調查事證，重為復查之決定，其重為復查之結果，縱與已撤銷之前決定持相同之見解，於法亦非有違。」其中如係指摘事件之事實尚欠明瞭，應由被告機關調查事證後另為處分者，該機關依判決意旨或本於職權再調查事證，倘依調查結果重為認定之事實，認前處分適用法規並無錯誤，而維持已撤銷之前決定之見解者，於法固非有違；惟如係指摘原決定及處分之法律見解有違誤者，該管機關即應受行政法院判決所示法律見解之拘束，不得違背。上開判例與上述意旨不符之處，有違憲法保障人民訴訟權之意旨，應不予適用。

previously nullified, is not against the law." While it is not against law in the event where it is pointed out in such judgment that the facts of the case are not sufficiently clear and that the defendant administrative agency must take a new action upon investigation into the facts and evidence, and where, as a result of the re-investigation carried out ex office by the agency or in pursuance of the essence of the judgment, it is found by such agency that the previous action did not err in law and that the opinion of the previous decision nullified must be sustained, the supervisory agency must be bound by the legal opinion given in the administrative court judgment if it is pointed out in such judgment that the original administrative decision or action has erred in law. The Precedent quoted above is contrary to Article 16 of the Constitution in protecting the people's right to sue, to the extent that it is inconsistent with the essence of our opinion given above, and must therefore be rendered invalid.

Justice Geng Wu filed concurring opinion.

本號解釋吳大法官庚提出協同意見書。

J. Y. Interpretation No.369（December 23, 1994）*

ISSUE: Are the House Tax Act provisions with respect to the legal basis on which house tax may be collected, tax rates, the procedure authorizing local governments to determine the tax rates, and house tax exemption and reduction constitutional?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 1, 5, 6 and 15 of the House Tax Act（房屋稅條例第一條、第五條、第六條、第十五條）; Articles 5, 147, and 187 of the Land Act（土地法第五條、第一百四十七條、第一百八十七條）; House Dues Act（房捐條例）; J. Y. Interpretations Nos. 217, 315 and 367（司法院釋字第二一七號、第三一五號、第三六七號解釋）.

KEYWORDS:

legislative discretion（立法裁量）, right of equality（平等權）, house tax（房屋稅）, current value（現值）, constructional improvement（建築改良物）, land improvement（土地改良物）, house dues（房捐）, property tax（財產稅）, revenue tax（收益稅）, rental（租金）, general law（普通法）, special law（特別法）, agricultural improvement（農作改良物）. **

* Translated by Raymond T. Chu.

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

HOLDING: Article 19 of the Constitution providing that "the people shall have the duty to pay tax as prescribed by law" means that the people shall have the duty to pay tax or the privilege to enjoy the benefit of tax exemption or reduction in pursuance of the requirements of law. The substance of the law is, to a reasonable extent, a matter of legislative discretion. Thus, we have found nothing in Articles 1, 5, 6 and 15 of the House Tax Act that is in conflict with the Constitution. Furthermore, the house tax is assessed at a statutory rate of the current value of the house and is a type of property tax. While no distinction is made under Article 15, Paragraph 1, Subparagraph 9, of said Act between houses for owners' residences and other residences for the purpose of determining the amount of house tax exemption, it is nonetheless a matter within the power of legislative discretion and is not contrary to the purpose of the Constitution in safeguarding the right of equality and the property right of the people. However, the Land Act provides in Article 187 that "a constructional improvement used as part of the owner's

解釋文：憲法第十九條規定「人民有依法律納稅之義務」，係指人民有依法律所定要件負繳納稅捐之義務或享減免繳納之優惠而言。至法律所定之內容於合理範圍內，本屬立法裁量事項，是房屋稅條例第一條、第五條、第六條及第十五條之規定與憲法並無牴觸。又房屋稅係依房屋現值按法定稅率課徵，為財產稅之一種；同條例第十五條第一項第九款就房屋稅之免稅額雖未分別就自住房屋與其他住家用房屋而為不同之規定，仍屬立法機關裁量之範疇，與憲法保障人民平等權及財產權之本旨，亦無牴觸。惟土地法第一百八十七條規定：「建築改良物為自住房屋時，免予徵稅」，而房屋稅條例第一條則規定：「各直轄市及各縣（市）（局）未依土地法徵收土地改良物稅之地區，均依本條例之規定徵收房屋稅」，對自住房屋並無免予課徵房屋稅之規定，二者互有出入，適用時易滋誤解，應由相關主管機關檢討房屋租稅之徵收政策修正之。

residence shall be exempt from tax," whereas Article 1 of the House Tax Act provides: "House tax shall be levied under this Act in all areas where no land improvement tax is collected by the governments of a municipality under direct jurisdiction of the Executive Yuan or of another county (city or bureau)," whereby no exemption from house tax is allowed for a house for the owner's residence. The discrepancy between the two statutes is apt to cause misinterpretation in their application, and the competent authority must therefore review the policy in connection with the assessment of the house tax and make amendments thereto.

REASONING: Article 19 of the Constitution providing that "the people shall have the duty to pay tax as prescribed by law" means that the people shall have the duty to pay tax or the privilege to enjoy the benefit of tax exemption or reduction in pursuance of the requirements of law. That the substance of law is, to a reasonable extent, a matter of legislative discretion has been repeatedly made clear by this Yuan in our Interpretations

解釋理由書：憲法第十九條規定「人民有依法律納稅之義務」，係指人民有依法律所定要件負繳納稅捐之義務或享減免繳納之優惠而言。至法律所定之內容於合理範圍內，為立法裁量事項，前經本院釋字第二一七號、第三一五號及第三六七號解釋說明其意旨。房屋稅條例就納稅主體、稅目、稅率、納稅方法及納稅期間等項既分別定有明文，則其第一條關於徵收房屋稅之依據、第五條關於稅率、第六條關於授權

Nos. 217, 315 and 367. The taxpaying bodies, tax denominations, tax rates, tax paying methods, and tax payment period being expressly defined in the House Tax Act, the provisions of Article 1 thereof with respect to the legal basis on which house tax may be collected, Article 5 on tax rates, Article 5 with respect to the procedure to authorize local governments to determine the tax rates, and Article 15 with respect to house tax exemption and reduction are not in conflict with Article 19 of the Constitution. Furthermore, because all residences of a current value not over a certain amount are exempt from house tax under the House Tax Act, Article 15, Paragraph 1, Subparagraph 9, with no distinction between houses for the owners' residences and other residences, all leasehold residences of a current value not over a certain amount are allowed the same tax benefit. It must be pointed out, however, that the tax levied on houses is a type of property tax. Under the previous House Dues Act, houses were categorized into those for residence purposes and for business purposes, each of which was further classified into houses for personal use

地方政府規定稅率之程序，及第十五條關於減免房屋稅之規定，與憲法第十九條規定並未牴觸。又房屋稅條例第十五條第一項第九款規定住家房屋現值在一定金額以下者免徵房屋稅，雖未分別就自住房屋與其他住家用房屋而為不同之規定，致出租之住家用房屋現值在一定金額範圍內者亦同邀免徵房屋稅之優惠。第對房屋課稅係屬財產稅之一種，原房捐條例分房屋為住家用、營業用兩種，每種又分為自用、出租兩類，課徵房捐標準，對自用者依房屋價值計徵，對出租者依租金收益計徵，是房捐具財產稅兼收益稅之性質。現行房屋稅條例概按房屋現值計徵房屋稅，則不論住家用或營業用房屋，不再區分自用與出租兩類，各依同一稅率課稅；住家房屋並於同一現值金額範圍內免徵房屋稅，與憲法保障人民平等權及財產權之本旨，亦無牴觸。惟土地法與房屋稅條例就房屋租稅之徵收言，雖存有普通法與特別法之關係，其稅率之高低，固應依據房屋稅條例予以優先適用；然土地法第五條就「土地改良物」分為建築改良物及農作改良物二種，同法第一百八十七條復規定：「建築改良物為自住房屋時，免予徵稅」，而房屋稅條例第一條規定：「各直轄市及各縣（市局）未依土

and for lease, the former being subject to assessment of house dues based on the respective value of the house and the latter being subject to payment of dues based on the rental earned. The house dues were therefore of the nature of both property tax and revenue tax. Under the current House Tax Act, however, house tax is levied at the same rate based on the value of the house, irrespective of whether it is for residence or for business purpose and with no distinction between houses for personal use and for lease, and all residences of the same current value are exempt from house tax. Such statute is hence not in conflict with the purpose of the Constitution in guaranteeing the people the right of equality and their property right. While there exists a relationship of general law and special law between the Land Act and the House Tax Act insofar as the assessment of house tax is concerned, and the tax rate specified by the House Tax Act must prevail, there is a discrepancy between the Land Act, which classifies “land improvements” intoconstructional improvements and agricultural improvements under Article 5 and pro-

地法徵收土地改良物稅之地區，均依本條例之規定徵收房屋稅」，對自住房屋並無免予課徵房屋稅之規定，二者互有出入，適用時易滋誤解；且土地法第一百四十七條上段規定：「土地及其改良物，除依本法規定外，不得用任何名目徵收或附加稅款」，其與房屋稅條例亦不能謂無出入。類此土地法及房屋稅條例相關規定不一之情形，應檢討修正，俾資兼顧法律條文相互間之協調。

vides under Article 187 that "a constructional improvement used as the owner's residence shall be exempt from tax," and the House Tax Act, which provides under Article 1: "House tax shall be levied under this Act in all areas where no land improvement tax is collected by the government of a municipality under direct jurisdiction of the Executive Yuan or of another county (city or bureau)," whereby no exemption from house tax is allowed for a house used as the owner's residence. The discrepancy between the two statutes is apt to cause misinterpretation in application. Furthermore, the Land Act provision under the first sentence of Article 147 that "no tax or surtax in whatever denomination may be imposed on land or improvement thereon except as herein specified" can hardly be deemed to be in accord with the House Tax Act. The conflicts between the Land Act and the House Tax Act such as those we have pointed out above must be reviewed and revised to bring the texts of such statutes in harmony with each other.

J. Y. Interpretation No.370（January 6, 1995）*

ISSUE: Does the statute of limitations on a petition to invalidate an already registered trademark constitute deprivation of property right protection, thus violating Article 15 of the Constitution?

RELEVANT LAWS:

Article 15 of the Constitution（憲法第十五條）; Articles 25, Paragraph 2, Subparagraph 1, 37, Paragraph 1, Subparagraph 12, and 52, Paragraph 1, of the Trademark Act（商標法第二十五條第二項第一款、第三十七條第一項第十二款、第五十二條第一項）.

KEYWORDS:

likelihood of confusion（商品近似造成混淆）, statute of limitations（時效期間）, trademark（商標）.**

HOLDING: In accordance with Article 52, Paragraph 1, and Article 37, Paragraph 1, Subparagraph 12, of the Trademark Act, an interested party may request the competent authority in charge of trademark matters to conduct a review and invalidate a trademark registration, if a design is identical with or similar to an

解釋文：依商標法第五十二條第一項、第三十七條第一項第十二款規定，商標圖樣相同或近似於他人同一商品或類似商品之註冊商標者，利害關係人得申請商標主管機關評定其註冊為無效，係為維持市場商品交易秩序，保障商標專用權人之權益及避免消費大眾對於不同廠商之商品發生誤認致受損害而

* Translated and edited by Professor Andy Y. Sun.

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

other person's registered trademark. The purposes of this statute are to maintain the order of transactions, to protect the interests of the holder of the right to the exclusive use of trademark, and to avoid petitions for damages that might result from public consumers' confusion in identifying goods by different merchants. With regard to the time limit within which a petition for review and invalidation must be filed, by reference to the meaning and purpose of Article 52, Paragraph 3, and Article 25, Paragraph 2, Subparagraph 1, of the same Act, clearly the limitation that no petition may be filed ten years after the registration protects both the general public and private interests, and hence, does not contradict Article 15 of the Constitution for the protection of people's private property.

設。關於其申請評定期間，參諸同法第五十二條第三項及第二十五條第二項第一款規定之意旨，可知其須受註冊滿十年即不得申請之限制，已兼顧公益與私益之保障，與憲法第十五條保障人民財產權之規定並無牴觸。

REASONING: A trademark right is one type of property right that must be protected in accordance with Article 15 of the Constitution. Yet it can be limited by law for the sake and necessity of enhancing the public interest. An interested party may, in accordance with Arti-

解釋理由書：商標權為財產權之一種，依憲法第十五條規定，固應予保障，惟為增進公共利益之必要，自得以法律限制之。商標圖樣相同或近似於他人同一商品或類似商品之註冊商標者，利害關係人得依商標法第五十二條、第三十七條第一項第十二款規定，

cle 52, Paragraph 1, and Article 37, Paragraph 1, Subparagraph 12, of the Trademark Act, request the competent authority in charge of trademark matters to conduct a review and invalidate a trademark registration, if a design is identical with or similar to another person's registered trademark. This is to maintain the order of transactions, to protect the interests of the holder of the right to the exclusive use of trademark, and to avoid petitions for damages that might result from public consumers' confusion in identifying goods by different merchants. Note that Article 37, Paragraph 1, Subparagraph 12, involves the determination of facts regarding identical or similar trademarks and goods, and it is inevitable that certain registrations are erroneously permitted as a matter of fact. Thus, without any remedy, the public interest may be affected because either the rights and interests of the prior trademark registrants will be jeopardized or consumers may be confused. Therefore, Article 52 concerning review and invalidation is designed to redress these situations. However, for an erroneously registered mark that has been used for several years, the

申請商標主管機關評定其註冊為無效，係為維持市場商品交易秩序，保障商標專用權人之權益及避免消費大眾對於不同廠商之商品發生誤認致受損害而設。顧第三十七條第一項第十二款情形，因涉及商標相同或近似，及商品相同或類似之事實認定，其誤准註冊者，事實上在所難免。若無救濟措施，將損及先註冊之商標專用權人權益，或造成消費者混淆影響公益，故有商標法第五十二條評定註冊無效之規定。惟違反本款被誤准註冊之商標，於註冊後已使用多年，其因持續使用所建立之商譽，亦應予保護。基於對既有法律狀態之尊重及維持，此種誤准註冊之商標，已經過相當期間者，其註冊之瑕疵應視為已治癒，不得復申請評定之。關於此項期間，參諸同法第二十五條第二項第一款及第五十二條第三項規定之意旨為十年，已兼顧公益私益之保障，與憲法第十五條保障人民財產權之規定並無牴觸。至其除斥期間之長短，是否妥適，係屬立法裁量之範圍；又評定註冊之商標為近似而無效，涉及註冊之信賴利益，仍應依誠實及信用方法為之，併此說明。

good reputation established by the continuous use of the mark by the holder should also be protected. As a matter of respect for and maintenance of the status quo of a certain legal relationship, the mistake of allowing the erroneously registered trademark is deemed redressed after a certain period of time and is no longer subject to review and invalidation. Article 25, Paragraph 2, Subparagraph 1, and Article 52, Paragraph 3, of the same [Trademark] Act has set forth a ten-year period that protects both the public and private interests and does not contradict Article 15 of the Constitution. Whether such a statute of limitation is proper is within the Legislature's scope of discretion. Furthermore, it should also be pointed out that invalidating a registered trademark concerns the credibility of the registration itself and should be reviewed with honesty and equity.

Justice Young-Mou Lin filed dissenting opinion in part.

本號解釋林大法官永謀提出部分不同意見書。

J. Y. Interpretation No.371（January 20, 1995）*

ISSUE: Do Article 5, Paragraphs 2 and 3 of the Constitutional Interpretation Procedure Act authorizing only the Supreme Court and Administrative Court to have the right to petition the Grand Justices Council for the interpretation of statutes governing pending litigation violate Article 80 of the Constitution, which provides that a judge shall try cases in accordance only with law?

RELEVANT LAWS:

Articles 78, 79, Paragraph 2, 80, 171and 173 of the Constitution（憲法第七十八條、第七十九條第二項、第八十條、第一百七十一條及第一百七十三條）; Article 4, Paragraph 2, of the Amendments to the Constitution（憲法增修條文第四條第二項）; Articles 5, Paragraphs 2 and 3, 8 of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第五條第二項、第三項、第八條）.

KEYWORDS:

Grand Justices（大法官）, judge（法官）, constitution（憲法）, law（法律）, reasonable assurance（合理確信）, suspend the pending procedure（停止訴訟程序）, judicial review（司法審查）. **

* Translated by Jaw-Perng Wang.

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

HOLDING: The Constitution is the state's highest legal authority. Any statute that contradicts the Constitution shall be null and void. Whether a given statute contradicts the Constitution shall be interpreted by the Grand Justices of the Judicial Yuan. The above statement is obvious from Articles 171, 173 and 78, and Article 79, Paragraph 2, of the Constitution. In addition, Article 80 of the Constitution clearly provides that judges shall only try cases in accordance with law. In trying a case, a judge shall base his decision on statutes that have been promulgated and effective in accordance with the legal procedure. A judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since the Constitution's authority is higher than the statute's, judges have the obligation to obey the Constitution over any other statutes. Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality. In the abovementioned

解釋文：憲法為國家最高規範，法律牴觸憲法者無效，法律與憲法有無牴觸發生疑義而須予以解釋時，由司法院大法官掌理，此觀憲法第一百七十一條、第一百七十三條、第七十八條及第七十九條第二項規定甚明。又法官依據法律獨立審判，憲法第八十條定有明文，故依法公布施行之法律，法官應以其為審判之依據，不得認定法律為違憲而逕行拒絕適用。惟憲法之效力既高於法律，法官有優先遵守之義務，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者，自應許其先行聲請解釋憲法，以求解決。是遇有前述情形，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。司法院大法官審理案件法第五條第二項、第三項之規定，與上開意旨不符部分，應停止適用。

situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute, and petition to the Grand Justices of the Yuan to interpret its constitutionality. The provisions of Article 5, Paragraphs 2 and 3, of the Constitutional Interpretation Procedure Act which are inconsistent with the above decision shall no longer be applied.

REASONING: Based on the constitutional principle of separation of powers, modern countries with a written constitution and rule of law have set up a judicial review system. Those which do not have a special judicial tribunal for judicial review delegate this power to their ordinary courts through precedents, as the United States does, or through explicit constitutional provisions, as Japan does (Article 81 of the 1946 Constitution). In those countries which have special judicial tribunals for judicial review, the constitutionality of statutes is reviewed by

解釋理由書：採用成文憲法之現代法治國家，基於權力分立之憲政原理，莫不建立法令違憲審查制度。其未專設違憲審查之司法機關者，此一權限或依裁判先例或經憲法明定由普通法院行使，前者如美國，後者如日本（一九四六年憲法第八十一條）。其設置違憲審查之司法機關者，法律有無牴觸憲法則由此一司法機關予以判斷，如德國（一九四九年基本法第九十三條及第一百條）、奧國（一九二九年憲法第一百四十條及第一百四十條之一）、義大利（一九四七年憲法第一百三十四條及第一百三十六條）及西班牙（一九七八年

the special judicial tribunals, such as the Constitutional Courts of Germany (Articles 93 and 100 of the 1949 Basic Law), Austria (Articles 140 and 141-1 of the 1929 Constitution), Italy (Articles 134 and 136 of the 1947 Constitution), and Spain (Articles 161 and 163 of the 1978 Constitution). Different countries with different situations could not be expected to have the same systems and applications. Nonetheless, their purposes are all to protect the constitution's highest authority in law, as well as to maintain a judge's independence in exercising his duties, in order that in trying a case, a judge shall obey nothing but the constitution and statutes without any interference. Because our legal system mainly adopted the statutes of continental countries, the development of our judicial review system has been very similar to those of the abovementioned continental countries since our Constitution went into effect.

憲法第一百六十一條至第一百六十三條）等國之憲法法院。各國情況不同，其制度之設計及運作，雖難期一致，惟目的皆在保障憲法在規範層級中之最高性，並維護法官獨立行使職權，俾其於審判之際僅服從憲法及法律，不受任何干涉。我國法制以承襲歐陸國家為主，行憲以來，違憲審查制度之發展，亦與上述歐陸國家相近。

Article 171 of the Constitution provides: "Laws that contradict the Constitution shall be null and void. In case of doubts as to whether a given statute con-

憲法第一百七十一條規定：「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」，第一百七十三條規定：「憲法之解釋，

tradicts the Constitution, the matter shall be interpreted by the Judicial Yuan." Article 173 of the Constitution provides: "The Constitution shall be interpreted by the Judicial Yuan." Article 78 of the Constitution provides: "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders." Article 79, Paragraph 2, of the Constitution and Article 4, Paragraph 2, of the Amendment to the Constitution clearly provide that the Grand Justices of the Judicial Yuan shall be responsible for the matters specified in Article 78 of the Constitution. Accordingly, the power to interpret a statute's constitutionality and to declare its nullity rests exclusively on the Grand Justices of the Judicial Yuan. Pursuant to Article 80 of the Constitution, judges of different levels shall try cases in accordance with law. In trying a case, a judge, therefore, shall base his decision on statutes that have been promulgated and effective in accordance with the legal procedure. A judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since

由司法院為之」，第七十八條又規定：「司法院解釋憲法，並有統一解釋法律及命令之權」，第七十九條第二項及憲法增修條文第四條第二項則明定司法院大法官掌理第七十八條規定事項。是解釋法律牴觸憲法而宣告其為無效，乃專屬司法院大法官之職掌。各級法院法官依憲法第八十條之規定，應依據法律獨立審判，故依法公布施行之法律，法官應以其為審判之依據，不得認定法律為違憲而逕行拒絕適用。惟憲法乃國家最高規範，法官均有優先遵守之義務，各級法院法官於審理案件時，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者，自應許其先行聲請解釋憲法以求解決，無須受訴訟審級之限制。既可消除法官對遵守憲法與依據法律之間可能發生之取捨困難，亦可避免司法資源之浪費。是遇有前述情形，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。司法院大法官審理案件法第五條第二項、第三項之規定，與上開意旨不符部分，應停止適用。關於各級法院法官聲請本院解釋法律違憲事項以本解釋為準，其聲請程式準用同法第八條第一項之規定。

the Constitution is the state's highest authority, judges have an obligation to obey the Constitution over any other statutes. Therefore, in trying cases where judges of different levels have suspected, with reasonable assurance, that the statute applicable to the cases is unconstitutional, they shall be allowed to petition for interpretation of its constitutionality, regardless of the levels where the cases are pending. This may eliminate a judge's dilemma of obeying the Constitution and applying the controversial statute, as well as avoid the waste of judicial resources. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute, and petition to the Justices of the Yuan to interpret its constitutionality. The provisions of Article 5, Paragraphs 2 and 3, of the Constitutional Interpretation Procedure Act which are inconsistent with the above interpretation shall no longer be applied. Petitions for interpretation of the constitu-

tionality of statutes by judges of different levels shall be determined according to the interpretation of this case, and the form of the petition shall apply to Article 8, Paragraph 1, of the said Act.

J. Y. Interpretation No.372（February 24, 1995）*

ISSUE: The Supreme Court's precedent holds that "although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to sue for divorce, it does not include cases where the other party temporarily loses control and overreacts to the spouse's misconduct." Is the said precedent in conflict with the Constitution, thus being void?

RELEVANT LAWS:

Universal Declaration of Human Rights（世界人權宣言）; Article 9, Paragraph 5, of the Amendments to the Constitution（憲法增修條文第九條第五項）; Article 1052, Paragraph 1, Subparagraph 3 of the Civil Code（民法第一千零五十二條第一項第三款）; Supreme Court's Precedent S.T. 4554（Supreme Court, 1934）（最高法院二十三年上字第四五五四號判例）.

KEYWORDS:

personal dignity（人格尊嚴）, personal safety（人身安全）, unbearable mistreatment cohabitation（不堪同居之虐待）, marriage（婚姻）,domestic violence（家庭暴力）. **

HOLDING: The maintenance of personal dignity and the protection of per-

解釋文：維護人格尊嚴與確保人身安全，為我國憲法保障人民自由權

* Translated by Dr. Tze-Shiou Chien.

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

sonal safety are two of the fundamental concepts underlying the constitutional protection of the people's freedoms and rights. Our society expects that the institution of marriage should be protected by preventing domestic violence and by improving mutual respect between spouses. To determine what constitutes "unbearable mistreatment in cohabitation" as provided in Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code, the courts should, case by case, take into account the degree of the mistreatment suffered by the injured party, the levels of education of both parties, their social status, and so on, and determine whether the continuity of the marriage is threatened. If the degree of mistreatment suffered by the injured party goes beyond the encroachments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation. The Supreme Court's Precedent S.T. 4554 (Supreme Court, 1934) held that: "although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to ask for a divorce, this does not include cases where the

利之基本理念。增進夫妻情感之和諧，防止家庭暴力之發生，以保護婚姻制度，亦為社會大眾所期待。民法第一千零五十二條第一項第三款所稱「不堪同居之虐待」，應就具體事件，衡量夫妻之一方受他方虐待所受侵害之嚴重性，斟酌當事人之教育程度、社會地位及其他情事，是否已危及婚姻關係之維繫以為斷。若受他方虐待已逾越夫妻通常所能忍受之程度而有侵害人格尊嚴與人身安全者，即不得謂非受不堪同居之虐待。最高法院二十三年上字第四五五四號判例謂：「夫妻之一方受他方不堪同居之虐待，固得請求離婚，惟因一方之行為不檢而他方一時忿激，致有過當之行為，不得即謂不堪同居之虐待」，對於過當之行為逾越維繫婚姻關係之存續所能忍受之範圍部分，並未排除上述原則之適用，與憲法尚無牴觸。

other party temporarily loses control and overreacts to the spouse's misconduct." This Precedent, which does not exclude the operation of the abovementioned fundamental ideas and social expectations if the other party's overreactions threaten the continuity of the marriage, is not in violation of the Constitution.

REASONING: The maintenance of personal dignity and the protection of personal safety are contained in the Universal Declaration of Human Rights, and are also two of the fundamental concepts underlying our constitutional protection of the people's freedoms and rights. Article 9, Paragraph 5, of the Amendments to the Constitution, which provides that: "The State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality," enshrines the above ideas. In Interpretation No. 365, this Council has held that this constitutional protection shall also be applicable to marital relations and domestic life. The objective of marriage is for a husband and wife to live together. The

解釋理由書：人格尊嚴之維護與人身安全之確保，乃世界人權宣言所揭示，並為我國憲法保障人民自由權利之基本理念。憲法增修條文第九條第五項規定：「國家應維護婦女之人格尊嚴，保障婦女之人身安全，消除性別歧視，促進兩性地位之實質平等」即在宣示上述理念。此一憲法意旨，於婚姻關係及家庭生活，亦有其適用，業經本院釋字第三六五號解釋釋示在案。婚姻係以夫妻之共同生活為目的，配偶應互相協力保持其共同生活之圓滿、安全及幸福，因而夫妻應互相尊重以增進情感之和諧，防止家庭暴力之發生，不僅為維繫婚姻所必要，亦為社會大眾所期待。民法第一千零五十二條第一項第三款規定夫妻之一方受他方不堪同居之虐待者，得向法院請求離婚，旨在維持夫妻任何一方之人格尊嚴與人身安全。若一

spouses should strive and cooperate to maintain their mutual satisfaction, security and happiness. Therefore, it is not only a necessity for a stable marriage but also generally expected that a husband and wife should respect each other to improve mutual harmony and to prevent domestic violence. Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code, which provides that a spouse who suffers unbearable mistreatment inflicted by the other party in cohabitation is entitled to resort to the courts for a divorce, is aimed at protecting the personal dignity and safety of both spouses. If the mistreatment becomes so severe that the continuity of the marital relationship seems unlikely, a request for divorce should be approved. To determine so-called "unbearable mistreatment in cohabitation," the courts should, case by case, take into account the degree of the mistreatment suffered by the injured party, the levels of education of both parties, their social status, and so on, and determine whether the continuity of marriage is threatened. If the degree of mistreatment suffered by the injured party goes beyond the encroach-

方受他方不堪同居之虐待，夫妻繼續共同生活之目的，已無可期待，自應許其訴請離婚。所謂「不堪同居之虐待」應就具體事件，衡量夫妻之一方受他方虐待所受侵害之嚴重性，斟酌當事人之教育程度、社會地位及其他情事，是否已危及婚姻關係之維繫以為斷。若受他方虐待已逾越夫妻通常所能忍受之程度而有侵害人格尊嚴與人身安全者，即不得謂非受不堪同居之虐待。

ments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation.

The Supreme Court's Precedent S.T. 4554 (Supreme Court, 1934) held that: "although a spouse who has suffered unbearable mistreatment in cohabitation is entitled to ask for a divorce, this does not include cases where the other party temporarily loses control and overreacts to the spouse's misconduct." The holding said only that the other party temporarily losing control and overreacting to the spouse's misconduct should not necessarily be seen as inflicting unbearable mistreatment in cohabitation. Accordingly, once education levels, social status and other relevant factors have been taken into account, if the overreactions do not threaten the continuity of the marriage, the request for a divorce based on unbearable mistreatment in cohabitation should not be approved. This precedent does not intend to confer upon the other party powers to punish the party who commits the misconduct. If the degree of mistreat-

最高法院二十三年上字第四五五四號判例謂：「夫妻之一方受他方不堪同居之虐待，固得請求離婚，惟因一方之行為不檢而他方一時忿激，致有過當之行為，不得即謂不堪同居之虐待」，係說明「因一方之行為不檢而他方一時忿激，致有過當之行為」，非當然構成「不堪同居之虐待」之要件。所指「過當之行為」經斟酌當事人之教育程度、社會地位及其他情事，尚未危及婚姻關係之維繫者，即不得以此認為受他方不堪同居之虐待而訴請離婚。惟此判例並非承認他方有懲戒行為不檢之一方之權利，若一方受他方虐待已逾越夫妻通常所能忍受之程度而有侵害人格尊嚴與人身安全之情形，仍不得謂非受不堪同居之虐待。最高法院二十三年上字第四五五四號判例意旨，對於過當之行為逾越維繫婚姻關係之存續所能忍受之範圍部分，並未排除民法第一千零五十二條第一項第三款規定之適用，與憲法之規定尚無牴觸。

ment suffered by the injured party goes beyond the encroachments on personal dignity and security that would be tolerated by most spouses, this should be seen as unbearable mistreatment in cohabitation. Therefore, the Supreme Court's Precedent S.T. 4554 (Supreme Court, 1934), which does not exclude the application of Article 1052, Paragraph 1, Subparagraph 3, of the Civil Code if the other party's overreactions become detrimental to the continuity of marriage, is not in violation of the Constitution.

Justice Young-Mou Lin filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion and dissenting opinion in part.

Justice Tong-Schung Tai filed dissenting opinion in part, in which Justice Vincent Sze joined.

本號解釋林大法官永謀提出協同意見書；蘇大法官俊雄提出協同（含部分不同）意見書；戴大法官東雄與施大法官文森共同提出部分不同意見書。

J. Y. Interpretation No.373（February 24, 1995）*

ISSUE: Is the provision of the Labor Union Act, prohibiting technicians and janitors of an educational enterprise from organizing a labor union, in violation of the Constitutional?

RELEVANT LAWS:

Articles 14, 23 and 153 of the Constitution（憲法第十四條、第二十三條、第一百五十三條）; Articles 4, 5, 6, 12, 20 and 26 of the Labor Union Act（工會法第四條、第五條、第六條、第十二條、第二十條、第二十六條）.

KEYWORDS:

labor unions（工會）, technicians（技工）, maintenance workers（工友）, educational enterprises（教育事業）, administrative agencies（行政機關）, munitions industries（軍火工業）, right of association（結社權）, labor conditions（勞動條件）, social and economic status（社會及經濟地位）, collective bargaining（團體交涉）, dispute resolution（爭議解決）, social order（社會秩序）, public welfare（公共利益）, mediation（調解）.**

HOLDING: Under Article 4 of the Labor Union Act, which stipulates that "Persons employed in administrative or

解釋文：工會法第四條規定：「各級政府行政及教育事業、軍火工業之員工，不得組織工會」，其中禁止教

* Translated by Professor Cing-Kae Chiao.

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

educational agencies of government at any level, and persons employed in ammunitions industries shall not organize a labor union," technicians and maintenance workers employed by educational agencies are not permitted to organize labor unions. However, due to the service-oriented nature of work associated with such technicians and maintenance workers, prohibiting the organizing of labor unions for those engaged in this line of work unnecessarily deprives them of their basic rights. This prohibition actually oversteps the imposed threshold of Article 23 of the Constitution, and infringes upon the aforementioned workers' constitutionally guaranteed right of association. The prohibition is to be abolished within one year following the delivery of this interpretation. Any necessary changes to be made in regards to the labor rights on the basis of the nature of work associated with technicians and maintenance workers employed by educational agencies are to be evaluated and amended by the legislature in the aforementioned time period.

育事業技工、工友組織工會部份，因該技工、工友所從事者僅係教育事業之服務性工作，依其工作之性質，禁止其組織工會，使其難以獲致合理之權益，實已逾越憲法第二十三條之必要限度，侵害從事此項職業之人民在憲法上保障之結社權，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。惟基於教育事業技工、工友之工作性質，就其勞動權利之行使有無加以限制之必要，應由立法機關於上述期間內檢討修正，併此指明。

REASONING: Article 14 of the

解釋理由書：憲法第十四條規

Constitution stipulates that citizens shall have the freedom of association. Additionally, Paragraph 1 of Article 153 of the Constitution reiterates the duty of the State to enact laws and implement policies that protect workers so as to better their livelihood and improve productive skills. Workers employed in all lines of work organize labor unions in order to improve labor conditions, and to raise their social and economic status. This basic labor right is generally recognized by countries with modern legal systems, and its safeguarding was the intent of Article 153 of the Constitution. Labor union laws promulgated by the State shall allow workers to enjoy the right to collective bargaining and dispute resolution, as long as social order and public welfare are secured. Article 4 of the Labor Union Act stipulates that: "Persons employed in administrative or educational agencies of government at any level, and persons employed in munitions industries shall not organize a labor union," and among those groups, technicians and maintenance workers working for educational agencies are not permitted to organize labor unions. Although the

定人民有結社之自由。第一百五十三條第一項復規定國家為改良勞工之生活，增進其生產技能，應制定保護勞工之法律，實施保護勞工之政策。從事各種職業之勞動者，為改善勞動條件，增進其社會及經濟地位，得組織工會，乃現代法治國家普遍承認之勞工基本權利，亦屬憲法上開規定意旨之所在。國家制定有關工會之法律，應於兼顧社會秩序及公共利益前提下，使勞工享有團體交涉及爭議等權利。工會法第四條規定：「各級政府行政及教育事業、軍火工業之員工，不得組織工會。」其中禁止教育事業技工、工友組織工會部分，因該技工、工友所從事者僅為教育事業之服務性工作，其工作之性質，與國民受教育之權利雖有關連，惟禁止其組織工會，使其難以獲致合理之權益，實已逾越憲法第二十三條規定之必要限度，侵害從事此項職業之人民在憲法上保障之結社權。應自本解釋公布之日起，至遲於屆滿一年時，失其效力。又工會為保障勞工權益，得聯合會員，就勞動條件及會員福利事項，如工資、工作時間、安全衛生、休假、退休、職業災害補償、保險等事項與僱主協商，並締結團體協約；協議不成發生之勞資間糾紛事件，得由工會調處；亦得為勞資爭議申

nature of their work is linked to the citizenry's right to education, by prohibiting the formation of labor unions, it deprives the aforementioned workers of their basic rights, exceeds the imposed threshold of Article 23 of the Constitution and infringes upon these workers' constitutionally guaranteed right of association. This prohibition is to be lifted within one year following delivery of this interpretation. To safeguard their labor rights, members of labor unions should organize, negotiate, and conclude agreements with employers on matters related to working conditions and welfare issues such as wages, working hours, health and safety, vacations, retirement, work accident compensation, insurance, etc. If negotiations fail or labor disputes arise, labor unions shall help mediate such impasses. Should all mediation fail to resolve a labor dispute, labor unions may go on strike if legal procedures are adhered to. The Labor Union Act (Articles 5, 6, 12, 20 and 26), the Collective Bargaining Act and the Settlement of Labor-Management Disputes Act provide related regulations for reference. The nature of work for technicians and maintenance workers working

請調解，經調解程序無效後，即得依法定程序宣告罷工，以謀求解決。此觀工會法第五條、第六條、第十二條、第二十條、第二十六條及團體協約法、勞資爭議處理法有關規定自明。基於教育事業技工、工友之工作性質與國民受教育權利之保護，諸如校園之安全、教學研究環境之維護等各方面，仍不能謂全無關涉；其勞動權利之行使，有無加以限制之必要，應由立法機關於一年內檢討修正，併此指明。

in educational agencies may not compromise protection of the right of citizens to education, such as in aspects related to school safety and safety within educational and research environments. Any necessary changes to be made in regards to the labor rights on the basis of the nature of work associated with technicians and maintenance workers employed by educational agencies are to be evaluated and amended by the legislature in the aforementioned time period.

Justice Tieh-Cheng Liu filed dissenting opinion, in which Justice Tong-Schung Tai joined.

本號解釋劉大法官鐵錚、戴大法官東雄共同提出不同意見書。

J. Y. Interpretation No.374（March 17, 1995）*

ISSUE: Is it constitutional for courts to dismiss a civil case brought by a contesting landowner who did not dispute on site during a land survey but who did contest the survey results without success within the period of public notice?

RELEVANT LAWS:

Articles 15 and 16 of the Constitution（憲法第十五條、第十六條）; Articles 46-1 to 46-3 of the Land Act（土地法第四十六條之一、第四十六條之二、第四十六條之三）; Article 5, Paragraph 1, Subparagraph 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）; Article 3 of the Standard Act for the Laws and Rules（中央法規標準法第三條）; The Resolution of the 8th Supreme Court Civil Law Convention (April 22, 1986)（最高法院七十五年四月二十二日第八次民事庭會議決議）.

KEYWORDS:

land-ownership map（地籍圖）, property rights（財產權）, right of instituting legal proceedings（訴訟權）. **

HOLDING: The re-surveying of a land-ownership map pursuant to Articles 46-1 to 46-3 of the Land Act is purely a

解釋文：依土地法第四十六條之一至第四十六條之三之規定所為地籍圖重測，純為地政機關基於職權提供土

* Translated by Professor Tze-Shiou Chien.

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technical service ex officio provided by the land administration office. The purpose of this service is to utilize a census and survey to reflect the scope of the people's original ownership on the landownership map correctly and completely. It does not expand or diminish the scope of the people's private rights. Therefore, when a landowner according to law brings a civil case contesting a boundary before the courts, the courts should not, based on the reason that there is obviously no basis for him/her to ask that the boundary be redrawn to correct his/her earlier mistake in identifying the boundary, dismiss the case, but should, based on the examination of the evidence, substantially review the case, even though the bordering landowners, having been notified by the land administration office, were on site to identify the boundary jointly and no dispute arose when the land administration office did the survey. This is necessary because the land administration office according to law has to register the change of land boundary based on the survey once the period of public notice of the survey result expires, even though the landowner, in

地測量技術上之服務，將人民原有土地所有權範圍，利用地籍調查及測量等方法，將其完整正確反映於地籍圖，初無增減人民私權之效力。故縱令相鄰土地所有權人於重新實施地籍測量時，均於地政機關通知之期限內到場指界，毫無爭議，地政機關依照規定，已依其共同指定之界址重新實施地籍測量。則於測量結果公告期間內即令土地所有權人以指界錯誤為由，提出異議，測量結果於該公告期間屆滿後即行確定，地政機關應據以辦理土地標示變更登記。惟有爭執之土地所有權人尚得依法提起民事訴訟請求解決，法院應就兩造之爭執，依調查證據之結果予以認定，不得以原先指界有誤，訴請另定界址為顯無理由，為其敗訴之判決。最高法院七十五年四月二十二日第八次民事庭會議決議(一)略謂：為貫徹土地法整理地籍之土地政策，免滋紛擾，不許原指界之當事人又主張其原先指界有誤，訴請另定界址，應認其起訴顯無理由云云，與上開意旨不符，有違憲法保障人民財產權及訴訟權之規定，應不予適用。

order to correct his/her earlier mistake made on site, contests the result within the period of public notice. The Resolution of the 8th Supreme Court Civil Law Convention (April 22, 1986), Part I, essentially states that to implement the policy for clarifying the scope of landownership in the Land Act thoroughly and to avoid any interruption, the landowner who identifies the boundary earlier on site should not be allowed to ask that the boundary be redrawn later and the civil suit bought by him/her should be dismissed as frivolous. Said Resolution, being inconsistent with the above holding and in violation of the constitutional rules protecting the people's property rights and the right to institute legal proceedings, shall no longer apply.

REASONING: Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act provides that when an individual whose constitutional right was infringed upon and whose remedies provided by law for such infringement have been exhausted has questions on the constitutionality of the statute or regulation relied upon by the

解釋理由書：司法院大法官審理案件法第五條第一項第二款規定，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牴觸憲法之疑義者，得聲請解釋憲法。其中所稱命令，並不以形式意義之命令或使用法定名稱（如中央法規標準法第三條之規定）者為限，凡中央或地方機關

court of last resort in its final judgment, he may make petition for interpretation of the Constitution. This Council has repeatedly ruled (See J.Y. Interpretations Nos. 216, 238 and 336) that the regulation mentioned in the provision should not be confined to the regulation in the formal sense or to some legal titles (e.g., Article 3 of the Standard Act for the Laws and Rules). The administrative rules or opinions on applying the law (e.g., opinion letters by relevant agencies) ex officio promulgated by the central or local governments could be the objects for judicial review if they are invoked by the judges in the final judgment, although they have no legal binding force on the independent judges. According to current laws, the judicial branch, except in concrete cases, may express its legal opinions in precedents and resolutions. It is an established practice that the precedents whose constitutionality is challenged by the people have been deemed as regulations mentioned above and have been reviewed by this Council (See J.Y. Interpretations Nos. 154, 177, 185, 243, 271, 368 and 372). Although the Resolutions made by the Supreme Court

依其職權所發布之規章或對法規適用所表示之見解（如主管機關就法規所為之函釋），雖對於獨立審判之法官並無法律上之拘束力，若經法官於確定終局裁判所引用者，即屬前開法條所指之命令，得為違憲審查之對象，迭經本院著有解釋在案（釋字第二一六號、第二三八號、第三三六號等號解釋）。至於司法機關在具體個案之外，表示其適用法律之見解者，依現行制度有判例及決議二種。判例經人民指摘違憲者，視同命令予以審查，已行之有年（參照釋字第一五四號、第一七七號、第一八五號、第二四三號、第二七一號、第三六八號及第三七二號等解釋），最高法院之決議原僅供院內法官辦案之參考，並無必然之拘束力，與判例雖不能等量齊觀，惟決議之製作既有法令依據（法院組織法第七十八條及最高法院處務規程第三十二條），又為代表最高法院之法律見解，如經法官於裁判上援用時，自亦應認與命令相當，許人民依首開法律之規定，聲請本院解釋，合先說明。

have only consultative, not legally binding, force on judges and therefore cannot be seen as equal to the Precedents, due to the fact that they are made according to law (See Article 78 of the Court Organic Act and Article 32 of the Regulation Governing the Operational Procedures of the Supreme Court) and represent the legal opinions of the Supreme Court, they shall be deemed equivalent to the regulations mentioned above if they are invoked by judges in judgments, and thus subject to review by this Council once the people make petition for interpretation.

Article 15 of the Constitution provides that the right of property shall be guaranteed to the people. Article 16 of the Constitution also explicitly provides that the people shall have the right to institute legal proceedings. Accordingly, when a person whose property rights have been infringed institutes legal proceedings to seek remedies, the concerned court qua a judiciary organization should ex officio make the judgment to resolve the dispute, based on the examination of evidence and rules of experience and reasoning. The re-

憲法第十五條規定，人民之財產權應予保障。又人民有訴訟之權，憲法第十六條亦有明文規定。人民財產權遭受侵害，循訴訟途徑謀求救濟，受理之法院，應依其權限，本於調查證據之結果，依經驗法則及論理法則等，就其爭執予以裁判，發揮司法功能，方符憲法上開條文之意旨。依土地法第四十六條之一至第四十六條之三之規定所為地籍圖重測，係地政機關基於職權提供土地測量技術上之服務，就人民原有土地所有權範圍，利用地籍調查及測量等方法，將其完整正確反映於地籍圖，初無

surveying of a land-ownership map pursuant to Articles 46-1 to 46-3 of the Land Act is purely a technical service ex officio provided by the land administration office. The purpose of this service is to utilize a census and survey to reflect the scope of the people's original ownership on the land-ownership map correctly and completely. It does not expand or diminish the scope of the people's private rights. Therefore, when a landowner according to law brings a civil case before the courts contesting a boundary, the courts should not, based on the reason that there is obviously no basis for him/her to ask that the boundary be redrawn to correct his/her earlier mistake in identifying the boundary, dismiss the case, but should, based on the examination of the evidence, substantially review the case, even though the bordering landowners, having been notified by the land administration office, were on site to identify the boundary jointly, and no dispute arose when the land administration office did the survey. This is necessary because the land administration office according to law has to make the change in registration of land boundary based on the

增減人民私權之效力。故相鄰土地所有權人於重新實施原籍測量時，均於地政機關通知之期限內到場指界而無爭議者，地政機關應依其共同指定之界址重新實施地籍測量。縱令土地所有權人於測量結果公告期間以指界錯誤為由，提出異議，測量結果於該公告期間屆滿後即行確定，地政機關應據以辦理土地標示變更登記。惟有爭執之土地所有權人尚得依法提起民事訴訟請求解決，法院應就兩造之爭執，依調查證據之結果予以認定，不得以原先指界有誤，訴請另定界址為顯無理由，為其敗訴之判決。最高法院七十五年四月二十二日第八次民事庭會議決議㈠略稱：相鄰土地所有人於重新實施地籍測量時，均於地政機關通知之期限內到場指界，毫無爭議，地政機關依照規定，已依其共同指定之界址重新實施地籍測量。於測量結果公告後，自不許土地所有權人主張其原先指界有誤，訴請另定界址等語，與上開意旨不符，有違憲法保障人民財產權及訴訟權之規定，應不予適用。

survey once the period of public notice of the survey result expires, even though the landowner, in order to correct his/her earlier mistake made on site, contests the result within the period of public notice. The Resolution of the 8th Supreme Court Civil Law Convention (April 22, 1986), Part I, essentially states that to implement the policy for clarifying the scope of landownership in the Land Act thoroughly and to avoid any interruption, the landowner who identifies the boundary earlier on site should not be allowed to ask that the boundary be redrawn later and the civil suit bought by him/her should be dismissed as frivolous. Said Resolution, being inconsistent with the above holding and in violation of the constitutional rules protecting the people's property rights and the right to institute legal proceedings shall no longer apply.

Justice Jyun-Hsiung Su filed dissenting opinion in part.

Justice Chi-Nan Chen filed dissenting opinion.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋蘇大法官俊雄提出部分不同意見書；陳大法官計男、孫大法官森焱與林大法官永謀分別提出不同意見書。

Justice Young-Mou Lin filed dissenting opinion.

J. Y. Interpretation No.375（March 17, 1995）*

ISSUE: May the tax exemption provided for in Article 31 of the Agricultural Development Act apply to the situation where there is only one heir eligible to inherit the agricultural land?

RELEVANT LAWS:

Articles 15 and 172 of the Constitution（憲法第十五條、第一百七十二條）; Article 1138 of the Civil Code（民法第一千一百三十八條）; Articles 1, 26, 30 and 31 of the Agricultural Development Act（農業發展條例第一條、第二十六條、第三十條及第三十一條）; Article 17, Paragraph 1, Subparagraph 5, of the Estate And Gift Taxes Act（遺產及贈與稅法第十七條第一項第五款）; Article 21 of the Enforcement Rules of the Agricultural Development Act（農業發展條例施行細則第二十一條）.

KEYWORDS:

agricultural land（農業用地）, heir（繼承人）, inheritance tax（遺產稅）, gift tax（贈與稅）, tax exemption（免稅）. **

HOLDING: The first part of Article 31 of the Agricultural Development Act provides that, "Where the agricultural

解釋文：農業發展條例第三十一條前段規定：「家庭農場之農業用地，其由能自耕之繼承人一人繼承或承

* Translated by Wellington L. Koo, and Formosa Transnational Attorneys at Law.

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

land in a family farm is inherited in whole or succeeded by one heir who is capable of farming on his own and who continues agricultural production on such land, the inheritance tax and gift tax shall be exempted." This provision aims to encourage the inheritance or succession of the agricultural land by one heir when there are two or more heirs eligible to inherit the agricultural land and to prevent the overdivision of such land, thus hindering the agricultural development. However, in the case where there is only one heir, there is no concern about co-ownership of the agricultural land as a result of dividing or transferring the estate, thus it is unnecessary to provide tax exemption as encouragement. The first part of Article 21 of the Enforcement Rules of the said Act, which provides that, "The circumstance of inheritance or succession by one heir as specified in Article 31 of the Act shall be construed as the situation where there are two or more heirs in accordance with Article 1138 of the Civil Code, and they all agree to the inheritance or succession by one heir among themselves," is in line with the aforesaid aim, within the scope of

受，而繼續經營農業生產者，免徵遺產稅或贈與稅」，其目的在於有二人以上之繼承人共同繼承農業用地時，鼓勵其協議由繼承人一人繼承或承受，庶免農地分割過細，妨害農業發展。如繼承人僅有一人時，既無因繼承而分割或移轉為共有之虞，自無以免稅鼓勵之必要。同條例施行細則第二十一條前段規定：「本條例第三十一條所稱由繼承人一人繼承或承受，指民法第一千一百三十八條規定之共同繼承人有二人以上時，協議由繼承人一人繼承或承受」，與上開意旨相符，並未逾越法律授權範圍，且為增進公共利益所必要，與憲法尚無牴觸。

delegation of authority under the Act, necessary for promoting the public interest, and is not contradictory to the Constitution.

REASONING: The legislative purposes of the Agricultural Development Act, as provided for in Article 1 thereof, are to expedite agricultural development, promote agricultural production and distribution, and increase the income of and raise the living standards of farmers. To accomplish these purposes, policies are formed actively to encourage engagement in enlarging the scale of agricultural production as well as passively to prohibit the agricultural land from being over divided or co-owned after transfer. All such policies are important measures for promoting agricultural development. Therefore, Article 26 of Paragraph 1 of the Act provides that: "The agricultural authority shall encourage and assist family farms to expand the scale of operation, or engage in large-scale agricultural production through joint operation, entrusted operation, cooperative farming or other methods of operation. Funds shall be allocated for furnish-

解釋理由書：農業發展條例係為加速農業發展，促進農業產銷，增加農民所得，提高農民生活水準而制定，此為該條例第一條所明示。為達成此目的，乃有積極獎勵從事擴大規模農業生產及消極禁止農地細分及移轉為共有之政策，要均為促進農業發展之重要方法，是以有同條例第二十六條第一項「農業主管機關應獎勵輔導家庭農場，擴大經營規模，或以共同經營、委託經營、合作農場及其他經營方式，從事擴大規模農業生產；並籌撥資金協助貸款或補助」及第三十條前段「每宗耕地不得分割及移轉為共有」等規定。同條例第三十一條復規定，家庭農場之農業用地，其由能自耕之繼承人一人繼承或承受，而繼續經營農業生產者，免徵遺產稅或贈與稅，並自繼承或承受之年起，免徵田賦十年，其需以現金補償其他繼承人者，由農業主管機關協助辦理十五年貸款。又修正前之遺產及贈與稅法第十七條第一項第五款規定：「遺產中之農業用地，由繼承人或受遺贈人，繼續

ing loans or subsidies in such respect." Further, the first part of Article 30 of the Act provides that "No piece of agricultural land can be divided or co-owned after transfer." Article 31 of the Act also provides that where the agricultural land in a family farm is in whole inherited or succeeded by one heir who is capable of farming on his own and who continues agricultural production on such land, the inheritance tax and the gift tax shall be exempted. In addition, the agricultural land tax shall be exempted for ten years commencing from the year of inheritance or succession. In the event any money is needed to compensate other heirs, the agricultural authority shall assist in arranging a loan with a term of fifteen years. Moreover, Article 17, Paragraph 1, Subparagraph 5, of the Estate And Gift Taxes Act, prior to its revision, provided that, "Where the heirs or devisees continue to operate agricultural production on the agricultural land within the estate, half of the value of such land shall be exempt from the inheritance tax and thus shall be deducted from the total value of the estate. However, if such land is in whole inher-

經營農業生產者，扣除其土地價值之半數。但由能自耕之繼承人一人繼承，繼續經營農業生產者，扣除其土地價值之全數」，此種自遺產總額中扣除其土地價值之半數或全數免徵遺產稅之規定，亦為配合加速發展農業政策所增列。此等租稅優惠之措施，其目的無非在於有二人以上之繼承人共同繼承或承受農業用地時，鼓勵其儘可能協議由繼承人一人繼承或承受，庶免農地因分割過細而妨害農業發展，此就上開各法條綜合對照觀之，事理甚明。如繼承人僅有一人時，並無因繼承而分割或移轉為共有之可言，自無此一免稅規定之適用。同條例施行細則第二十一條前段規定，本條例第三十一條所稱由繼承人一人繼承或承受，指民法第一千一百三十八條規定之共同繼承人有二人以上時，協議由繼承人一人繼承或承受。此與同條例之立法意旨與法條真義正相符合，並未逾越法律授權之範圍，且為增進公共利益所必要，與憲法尚無牴觸。

ited by one heir who is capable of farming on his own and who continues agricultural production on such land, the total value of such land shall be deducted." This provision regarding the exemption of the inheritance tax by deducting half or the total value of the land from the total value of the estate is stipulated in response to the policy of expediting agricultural development. In view of the aforesaid provisions, it is clear that such tax incentives are offered with an aim to encourage agreement to the inheritance or succession of the agricultural land by one heir when there are two or more heirs eligible to inherit the agricultural land, and to prevent the overdivision of agricultural land, thus hindering the agricultural development. In the case where there is only one heir, no issue of co-ownership of the agricultural land as a result of dividing or transferring the estate exists, and therefore the tax exemption shall not apply. The first part of Article 21 of the Enforcement Rules of the Act, which provides that the circumstance of inheritance or succession by one heir as specified in Article 31 of the Act shall be construed as the situation where

there are two or more heirs in accordance with Article 1138 of the Civil Code, and they all agree to the inheritance or succession by one heir among themselves, is in accordance with the legislative intent and the meaning of the statutory provision. It is within the scope of the delegation of authority under the Act, necessary for promoting the public interest, and is not contradictory to the Constitution.

J. Y. Interpretation No.376（March 31, 1995）*

ISSUE: Is it constitutional for the Department of Health, Executive Yuan, to include amphetamine among chemically synthesized narcotics by public notice?

RELEVANT LAWS:

Article 2, Subparagraph 4, and Article 3 of the Narcotics Control Act（麻醉藥品管理條例第二條第四款及第三條）; Article 8 of the Enforcement Rules of the Narcotics Control Act（麻醉藥品管理條例施行細則第八條）.

KEYWORDS:

synthetic narcotics and their precursor compounds（化學合成麻醉藥品類及其製劑）, narcotic drugs（麻醉藥品）, chemical synthesis（化學合成）, highly addictive effects（成癮性）,methamphetamine （安非他命）, long-term use（長期使用）, physical and psychological dependence（生理及心理上之依藥性）, behavior or personality disorder（行動與性格異常）, adverse side effects（副作用）, violent and anti-social behaviors（暴力攻擊及反社會行為）, medical treatment（醫療）. **

HOLDING: Article 2, Subparagraph 4, of the Narcotics Control Act pro-

解釋文：化學合成麻醉藥品類及其製劑為麻醉藥品管理條例所稱麻醉

* Translated by Li-Chih Lin, Esq., J.D.

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vides that synthetic narcotics and their precursor compounds are within one of the categories of narcotic drugs prescribed in the said Act. Methamphetamine is a narcotic produced independently by means of chemical synthesis and it has a highly addictive effect. Proclamation No. 904142 of the Health Bureau of the Executive Yuan, which was publicly announced on October 9th, 1990, states that: "Methamphetamine and its precursor compounds shall be categorized as synthetic narcotics as prescribed in Article 2, Paragraph 4, of the Narcotics Control Act and governed by the same law." The purpose of this Proclamation is to notify the public that methamphetamine and its precursor compounds have been categorized as synthetic narcotics and are governed by the said Act in accordance with the legislative intent of Article 3 of the said Act. Proclamation No. 904142 of the Health Bureau does not impose additional sanctions or obligations on the public and is warranted to maintain the social order and promote the public welfare. It is therefore consistent with the provisions set forth in the Constitution of the Republic of China.

藥品之一種，為同條例第二條第四款所明定。安非他命係以化學原料合成而具有成癮性之藥品，行政院衛生署中華民國七十九年十月九日衛署藥字第九〇四一四二號公告，將安非他命列入麻醉藥品管理條例所稱化學合成麻醉藥品類，係在公告確定其列為管理之項目，並非增列處罰規定或增加人民之義務，與憲法並無牴觸。

REASONING: Article 2, Subparagraph 4, of the Narcotics Control Act provides that synthetic narcotics and their precursor compounds are within one of the categories of narcotic drugs of the said Act. In addition, Article 8 of the Enforcement Rules of the said Act provides that the term "synthetic narcotics" refers to narcotics and their precursor compounds which are produced independently by means of chemical synthesis and have a highly addictive effect or narcotics and their precursor compounds which are combined into other highly addictive drugs. The long-term use of methamphetamine will result in tissue tolerance, and will cause the users to depend physically and psychologically on this narcotic. In addition, such long-term use will have adverse side effects on the users, including delusions and hallucinations associated with insanity and other behavior or personality disorders. Moreover, long-term users of methamphetamine often display violent and anti-social behaviors, which can have devastating effects on the users and pose imminent danger to the public safety. Therefore, methamphetamine and

解釋理由書：化學合成麻醉藥品類及其製劑為麻醉藥品管理條例所稱麻醉藥品之一種，為同條例第二條第四款所明定。又依同條例施行細則第八條規定同條例所稱化學合成麻醉藥品類係指以化學原料合成而具有成癮性或可改製為成癮性之藥品。安非他命如長期使用，將具耐藥性，同時有心理及生理上之依藥性，產生類似精神分裂症之錯覺、幻覺、妄想並伴有行動與性格異常等副作用，更具有暴力攻擊及反社會行為等傾向，不但影響個人身心健康，且危害社會公共安寧。故安非他命具有成癮性，係屬同條例第二條第四款所稱之麻醉藥品。行政院衛生署中華民國七十九年十月九日衛署藥字第九〇四一四二號公告：「『安非他命類』藥品列入麻醉藥品管理條例第二條第四款所定『化學合成類麻醉藥品』管理，並禁止於醫療上使用」，係在公告確定其列為管理之項目，依同條例第三條規定意旨，並非增列處罰規定或增加人民之義務，且為維持社會秩序，增進公共利益所必要，與憲法並無牴觸。

its precursor compounds which are highly addictive are within one of the categories of narcotic drugs prescribed in Article 2, Paragraph 4, of the Narcotics Control Act. Proclamation No. 904142 of the Health Bureau of the Executive Yuan, which was publicly announced on October 9th, 1990, states that: "Methamphetamines and their precursor compounds shall be categorized as synthetic narcotics as prescribed in Article 2, Subparagraph 4, of the Narcotics Control Act and governed by the same law. The use of methamphetamines and their precursor compounds shall be prohibited in medical treatment." The purpose of this Proclamation is to notify the public that methamphetamine and its precursor compounds have been categorized as synthetic narcotics and governed by the said Act in accordance with the legislative intent of Article 3 of the said Act. Proclamation No. 904142 of the Health Bureau does not impose additional sanctions or obligations on the public and is warranted to maintain the social order and promote the public welfare. It is therefore consistent with the provisions set forth in the Constitution of the Republic of China.

Justice Young-Mou Lin filed concurring opinion.

本號解釋林大法官永謀提出協同意見書。

J. Y. Interpretation No.377（March 31, 1995）*

ISSUE: Is the directive issued by the Ministry of Finance, which states to the effect that the income tax levied on any salary repaid in lump sum upon one's reinstatement should be based on the date of actual payment, constitutional?

RELEVANT LAWS:

Articles 14, 22, 76-1, Paragraph1, 84 and 88 of the Income Tax Act（所得稅法第十四條、第二十二條、第七十六條之一第一項、第八十四條、第八十八條）; Directive Ref. No. (60)-TSYFT-368 issued on June 2, 1971, by the Department of Taxation, Ministry of Finance（財政部賦稅署六十年六月二日(60)台稅一發字第三六八號箋函）.

KEYWORDS:

income year（所得歸屬年度）, cash basis（收付實現制）, accrual basis（權責發生制）, legislative discretion（立法裁量）, date of actual income（payment）（實際所得（給付）日期）, realized income（已實現之所得）, salary repaid upon reinstatement（復職補發薪金）. **

HOLDING: The income year for an individual should be determined based on the date of actual income, which is pre-

解釋文：個人所得之歸屬年度，依所得稅法第十四條及第八十八條規定並參照第七十六條之一第一項之意

* Translated by Vincent C. Kuan.

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scribed under Articles 14 and 88 of the Income Tax Act, in reference to the intent of Article 76-1, Paragraph1, thereof. In other words, the imposition of annual consolidated income tax should be limited to realized income, regardless of whether the cause of income occurs in a particular year. The Directive Ref. No. (60)-TSYFT-368 issued on June 2, 1971, by the Department of Taxation, Ministry of Finance, explains to the effect that the consolidated income tax levied on the salary repaid in lump sum by the agency the taxpayer served for the period of the taxpayer's suspension from office for certain reason upon his reinstatement should be based on the date of actual payment and on the aggregate amount of the actual payment. The said directive is in line with the legislative intent of the aforesaid provision of the Income Tax Act and is, therefore, not unconstitutional.

旨，係以實際取得之日期為準，亦即年度綜合所得稅之課徵，僅以已實現之所得為限，而不問其所得原因是否發生於該年度。財政部賦稅署六十年六月二日臺稅一發字第三六八號箋函關於納稅義務人因案停職後，於復職時服務機關一次補發其停職期間之薪金，應以實際給付之日期為準，按實際給付之總額，課徵綜合所得稅之釋示，符合上開所得稅法之意旨，與憲法尚無牴觸。

REASONING: Two different methods have been adopted in determining the income year, namely, the cash basis and accrual basis. There are advantages and disadvantages of both methods.

解釋理由書：認定所得歸屬年度有收付實現制與權責發生制之分，無論何種制度均利弊互見，如何採擇，為立法裁量問題。歷次修正之所得稅法關於個人所得稅之課徵均未如營利事業所

It is a question of legislative discretion when it is a matter of deciding which method is to be adopted. The past amendments to the Income Tax Act have never adopted the accrual basis, as is used, in principle, for profit-seeking enterprise income tax (refer to Article 22 of the Income Tax Act, as amended and promulgated on December 30, 1989), for the imposition of income tax for an individual, but instead the date of actual payment to the individual is used as the basis, i.e., the cash basis. Such contrast is crystal clear after referring to the following provisions of the Income Tax Act: Article 14, Paragraph1, thereof provides to the effect that the gross amount of consolidated income of an individual shall be the aggregate of various categories of income for the whole year; Article 88, Paragraph 1, thereof provides that, for a taxpayer having income of various categories, the tax withholder involved shall withhold tax payable at the time of payment as per the prescribed tax rates or withholding procedures, and pay the tax withheld in accordance with relevant provisions thereof; but Article 76-1, Paragraph 1, thereof

得採權責發生制為原則（見中華民國七十八年十二月三十日修正公布之所得稅法第二十二條），乃以個人所得實際取得之日期為準，即所謂收付實現制，此就同法第十四條第一項：個人綜合所得總額，以其全年各類所得合併計算之；第八十八條第一項：納稅義務人有各類所得者，應由扣繳義務人於給付時，依規定之扣繳率或扣繳辦法扣取稅款並繳納之，又第七十六條之一第一項對於公司未分配盈餘歸戶，按其歸戶年度稅率課徵所得稅，而不問其實際取得日期之例外規定，對照以觀，甚為明顯。是故個人綜合所得稅之課徵係以年度所得之實現與否為準，凡已收取現金或替代現金之報償均為核課對象，若因法律或事實上之原因而未能收取者，即屬所得尚未實現，則不列計在內。財政部賦稅署六十年六月二日臺稅一發字第三六八號箋函稱：「查所得之所屬年度，應以實際給付之日期為準，納稅義務人因案停職後，於復職時服務機關一次補發其停職期間之薪金，自應以實際給付之日期為準，按實際給付之總額，合併補發年度課徵綜合所得稅」，符合上述意旨，與憲法尚無牴觸。至於公務員因法定原因停職，於停職間，又未支領待遇或生活津貼者，復職時一次補發停職期間之

provides that the income tax levied on the undistributed earnings of a company shall be calculated based on the tax rate applicable in the taxable year, regardless of the date of actual payment. Therefore, the levy of the consolidated income tax for an individual depends on whether the income of a particular year is realized. Whoever receives cash or cash equivalent as payment will be subject to taxation. If such cash or its equivalent is not received for any reason in law or in fact, it will be regarded as income not realized and, as such, will not be counted toward one's income. The Directive Ref. No. (60)-TSYFT-368 issued on June 2, 1971, by the Department of Taxation, Ministry of Finance, states, "The income year should be determined based on the date of actual payment. The consolidated income tax levied on the salary repaid in lump sum by the agency the taxpayer served for the period of the taxpayer's suspension from office for certain reason upon his reinstatement should be based on the date of actual payment and on the aggregate amount of the actual payment." The said directive is in line with the legislative in-

俸給，與納稅義務人得依己意變動其所得給付時間之情形不同，此種所得係由長期累積形成，宜否於取得年度一次按全額課稅，應於所稅法修正時予以檢討，併予指明。

tent of the aforesaid provision of the Income Tax Act and is, therefore, not unconstitutional. In respect of the situation where a public functionary is suspended from his office for statutory cause and does not receive any remuneration or living allowance during the period of such suspension, the remuneration repaid in lump sum for the period of such public functionary's suspension upon his reinstatement should be distinguished from the circumstances under which a taxpayer may change of his own free will when his income is paid. Income of the kind is accumulated over a long period of time, and, as is hereby pointed out, whether tax should be levied on the aggregate amount thereof for the income year should be an issue to be addressed later when the Income Tax Act is amended.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋劉大法官鐵錚提出不同意見書。

J. Y. Interpretation No.378（April 14, 1995）*

ISSUE: Should the decisions rendered by the Committee on the Review of the Discipline of Lawyers be deemed equivalent to the final and binding judgment of the court in light of Article 16 of the Constitution?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Articles 40, 41,43 and 52 of the Lawyer's Act（律師法第四十條、第四十一條、第四十三條、第五十二條）.

KEYWORDS:

right to bring lawsuits（訴訟權）, lawyer's discipline（律師懲戒）, final and last judgment（確定終局判決）. **

HOLDING: The Committee on the Discipline of Lawyers and the Committee on the Review of the Discipline of Lawyers, established according to Articles 41 and 43 of the Lawyer's Act, serve as the first trial and final appeal tribunals of professional discipline within the organizations of the High Court and Supreme Court, and are different from the Commit-

解釋文：依律師法第四十一條及第四十三條所設之律師懲戒委員會及律師懲戒覆審委員會，性質上相當於設在高等法院及最高法院之初審與終審職業懲戒法庭，與會計師懲戒委員會等其他專門職業人員懲戒組織係隸屬於行政機關者不同。律師懲戒覆審委員會之決議即屬法院之終審裁判，並非行政處分或訴願決定，自不得再行提起行政爭

* Translated by Su-po Kao.

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tee on the Discipline of Accountants and other professional disciplinary organizations which are within the organizations of the Executive branch. The resolution of the Committee on the Review of the Discipline of Lawyers is therefore equivalent to the final and binding judgment of the court which is not an administrative act or a decision of administrative appeal and cannot be appealed through administrative litigation. Interpretation No. 295 of this Yuan should thus be further supplemented.

訟，本院釋字第二九五號解釋應予補充。

REASONING: Article 16 of the Constitution prescribes the people's right of instituting legal proceedings, which means the people in accordance with legal proceeding, have the right to request the court to adjudicate on their respective legal disputes, and such right has already been interpreted by this Yuan (See Interpretations Nos. 220 and 368). The so-called "court" will certainly include the adjudicating institution composed of judges. However, some adjudicating institutions, established within the judiciary and composed of both judges and profess-

解釋理由書：憲法第十六條規定人民有訴訟權，係指人民有依法定程序，就其權利義務之爭議，請求法院救濟之權利，業經本院闡釋在案（參照釋字第二二〇號、第三六八號解釋）。其中所謂法院固係指由法官所組成之審判機關而言，惟若因事件性質在司法機關之中設置由法官與專業人員共同參與審理之法庭或類似組織，而其成員均屬獨立行使職權不受任何干涉，且審理程序所適用之法則，亦與法院訴訟程序所適用者類同，則應認其與法院相當。人民依法律之規定就其爭議事項，接受此等法庭或類似組織之審理，即難謂憲法上

sionals, should be deemed to be equivalent to the "court," in the case where the members of such institutions exercise their authority independently from interference, and the procedural rules applied are similar to the court proceeding. Then the people's right of instituting legal proceedings is not violated should their respective disputes be adjudicated by such institutions in accordance with law.

之訴訟權遭受侵害。

In regard to the matters of violation of professional obligations and discipline of the professionals, the disciplinary institutions are mostly in the form of committees composed of the members of the respective professions, officials of relevant authority, and relevant experts according to the organic charter promulgated by the governing authority authorized by law, e.g., the disciplinary institutions of accountants and architects. As for lawyers whose mission is to protect human rights, uphold social justice and to promote democracy and the rule of law (See Article 1 of the Lawyer's Act amended and promulgated on Nov. 16, 1992), their practice is naturally mutually supportive and

關於專門職業人員違背其職業上應遵守之義務，而須受懲戒者，基於職業團體自治原則及各種專門職業之特性，掌理懲戒事項之組織，多由法律授權主管機關以訂定組織規程方式，組成包括各該職業團體成員、行政主管人員及有關專家之委員會，如會計師及建築師等之懲戒組織是。至於律師依法負有保障人權、實現社會正義及促進民主法治之使命（見中華民國八十一年十一月十六日修正公布之律師法第一條），其執行業務與法院之審判事務相輔相成，關係密切，法律對其懲戒機構之設立，遂有不同於其他專門職業人員之規定。依律師法第四十一條：「律師懲戒委員會由高等法院法官三人、高等法院檢察署檢察官一人及律師五人組織之；委員

highly related to the adjudication of the court. Therefore, the legal rules regarding the establishment of the disciplinary institutions are different from those regarding other professions. According to Article 41 of the Lawyer's Act: "The Committee on the Discipline of Lawyers shall be composed of three judges of the High Court, one prosecutor from the prosecutor's office in the High Court, and five lawyers; one of the members of the above committee shall be elected Chief Commissioner." Article 43 of the same Act also reads: "The Committee on the Review of the Discipline of Lawyers shall be composed of four justices of the Supreme Court, one prosecutor from the prosecutor's office in the Supreme Court, five lawyers and two scholars; one of the members of the above committee shall be elected Chief Commissioner." In regard to the proceeding of disciplinary matters, Article 40 of the same Act adopts the principle of prosecution, that is, the disciplinary procedure is initiated by a government organ other than the Discipline Committee or by the bar association. Also according to the Regulation on the Discipline of Lawyers, author-

長由委員互選之。」同法第四十三條：「律師懲戒覆審委員會由最高法院法官四人、最高法院檢察署檢察官二人、律師五人及學者二人組織之；委員長由委員互選之。」關於懲戒事件之審理，則依同法第四十條規定採彈劾主義，亦即懲戒程序之發動，係由懲戒委員會以外之機關或律師公會移送。又依同法第五十二條第二項授權訂定之律師懲戒規則，在組織結構上將上述懲戒委員會分別設在高等法院及最高法院，其成員於行使職權時實質上亦與各該法院法官享有同等之獨立性。此外，有關人員迴避，案件分配，證據調查（並得囑託法院予以調查），筆錄製作，作成評議及書類等，或準用刑事訴訟法之規定，或與法院審理訴訟案件之程序類同，各該委員會性質上屬於法院所設之職業懲戒法庭，與其他專門職業人員懲戒委員會係隸屬於行政機關者有別。雖各該懲戒委員會之成員除法官及檢察官外，尚有律師或學者，此乃職業懲戒組織之通例，於其行使職業懲戒權法庭之特性並無影響。受懲戒之律師對於律師懲戒委員會之決議不服者，得請求覆審，律師懲戒覆審委員會所為之決議，即屬法院之終審裁判，並非行政處分或訴願決定，自不得再行提起行政爭訟，本院釋

ized and promulgated pursuant to Article 52, Paragraph 2, of the same Act, the abovementioned Committees are established within the High Court and Supreme Court, respectively, in the structural sense and their members practically enjoy the same degree of independence as other judges of the same institutions do in the exercise of authority. In addition, as regards the rules of official withdrawal, case allocation, evidence investigation (may request the court to investigate), affidavit recording, verdict and documentation, etc., either the relevant rules of the Code of Criminal Procedure shall also be applied or, they are similar to the procedure of adjudication. The respective committees are the professional disciplinary tribunals of the courts in terms of their characteristics and are different from other committees of professional discipline established under the Executive branch. Though the members of the respective committees include lawyers and scholars in addition to judges and prosecutors, this is the common practice for the organization of professional discipline and does not affect its character as the tribunal ex-

字第二九五號解釋應予補充。又律師懲戒委員會既具職業懲戒法庭之性質，為使其名實相符並增進司法化之運作，宜於修正相關法律時改為法庭名稱，併予指明。

ercising the authority of professional discipline. The disciplined lawyer may appeal the resolution of the Committee on the Discipline of Lawyers and request for review. The resolution of the Committee on the Review of the Discipline of Lawyers is the final and binding judgment of the court in its character which is not an administrative act or a decision of administrative appeal and cannot be appealed through administrative litigation. Interpretation No. 295 of this Yuan should thus be further supplemented. And since the Committee on the Discipline of Lawyers bears the character of a professional disciplinary tribunal, it should be further pointed out that its official name should be changed to tribunal, when the relevant laws are revised, in order that its name accords with practice and to strengthen its judicial character.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋孫大法官森焱提出理由部分不同意見書。

J. Y. Interpretation No.379（May 12, 1995）*

ISSUE: Where the certificate of self-tilling ability is subsequently cancelled because the land transferee is found to be incapable of cultivating the land, is the land administration office entitled to delete the recordation already approved on the ground of nullification of the certificate of self-tilling ability?

RELEVANT LAWS:

Article 143, Paragraph 4 of the Constitution（憲法第一百四十三條第四項）; Article 30, Paragraph 1, the first sentence, Paragraph 2 of the Land Act（土地法第三十條第一項前段、第二項）; Article 82, Paragraph 1, Subparagraph 1, the first sentence of the Regulation Governing Land Registration（土地登記規則第八十二條第一項第一款前段）; Directive T. 62 N. 6795 (Executive Yuan, August 9,1973)（行政院六十二年八月九日台六十二內字第六七九五號函）; J. Y. Interpretation Yuan-tze No.1919（司法院院字第一九一九號解釋）.

KEYWORDS:

private farmland（私有農地）, transferee（承受人）, recordation of transfer of ownership（所有權移轉登記）, certificate of self-tilling ability（自耕能力證明書）, land administration office（地政機關）, recording office（登記機關）, prima facie review（形式上審查）, delete the recordation（塗銷登

* Translated by Raymond T. Chu.

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

記）, land distribution and readjustment（土地分配與整理）, self-farming landowners（自耕農）, protection for reliance（信賴保護）, reliance interest（信賴利益）. **

HOLDING: That transfer of ownership to private farmland may be made only to a transferee capable of cultivating the land by himself is specifically set forth in the Land Act under Article 30, Paragraph 1, the first sentence. And in applying for recordation of transfer of ownership to farmland, the transferee is required by the Regulation Governing Land Registration, Article 82, Paragraph 1, Subparagraph 1, the first sentence, to produce a certificate of self-tilling ability. Inasmuch as the recording office is charged with the duty to carry out a prima facie review of the certificate of self-tilling ability, it is also empowered to revoke its approval for recordation of the transfer of ownership and delete the same after the effectuation thereof if the respective hsiang, township, city or precinct office in charge finds that the transferee is not actually capable of self-tilling and

解釋文：私有農地所有權之移轉，其承受人以能自耕者為限，乃土地法第三十條第一項前段所明定。申請農地所有權移轉登記者，依土地登記規則第八十二條第一項第一款前段規定，應提出承受人自耕能力證明書，登記機關既應就所提自耕能力證明書為形式上的審查，則其於登記完畢後，經該管鄉（鎮、市、區）公所查明承受人不具備自耕能力而撤銷該自耕能力證明書時，其原先所有權移轉登記所據「具有自耕能力」之事由，已失所附麗，原登記機關自得撤銷前此准予登記之處分，逕行塗銷其所有權移轉登記。

cancels the certificate of self-tilling ability, whereby the "self-tilling ability" of the transferee to which the original recordation of the transfer of the ownership appertains is rendered fictitious.

REASONING: The land policy of the state as proclaimed by the Constitution in Article 143, Paragraph 4, is that in the distribution and readjustment of land the state shall in principle assist self-farming landowners and persons who make use of the land by themselves. To bring this constitutional principle into reality, the Land Act provides under Article 30, Paragraph 1, the first sentence, that transfer of ownership to private farmland may be made only to a transferee capable of cultivating the land by himself and provides further in Paragraph 2 thereof that a transfer in violation of such requirement will be null and void.

解釋理由書：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，係憲法第一百四十三條第四項所揭櫫之國家土地政策；土地法第三十條第一項前段規定，私有農地所有權之移轉，其承受人以能自耕者為限，第二項復規定，違反前項規定者，其所有權之移轉無效，即屬首開憲法原則之體現。

When handling an application for recordation of transfer of the title to farmland, the land administration office, in pursuance of the provision of the Regulation Governing Land Registration, Art.

地政機關受理農地所有權移轉登記之申請，依土地登記規則第八十二條第一項第一款前段之規定，係憑申請人戶籍所在地之鄉（鎮、市、區）公所核發自耕能力證明書為認定承受人具有自

82, Paragraph 1, Subparagraph 1, the first sentence, relies on the certificate of self-tilling ability issued by the office of the hsiang, township, city or precinct where the applicant maintains his household registration to determine if the transferee is capable of cultivating by himself. If the hsiang, township, city or precinct office in charge, after having issued to a transferee a certificate of self-tilling ability, finds that the transferee does not meet the elements required for the self-tilling ability by the Precautionary Matters on the Submission of Application and Issuance of Self-Tilling Certificate established by the Ministry of the Interior, and thereby cancels the certificate, the "self-tilling ability" of the transferee based on which the land administration office gave its approval to the application for recordation of the transfer of the ownership is now rendered fictitious, and its act of such approval, being defective, is certainly revocable and the recordation of the transfer of the ownership may be deleted. The interpretation given in Directive T. 62 N. 6795 (Executive Yuan, August 9, 1973) is consistent with the essence of the Land Act as

耕能力之依據。該管鄉（鎮、市、區）公所於核發自耕能力證明書後，如經查明承受人與內政部訂頒「自耕能力證明書之申請及核發注意事項」所載具備自耕能力之要件不符，因而撤銷該證明者，地政機關原先准予辦理所有權移轉登記所據「具有自耕能力」之事由，即失所附麗，前此准予登記之處分，既有瑕疵，地政機關自得撤銷之，逕將所有權移轉登記予以塗銷。行政院六十二年八月九日臺六十二內字第六七九五號函所為之解釋，符合上開土地法規定之意旨，並非以命令就人民之權利為得喪變更之規定。

it is not intended to provide for the acquisition or loss of or alteration to any right of people through the issue of administrative order.

While a transferee who applies for the transfer of ownership based on a contract of sale acquires the title by virtue of a juristic act, the approval granted by a land administration office for the recordation of the transfer of the title to private farmland is preconditioned upon the production by the transferee of a certificate of self-tilling ability. If this precondition no longer exists as a result of the cancellation of the certificate of self-tilling ability, the element required for recordation of the transfer of ownership previously approved in administration is shown to be insufficient, and the recordation effectuated before should not be deemed to be free of defect. Thus, the land administration office is unquestionably entitled to revoke its act to allow recordation and accordingly delete such recordation of the transfer of the ownership. The deletion of such recordation of the transfer of the owner ship is resultant from the cancellation of

承受人本於買賣契約辦理所有權移轉登記，固係依法律行為而取得所有權；然就地政機關准予辦理私有農地所有權移轉登記言，係以承受人已提出自耕能力證明書為前提，此一前提既因自耕能力證明書之撤銷而不存在，其在行政上原准予辦理移轉登記之要件，顯有欠缺，從而前此所為之登記，即不能謂無瑕疵，地政機關自得撤銷准予登記之處分，塗銷該移轉登記。地政機關係因自耕能力證明書被撤銷，而塗銷所有權移轉登記，並非逕行認定該買賣為無效，尚不涉及私權之認定。關於土地之買賣，是否因以不能之給付為契約標的而無效，買賣雙方當事人如有爭執，當然可訴由民事法院依法裁判。

the certificate of self-tilling ability, rather than aimed at direct voidance of the sale, and hence has nothing to do with the determination of any private right. In the event of a dispute between the parties to the sale of land over the issue of whether the sale is null and void on the ground that the subject matter of the contract is one that cannot be performed, the issue may without doubt be bought to a civil court for adjudication.

The purpose for the Land Act provision in Article 30, Paragraph 1, the first sentence, that transfer of ownership to private farmland may be made only to a transferee capable of cultivating the land by himself is to safeguard the public interest under the national land policy through the imposition of restraint. Whether the transferee of a private farmland is capable of self-cultivating is determined by the agency having charge of the issue of certificates of self-tilling ability. A transferee who, knowing that he is not capable of tilling the land, presents false information to support his application for a certificate of self-tilling ability,

按土地法第三十條第一項前段規定私有農地所有權移轉登記之承受人以能自耕者為限，本係基於國家土地政策，即公共利益之維護而為之限制，私有農地承受人有無自耕能力，係由核發自耕能力證明書之機關認定，承受人明知無自耕能力，猶提供不正確資料以為自耕能力證明之申請，即屬不法，當不生信賴保護之問題，自應負此法律上可能發生之效果；若承受人未有不法之行為，而係行政機關之錯誤致核發不實之自耕能力證明書，經地政機關憑以辦理所有權移轉登記，基於公益之維護，且依土地法第三十第二項規定，其所有權之移轉，亦屬無效，仍應認逕行塗銷登記為無不合。至如何補償其信賴利益，

has acted unlawfully, and is not entitled to protection for his reliance, and must of course be held responsible for any possible legal consequence. If the transferee has not acted unlawfully, but an incorrect certificate of self-tilling ability was issued by mistake by the administrative agency, based on which the land administration office processed the ownership transfer recordation, such transfer of ownership must also be treated as null and void for the purpose of safeguarding the public interest and under Article 30, Paragraph 2, of the Land Act. Consequently, the deletion of the recordation should not be deemed to be illegal. As regards how his reliance interest may be compensated, this is a separate issue. Incidentally, where a bona fide third person acquires rights in the land in reliance on such recordation, he should not be retroactively deprived of such right simply because of the nullification of the recordation, as we have so expounded in our Interpretation Yuan-tze No.1919.

係另一問題。又善意第三人若信賴該登記而取得土地權利時，依本院院字第一九一九號解釋之旨意，要不因登記處分之撤銷而被追奪，併此指明。

Justice Chi-Nan Chen filed dissenting opinion.

本號解釋陳大法官計男提出不同意見書。

J. Y. Interpretation No.380（May 26, 1995）*

ISSUE: Article 22, Paragraphs 1 and 3, of the Enforcement Rules of the University Act require the universities to design compulsory courses commonly to be taken by all the students regardless of their majors, no student may graduate if he fails to pass the courses once finally designed. Does the said provision violate Article 11 of the Constitution which guarantees freedom of teaching to the people?

RELEVANT LAWS:

Articles 11, 23 and 162 of the Constitution（憲法第十一條、第二十三條、第一百六十二條）; Articles 1, Paragraph 2, 4, 8, 11, 23 and 25 of the University Act（大學法第一條第二項、第四條、第八條、第十一條、第二十三條、第二十五條）; Article 3 of the Private School Act（私立學校法第三條）; Articles 2 and 3 of the Act Governing the Conferment of Academic Degrees（學位授予法第二條、第三條）; Article 22, Paragraphs 1 and 3 of the Enforcement Rules of the University Act（大學法施行細則第二十二條第一項、第三項）.

KEYWORDS:

freedom of teaching（教學自由）, institutional protection mechanism（學術自由之制度性保障）, freedom of research（研究自由）, freedom of instruction（講學自由）, freedom of study（學習自由）, the legal principle of the reservation of law（法律保留原則）, university self-government（大學自治）. **

* Translated by LAWRENCE S. LIU.

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

HOLDING: The provision regarding the freedom of teaching provided in Article 11 of the Constitution is an institutional protection mechanism for academic freedom. Such provision shall encompass the freedom of research, instruction, and study, etc., in the field of college education. Article 1, Paragraph 2, of the University Act provides that "A university shall be protected under the academic freedom and shall, to the extent permitted by law, be entitled to the right of self-government." The scope of such a right of self-government shall cover all essential academic matters that relate directly to research and teaching. Although the University Act does not specifically state the arrangement of college curricula, it is one of the essential academic matters and shall therefore be included within the scope of university self-government, since it is directly related to the freedom of teaching and study. As it is explicitly given in Article 162 of the Constitution that "All public and private educational and cultural institutions state-wide shall, in accordance with the law, be subject to state supervision," such supervision of university self-

解釋文：憲法第十一條關於講學自由之規定，係對學術自由之制度性保障；就大學教育而言，應包含研究自由、教學自由及學習自由等事項。大學法第一條第二項規定：「大學應受學術自由之保障，並在法律規定範圍內，享有自治權」，其自治權之範圍，應包含直接涉及研究與教學之學術重要事項。大學課程如何訂定，大學法未定有明文，然因直接與教學、學習自由相關，亦屬學術之重要事項，為大學自治之範圍。憲法第一百六十二條固規定：「全國公私立之教育文化機關，依法律受國家監督。」則國家對於大學自治之監督，應於法律規定範圍內為之，並須符合憲法第二十三條規定之法律保留原則。大學之必修課程，除法律有明文規定外，其訂定亦應符合上開大學自治之原則，大學法施行細則第二十二條第三項規定：「各大學共同必修科目，由教育部邀集各大學相關人員共同研訂之。」惟大學法並未授權教育部邀集各大學共同研訂共同必修科目，大學法施行細則所定內容即不得增加大學法所未規定之限制。又同條第一項後段「各大學共同必修科目不及格者不得畢業」之規定，涉及對畢業條件之限制，致使各大學共同必修科目之訂定實質上發生限

government shall not only be carried out within the framework of law, but be consistent with the principle of legal reservation, as set forth in Article 23 of the Constitution. The design of core curricula, except for those explicitly regulated by the law, should also comply with said principle of university self-government. Article 22, Paragraph 3, of the Enforcement Rules of the University Act reads: "The core curriculum common to all universities shall be jointly designed by relevant personnel from all universities, upon the invitation of the Ministry of Education." Nonetheless, the University Act has not authorized the Ministry of Education to "invite" all universities jointly to design the core curriculum common to these universities. As such, the content of the Enforcement Rules of the University Act shall not add restrictions that are not stipulated in the University Act. In addition, in the last sentence of the same Article, Paragraph 1 of said Enforcement Rules, the clause "Those who fail any of the core curriculum common to all universities may not graduate" is a restriction on the qualification of graduation and therefore

制畢業之效果，而依大學法第二十三條、第二十五條及學位授予法第二條、第三條規定，畢業之條件係屬大學自治權範疇。是大學法施行細則第二十二條第一項後段逾越大學法規定，同條第三項未經大學法授權，均與上開憲法意旨不符，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。

serves, in essence, to transform the design of the core curriculum common to all universities into a restrictive condition for graduation, given that Articles 23 and 25 of the University Act and Articles 2 and 3 of the Act Governing the Conferment of Academic Degrees stipulate that conditions for graduation shall fall within university self-government. Said last sentence of Article 22, Paragraph 1, of the Enforcement Rules of the University Act has gone beyond, whereas Paragraph 3 of the same Article has not been authorized by, the University Act and neither is in accord with the constitutional intent provided above. Such provisions should therefore become null and void no later than one year from the publication date of this Interpretation.

REASONING: The provision regarding the freedom of teaching provided in Article 11 of the Constitution aim at safeguarding academic freedom. Such a safeguard mechanism should be enforced by means of university organization as well as other institutional administrations, namely, an institutional protection mecha-

解釋理由書：憲法第十一條關於講學自由之規定，以保障學術自由為目的，學術自由之保障，應自大學組織及其他建制方面，加以確保，亦即為制度性之保障。為保障大學之學術自由，應承認大學自治之制度，對於研究、教學及學習等活動，擔保其不受不當之干涉，使大學享有組織經營之自治權能，

nism. To protect academic freedom, the right of universities to govern themselves should be recognized, so that academic activities such as research, teaching and learning do not have to be subject to improper intervention, and universities may thus enjoy the right of self-government in terms of organizational as well as operational matters, whereas individuals may enjoy academic freedom. As it is explicitly given in Article 162 of the Constitution that "All public and private educational and cultural institutions state-wide shall, in accordance with the law, be subject to state supervision," and Article 1, Paragraph 2, of the University Act that "A university shall be protected under the academic freedom and shall, to the extent permitted by law, be entitled to the right of self-government," the education authorities' supervision of universities should be authorized by the law, and the law per se should abide by the principle of the reservation of law provided in Article 23 of the Constitution.

個人享有學術自由。憲法第一百六十二條規定：「全國公私立之教育文化機關，依法律受國家之監督。」大學法第一條第二項規定：「大學應受學術自由之保障，並在法律規定範圍內，享有自治權。」是教育主管機關對大學之監督，應有法律之授權，且法律本身亦須符合憲法第二十三條規定之法律保留原則。

It is our understanding that academic freedom is closely related to the develop-

按學術自由與教育之發展具有密切關係，就其發展之過程而言，免於國

ment of education. With respect to the process of development, academic freedom, which is supposed to be free from intervention of the State, shall first reveal itself by means of the freedom of research and instruction, whereas the scope of safeguarding academic freedom shall extend to cover all other important academic activities that have to do with excelling in knowledge and exploring the truth, such as the formation of the research motive, the proposal of a research project, the composition of the research staff, the allocation of the research budget, the publication of the research results, etc. These academic activities should not only be protected but allowed to share the resources of society. Aside from research, matters of teaching and learning, such as the design of curricula and courses, the content of lectures, the evaluation of scholastic aptitude, the rules of examinations, the students' freedom to choose major(s) and curricula and student autonomy are also protected. Besides the aforementioned, the organization of universities and the evaluation and employment of instructors also fall within university self-

家權力干預之學術自由，首先表現於研究之自由與教學之自由，其保障範圍並應延伸至其他重要學術活動，舉凡與探討學問，發現真理有關者，諸如研究動機之形成，計畫之提出，研究人員之組成，預算之籌措分配，研究成果之發表，非但應受保障並得分享社會資源之供應。研究以外屬於教學與學習範疇之事項，諸如課程設計、科目訂定、講授內容、學力評定、考試規則、學生選擇科系與課程之自由，以及學生自治等亦在保障之列。除此之外，大學內部組織、教師聘任及資格評量，亦為大學之自治權限，尤應杜絕外來之不當干涉。大學法第四條、第八條、第十一條、第二十二條、第二十三條私立學校法第三條前段均定有大學應受國家監督之意旨，惟教育主管機關依法行使其行政監督權之際，應避免涉入前述受學術自由保障之事項。至於大學課程之自主，既與教學、學習自由相關，屬學術之重要事項，自為憲法上學術自由制度性保障之範圍。大學課程之訂定與安排，應由各大學依據大學自治與學術責任原則處理之。

government and should not be susceptible, specifically, to exterior interventions that are inappropriate. Articles 4, 8, 11, 22, 23, and the first sentence of Article 3 of the Private School Act reveal the legislative intent that universities should be subject to the supervision of the state; nevertheless the education authorities should refrain from tampering with the aforementioned matters regarding academic freedom when exercising their power of administrative supervision under the law. Since the autonomy of college curricula is relevant to the freedom of teaching and of learning and is therefore a matter of importance to academics, it should also be embraced by the institutional protection mechanism of academic freedom under the Constitution. Thus, the design and arrangement of university curricula should be handled by each university in accordance with the principle of university self-government and academic responsibility.

Article 23 of the University Act regulates the extension and reduction of the academic years as a matter of univer-

大學法第二十三條對於大學修業年限之延長及縮短，規定為大學自治事項，有關辦法授權由各大學自行擬定，

sity self-government and authorizes each university to draft relevant rules, so that they may be enforced after receiving the approval from the Ministry of Education. As such, the Ministry of Education is merely in the position of exercising "supervision on legitimacy" over the operation of each university. When exercising such "supervision on legitimacy," it is certain that the Ministry of Education should comply with the protection of academic freedom and the respect of university self-government and, therefore, should not add restrictions not provided by law. By the same logic, the design of the core curriculum should be in accordance with said principle of university self-government, unless the law provides otherwise. It is provided in Article 22, Paragraph 3, of the Enforcement Rules of the University Act that "The core curriculum common to all universities shall be jointly designed by relevant personnel from all universities, upon the invitation of the Ministry of Education." Nonetheless, the University Act has not authorized the Ministry of Education to "invite" all universities jointly to design the core cur-

報請教育部核備後實施，故教育部對各大學之運作僅屬於適法性監督之地位。教育部監督權之行使，應符合學術自由之保障及大學自治之尊重，不得增加法律所未規定之限制，乃屬當然。大學之必修課程，除法律有明文規定外，其訂定亦應符合上開大學自治之原則，大學法施行細則第二十二條第三項規定：「各大學共同必修科目，由教育部邀集各大學相關人員共同研訂之。」惟大學法並未授權教育部邀集各大學相關人員共同研訂共同必修科目，大學法施行細則所定內容即不得增加大學法所未規定之限制。教育部依此所定各大學共同必修科目僅係提供各大學訂定相關科目之準則。同條第一項後段「各大學共同必修科目不及格者不得畢業」之規定，為對畢業條件所加之限制，各大學共同必修科目之訂定因而發生限制畢業之效果，而依大學法第二十三條、第二十五條及學位授予法第二條、第三條規定，畢業之條件係屬大學自治權範疇。大學法施行細則第二十二條第一項後段自係逾越大學法規定，又同條第三項未經大學法授權，均與前揭憲法意旨不符，應自本解釋公布之日起，至遲於屆滿一年時，失其效力。於此期間，大學共同必修科目之設置，應本大學自治之精神由

riculum common to these universities. As such, the content of the Enforcement Rules of the University Act shall not add restrictions that are not stipulated in the University Act. The core curriculum common to all universities designed by the Ministry of Education serves as, according to the aforesaid reasoning, nothing more than a sample guideline for the reference of universities when designing their respective core curricula. The clause "Those who fail any of the core curriculum common to all universities may not graduate" in the last sentence of the same Article, Paragraph 1 of said Enforcement Rules, is a restriction on the qualification of graduation and therefore serves, in essence, to transform the design of the core curriculum common to all universities into a restrictive condition to graduation, given that Articles 23 and 25 of the University Act and Articles 2 and 3 of the Act Governing the Conferment of Academic Degrees stipulate that conditions for graduation shall fall within the extent of university self-government. Said last sentence of Article 22, Paragraph 1, of the Enforcement Rules of the University Act

法律明文規定，或循大學課程自主之程序由各大學自行訂定，併此指明。

has gone beyond, whereas Paragraph 3 of the same Article has not been authorized by, the University Act and neither is in accord with the legislative intent of the Constitution provided above. Such provisions should therefore become null and void no later than one year from the publication date of this Interpretation. In addition, it is our intention to point out that, during said period, the design and arrangement of the core curriculum common to all universities shall either be regulated explicitly by law, in compliance with the spirit of university self-government, or designed by each university, based on the procedure of autonomy.

Justice Young-Mou Lin filed concurring opinion, in which Justice Huey-Ing Yang joined.

Justice Hsiang-Fei Tung filed dissenting opinion, in which Justice Vincent Sze and Justice Hua-Sun Tseng joined.

本號解釋林大法官永謀、楊大法官慧英共同提出協同意見書；董大法官翔飛、施大法官文森與曾大法官華松共同提出不同意見書。

J. Y. Interpretation No.381（June 9, 1995）*

ISSUE: Shall the quorum requirement and the amount of affirmative votes to be cast in the First Reading Meeting held for the amendment of the Constitution be in accordance with Article 174, Subparagraph 1, of the Constitution?

RELEVANT LAWS:

Articles 34 and 174, Subparagraph 1, of the Constitution（憲法第三十四條、第一百七十四條第一款）; Article 1, Paragraph 9, of the Amendments to the Constitution（憲法增修條文第一條第九項）; J. Y. Interpretation No. 342（司法院釋字第三四二號解釋）; Article 8 of the Organic Act of the National Assembly （國民大會組織法第八條）; Articles 42, 43, 44, Subparagraph 2, and 46, Subparagraph 12, of the Regulation of the National Assembly Proceedings（國民大會議事規則第四十二條、第四十三條、第四十四條第二款、第四十六條第十二款）.

KEYWORDS:

Constitution（憲法）, amend（修改）, proposal for an amendment（修改案）, quorum（出席人數）, National Assembly（國民大會）, delegate to the National Assembly（國民大會代表）, First Reading（一讀）, self-governance（自律）. **

* Translated by Professor Chun-Jen Chen.

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

HOLDING: The quorum and the amount of votes required to amend the Constitution, as set forth in Article 174, Subparagraph 1, of the Constitution requiring two-thirds of the total number of delegates to the National Assembly to be present and a three-fourths affirmative vote to be cast, are those of requirements of a meeting of the National Assembly making a resolution to amend the Constitution. The Constitution as well as statutes is silent with respect to what Reading Meetings, their quorums and amounts of vote are needed in order to make a resolution of a constitutional amendment. The First Reading Meeting held for the amendment of the Constitution is not by itself the adoption of the constitutional amendment. Its quorum requirement falls into the domain of self-governance matters of the National Assembly. The National Assembly has the discretion and this will not give rise to constitutional issues when it adopts the one-third quorum as promulgated by Article 8 of the Organic Act of the National Assembly, the two-thirds quorum as mandated by Article 174, Subparagraph 1, of the Constitution,

解釋文：憲法第一百七十四條第一款關於憲法之修改，由國民大會代表總額三分之二之出席及出席代表四分之三之決議之規定，係指國民大會通過憲法修改案時，必須之出席及贊成之人數。至於憲法修改案應經何種讀會暨各次讀會之出席及議決人數，憲法及法律皆未規定。修改憲法所進行之一讀會程序，並非通過憲法修改案，其開議出席人數究採國民大會組織法第八條代表總額三分之一，或採憲法第一百七十四條第一款所定三分之二之出席人數，抑或參照一般會議規範所定出席人數為之，係屬議會自律之事項，均與憲法無違。至自律事項之決定，應符合自由民主憲政秩序之原則，乃屬當然，併此指明。

or a quorum according to the rules of general meetings. Of course, it is needless to say that every self-governance decision shall be made in accordance with the principles of the constitutional structure of free democracy.

REASONING: The National Assembly, consisting of delegates elected directly by people in a free territory and indirectly by political parties pro rata, exercises political power for nationals per procuration according to the mandate of the Constitution. National representative bodies may prescribe procedural rules on how their powers are exercised, provided such rules are not in contravention to the law and the Constitution. This well-recognized political principle is often referred to as parliamentary self-governance or parliamentary autonomy. Besides the written procedural rules of the parliament, there are various unwritten rules whose applications may vary from one resolution to another. This principle has been delineated by us in Judicial Yuan Interpretation No. 342. It is also in accordance with Article 1, Paragraph 9, of the Amendments

解釋理由書：國民大會由自由地區人民直接選出之代表及依政黨比例方式選出之代表組織之，依憲法之規定代表全國國民行使政權。而民意代表機關其職權行使之程序，於不牴觸憲法及法律範圍內，得依其自行訂定之議事規範為之，學理上稱為議會自律或議會自治。至議會規範除成文規則外，尚包括各種不成文例規，於適用之際，且得依其決議予以變通，業經本院釋字第三四二號解釋闡釋甚明。憲法增修條文第一條第九項規定：「國民大會行使職權之程序，由國民大會定之，不適用憲法第三十四條之規定」，亦係本於同一旨趣。

to the Constitution, which states: "The National Assembly has the authority to prescribe procedures governing how its powers are exercised regardless of the mandate of Article 34 of the Constitution."

The two-thirds quorum and the three-fourths affirmative vote requirements set forth in Article 174, Subparagraph 1, of the Constitution are mandates for the adoption of the constitutional amendment resolution. The one-third quorum and a one-half affirmative vote requirement set forth in Article 8 of the Organic Act of the National Assembly govern resolutions made for matters other than the constitutional amendment, and hence are not in contravention to Article 174, Subparagraph 1, of the Constitution. With respect to how Reading Meetings proceed and what quorums and amounts of affirmative vote of respective Reading Meetings are, the National Assembly has the authority to decide following the principles of parliamentary autonomy and within the scope of the Constitution. Of course, it is needless to say that every self-governance de-

憲法第一百七十四條第一款規定，憲法之修改由國民大會代表總額三分之二之出席及出席代表四分之三之決議，此乃關於國民大會議決通過憲法議案出席及可決人數之規定。國民大會組織法第八條規定，國民大會非有代表三分之一以上人數之出席，不得開議，其議決除憲法及法律另有規定外，以出席代表過半數之同意為之，此為關於國民大會討論議案，無憲法第一百七十四條第一款之適用或法律無特別規定時，必須具備之出席及可決人數之規定。至於修改憲法如何進行讀會以及各次讀會之出席及可決人數，憲法及法律皆未加以規定，於不牴觸憲法範圍內，得依議事自律之原則為之，惟議事自律事項之決定，應符合自由民主之憲政秩序，乃屬當然。中華民國八十一年四月七日修訂之國民大會議事規則第四十四條第二項及第四十六條第三項，則以憲法第一百七十四條第一款為依據，明定修改憲法

cision shall be made in accordance with the principles of the constitutional structure of free democracy. Articles 42, 43, 44, Subparagraph 2, and Article 46, Subparagraph 12, of the Regulation of the National Assembly Proceedings as amended on April 7, 1992, on the basis of Article 174, Subparagraph 1, of the Constitution, require a two-thirds quorum and three-fourths affirmative vote for the adoption of resolutions of the amendment to the Constitution and for the ratification of the amendment proposal submitted by the Legislative Yuan in Second Reading and Third Reading Meetings. The same rules are silent with regard to the quorum in the First Reading Meeting, except for Article 43 which requires a review of the proposal after general discussions in the First Reading Meeting. According to the petition and accompanying materials submitted by the National Assembly, the one-third quorum and two-thirds quorum were both once adopted in different First Reading Meetings by the first and second sessions of the National Assembly when amending the provisions of the Temporary Provisions Effective during the Pe-

之議案及複決立法院所提之憲法修正案所進行之第二讀會及第三讀會，其議決以代表總額三分之二之出席，出席代表四分之三之決議行之。而第一讀會之出席人數則未見諸明文，同規則第四十三條，對一讀會中修改憲法之議案，僅規定經大體討論後，應即交付審查。又依據國民大會聲請本院解釋之聲請書及附送資料記載，第一屆國民大會及第二屆國民大會進行修訂動員戡亂時期臨時條款或增訂憲法條文之第一讀會，固多以上開國民大會組織法所定以代表總額三分之一為出席開議之人數，但亦有適用憲法第一百七十四條第一款所定以代表總額三分之二為出席開議之人數者。是故修改憲法所進行之一讀會程序，並非通過憲法修改案，其開議出席人數究採國民大會組織法第八條代表總額三分之一，或採憲法第一百七十四條第一款所定三分之二之出席人數，抑或參照一般會議規範所定出席人數為之，係屬議會自律之事項，均與憲法無違。

riod of National Mobilization for Suppression of the Communist Rebellion. Therefore, the First Reading proceeding for the constitutional amendment cannot be equated to the adoption of the constitutional amendment resolution, and its quorum requirement falls into the domain of parliamentary autonomy and will not give rise to constitutional issues regardless what quorum is adopted, the one-third quorum as promulgated by Article 8 of the Organic Act of the National Assembly, or the two-thirds quorum as mandated by Article 174, Subparagraph 1, of the Constitution, or a quorum according to rules of general meetings.

Justice Sen-Yen Sun filed dissenting opinion.

本號解釋孫大法官森焱提出不同意見書。

J. Y. Interpretation No.382（June 23, 1995）*

ISSUE: Under the Constitution, is a discharged student entitled to bring an administrative appeal and later an administrative litigation against his/her respective school to challenge the discharge?

RELEVANT LAWS:

Article 15, 16, 18, 77 and 83 of the Constitution to（憲法第十五條、第十六條、第十八條、第七十七條、第八十三條）; J. Y. Interpretations Nos. 187, 201, 243, 266, 295, 298, 312, 323 and 338（司法院釋字第一八七號、第二〇一號、第二四三號、第二六六號、第二九五號、第二九八號、第三一二號、三二三號、三三八號解釋）; Article 1 of the Administrative Appeal Act (訴願法第一條); Article 1 of the Administrative Proceedings Act (行政訴訟法第一條); Precedent P.T. No. 6（Ad. Ct. 1952）（行政法院四十一年判字第六號判例）.

KEYWORDS:

discharge or similar action（退學或類此之處分行為）, student discipline（學生懲處）, right to sue（訴訟權）, an opportunity for education（受教育機會）, administrative appeal（訴願）, administrative litigation（行政訴訟）. **

HOLDING: An discharge or similar action taken by a school of any

解釋文：各級學校依有關學籍規則或懲處規定，對學生所為退學或類

* Translated by Dennis T. C. Tang.

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

level against one of its students in accordance with its student codes or disciplinary regulations will change that student's status and hinder his/her opportunity to receive an education. In light of its significant impact on the people's right to education guaranteed by the Constitution, such a disciplinary action shall be classified as an administrative act subject to administrative appeal and administrative litigation. The disciplined student is entitled to bring an administrative appeal and later an administrative litigation when he/she has exhausted all remedies available within his/her school. To the extent that it is contrary to this Interpretation, the ruling announced in Precedent P.T. No. 6 of the Administrative Court in 1952 should no longer be applied, so that the right to education and the right of instituting legal proceedings guaranteed by the Constitution can be secured.

此之處分行為，足以改變其學生身分並損及其受教育之機會，自屬對人民憲法上受教育之權利有重大影響，此種處分行為應為訴願法及行政訴訟法上之行政處分。受處分之學生於用盡校內申訴途徑，未獲救濟者，自得依法提起訴願及行政訴訟。行政法院四十一年判字第六號判例，與上開意旨不符部分，應不予援用，以符憲法保障人民受教育之權利及訴訟權之意旨。

REASONING: The Constitution guarantees the people a right to education. And a person whose right guaranteed by the Constitution is illegally infringed upon is entitled pursuant to Article 16 of the

解釋理由書：人民有受教育之權利，為憲法所保障。而憲法上權利遭受不法侵害者，自得行使憲法第十六條訴願及訴訟之權，於最後請求司法機關救濟，不因其身分而受影響，迭經本院

Constitution to administrative appeal as well as ultimately to sue in a court, regardless of his/her status. Such an opinion has been reiterated repeatedly in Interpretations Nos. 187, 201, 243, 266, 295, 298, 312, 323 and 338 rendered by the Judicial Yuan regarding people possessing the status of civil servants or others yet involved in litigation.

釋字第一八七、二〇一、二四三、二六六、二九五、二九八、三一二、三二三及三三八號等解釋，就人民因具有公務員或其他身分關係而涉訟之各類事件中，闡釋甚明。

Public schools as institutions established by various levels of governments pursuant to laws and regulations to carry out educational functions possess the status of administrative agencies. Private schools as institutions established pursuant to the Private School Act and approved by the competent educational agency with an authorized official seal have the authority to carry out educational functions, such as selecting, enrolling, and disciplining students as well as issuing degree certificates. Private schools to such an extent are educational institutions authorized by law to exercise public authority within a specified scope and should be regarded as possessing a status equivalent to administrative agencies (See J.Y. Inter-

公立學校係各級政府依法令設置實施教育之機構，具有機關之地位，而私立學校係依私立學校法經主管教育行政機關許可設立並製發印信授權使用，在實施教育之範圍內，有錄取學生、確定學籍、獎懲學生、核發畢業或學位證書等權限，係屬由法律在特定範圍內授與行使公權力之教育機構，於處理上述事項時亦具有與機關相當之地位（參照本院釋字第二六九號解釋）。是各級公私立學校依有關學籍規則或懲處規定，對學生所為退學或類此之處分行為，足以改變其學生身分及損害其受教育之機會，此種處分行為應為訴願法及行政訴訟法上之行政處分，並已對人民憲法上受教育之權利有重大影響。人民因學生身分受學校之處分，得否提起行政爭訟，應就其處分內容分別論斷。如學生

pretation No. 269). An discharge or similar action taken by a public or private school of any level against a student in accordance with its student codes or disciplinary regulations will change that student's status and hinder his/her opportunity to receive an education. Such a disciplinary action shall be deemed as an administrative act subject to administrative appeal and administrative litigation in light of its significant impact on the people's right to education guaranteed by the Constitution. Whether a person suffering from such an action because of his/her student status is entitled to administrative appeal and administrative litigation depends upon the contents of the action in dispute. Whenever a disciplinary action, such as recording a demerit or reprimand, is necessary for the maintenance of a school's order or realization of educational purposes and does not infringe upon the student's right to education, the student(s) affected should only be allowed to appeal within the school, and not be allowed to bring administrative appeal and litigation. On the contrary, when a student suffers discharge or similar actions that in

所受處分係為維持學校秩序、實現教育目的所必要，且未侵害其受教育之權利者（例如記過、申誡等處分），除循學校內部申訴途徑謀求救濟外，尚無許其提起行政爭訟之餘地。反之，如學生所受者為退學或類此之處分，則其受教育之權利既已受侵害，自應許其於用盡校內申訴途徑後，依法提起訴願及行政訴訟。行政法院四十一年判字第六號判例：「學校與官署不同，學生與學校之關係，亦與人民與官署之關係有別，學校師長對於違反校規之學生予以轉學處分，如有不當情形，亦祇能向該管監督機關請求糾正，不能按照訴願程序，提起訴願。」與上開意旨不符部分，應不予援用，以符憲法保障人民受教育之權利及訴訟權之意旨。

fact affect his/her right to education, he/she is entitled to administrative appeal and administrative litigation pursuant to the law after having exhausted all remedies available within the school. To the extent that it is contrary to this Interpretation, the ruling of Precedent P.T. No. 6 of the Administrative Court in 1952 stating that, "schools are different from agencies; the relationship between a school and its students is also different from that between the people and an agency; when a transfer decision made by a school against a student is considered inappropriate, the affected student may only request the agency that committed the oversight to correct it, and can not bring administrative appeal pursuant to the Administrative Appeal Act," should no longer be applied, so that the right to education and the right of instituting legal proceedings guaranteed by the Constitution can be secured.

In addition, an agency or a court reviewing such a discharge or similar action should defer to the decision on judgment of moral character, evaluation of academic performance or choice of discipli-

又受理學生退學或類此處分爭訟事件之機關或法院，對於其中涉及學生之品行考核、學業評量或懲處方式之選擇，應尊重教師及學校本於專業及對事實真象之熟知所為之決定，僅於其判斷

nary measures made by the teacher(s) and school based upon their expertise and familiarity with the facts. Such a decision can be revoked or altered only when the judgment or discretion involved is illegal or obviously inappropriate.

或裁量違法或顯然不當時，得予撤銷或變更，併此指明。

J. Y. Interpretation No.383（July 7, 1995）*

ISSUE: Are the Ordinance and Directive issued by the Ministry of Economic Affairs according to the authorization of Articles 1 and 34 of the Mining Act in contravention to the law and the Constitution?

RELEVANT LAWS:

Articles 15, 143, Paragraph 2, the Constitution（憲法第十五條、第一百四十三條第二項）, Articles 1 and 34 of the Mining Act（礦業法第一條、第三十四條）.

KEYWORDS:

Ministry of Economic Affairs（經濟部）, province（省）, agency-in-charge（主管機關）, central governing authority（中央主管機關）, public interests（公益）, mine（礦）, mining territory（礦區）, adjacent mining territory（鄰接礦區）, demarcate（區劃）, explore（探勘）, quarry（開採）, mining rights（礦業權）, revoke（撤銷）,vacate（註銷）,reiterate（重申）, discretion（裁量權）, declaratory instruction（準則性釋示）.**

HOLDING: The competent authorities of the Ministry of Economic Affairs, provinces or special (Executive-

解釋文：經濟部或省（直轄市）主管機關，認為礦業申請地有妨害公益或無經營之價值時，得不予核准；

* Translated by Professor Chun-Jen Chen.

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

Yuan-governed) municipalities may refuse to grant permission when they deem that the quarrying in the applied mining territory will be detrimental to public interests or economically unsuitable. Article 34 of the Mining Act authorizes the Ministry of Economic Affairs to stop accepting applications for quarrying in specified mining territories in order to explore mineral resources, to demarcate mining territories, or to adjust the mineral outputs. Therefore, the competent authorities have the discretion with respect to mining applications. On August 4, 1972, the Ministry of Economic Affairs issued "Ministry of Economic Affairs Ordinance (61 Jin-Kung-Tze) No. 21516" stating that, except for special reasons that allow the public to apply, all mines whose permissions have been revoked or vacated are temporarily reserved in order to be integrated with adjacent mining territories sharing the same mineral veins to reach the proper economies of scale and reasonable management, and to strengthen mining safety. The same language is reiterated in Ministry of Economic Affairs Directive (75 Jin-Kung-Tze) No. 35906 (August 15,

經濟部為探勘礦產調整礦區或調節產銷時，得指定某區域內之礦，停止接受申請，礦業法第三十四條有明文規定，是對於探採礦產之申請，主管機關本有准駁之裁量權。經濟部六十一年八月四日經（六一）礦字第二一五一六號令稱：今後凡被撤銷或註銷礦業權之煤礦，除有特殊原因，可予單獨開放人民申領者，一律應予暫行保留，以備有礦利關係之鄰接礦區調整增區促使擴大規模，趨於合理化經營，而增加保安之管理等語；復於七十五年八月十五日以經（七五）礦字第三五九〇六號函，就礦種中包含煤礦者，一併暫予保留，不開放人民申請一事，重申前令，均係中央主管機關依上開規定，對下級主管機關就臺灣地區煤礦之探採所為之準則性釋示，與憲法尚無牴觸。

1986), which indicates that those mines, including coal mines, whose permissions have been revoked or vacated are temporarily reserved and not open to public application. The above-mentioned Ordinance and Directive are both declaratory instructions made by the central governing authority to its subordinate agencies under the proper authorization of the above-mentioned statute and are not in contravention to the Constitution.

REASONING: Article 143, Paragraph 2, of the Constitution states that mineral deposits which are embedded in the land shall belong to the State, regardless of the fact that private individuals may have acquired ownership over such land. Article 1 of the Mining Act provides that all mines within the territory of the Republic of China belong to the State; no exploration or quarrying is allowed unless a mining right has been obtained according to the Mining Act; the competent authorities of the Ministry of Economic Affairs, provinces or the special (Executive-Yuan-governed) municipalities may refuse to grant permission when they deem

解釋理由書：附著於土地之礦屬於國家所有，不因人民取得土地所有權而受影響，憲法第一百四十三條第二項定有明文。又礦業法第一條規定，中華民國領域內之礦，均為國有，非依礦業法取得礦業權，不得探採。而人民申請設定礦業權時，經濟部或省（直轄市）主管機關，認為礦業申請地有妨害公益或無經營之價值時，得不予核准；經濟部為探勘礦產調整礦區或調節產銷時，得指定某區域內之礦，停止接受申請，復為礦業法第三十四條所明定，因之，主管機關對於探採礦產之申請，本有准駁之裁量權。臺灣地區煤礦天然條件較差，且因開採日深，致生產成本偏高，工作環境日趨惡劣，故應以維護礦

that the quarrying in the applied mining territory will be to the detriment of public interests or economically unsuitable. Article 34 of the same Act provides that the Ministry of Economic Affairs may stop accepting applications for quarrying in specified mining territories to explore mineral resources, to demarcate mining territories, or to adjust the mineral outputs. Consequently, the competent authorities have the discretion with respect to mining applications. The fundamental principles of the government's coal industry policy shall be to ensure mining safety and to emphasize economic efficiency, because Taiwan's coal mines are naturally inferior and the costs of coal production are rising and coal miners' working environment is getting worse as the quarrying gets deeper and deeper. On August 4, 1972, the Ministry of Economic Affairs issued "Ministry of Economic Affairs Ordinance (61 Jin-Kung-Tze) No. 21516" providing that "As quarrying in Taiwan's coal mines gets deeper, the pressure on bedrock increases; the amount of ventilation decreases; geological conditions change dramatically; coal seams get thin-

工安全及重視經濟效益為煤業政策之基本原則。經濟部六十一年八月四日經（六一）礦字第二一五一六號令稱：「本省煤礦開採日漸進入深部，岩磐壓力增大，通風困難，地質變化大，煤層薄，瓦斯含量高，業主資金不足，從業員工素質不齊，雖主管機關極力輔導，但礦場災變仍難大幅減少，除應加強從業員工安全知識充實及改善安全設施外，今後凡被撤銷或註銷礦業權之煤礦，除有特殊原因，可予單獨開放人民申請者，一律應予暫行保留，以備有礦利關係之鄰接礦區調整增區促使擴大規模，趨於合理化經營，而增強保安之管理」等語，復於七十五年八月十五日以經（七五）礦字第三五九〇六號函，就礦種中包含煤礦者，一併暫予保留，不開放人民申請一事，重申前令，均係中央主管機關依上開規定，對下級主管機關就臺灣地區煤礦探採所為之準則性釋示，並未違背上開法條規定之意旨，與憲法尚無牴觸。

ner; and the amount of gas also increases. All these problems coupled with mining right holders' lack of capital and some miners' lack of training keep the number of mining disasters high in spite of the government's technical assistance and educational effort. Besides improving miner education and safety measures, except for special reasons to allow the public to apply, all mines whose permissions have been revoked or vacated are temporarily reserved in order to be integrated with adjacent mining territories sharing the same mineral veins to reach the proper economies of scale and reasonable management, and to strengthen mining safety." The same language is reiterated in Ministry of Economic Affairs Directive (75 Jin-Kung-Tze) No. 35906 (August 15, 1986), which provides that those mines, including coal mines, whose permissions have been revoked or vacated are temporarily reserved and not open to public application. Both the above-mentioned Ordinance and Directive are declaratory instructions made by the central governing authority to its subordinate agencies under the proper authorization of the above-

mentioned statute and are not in contravention to the Constitution.

Justice Jyun-Hsiung Su filed dissenting opinion.

本號解釋蘇大法官俊雄提出不同意見書。

J. Y. Interpretation No.384（July 28, 1995）*

ISSUE: Articles 5, 6, 7, 12, and 21 of the Gangster Prevention Act authorize the police arbitrarily to classify a person as a gangster, to force him to appear before the police or arrest him, to adopt a secret witness system, and to impose a rehabilitative program upon him irrespective of due process of law. Do the said provisions constitute an infringement on the people's freedom and rights as guaranteed by the Constitution?

RELEVANT LAWS:

Articles 8, Paragraph 1, 16 and 23of the Constitution（憲法第八條第一項、第十六條、第二十三條）; Article 96 of the Criminal Code（刑法第九十六條）; Articles 2, 4, 5, 6, 7,12, 16 and 21 of the Gangster Prevention Act （檢肅流氓條例第二條、第四條、第五條、第六條、第七條、第十二條、第十六條、第二十一條）.

KEYWORDS:

physical freedom（人身自由）, in accordance with the procedure prescribed by law（符合法定程序）, arrest（逮捕）, detention（拘禁）, trial（審問）, punishment（處罰）, secret witness（秘密證人）, the right to confront with the witness（與證人對質之權利）,correction and training programs（告誡列冊輔導處分）, specific deterrence（拘禁）, administrative litigation（行政訴訟）. **

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* Translated by Jaw-Perng Wang.

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

HOLDING: Article 8, Paragraph 1, of the Constitution provides that "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 a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a court in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment not carried out in accordance with the procedure prescribed by law may be resisted." The phrase "in accordance with the procedure prescribed by law" in the above Paragraph means that the procedure a governmental organ uses as a basis upon which to impose any measures restraining people's liberty, no matter whether their status is that of a criminal defendant or not, must be prescribed by law. The contents of the law must be proper in substance, and comply with the relevant conditions set up in Article 23 of the Constitution. Articles 6 and 7 of the Gangster Prevention Act (hereinafter the "Act") authorize the police to

解釋文：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。非依法定程序之逮捕，拘禁，審問，處罰，得拒絕之。」其所稱「依法定程序」，係指凡限制人民身體自由之處置，不問其是否屬於刑事被告之身分，國家機關所依據之程序，須以法律規定，其內容更須實質正當，並符合憲法第二十三條所定相關之條件。檢肅流氓條例第六條及第七條授權警察機關得逕行強制人民到案，無須踐行必要之司法程序；第十二條關於秘密證人制度，剝奪被移送裁定人與證人對質詰問之權利，並妨礙法院發見真實；第二十一條規定使受刑之宣告及執行者，無論有無特別預防之必要，有再受感訓處分而喪失身體自由之虞，均逾越必要程度，欠缺實質正當，與首開憲法意旨不符。又同條例第五條關於警察機關認定為流氓並予告誡之處分，人民除向內政部警政署聲明異議外，不得提起訴願及行政訴訟，亦與憲法第十六條規定意旨相違。均應自本解釋公布之日起，至遲於中華民國八十五年十二月三十一日失其效力。

force people to appear before the police bureau without following any necessary judicial procedure. The secret witness provision of Article 12 of said Act deprives of the right of the accused to confront the witnesses, and hampers the court's truth-finding function. Article 21 of said Act, without considering the necessity of detention, allows the imposition of correction and training programs on a prisoner, even after he has served his criminal sentence, and, therefore, jeopardizes his liberty. All the above articles of said Act exceed the extent of necessity, lack substantive propriety, and are inconsistent with the essence of the above Article of the Constitution. Furthermore, Article 5 of said Act, regarding the police's decision to consider a person as a gangster and to issue him admonitions, contradicts Article 16 of the Constitution because he could only appeal the decision to the National Police Administration, Ministry of the Interior, but has no right to lodge administrative appeal and institute administrative litigation. All of the Act's above Articles shall become null and void no later than December 31, 1996 after the promulgation of this Interpretation.

REASONING: Full protection of physical freedom is the prerequisite condition for people to enjoy other freedoms and rights guaranteed by the Constitution and is an important fundamental right. Article 8 of the Constitution, therefore, specifically provides for the protection of physical freedom of the people. Its Paragraph 1 provides that "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 a judicial or police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a court in accordance with the procedure prescribed by law. Any arrest, detention, trial or punishment not carried out in accordance with the procedure prescribed by law may be resisted. It indicates that people, no matter whether their status is that of a criminal defendant or not, are protected by the above provision from any measures restraining physical freedom, except as otherwise provided by the Constitution. Except in the case of flagrante delicto which

解釋理由書：人民身體自由享有充分保障，乃行使其憲法上所保障其他自由權利之前提，為重要之基本人權。故憲法第八條對人民身體自由之保障，特詳加規定。該條第一項規定：「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。非依法定程序之逮捕，拘禁，審問，處罰，得拒絕之。」係指凡限制人民身體自由之處置，在一定限度內為憲法保留之範圍，不問是否屬於刑事被告身分，均受上開規定之保障。除現行犯之逮捕，由法律另定外，其他事項所定之程序，亦須以法律定之，且立法機關於制定法律時，其內容更須合於實質正當，並應符合憲法第二十三條所定之條件，此乃屬人身自由之制度性保障。舉凡憲法施行以來已存在之保障人身自由之各種建制及現代法治國家對於人身自由所普遍賦予之權利與保護，均包括在內，否則人身自由之保障，勢將徒託空言，而首開憲法規定，亦必無從貫徹。

shall be separately prescribed by law, all other procedures governing arrest, detention, or punishment shall be based on statutes. Furthermore, the law passed by the legislative body must be proper in substance and comply with the conditions set up in Article 23 of the Constitution. This is the way of systematic protection of physical freedom. After the enactment of the Constitution, the idea was included in all existing organizational systems which protect physical freedom in our nation, and also in countries with the rule of law which universally provides the endowment and protection of the right to physical freedom. If it were otherwise, the protection of physical freedom would exist only in the form of words, and the above constitutional provisions would never be enforced.

The above substantive due process of law covers substantive law as well as procedural law. In substantive law, it must comply with the principle of legality. In procedural law, examples are as follows: except in the case of flagrante delicto, the arrest of a suspect shall follow necessary

前述實質正當之法律程序，兼指實體法及程序法規定之內容，就實體法而言，如須遵守罪刑法定主義；就程序法而言，如犯罪嫌疑人除現行犯外，其逮捕應踐行必要之司法程序、被告自白須出於自由意志、犯罪事實應依證據認定、同一行為不得重覆處罰、當事人有

judicial process; the accused's confession shall be voluntary; a conviction shall be based upon evidence; no person shall be subject to punishment for the same offence twice; the parties have the right to confront and cross-examine their witnesses; the separation of the judiciary and prosecution; trials shall be public in principle; and the right to appeal the lower court's decision. Unless in the permissible exception that martial law is declared in accordance with the law, or when the state or the people are in a state of emergency, all statutory provisions are deemed to contradict the substantive due process of law if they are inconsistent with the above said principles. The previous form of the current Gangster Prevention Act (hereinafter the "Act") was enacted in the Period of Mobilization for the Suppression of the Communist Rebellion. Its value was in maintaining the social order. Although the acts enumerated in its Article 2 could be constitutionally prohibited by statutes, the contents of the statutes, as a matter of course, had to comply with substantive due process.

與證人對質或詰問證人之權利、審判與檢察之分離、審判過程以公開為原則及對裁判不服提供審級救濟等為其要者。除依法宣告戒嚴或國家、人民處於緊急危難之狀態，容許其有必要之例外情形外，各種法律之規定，倘與上述各項原則悖離，即應認為有違憲法上實質正當之法律程序。現行檢肅流氓條例之制定，其前身始於戒嚴及動員戡亂時期而延續至今，對於社會秩序之維護，固非全無意義，而該條例（指現行法，下同）第二條所列舉之行為，亦非全不得制定法律加以防制，但其內容應符合實質正當之法律程序，乃屬當然。

Article 4 of said Act, regarding listing a person as a gangster, admonishing him and subjecting him to reformatory measures, not only affects a person's reputation, but also might jeopardize his liberty by subjecting him to correction and training programs. It is of course an administrative act damaging a person's right and interests. Article 5 of said Act provides that, if he is not satisfied with the police decision listing him as a gangster, he may appeal the police decision, with a written statement of reasons, to the National Police Administration, Ministry of the Interior, within 10 days after he receives the notice listing him as a gangster. However, the decision of the National Police Administration, Ministry of the Interior, is final in that he has no right to appeal it to any authorities. It excludes the application of administrative litigation, and obviously contradicts Article 16 of the Constitution which guarantees the right to lodge administrative appeal and institute administrative litigation.

按同條例第四條對於列為流氓之告誡列冊輔導處分，非但影響人民之名譽，並有因此致受感訓處分而喪失其身體自由之虞，自屬損害人民權益之行政處分。惟依同條例第五條規定：經認定為流氓受告誡者，如有不服，得於收受告誡書之翌日起十日內，以書面敘述理由，經由原認定機關向內政部警政署聲明異議，對內政部警政署所為決定不服時，不得再聲明異議。排除行政爭訟程序之適用，顯然違反憲法第十六條保障人民訴願及訴訟之權。

Article 6 of the Act provides: "After a person is listed as a gangster and his

同條例第六條規定：「經認定為流氓而其情節重大者，直轄市警察分

situation is considered serious, the police bureau may subpoena him to appear without any prior notice. The police may arrest the person who was subpoenaed but failed to appear." Its Article 7 provides: "Within a year after a person is listed as a gangster and has been given such warning, the police bureau may subpoena him to appear if he still meets any condition as prescribed in any Subparagraph of Article 2. The police may arrest the person who was subpoenaed but failed to appear. For those who have committed the offenses, the police may arrest them without prior subpoenas." Both of the above articles authorize the police to arrest people without prior notice or warrants. Although a gangster might have committed criminal offenses, he might sometime fail to meet the elements of crimes. Regarding the arrest of a person who committed a criminal offense, the Code of Criminal Procedure provides specific formats and procedures for arrests with or without warrants. The above Articles of said Act do not distinguish whether a person has committed an offense, and allow the police to arrest a person without any judicial approval or

局、縣（市）警察局得不經告誡，逕行傳喚之；不服傳喚者，得強制其到案。」及第七條規定：「經認定為流氓於告誡後一年內，仍有第二條各款情形之一者，直轄市警察分局、縣（市）警察局得傳喚之；不服傳喚者，得強制其到案。對正在實施中者，得不經傳喚強制其到案。」授權警察機關可逕行強制人民到案，但流氓或為兼犯刑事法之犯罪人或僅為未達犯罪程度之人，而犯罪人之拘提逮捕，刑事訴訟法定有一定之程式及程序，上開條文不問其是否在實施犯罪行為中，均以逮捕現行犯相同之方式，無須具備司法機關簽發之任何文書，即強制其到案，已逾越必要程度，並有違憲法第八條第一項明白區分現行犯與非現行犯之逮捕應適用不同程序之規定意旨。

papers, as in the case of flagrante delicto. They have exceeded the extent of necessity, and have violated Article 8, Paragraph 1, of the Constitution which clearly distinguishes those who are flagrante delicto and those who are not, and demands application of different procedures for them.

Article 12, Paragraph 1, of the Act provides "In handling the case of gangsters, the police or the court shall examine a witness separately in secret if the accuser, victims, or witnesses ask that their names and identities remain confidential. In any notices or minutes, their names or identities shall be replaced by code numbers. Names or identities of secret witnesses shall not be revealed." Its Paragraph 2 provides "The accused and his retained lawyer may not request to confront or cross-examine secret witnesses." Without considering the circumstances of the case, the Act demands that courts examine a witness separately in secret as a secret witness, as well as preventing the accused and his lawyer from confronting or cross-examining secret witnesses, sim-

同條例第十二條第一項規定：「警察機關及法院受理流氓案件，如檢舉人、被害人或證人要求保密姓名、身分者，應以秘密證人之方式個別訊問之；其傳訊及筆錄、文書之製作，均以代號代替真實姓名、身分，不得洩漏秘密證人之姓名、身分」。第二項規定：「被移送裁定人及其選任之律師不得要求與秘密證人對質或詰問」，不問個別案情，僅以檢舉人、被害人或證人要求保密姓名、身分，即限制法院對證人應依秘密證人方式個別訊問，並剝奪被移送裁定人及其選任律師與秘密證人之對質或詰問，用以防衛其權利，俾使法院發見真實，有導致無充分證據即使被移送裁定人受感訓處分之虞，自非憲法之所許。

ply because the accuser, victims, or witnesses request that their names and identities remain confidential. It deprives of the right of the accused to defense, hampers the court's truth-finding function, and may force the accused to accept the correction and training programs without sufficient evidence, and is, of course, not permitted by the Constitution.

The Act's enforcement provision in its Article 21, regarding a person whose act meets both the Act and other criminal statutes, allows the imposition of correction and training programs on an accused and jeopardizes his liberty even after he has served his sentences for the same offense, without considering the necessity of detention. The Criminal Code already has relevant provisions (Article 96) regarding rehabilitative measures when a trial judge believes it is necessary for the convicted. The correction and training program is a measure outside the range of the rehabilitative measures provided in the Criminal Code or the Act Governing the Enforcement of Rehabilitative Measures. The liberty of a person on whom the correction

同條例第二十一條關於受感訓處分人其行為同時觸犯刑事法律者之執行規定，使受刑之宣告及執行之人，不問有無特別預防之必要，有再受感訓處分而喪失身體自由之危險。又同一行為觸犯刑事法者，依刑法之規定，刑事審判中認須施予保安處分者，於裁判時併宣告之（參照刑法第九十六條），已有保安處分之處置。感訓處分為刑法及保安處分執行法所定保安處分以外之處分，而受感訓處分人，因此項處分身體自由須受重大之限制，其期間又可長達三年，且依上開規定，其執行復以感訓處分為優先，易造成據以裁定感訓處分之行為事實，經警察機關以同時觸犯刑事法律，移送檢察機關，檢察官或法院依通常程序為偵查或審判，認不成立犯罪予以不起訴處分或諭知無罪，然裁定感

and training program is imposed will be substantially restrained, and the term of the program may be as long as up to three years. Under the Act, the correction and training program shall be enforced before any other correction announced under other statutes. The same accused's act might be the basis of the correction and training program, as well as the basis of offenses under other criminal codes. Based on the same fact, the police may send the case to the prosecutorial office. It is possible that prosecutors may issue a non-prosecutorial disposition or courts may render an acquittal judgment after the investigation or trial under the ordinary criminal procedure. However, the prosecutor's decision or court's judgment may come after the finality of the decision of the correction and training program and its enforcement. Although the Act has retrial provisions (Article 16, Paragraph 1, Subparagraph 7, of the Act), it could never compensate for the liberty the accused had already lost. All of the above provisions are contrary to the historically established principles that protect physical freedom as well as an accused criminal's

訓處分之裁定已經確定，受處分人亦已交付執行，雖有重新審理之規定（同條例第十六條第一項第七款），但其喪失之身體自由，已無從彌補。凡此均與保障人民身體自由、維護刑事被告利益久經樹立之制度，背道而馳。檢肅流氓條例上開規定，縱有防止妨害他人自由，維護社會秩序之用意，亦已逾越必要程度，有違實質正當，自亦為憲法所不許。

interests. Even though the above provisions of the Act may have the function of preventing infringement upon the freedoms of others or maintaining the social order, they exceed the extent of necessity, violate the substantive propriety, and are not permitted under the Constitution.

Accordingly, Article 5 of the Act contradicts Article 16 of the Constitution which protects the people's right to lodge administrative appeal and institute administrative litigation. Articles 6, 7, 12, and 21 conflict with Article 8, Paragraph 1, of the Constitution which protects the people's liberty. All the above Articles of the Act shall become null and void no later than December 31, 1996 after the promulgation of this Interpretation. During the above period, the relevant authorities shall thoroughly re-examine the Act in order to balance the protection of personal rights and the preservation of the social order.

Justice Sen-Yen Sun filed concurring opinion.

Justice Young-Mou Lin filed concurring opinion.

綜上所述，檢肅流氓條例第五條與憲法第十六條保障人民訴願及訴訟之權有違，第六條、第七條、第十二條及第二十一條則與憲法第八條第一項保障人民身體自由之意旨不符，均應自本解釋公布之日起，至遲於中華民國八十五年十二月三十一日失其效力。在此期間有關機關應本於保障個人權利及維護社會秩序之均衡觀點，對檢肅流氓條例通盤檢討。

本號解釋孫大法官森焱、林大法官永謀分別提出協同意見書。

J. Y. Interpretation No.385（September 8, 1995）*

ISSUE: Are the relevant provisions of the Act of Encouragement of Investment, providing to the effect that, upon expiry of the said Act, a foreign company which still enjoys tax benefits thereunder shall be subject to the 20% withholding income tax after paying the after-tax surplus to its head office, in line with the Constitution?

RELEVANT LAWS:

Article 19 of the Constitution（憲法第十九條）; Articles 3 and 16, Paragraph 3 of the Act of Encouragement of Investment（獎勵投資條例第三條、第十六條第三項）.

KEYWORDS:

pay tax（納稅）, duty（義務）, foreign company（外國公司）, expire（屆滿）,preferential tax treatment（租稅優惠）, head office（總公司）, branch office（分公司）, in contravention to（牴觸）, after-tax earning（稅後盈餘）, income tax（所得稅）. **

HOLDING: Article 19 of the Constitution mandates that people have duties to pay taxes prescribed by law. In addition, Article 19 stipulates that people

解釋文：憲法第十九條規定人民有依法律納稅之義務，固係指人民有依據法律所定之納稅主體、稅目、稅率、納稅方法及納稅期間等項而負納稅

* Translated by Professor Spenser Y. Hor.

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

have duties to pay taxes according to the taxpaying entities, items, rates, payment methods and payment periods so prescribed by tax laws. However, when such a tax law imposes co-related rights and duties on people, in order to preserve the integrity of the application of law and to balance the imposed rights and duties, it shall not be applied partially and selectively. Those qualified foreign companies that were approved under the then-in-effect Article 3 of the Act of Encouragement of Investment may still enjoy the preferential tax treatments after its expiration. Therefore, in order to be consistent with the legislative intent, those qualified foreign companies shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices. The Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 800356032, September 24, 1992, is consistent with the foregoing, and is therefore not in contravention to the Constitution.

義務之意，然課人民以繳納租稅之法律，於適用時，該法律所定之事項若權利義務相關連者，本於法律適用之整體性及權利義務之平衡，當不得任意割裂適用。獎勵投資條例施行期間內，經依該條例第三條核准受獎勵之外國公司，於該條例施行期間屆滿後，既仍得繼續適用該條例享受租稅優惠，自應一併依同條例第十六條第三項之規定，於其稅後盈餘給付總公司時，扣繳百分之二十所得稅，方符立法原意。財政部八十年九月二十四日臺財稅字第八〇〇三五六〇三二號對此之函釋，符合上開意旨，與憲法並無牴觸。

REASONING: Article 19 of the Constitution mandates that people have

解釋理由書：憲法第十九條規定人民有依法律納稅之義務，固係指人

duties to pay taxes prescribed by law. In addition, Article 19 stipulates that people have duties to pay taxes according to the taxpaying entities, items, rates, payment methods and payment periods so prescribed by tax laws. However, when such a tax law imposes co-related rights and duties on people, in order to preserve the integrity of the application of law and to balance the imposed rights and duties, it shall not be applied partially and selectively. Those foreign companies that were approved for preferential tax treatments under Article 3 of the Act of Encouragement of Investment, as amended on January 26, 1987, shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices. The legislative intent is that since those qualified foreign companies' Taiwan branch offices enjoy preferential tax treatments, they shall pay the income taxes mentioned above while paying after-tax earnings to their head offices; otherwise, foreign companies may simply set up Taiwan branches to avoid paying taxes in Taiwan. Therefore, the two Articles of the same

民有依據法律所定之納稅主體、稅目、稅率、納稅方法及納稅期間等項而負納稅義務之意，然課人民以繳納租稅之法律，於適用時，該法律所定之事項若權利義務相關連者，本於法律適用之整體性及權利義務之平衡性，當不得任意割裂適用。中華民國七十六年一月二十六日修正公布之獎勵投資條例第三條核准獎勵之外國公司，依同條例第十六條第三項規定，其所設分公司之所得，於繳納營利事業所得後，將其稅後盈餘給付總公司時，應按其給付額扣繳百分之二十所得稅，立法意旨係因外國公司在我國境內之分公司既享受租稅減免之優惠，則其稅後盈餘欲給付總公司時，自應負擔上述所得稅扣繳之義務，否則，外國公司即得以成立分公司之方式規避我國稅負。故兩者係相互關連之規定，要不得割裂適用。茲前述獎勵投資條例雖於七十九年十二月三十一日施行期間屆滿而失效，惟在該條例施行期間內核准之案件（五年或四年免稅），就該個案言，尚不因該條例施行期間屆滿而失效，仍繼續適用該條例予以獎勵，俾保障投資人之權益。是經核准獎勵投資之外國公司於獎勵投資條例施行期間屆滿後，既仍得享受免稅優惠，其與此相關連之總公司稅負，自應併依同條例第十

statute are co-related and shall not be applied partially and selectively. Though the above mentioned statute had expired and was no longer in effect on December 31, 1990, those qualified foreign companies that were approved (for four-or five-year exemptions) under Article 3 of the same statute while it was still in effect may still enjoy preferential tax treatments to protect investors' rights. Since those qualified foreign companies may still enjoy preferential tax treatments after the expiration of the same statute, to be consistent with the legislative intent, Article 16, Paragraph 3, shall also be applicable to impose co-related income taxes on their head offices. The Ministry of Finance Directive Tai-Tsai-Shui-Tze No. 800356032, September 24, 1992, states that: "To ensure a fair tax policy, those foreign companies that have enjoyed and been enjoying tax preferential treatments given by the Act of Encouragement of Investment shall pay twenty percent income taxes under Article 16, Paragraph 3, of the same Act while paying after-tax earnings to their head offices." This Directive is consistent with the foregoing in prohibiting partial and

六條第三項扣繳所得稅，方符原立法意旨。財政部八十年九月二十四日臺財稅字第八〇〇三五六〇三二號函稱：「如原已享受及繼續享受獎勵投資條例租稅優惠之外國公司，其在臺分公司所產生之相關稅後盈餘，於八十年以後匯回總公司時，為期課稅公平，仍應依獎勵投資條例第十六條第三項規定，按給付額扣繳百分之二十所得稅」，乃係本於法律適用之整體性，不得任意割裂所為之釋示，符合上開意旨，與憲法並無牴觸。

selective applications and preserving the integrity of the application of law, and is therefore not in contravention to the Constitution.

Justice Tieh-Cheng Liu filed concurring opinion.

Justice Jyun-Hsiung Su filed concurring opinion.

本號解釋劉大法官鐵錚、蘇大法官俊雄分別提出協同意見書。

J. Y. Interpretation No.386（September 29, 1995）*

ISSUE: Is the provision of the Central Government Development Bonds Issuance Act, providing that no registration of loss or stop payment may be made for various reasons, including lost vouchers of the bond, in violation of the Constitution?

RELEVANT LAWS:

Articles 15 and 16 of the Constitution（憲法第十五條、第十六條）; Articles 720, Paragraph 1, 725 and 727 of the Civil Code（民法第七百二十條第一項、第七百二十五條、第七百二十七條）; Article 8 of the Central Government Development Bonds and Loans Act（中央政府建設公債及借款條例第八條）.

KEYWORDS:

bond certificates（公債債票）, the central government development bond（中央政府建設公債）, reporting of loss（掛失止付）, the National Treasury（國庫）, bona fide third parties（善意第三人）. **

HOLDING: The first part of Article 8 of the Central Government Development Bonds Issuance Act states that: "Reporting of loss to prevent cashing by

解釋文：中央政府建設公債發行條例第八條前段規定：「本公債債票遺失、被盜或滅失者，不得掛失止付，並不適用民法第七百二十條第一項但

* Translated by Professor Wen-Yeu Wang.

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

the bearer is not allowed for any bond certificates which are lost, stolen or missing." Thus, Articles 720, Paragraph 1 , 725 and 727 of the Civil Code shall not be applicable. This prevents legal owners of government bearer bonds from protecting their rights and interests under the relevant provisions in the Civil Code governing bearer securities in the event that their bond certificates are lost, stolen or missing. In the absence of any alternative and reasonable remedies, this is contrary to the intention of safeguarding the people's rights and interests as stated in Articles 15 and 16 of the Constitution. Hence, with effect from the date of publication of this interpretation, the above stated provision shall no longer apply to any government bearer bonds issued under the above regulations.

書、第七百二十五條及第七百二十七條之規定。」使人民合法持有之無記名公債債票於遺失、被盜或滅失時，無從依民法關於無記名證券之規定請求權利保護，亦未提供其他合理之救濟途徑，與憲法第十五條、第十六條保障人民權利之意旨不符，應自本解釋公布之日起，於其後依該條例發行之無記名公債，停止適用。

REASONING: In order to raise funds for major national construction projects, central government construction government bearer bonds are issued by means of issuing bond certificates. The National Treasury's obligation to pay the owners of the bond certificates is in prin-

解釋理由書：國家為支應重大建設發行之無記名中央政府建設公債，係以發行債票方式籌集資金，國庫對公債債票持有人所負之給付義務，本質上與自然人或公私法人為發行人，對無記名證券持有人負擔以證券所載之內容而為給付之義務，並無不同。法律為保護

ciple no different from the obligation, as stated on the securities, to pay the owners of bearer securities issued by natural persons or public/private corporate bodies. The law protects the owners of bearer securities from any unjustified loss arising from lost, stolen or missing securities certificates by providing various safeguards and remedies [See Articles 720, Paragraph 1 , 725 and 727 of the Civil Code]. This had long been established as a framework of institutional safeguards for bearer securities, maintaining fairness without affecting the rights and interests of bona fide third parties or imposing any further burdens on the issuers. However, the amendments to the first part of Article 8 of the Central Government Development Bonds Issuance Act published on July 29, 1999, which state that: "Reporting of loss to prevent cashing by the bearer is not allowed for any bond certificates which are lost, stolen or missing" (Thus, Articles 720, Paragraph 1 , 725 and 727 of the Civil Code shall not be applicable.) not only prohibit the reporting of loss to prevent cashing by the bearer but also specifically exclude the substantial and pro-

無記名證券持有人，於證券遺失、被盜或滅失時，不使其受不當之損失，民法第七百二十條第一項但書、第七百二十五條及第七百二十七條本設有各種保護之規定及救濟之程序，以維持公平，不致影響善意第三人之權益，亦未增加發行人之負擔，此為對無記名證券久已建立之制度性保障。而中華民國八十年七月二十九日修正公布之中央政府建設公債發行條例第八條前段規定：「本公債債票遺失、被盜或滅失者，不得掛失止付，並不適用民法第七百二十條第一項但書、第七百二十五條及第七百二十七條之規定。」其禁止掛失止付，並特別排除上述民法對正當公債權利人實體及程序上應享有之權利，立法原意固在尊重契約自由之精神下，增進該種公債之流通性，以實現財政之目的。惟其對於國庫明知無記名證券持有人無處分之權利，或受有遺失、被盜或滅失之通知時，仍可因其給付而免責，以及限制正當權利人聲請法院依公示催告程序，宣告遺失、被盜或滅失之無記名證券無效，使依該條例發行之無記名公債債票合法持有人，無從依民法關於無記名證券之規定請求權利保護，亦未提供其他之合理救濟途徑，與憲法第十五條保障人民財產權及第十六條保障人民因權利

cedural rights enjoyed by the government bond obligees under the Civil Code. The original legislative intent was to realize the financial target by enhancing the circularity of such government bonds while respecting the freedom of contract. The National Treasury was well aware that owners of bearer securities had no right of action and that it would be exonerated from liability upon payment even if it had notification that the certificates were lost, stolen or missing. Nevertheless, it still imposed restrictions on the proper obligees applying to court to declare invalid the lost, stolen or missing bond certificates in accordance with the procedure for public summons for assertion of claim. This resulted in legal owners of government bearer bonds bond certificates issued under the above stated regulations being unable to apply for protection of their rights and interests provided in the Civil Code. No alternative and reasonable remedies were provided. This is contrary to Article 15 of the Constitution, which safeguards the people's property rights, and Article 16 of the Constitution, which provides that persons whose rights and

受損得依法定程序請求救濟之意旨不符，應自本解釋公布之日起，於其後依該條例發行之無記名公債，停止適用。

interests are infringed shall be able to apply for remedies in accordance with legally stipulated procedures. Hence, with effect from the date of publication of this interpretation, the above stated provision shall no longer apply to any government bearer bonds issued under the above regulations.

Justice Chi-Nan Chen filed dissenting opinion in part.

本號解釋孫大法官森焱提出部分不同意見書。

J. Y. Interpretation No.387（October 13, 1995）*

ISSUE: Shall the Premier (President of the Executive Yuan) submit his resignation to the President prior to the newly elected legislators' swearing-in for their new term?

RELEVANT LAWS:

Articles 54, 55, Paragraph 1, 56, 57, and 58 of the Constitution（憲法第五十四條、第五十五條第一項、第五十六條、第五十七條、第五十八條）.

KEYWORDS:

the Premier（行政院院長）, the Executive Yuan（行政院）, the Legislative Yuan（立法院）, the democratic politics（民主政治）. **

HOLDING: Under Articles 54, 55, Paragraph 1, and 56 of the Constitution, the Executive Yuan establishes a premier, a vice-premier, some ministers, and a certain number of ministers without portfolio. The premier is appointed by the President with the consent of the Legislative Yuan. The vice-premier, ministers, and ministers without portfolio are nomi-

解釋文：行政院設院長、副院長各一人，各部會首長若干人，及不管部會之政務委員若干人；行政院院長由總統提名，經立法院同意任命之；行政院副院長、各部會首長及不管部會之政務委員，由行政院院長提請總統任命之。憲法第五十四條、第五十五條第一項、第五十六條定有明文。行政院對立法院負責，憲法第五十七條亦規定甚

* Translated by Professor Tsung-Fu Chen.

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nated by the premier and appointed by the President. Under Article 57 of the Constitution, the premier is accountable to the Legislative Yuan. Since the premier has to receive consent from and be politically accountable to the Legislative Yuan, the premier has to resign before the first session of each new Legislative Yuan so as to fulfill the doctrine of government by the people and his/her political accountability. Because the vice premier, ministers, and ministers without portfolio are nominated by the premier and appointed by the President, and because all of them are members of the Executive Yuan Council, they participate in administrative policy-making and have to step down when the premier resigns.

詳。行政院院長既須經立法院同意而任命之，且對立法院負政治責任，基於民意政治與責任政治之原理，立法委員任期屆滿改選後第一次集會前，行政院院長自應向總統提出辭職。行政院副院長、各部會首長及不管部會之政務委員係由行政院院長提請總統任命，且係出席行政院會議成員，參與行政決策，亦應隨同行政院院長一併提出辭職。

REASONING: Under Article 57 of the Constitution, the Executive Yuan is accountable to the Legislative Yuan. Politics in a democracy mainly involves popular politics and accountability politics. The legitimacy of a modern state to establish its government and to implement its administrative affairs is based on the will of the people. When legislators are re-

解釋理由書：依憲法第五十七條規定行政院應對立法院負責。民主政治以民意政治及責任政治為重要內涵；現代法治國家組織政府、推行政務，應以民意為基礎，始具正當性。從而立法委員因任期屆滿而改選時，推行政務之最高行政機關為因應最新民意，自應重新改組，方符民主政治之意旨。

elected at the end of their terms, the highest executive organ, which is in charge of carrying out administrative affairs, has to be re-organized so as to keep pace with the expressed will of the people and to fulfill the doctrine of democratic politics.

Under Articles 54, 55, Paragraph 1, and 56 of the Constitution, the Executive Yuan establishes a premier, a vice-premier, some ministers, and a certain number of ministers without portfolio; the premier is appointed by the President with the consent of the Legislative Yuan. The vice-premier, ministers, and ministers without portfolio are nominated by the premier and appointed by the President. Under Article 57 of the Constitution, the Executive Yuan is responsible for submitting a statement of its administrative policies and a report on its administration. When the Executive Yuan does not agree with the bills passed by the legislators and demands a second decision, the premier has to accept the bill or resign. The premier is appointed by the President with the consent of the Legislative Yuan. Accordingly, the premier is politically ac-

行政院設院長、副院長各一人、各部會首長及不管部會之政務委員若干人；行政院院長由總統提名經立法院同意任命之；行政院副院長、各部會首長及不管部會之政務委員，由行政院院長提請總統任命之。憲法第五十四條、第五十五條第一項、第五十六條定有明文。行政院有向立法院提出施政方針及施政報告之責；行政院移請立法院之覆議案，如經出席立法委員三分之二維持原決議，行政院院長應即接受該決議或辭職，憲法第五十七條亦規定甚詳。行政院院長由總統提名，經立法院同意任命，行政院院長對立法院負政治責任，此乃我國憲法有關總統、行政院、立法院三者間之制度性設計。行政院院長之任命，既須經由立法院同意，基於民意政治之原理，自應於每屆立法委員任期屆滿改選後第一次集會前提出辭職，俾總統得審視立法院改選後之政治情勢，重行提名新任人選，咨請立法院同意以

countable to the Legislative Yuan. This is the institutional design of our constitution, which concerns the relationships among the President, the Executive Yuan, and the Legislative Yuan. Based on the doctrine of government by the people and because the appointment of the premier is confirmed by the Legislative Yuan, the premier has to resign prior to the first session of each new Legislative Yuan. Through this mechanism, the President is able to review the new political situations after the re-election of legislators, and then appoint a new premier with the consent of the Legislative Yuan, so as to reflect the expressed will of the people. Under Article 58 of the Constitution, the vice-premier, ministers, and ministers without portfolio are nominated by the premier and appointed by the President. Their nomination reflects the premier's political ideology. Since they attend the Executive Yuan Council and participate in policy-making, they have to resign along with the premier so as to manifest their accountability. Nonetheless, the heads of sub-organs in the Executive Yuan are not ministers without portfolio. Their resignation

反映民意趨向。行政院副院長、各部會首長及不管部會之政務委員，則係由行政院院長依其政治理念，提請總統任命，並依憲法第五十八條之規定，出席行政院會議，參與行政決策，亦應隨同行政院院長一併向總統提出辭職以彰顯責任政治。至於不具政務委員身分之行政院所屬機關首長，其辭職應依一般行政程序辦理，其中任期法律有明文規定者，不受上述行政院總辭之影響，乃屬當然。

has to accord with ordinary administrative procedures, which may be provided by other laws and is not influenced by the general resignation of the Executive Yuan.

Justice Geng Wu filed dissenting opinion.

本號解釋吳大法官庚提出不同意見書。

J. Y. Interpretation No.388（October 27, 1995）*

ISSUE: Shall an incumbent President who is campaigning for re-election be subject to criminal prosecution, despite the provision of Article 52 of the Constitution, which provides that the President, unless he is recalled or discharged from office, shall not be subject to any criminal prosecution except being charged with rebellion or treason?

RELEVANT LAWS:

Article 52 of the Constitution（憲法第五十二條）; Criminal Code（刑法）; the Presidential and the Vice-Presidential Election and Recall Act（總統副總統選舉罷免法）.

KEYWORDS:

rebellion（內亂罪）, treason（外患罪）, criminal prosecution（刑事上之訴究）, campaigning for re-election（競選連任）. **

HOLDING: Article 52 of the Constitution provides that the President, unless he is recalled or discharged, shall not be subject to any criminal prosecution except being charged with crimes in relation to rebellion or treason. This is to pay

解釋文：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。

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* Translated by Wellington L. Koo, Formosa Transnational Attorney at Law.

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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. When an incumbent President is campaigning for re-election, the campaign activities shall be governed by the Presidential and the Vice-Presidential Election and Recall Act. However, since his status as the President remains unchanged during the campaign, Article 52 of the Constitution still applies.

現職總統競選連任時，其競選活動固應受總統副總統選舉罷免法有關規定之規範，惟其總統身分並未因參選而變更，自仍有憲法第五十二條之適用。

REASONING: Article 52 of the Constitution provides that the President, unless he is recalled or discharged, shall not be subject to any criminal prosecution except being charged with crimes in relation to rebellion or treason. This is 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

解釋理由書：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外患罪，仍須受刑事上之訴究；如

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 crimes other than rebellion and treason, the prosecution for such crimes is to be only temporarily withheld. The application of the Criminal Code or relevant laws which provide for criminal punishment is not permanently excluded.

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。

When an incumbent President is campaigning for re-election, as a candidate, his campaign activities shall be governed by the Presidential and the Vice-Presidential Election and Recall Act. However, his status as President remains unchanged. Under the principle of the supremacy of the Constitution and the

現職總統競選連任時，因其已名列總統候選人，其競選活動固應受總統副總統選舉罷免法有關規定之規範，惟其總統身分並未因參選而變更。依憲法優於法律之法則，現職總統依法競選連任時，除犯內亂或外患罪外，非經罷免或解職，並不得適用刑法及總統副總統選舉罷免法等有關刑罰之規定予以訴

purpose of Article 52 of the Constitution, unless he is recalled or discharged, an incumbent President who is campaigning for re-election, shall not be prosecuted in accordance with the Criminal Code and criminal provisions provided for in the Presidential and the Vice-Presidential Election and Recall Act, except for the commission of rebellion or treason.

究，以符憲法第五十二條之意旨。

J. Y. Interpretation No.389（November 10, 1995）*

ISSUE: Is it unconstitutional to exclude hereditary chronic disease or a deformity that occurred/existed before a worker enrolled in the labor insurance program from labor insurance coverage?

RELEVANT LAWS:

Articles 19, Paragraph 1, 40, 41, 42, 43, 44 and 51, Paragraphs 1 and 2 of the Labor Insurance Act（勞工保險條例第十九條第一項、第四十條、第四十一條、第四十二條、第四十三條、第四十四條、第五十一條第一項、第二項）.

KEYWORDS:

labor insurance（勞工保險）, medical care benefits（醫療給付）, hereditary chronic disease（先天性痼疾）, cosmetic surgery（美容外科）.**

HOLDING: According to Article 44 of the Labor Insurance Act, cosmetic surgery is excluded from medical indemnity. In addition, Article 19, Paragraph 1, of the same Act stipulates that in the case where an insurance peril happens after an insurance policy takes effect and before such policy is terminated, the in-

解釋文：勞工保險條例第四十四條規定，醫療給付不包括美容外科。又同條例第十九條第一項規定，被保險人或其受益人，於保險效力開始後停止前發生保險事故者，始得依該條例規定，請領保險給付。勞工保險診療費用支付標準表係依據勞工保險條例第五十一條第二項授權訂定，其第九部第四節

* Translated by Dr. C.Y. Huang of Tsar & Tsai Law Firm.

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sured or his/her beneficiary shall be entitled to claim insurance benefit payments. The Standard Forms for Payment of Labor Insurance Medical Coverage are made under authorization of Article 51, Paragraph 2, of the Labor Insurance Act. In connection with corrective surgery for the jaw, Part 9, Section 4, Paragraph 2, of the Standard Forms specifies, in accordance with Article 51, Paragraph 2, of the same Act, that a claim of medical care benefits is "restricted to special cases, with approved application, of external injuries or painful jaw joints" on the grounds that such cases satisfy the prerequisite that accidents may happen after an insurance policy takes effect and before such policy is terminated, and that the subject medical treatment is not cosmetic surgery. Hereditary chronic disease or a deformity that occurred/existed before a worker enrolled in the labor insurance program is not covered; hence, there will be no medical care benefits. This is within the authorized scope of the said Act and does not contradict the Constitution.

第二項關於顎骨矯正手術，載明「限外傷或顳顎關節疼痛者專案報准後施行」，乃因有此情形，始同時符合保險效力開始後停止前所發生之保險事故，以及非屬美容外科之要件。若勞工於加入勞工保險前發生之先天性痼疾或畸形，即不在勞工保險承保範圍。其不支付診療費用，並未逾越該條例授權範圍，與憲法尚無牴觸。

REASONING: According to

解釋理由書：勞工保險條例第

Article 19, Paragraph 1, of the Labor Insurance Act, in the event where an insurance peril happens after an insurance policy takes effect and before such policy is terminated, the insured or his/her beneficiary shall be entitled to claim insurance benefit payments. It is therefore stipulated that claim of insurance benefit payments is restricted to insurance perils which happen after an insurance policy takes effect and before such policy is terminated. In addition, since labor insurance belongs to social insurance and for the purpose of avoiding waste of medical resources, Article 44 of the Labor Insurance Act stipulates: "Medical care benefits shall not be paid for legally declared epidemics, leprosy, narcotic addictions, child delivery, miscarriage, plastic surgery, false teeth, prosthetic eyes, eyeglasses or accessories, patient transportation, special nurses, blood transfusion, registration fees, charges for documents, treatments for which facilities are not available at the hospital or clinic, or other items which are not referred to in Articles 41 or 43, except in the case of blood transfusion in an emergency treatment of an insured person

十九條第一項規定：「被保險人或其受益人，於保險效力開始後停止前發生保險事故者，得依本條例規定，請領保險給付」，明示保險給付之請領，以保險效力開始後停止前發生保險事故者為限。又勞工保險係屬社會保險，為避免浪費社會醫療資源，勞工保險條例第四十四條又規定：「醫療給付不包括法定傳染病、痲瘋病、麻醉藥品嗜好症、接生、流產、美容外科、義齒、義眼、眼鏡或其他附屬品之裝置，病人運輸、特別護士看護、輸血、掛號費、證件費、醫療院、所無設備之診療及第四十一條、第四十三條未包括之項目。但被保險人因緊急傷病，經保險人自設或特約醫療院、所診斷必須輸血者，不在此限。」顯見「美容外科」，不屬勞工保險條例第四十條所定「被保險人罹患傷病」之範圍，不在醫療給付之列。但法律規定之內容不能鉅細靡遺，立法機關自得就有關醫療上之技術性、細節性等專業事項，授權主管機關發布命令為補充規定，同條例第五十一條第一項遂定有「應依照勞工保險診療費用支付標準表及用藥種類與價格表支付之」之明文。而上述勞工保險診療費用支付標準表及用藥種類與價格表，依同條第二項，授權由中央主管機關會同中央衛生

deemed by the hospital operated or specially contracted by the insurer to be strictly necessary." Obviously, cosmetic surgery is outside the scope of "injury or illness suffered by the insured" as provided for in Article 40 of the Labor Insurance Act, and is not eligible for medical care benefits. Laws and regulations, however, cannot stipulate all the details; therefore, the legislative branch may authorize the competent authority to promulgate supplementary provisions for technical matters and details regarding medical treatment. Hence the stipulation in Article 51, Paragraph 1, in the same Act: "Payment shall comply with the Standard Forms for Payment of Labor Insurance Medical Coverage, and the Standard Forms for Acceptable Medicines List and Their Prices." The central competent authority is authorized in accordance with Paragraph 2 of the same Article to prescribe the aforesaid Standard Forms for Payment of Labor Insurance Medical Coverage, and the Standard Forms for Acceptable Medicines List and Their Prices upon consultation with the central competent authority in charge of health

主管機關定之。該標準表第九部第四節第二項關於顎骨矯正手術，載明「限外傷或顳顎關節疼痛者專案報准後施行」之規定，意指有上述情形，其顎骨矯正手術即符合保險效力開始後停止前所發生之保險事故，以及非屬美容外科之要件。若勞工於加入勞工保險前發生之先天性痼疾或畸形，即不在勞工保險承保範圍。其不支付診療費用，並未逾越該條例授權範圍，與憲法尚無牴觸。

matters. In connection with corrective surgery for the jaw, Part 9, Section 4, Paragraph 2, of the said Standard Forms specifies, in accordance with Article 51, Paragraph 2, of the same Act, that claim of medical care benefits is "restricted to special cases, with approved application, of external injuries or painful jaw joints" since such cases satisfy the prerequisite that an accident may happen after an insurance policy takes effect and before its termination, and that the subject medical treatment is not cosmetic surgery. Hereditary chronic disease or a deformity that occurred/existed before a worker enrolled in the labor insurance program is not covered; hence, there will be no medical care benefits. This is within the authorized scope of the said Act and does not conflict with the Constitution.

Justice Jyun-Hsiung Su filed dissenting opinion, in which Justice Tong-Schung Tai joined.

本號解釋蘇大法官俊雄、戴大法官東雄共同提出不同意見書。

J. Y. Interpretation No.390（November 10, 1995）*

ISSUE: Is the Regulation Governing Factory Set-up Registration constitutional in stipulating that a factory which fails to apply for setup registration, operate the business for proscribed purposes, or violates other related laws and regulations shall be closed or shall suspend operation without specific authorization of law?

RELEVANT LAWS:

Article 23 of the Constitution（憲法第二十三條）; Article 5, Subparagraph 2, of the Standard Act for the Laws and Rules（中央法規標準法第五條第二款）; Article 19, Paragraph 1, of the Regulation Governing Factory Set-up Registration（工廠設立登記規則第十九條第一項）.

KEYWORDS:

factory set-up（工廠設立）, restriction on people's rights（對人民權利之限制）, administrative sanction（行政罰）. **

HOLDING: A person who violated the obligation imposed by the administrative law while setting up a factory was ordered to suspend or close the business under Article 19, Paragraph 1, of the Regulation Governing Factory Set-up Registra-

解釋文：對於人民設立工廠而有違反行政法上義務之行為，予以停工或勒令歇業之處分，涉及人民權利之限制，依憲法第二十三條及中央法規標準法第五條第二款規定，應以法律定之；若法律授權以命令為補充規定者，授權

* Translated by Professor Chin-Chin Cheng.

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

tion. According to Article 23 of the Constitution and Article 5, Subparagraph 2, of the Standard Act for the Laws and Rules, imposing an administrative sanction on people is related to the restriction on the people's rights. Therefore, it should be regulated under legislative law. If it is authorized by legislative law to issue orders as supplemental regulations, the purpose, content, and scope of the authorization should be concrete and definite. Article 19, Paragraph 1, of the Regulation Governing Factory Set-up Registration provides: "A factory will be ordered to suspend or close business fully or partially by the Construction Bureau if it fails to make a setup application, operate the business for proscribed purposes, or violates other relevant laws and regulations." This regulation is related to the restriction on the people's rights. However, it lacks the necessary authorization made by the legislative law. Therefore, it is contrary to Article 23 of the Constitution, and should be null and void no later than one year after the date of this proclamation after the promulgation of this Interpretation.

之目的、內容及範圍，應具體明確，始得據以發布命令。工廠設立登記規則第十九條第一項規定：「工廠不依照本規則之規定申請設立登記，或不依照核定登記事項經營，或違反其他工廠法令者，得由省（市）建設廳（局）予以局部或全部停工或勒令歇業之處分」，涉及人民權利之限制，欠缺法律授權之依據，與前述意旨不符，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

REASONING: A person who violates the obligation imposed by the administrative law while setting up a factory is ordered to suspend or close the business under Article 19, Paragraph 1, of the Regulation Governing Factory Set-up Registration. According to Article 23 of the Constitution and Article 5, Subparagraph 2, of the Standard Act for the Laws and Rules, imposing an administrative sanction on people is related to the restriction on the people's rights. Therefore, it should be regulated under legislative law. If it is authorized by legislative law to issue orders as supplemental regulations, the purpose, content, and scope of the authorization should be concrete and definite. This Yuan has held the same in Interpretations Nos. 313, 360 and 367. In order to regulate the establishment of factories, the Ministry of the Economy issued the Regulation Governing Factory Set-up Registration on July 31, 1991. The administrative sanction imposed by the Regulation is related to the people's rights as protected by the Constitution. Therefore, the administrative sanction imposed by the Regulation should be authorized under

解釋理由書：對於人民設立工廠而有違反行政法上義務之行為，予以停工或勒令歇業之處分，涉及人民工作權及財產權之限制，依憲法第二十三條及中央法規標準法第五條第二款規定，其處分之構成要件，應以法律定之；若法律就其構成要件，授權以命令為補充規定者，授權之目的、內容及範圍，應具體明確，始得據以發布命令。迭經本院釋字第三一三號、第三六〇號及第三六七號等解釋釋示有案。經濟部為管理國內工廠之設立，於中華民國八十年七月三十一日修正發布之工廠設立登記規則，其規定涉及限制憲法所保障之人民權利事項，依上開說明，仍應有法律或法律授權之依據始得為之。工廠設立登記規則第十九條第一項規定：「工廠不依照本規則之規定申請設立登記，或不依照核定登記事項經營，或違反其他工廠法令者，得由省（市）建設廳（局）予以局部或全部停工或勒令歇業之處分」，其中關於人民違反該規則之行為，得予以局部或全部停工或勒令歇業之處分部分，已涉及人民工作權及財產權之限制，此項規定既無法律上之明文，復欠缺法律授權之依據，與首開意旨不符，應自本解釋公布之日起，至遲於屆滿一年時失其效力。

legislative law. Article 19, Paragraph 1, of the Regulation Governing Factory Set-up Registration provides: "A factory will be ordered to suspend or close business fully or partially by the Construction Bureau if it fails to make a setup application, operate the business for proscribed purposes, or violates other relevant laws and regulations." A factory could be ordered to suspend or close business for violating the Regulation. The administrative sanction is related to the people's right to work and their property rights. However, the provision is neither regulated nor authorized under legislative law. Therefore, it is contrary to Article 23 of the Constitution, and should be null and void no later than one year after the promulgation of this Interpretation.

J. Y. Interpretation No.391（December 8, 1995）*

ISSUE: May the Legislative Yuan, without changing the total amount of the general budget, add, delete or adjust the amount of individual items within each or among different government agencies and in the form of individual member's proposals, as in the review process of a statutory bill, without violating the Constitution?

RELEVANT LAWS:

Articles 63 and 70 of the Constitution（憲法第六十三條、第七十條）; J. Y. Interpretation No. 264（司法院釋字第二六四號解釋）.

KEYWORDS:

budgetary bill（預算案）; *massnahmegesetz*（law of measures）（措施性法律）, responsive governance（責任政治）, separation of powers（權力分立）, statutory bill（法律案）. **

HOLDING: In accordance with Article 63 of the Constitution, the Legislative Yuan has the power to review budgetary bills. In reviewing the general budgetary bill of the Central Government,

解釋文：立法院依憲法第六十三條之規定有審議預算案之權，立法委員於審議中央政府總預算案時，應受憲法第七十條「立法院對於行政院所提預算案，不得為增加支出之提議」之限制

* Translator by Professor Andy Y. Sun.

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Members of the Legislative Yuan are restricted by Article 70 of the Constitution, which states that "[t]he Legislative Yuan shall not propose to increase expenditures over the budgetary bill presented by the Executive Yuan[,]" and other related Interpretations of this Yuan. While reasonable deletions and reductions may be made, in light of the difference in nature between a budgetary and a statutory bill, the review process of a budgetary bill cannot apply, mutatis mutandis, to the process of [enacting] a statutory bill which may be revised provision by provision and word by word, so that the designated budgetary amount for each agency may be shifted, added or reduced among different items and the originally budgetary item may be added or reduced. As far as shifting, addition or cost overrun of a budgetary item is concerned, it cannot be said that this is not a type of increase of expenditure as indicated in the Constitution. Furthermore, it involves the revision and adjustment of the contents of policy implementation and planning, which can easily result in the successfulness or failure of a policy being unaccounted for, and

及本院相關解釋之拘束，雖得為合理之刪減，惟基於預算案與法律案性質不同，尚不得比照審議法律案之方式逐條逐句增刪修改，而對各機關所編列預算之數額，在款項目節間移動增減並追加或削減原預算之項目。蓋就被移動增加或追加原預算之項目言，要難謂非上開憲法所指增加支出提議之一種，復涉及施政計畫內容之變動與調整，易導致政策成敗無所歸屬，責任政治難以建立，有違行政權與立法權分立，各本所司之制衡原理，應為憲法所不許。

politics of accountability being difficult to establish, hence violating the separation of Executive and Legislative power and the principle of checks and balances, which shall not be permitted by the Constitution.

REASONING: In accordance with Article 63 of the Constitution, the Legislative Yuan has the power to review and resolve statutory or budgetary bills or bills concerning martial law, amnesty, a declaration of war and conclusion of peace or treaties. Based upon written and unwritten parliamentary rules of the Legislative Yuan concerning the review and resolution process for different kinds of bills, there are those that require Three Readings (such as budgetary and bills of act), or only Two Readings (bills other than budget and statute), or ostensibly Two Readings but do not involve substantive, provision-by-provision discussions before the final vote is cast. This [last category] normally concerns a treaty or international written agreement. Any amendment of a provision or adjustment of language to the original bill submitted by the Executive Yuan would inevitably

解釋理由書：立法院依憲法第六十三條之規定，有議決法律案、預算案、戒嚴案、大赦案、宣戰案、媾和案及條約案等之權限，立法院審議各種議案之過程及方式，依其成文或不成文之議事規則規定，有應經三讀程序者（如法律案及預算案），有僅須二讀者（法律案、預算案以外之議案），更有雖經二讀，但實質上未作逐條討論即付表決者，此類議案通常為條約或國際書面協定，蓋審議時如對行政院提出之原案作條文之修改或文字之更動，勢將重開國際談判，如屬多邊公約，締約國為數甚多，重新談判殆無可能，立法機關僅有批准與否之權。所以有上述之差異，皆係因議案性質不同之故。

reopen international negotiations. This is almost impossible if it concerns a multilateral convention, so the legislative body only carries the power of voting up or down [of the bill in its entirety]. These differences all result from the differences in nature of a given bill.

There are also particularities to a budgetary bill that render it different from a statutory bill: First, any and all related Yuan or Members of the Legislative Yuan may propose bills of act, but only the Executive Yuan may propose budgetary bills; Second, there is no time limitation on the proposition, review and resolution of a statutory bill; time limits do apply to the proposition and review of a budgetary bill because it concerns the government's revenues and expenditures of the entire fiscal year and must be enacted within a certain time frame; in addition, there is also a difference in the fundamental character of a budgetary and statutory bill. A statute (or law) is a set of abstract regulations concerning the rights and obligations of no particular individuals (including government agencies and the general pub-

預算案亦有其特殊性而與法律案不同；法律案無論關係院或立法委員皆有提案權，預算案則祇許行政院提出，此其一；法律案之提出及審議並無時程之限制，預算案則因關係政府整體年度之收支，須在一定期間內完成立法程序，故提案及審議皆有其時限，此其二；除此之外，預算案、法律案尚有一項本質上之區別，即法律係對不特定人（包括政府機關與一般人民）之權利義務關係所作之抽象規定，並可無限制的反覆產生其規範效力，預算案係以具體數字記載政府機關維持其正常運作及執行各項施政計畫所須之經費，每一年度實施一次即失其效力，兩者規定之內容、拘束之對象及持續性完全不同，故預算案實質上為行政行為之一種，但基於民主憲政之原理，預算案又必須由立法機關審議通過而具有法律之形式，故有稱之為措施性法律（Massnahmegesetz）者，以

lic), and can generate its regulatory effect repetitively and without limitation. A budgetary bill contains concrete figures that indicate the expenses needed to maintain the normal operations and carry out all kinds of policy planning of a government agency, which expires once every year after being implemented once. Thus, the content of regulations, subject matter to be regulated and continuity of the two are different. Substantively, a budgetary bill is a type of administrative act but because of the principle of constitutional democracy, it must be reviewed and resolved by the legislative body in order to have the form of a law. Hence, it may be referred to as law of measures (*Massnahmegesetz*) in light of its differences from an ordinary statutory bill. Current practices of the Legislative Yuan in its review of a budgetary bill often contain a resolution under the item of a certain government agency that the total [budget] is to be reduced by a certain dollar amount, with details to be adjusted ab initio by that agency. This further demonstrates the fundamental differences in the review and resolution process of a budgetary bill and

有別於通常意義之法律。而現時立法院審議預算案常有在某機關之科目下，刪減總額若干元，細節由該機關自行調整之決議，亦足以證明預算案之審議與法律案有其根本之差異，在法律案則絕不允許法案通過，文字或條次由主管機關自行調整之情事。是立法機關審議預算案具有批准行政措施即年度施政計畫之性質，其審議方式自不得比照法律案作逐條逐句之增刪修改，而對各機關所編列預算之數額，在款項目節間移動增減並追加或削減原預算之項目，實質上變動施政計畫之內容，造成政策成敗無所歸屬，政治責任難予釐清之結果，有違立法權與行政權分立之憲政原理。

a statutory bill: in a statutory bill, under absolutely no circumstances may an enforcing agency adjust ab initio the language or sequence of a statute after it has already being enacted. Therefore, the review and resolution process concerning a budgetary bill possess the nature of granting an approval to certain administrative measures, i.e., annual policy planning and implementation, and cannot apply, mutatis mutandis, to the review process of a statutory bill which may be revised provision by provision and word by word, so that the designated budgetary amount for each agency may be shifted, added or reduced among different items and the originally budgetary item may be added or reduced. Such has in substance changed the contents of policy implementation and planning, which can result in the successfulness or failure of a policy being unaccounted for, and politics of accountability being difficult to clarify, hence violating the constitution principle of the separation of Executive and Legislative power.

Furthermore, Article 70 of the Constitution stipulates, "[t]he Legislative

又憲法第七十條規定：「立法院對行政院所提預算案不得為增加支出之

Yuan shall not propose to increase expenditures over the budgetary bill presented by the Executive Yuan." In reviewing and resolving the general budget of the Central Government, the Legislative Yuan shall be restricted by this provision. Nor may the Legislative Yuan propose to increase the expenditures outside of a budgetary bill and in the form of a member's proposal, as [clarified] by this Yuan's Interpretation No. 264. While the total amount of the general budget is not subject to change in the review process of the Legislative Yuan, only the designated budgetary amount for each agency may be shifted, added or reduced. Yet as far as shifting, addition or cost overrun of a budgetary item is concerned, it cannot be said that this is not a type of increase of expenditure as indicated in the Constitution. This is not much different in substance from the situation where the general budgetary amount may not have been increased, but addition of expenditures is nevertheless made outside of a budgetary bill and in the form of a member's proposal. This involves the change and adjustment of policy planning and implemen-

提議」，立法院審議中央政府總預算案應受此一規定之限制，而立法院不得在預算案之外以委員提案方式為增加支出之提議，復經本院釋字第二六四號解釋釋示有案。立法委員於審議預算案時，雖不變動總預算金額，僅對各機關原編預算之數額在款項目節間作移動增減，然就被移動而增加或追加之原預算項目言，要難謂非上開憲法所指增加支出提議之一種，其情形與不增加總預算金額，在預算案之外，以委員提案方式為增加支出之提議，實質上亦無不同，既涉及施政計畫內容之變動與調整，易導致政策成敗無所歸屬，責任政治難以建立，尚非憲法之所許。至立法委員對行政院所提預算案所顯示之重要政策如不贊同時，自得就其不贊同部分，依憲法所定程序決議移請行政院變更，其相關之預算項目，自亦隨之調整；或於審議預算案時如發現有不當之支出者，復得逕為合理之刪減，均足達成監督施政，避免支出浮濫致增人民負擔之目的。

mentation, which can result in the successfulness or failure of a policy being unaccounted for, and politics of accountability being difficult to establish, which is not permitted by the Constitution. If the Legislative Yuan should not concur with an important policy as reflected in the budgetary bill submitted by the Executive Yuan, it may, [by resolution,] transmit the portion in question to the Executive Yuan for policy alteration in accordance with the constitutionally mandated process, and the related budgetary items will naturally be adjusted accordingly. Or in the event improper expenditures are discovered in the review of a budgetary bill, reasonable reduction or deletion can be made so that the goals of monitoring the implementation of policies and avoidance of abusive expenditure that results in the overburdening of the people can be accomplished.

Justice Chung-Mo Cheng filed dissenting opinion in part.

Justice Jyun-Hsiung Su filed dissenting opinion, in which Justice Tieh-Cheng Liu joined.

本號解釋城大法官仲模提出部分不同意見書；蘇大法官俊雄、劉大法官鐵錚共同提出不同意見書。

J. Y. Interpretation No.392（December 22, 1995）*

ISSUE: Is the "unlawful" arrest and detention condition imposed by Article 1 of the Habeas Corpus Act inconsistent with Article 8 of the Constitution?

RELEVANT LAWS:

Articles 8 ,9 ,52, 77, 82 and 97 of the Constitution（憲法第八條、第九條、第五十二條、第七十七條、第八十二條及第九十七條）; Article 4, Paragraph 2, of the Amendments to the Constitution（憲法增修條文第四條第二項）; Article 1 of the Habeas Corpus Act（提審法第一條）; Articles 71, Paragraph 4, 101,102, Paragraph 3, 105, Paragraph 3, 120, 121, Paragraph 1 and 259, Paragraph 1 of the Code of Criminal Procedure（刑事訴訟法第七十一條第四項、第一百零一條、第一百零二條第三項、第一百零五條第三項、第一百二十條、第一百二十一條第一項、第二百五十九條第一項）;Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第十三條第一項）; Article 40, Paragraph 2, of the Court Organic Act（法院組織法第四十條第二項）; J. Y. Interpretation Yuan-je tze No. 4034（司法院院解字第四〇三四號解釋）.

KEYWORDS:

judicial organ（司法機關）, court（法院）, prosecutor（檢

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* Translated by H.C. Tsai, Esq.

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察官）, arrest（逮捕）, detention（拘禁）, investigation（調查、偵查）, indictment（起訴）, trial（審問）, habeas corpus（人身保護令狀）. **

HOLDING: Criminal procedure, the judicial proceeding to try criminal cases, is one of the powers held by the judicial branch. It is a process with the purpose of carrying out the penal power of a state. A criminal trial begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to carry out its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. There-

解釋文：司法權之一之刑事訴訟、即刑事司法之裁判，係以實現國家刑罰權為目的之司法程序，其審判乃以追訴而開始，追訴必須實施偵查，迨判決確定，尚須執行始能實現裁判之內容。是以此等程序悉與審判、處罰具有不可分離之關係，亦即偵查、訴追、審判、刑之執行均屬刑事司法之過程，其間代表國家從事「偵查」「訴追」「執行」之檢察機關，其所行使之職權，目的既亦在達成刑事司法之任務，則在此一範圍內之國家作用，當應屬廣義司法之一。憲法第八條第一項所規定之「司法機關」，自非僅指同法第七十七條規定之司法機關而言，而係包括檢察機關在內之廣義司法機關。

fore, the term "judicial organ" used in Article 8, Paragraph 1, of the Constitution would not have the same meaning as the term "judicial organ" used in Article 77 of the Constitution. Instead, the term is applied as an expansive definition in order that the prosecutor's offices may be included therein.

The term "trial" defined in Article 8, Paragraphs 1 and 2, of the Constitution means trial by court. He who has no authority to try a case cannot conduct this proceeding. The "court" defined in Article 8, Paragraphs 1 and 2, means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2, of the Constitution, if any organ other than a court arrested or detained a person, such organ shall surrender the detainee to a competent court for trial within 24 hours of said action. Therefore, the Code of Criminal Procedure, Article 101, and Article 102, Paragraph 3, applies mutatis mutandis to Article 71, Paragraph 4, and Article 120, which empowers a prosecutor other than a judge to detain suspects; Article 105,

憲法第八條第一項、第二項所規定之「審問」，係指法院審理之訊問，其無審判權者既不得為之，則此兩項所稱之「法院」，當指有審判權之法官所構成之獨任或合議之法院之謂。法院以外之逮捕拘禁機關，依上開憲法第八條第二項規定，應至遲於二十四小時內，將因犯罪嫌疑被逮捕拘禁之人民移送該管法院審問。是現行刑事訴訟法第一百零一條、第一百零二條第三項準用第七十一條第四項及第一百二十條等規定，於法院外復賦予檢察官羈押被告之權；同法第一百零五條第三項賦予檢察官核准押所長官命令之權；同法第一百二十一條第一項、第二百五十九條第一項賦予檢察官撤銷羈押、停止羈押、再執行羈押、繼續羈押暨其他有關羈押被告各項處分之權，與前述憲法第八條第二項規定之意旨均有不符。

Paragraph 3, of the same Code which empowers a prosecutor to grant a request for detention submitted by the chief officer of the detention house; Article 121, Paragraph 1, and Article 259, Paragraph 1, of the same Code which empowers a prosecutor to withdraw, suspend, resume, continue detention, or to take any other measures in conjunction with a detention.

These provisions are incongruous with the spirit of the aforementioned Article 8, Paragraph 2, of the Constitution. Article 8, Paragraph 2, of the Constitution merely provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. Said person, or any 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 said person for trial." It does not impose an "unlawful arrest or detention" condition

憲法第八條第二項僅規定：「人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並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。」並未以「非法逮捕拘禁」為聲請提審之前提要件，乃提審法第一條規定：「人民被法院以外之任何機關非法逮捕拘禁時，其本人或他人得向逮捕拘禁地之地方法院或其所隸屬之高等法院聲請提審。」以「非法逮捕拘禁」為聲請提審之條件，與憲法前開之規定有所違背。

for surrendering the detainee to court for trial. Whereas Article 1 of the Habeas Corpus Act prescribes that "When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition the District Court or High Court of the arresting place to issue a writ directing the detainor to surrender the detainee to court for trial." It does add an extra term "unlawful arrest or detention" as a condition for petitioning the writ. Therefore, this provision violates the aforementioned Article 8, Paragraph 2, of the Constitution.

It is hereby declared that the above-mentioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Yuan-je Tze No. 4034 of this Yuan shall be modified accordingly. As to the 24-hour requirement stated in the "turn over within 24 hours" clause of Article 8, Paragraph 2, of the Constitution, it shall refer to objectively feasible time for conducting an investigation. Interpretation No. 130 of this Yuan

上開刑事訴訟法及提審法有違憲法規定意旨之部分，均應自本解釋公布之日起，至遲於屆滿二年時失其效力；本院院解字第四〇三四號解釋，應予變更。至於憲法第八條第二項所謂「至遲於二十四小時內移送」之二十四小時，係指其客觀上確得為偵查之進行而言。本院釋字第一三〇號之解釋固仍有其適用，其他若有符合憲法規定意旨之法定障礙事由者，自亦不應予以計入，併此指明。

shall still be binding. In the case where good causes exist, any other constitutionally permissible defenses for timeliness shall also be exempted from the 24-hour limit. It is hereby pointed out as well.

REASONING: This case has been brought before this Yuan on the following grounds: [1]Petitioner Legislative Yuan, while performing its duty to revise the Code of Criminal Procedure, questioned whether the prosecutor's office is included in the meaning of "judicial organ" provided in Article 8, Paragraph 1, of the Constitution. Therefore, it has petitioned this Yuan for an interpretation; [2]Petitioner Hsu, Shin-Lian claimed that his constitutionally protected right had been infringed upon unlawfully. He had litigated the issue in lower courts, and had exhausted all appeals available. Therefore, he asked this Yuan to review the issue of whether the relevant laws applied in his final and binding judgment were constitutional. [3]Petitioners Chang, Chun-Shong et al., 52 members of the Legislative Yuan, while exercising their legislative functions and duties, had a question about

解釋理由書：本件係因：一、立法院依其職權審查刑事訴訟法修正案，為憲法第八條第一項前段所稱之「司法機關」是否包括檢察機關，發生疑義，聲請本院解釋；二、許信良於其憲法所保障之權利，認為遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律發生有牴觸憲法之疑義，聲請本院解釋；三、立法委員張俊雄等五十二名就其行使職權適用憲法發生疑義，聲請解釋，均符合司法院大法官審理案件法第五條第一項之規定；四、臺灣臺中地方法院法官高思大於行使職權適用憲法發生疑義，依本院釋字第三七一號解釋，聲請解釋，亦屬有據；經大法官議決應予受理及將上開各案合併審理，並依司法院大法官審理案件法第十三條第一項通知聲請人等及關係機關法務部指派代表，於中華民國八十四年十月十九日及十一月二日到場，在憲法法庭行言詞辯論，同時邀請法官代表、法律學者、律師代表到庭陳

the meaning of a constitutional provision. Therefore, they had petitioned this Yuan for an interpretation; [4] Petitioner Gao Shi-Da, judge of the Taichung District Court, Taiwan, while exercising his function and duty as a judge, was in doubt about the meaning of certain constitutional provisions. Therefore, he had adjourned the trial proceeding sua sponte and petitioned this Yuan to render an interpretation based on the rule promulgated by Interpretation No. 371. The Grand Justices granted review for these petitions and consolidated them into one case. In accordance with Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act, the Grand Justices held two oral argument sessions in the Constitutional Court on October 19, 1995, and November 2, 1995, respectively, and notified the petitioners, and the respondent government agency--The Ministry of Justice, to present their cases respectively. It also invited representative judges, legal scholars and lawyers, respectively, to present their amicus curiae briefs before the court. This is a brief account of the background of this case.

述意見，合先說明。

The Petitioners' arguments basically can be summarized as follows: [1]By the literal meaning interpretation approach, as well as by the systematic interpretation approach, the meaning of "judicial organ" in Article 8, Paragraph 1, of the Constitution should be the same as the "judicial organ" stated in Article 77 of the Constitution, which means "those governmental organs having charge of civil, criminal, and administrative cases, and over cases concerning disciplinary measures against public functionaries, and that are administered and supervised by the Judicial Yuan as the highest organ in the hierarchical structure." In view of the doctrine of the separation of powers, and its organizational structure and function, the judicial power is an adjudicative power. It possesses the unique characters of justice, passiveness, impartial third party, and independence, which are contrary to the characters of prosecutorial power, which are public interest orientation, activeness, party litigant status, and submissiveness. Interpretation No. 13 of this Yuan, which opines "The job protection for an active prosecutor, in accordance with Article 82

本件聲請人等之主張略稱：一、自文義及體系解釋之觀點，憲法第八條第一項前段所稱之司法機關，應同於憲法第七十七條所規定之司法機關，即專指「掌理民事、刑事、行政訴訟之審判及公務員之懲戒，而其行政監督系統上係以司法院為最高機關之機關」。自權力分立原理，組織結構功能之觀點，司法權即審判權，具正義性、被動性、公正第三者性及獨立性之特徵，與檢察權之公益性、主動性、當事人性及檢察一體、上命下從特徵，截然不同。司法院釋字第十三號解釋但書之說明「實任檢察官之保障，依同法第八十二條及法院組織法第四十條第二項之規定，除轉調外，與實任推事同」，則僅在說明法院組織法對檢察官之保障，係比照法官之規定現狀，不能改變檢察官在憲法上屬於行政機關之基本地位。二、依憲法第八條第一項：「非由法院依法定程序，不得審問、處罰。」是憲法所稱之「法院」，係專指有「審問處罰」權之法院而言；而所謂有「審問處罰」權之機關，依憲法第七十七條乃專指有審判權之各級法院。檢察官並未擁有「審問處罰」之權限，自非憲法上所稱之法院。憲法第八條第二項後段所稱之法院，既僅指有提審權、負責審判之狹義法院，

of the same law [the Constitution] and Article 40, Paragraph 2, of the Court Organic Act, shall be the same as a judge in every respect except provisions regarding job transfers," merely states that the job protection rendered the prosecutor by the Court Organic Act is on a par with a judge. It cannot alter the fundamental position the prosecutor occupied in the Constitution as a member of the executive branch. [2]According to Article 8, Paragraph 1, of the Constitution: "No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law." Therefore, the "law court" designated in the Constitution shall mean the courts empowered "to try and punish"; and the organs having power "to try and punish," according to Article 77 of the Constitution, are limited to the law court in the judicial branch only. The prosecutors do not hold the power "to try and punish," hence they are not the "law court" named in the Constitution. Since the competent court designated in Article 8, Paragraph 2, second sentence, of the Constitution means a court with the power to issue writs directing the detainor to sur-

不包括檢察官，則列於同條項前段之「法院」，自應與之為同一解釋，亦即同條第二項前段之「法院」僅指負責審判之法院，不含檢察官在內。三、基於保障人民訴訟權之觀念，以「當事人對等原則」配合理解憲法第八條第一項所規定正當「法律程序」之意義，益可證明同條項前段所稱之「司法機關」，不應包括檢察機關在內。若使代表國家身為刑事訴訟程序當事人之檢察官亦得決定、執行羈押者，非但不符「當事人對等」亦折損實質正當之「法律程序」之嚴肅意義，以及人民對於國家訴追犯罪之公信力。故應將檢察官排除於「司法機關」之外，始能符合正當法律程序之憲法意義。四、就我國憲法第八條之立法沿革言，歷次憲法或草案均將提審之權力，專屬於負責審判之狹義法院。提審法第一條所規定非法逮捕拘禁之要件，增加憲法第八條第二項所未規定之限制，實則依該條之意旨，縱為合法之逮捕拘禁，亦得聲請提審，且極易令人誤解「非法」與否之認定權，委之於法院以外之機關（如檢察官），無異剝奪人民之提審權，架空憲法保障人身自由之崇高內涵，顯與憲法第八條第二項之意旨不符。五、依憲法第八條第一項前段、第二項、第三項規定：「人民身體

render the detainee for trial [writ of habeas corpus] and to try a case, it does not include the prosecutor. It goes without saying that the "court" designated in the first and second sentences of the same Article and Paragraph shall be interpreted the same, i.e., the competent "court" in Article 8, Paragraph 2, of the Constitution shall mean law courts with jurisdiction to try cases. [3]On account of the concept of protecting the people's right to institute litigation, and applying "the doctrine of equal status of the litigants," we expound the meaning of "procedure prescribed by law" in Article 8, Paragraph 1, of the Constitution. It is clear that the "judicial organ" designated in the first sentence of the same Article and Paragraph does not include the prosecutor's office. Were we to permit the state's representative and a party litigant, the prosecutor, to hold the detention power, it would not be in harmony with "the doctrine of equal status of the litigants." It would also erode the strict meaning of "procedure prescribed by law." Therefore, the prosecutor's office should be excluded from the "judicial organ" to conform to the meaning of the

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。……人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並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，向逮捕機關提審。法院對於前項聲請不得拒絕，並不得先令逮捕拘禁之機關查覆。逮捕拘禁之機關，對於法院之提審，不得拒絕或遲延」。由上開規定可知，法院以外之機關不得拘禁人民二十四小時以上，從而現行刑事訴訟法第一百零八條規定賦予檢察官得拘禁人民之人身自由達二月以上而不移送法院審問，顯有違憲之疑義等語。

Constitution. [4]In view of the legislative history of Article 8 of the Constitution, each version of the constitutional drafts had allocated the detention power exclusively to the law court in charge of trial. By prescribing an unlawful arrest or detention as the condition for issuing writs, Article 1 of the Habeas Corpus Act has imposed additional conditions not required by Article 8, Paragraph 2, of the Constitution. Whereas, the framers of the Constitution had intended the contrary, even a lawful arrest or detention itself would have been entitled to petition for writs. Therefore, it could easily create a misconception that the framers had assigned to an organ other than a court (e.g., the prosecutor's office) the power to determine "unlawfulness." This is tantamount to depriving the people's right to the writs, defying the noble intention of the Constitution to protect physical freedom, and conflicting with the spirit of Article 8, Paragraph 2, of the Constitution. [5]According to Article 8, first sentence of Paragraph 1, Paragraph 2, and Paragraph 3 of the Constitution: "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… When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and his designated relative or friend, of the ground for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for surrender of said person for trial. The court shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for surrender of the said person for trial." It can be inferred from the abovementioned provisions that no organ other than a court can detain a person for more than 24 hours. Therefore, Article 108 of the present Code of Crimi-

nal Procedure, which confers on the prosecutor a power to detain persons and restrict physical freedom for two months without transferring to court for trial, is under suspicion of violating the Constitution...and so on.

The Respondent government agency replies as follows: [1]The definition of judicial power should also consider its purpose and function, not merely its form of hierarchical structures. Therefore, in addition to the power to try cases, judicial power should at least also include the power to interpret laws, the power to discipline public functionaries, and the power to prosecute. The majority of legal professionals and constitutional law scholars were of the opinion that the judicial organ includes the prosecutor's office. Interpretations Nos. 13, 325 and 384 of this Yuan had already affirmed, either directly or indirectly, that the prosecutor's office is a judicial organ. Although the prosecutor's office is subject to the supervision of the Ministry of Justice now, the Court Organic Act, in order to strengthen the independence of the prosecutor, has

關係機關主張略稱：一、司法權的定義應從目的性及功能性角度觀察，非單從組織配屬的形式來判斷。故司法權除審判權外，至少尚包括解釋權、懲戒權及檢察權。司法機關包括檢察機關為實務界及憲法學者通說。司法院釋字第十三號、第三二五號、第三八四號解釋，均間接或直接肯定檢察機關是司法機關。檢察機關今雖隸屬法務部，但法院組織法為強化檢察官獨立行使職權，規定法務部長僅有行政監督權而無業務指揮權，不能影響檢察官辦理個案之獨立性。二、五權憲法與三權憲法理論基礎相異，其係在揚棄三權分立之防弊制衡理念，而強調平等相維、分工合作之互助機能；現縱認為檢察官不是司法官，擁有羈押權不符合西方司法民主化分權制衡之標準，亦是立法政策問題，而非違憲問題，倘符合法定程序，檢察官應亦有羈押被告之權。三、就制憲背景而言，以立憲當時檢察官配屬法院及

provided that the Minister of Justice shall only have a power of administrative supervision, not a power of transactional supervision. It cannot interfere with the independence that a prosecutor enjoys in prosecuting a particular case. [2]The theoretical basis of a five-power constitution is different from that of a three-power constitution; it replaced the ideal of checks and balances with an emphasis on equal respect and cooperation. Even if we denied that the prosecutor is a judicial officer, hence his detention power would not be in accord with the western standard of democratic judiciary based on the doctrine of separation of powers, nonetheless this is not a constitutional issue, but a policy consideration for the legislators to decide. If we follow precisely the procedure prescribed by law, a prosecutor should have the power to detain an accused for investigation. [3]In view of the surrounding background for adoption of the Constitution, of the fact that the prosecutor's offices were physically attached to the courthouses, and of the fact that most arrests were made by the police, the "court" stated in Article 8, Paragraph 2, first sen-

逮捕拘禁機關多為警察機關之事實，憲法第八條第二項前段規定之「法院」，應指包含檢察機關在內之廣義法院；況自民國十六年建立檢察官配置法院之體制，雖歷經法院組織法之制定及多次修正，迄今均未改變，則上開「法院」之應包括檢察機關，要無疑義。四、「處罰」固為審判機關之職權；但「審問」則係指檢察官偵查中之訊問，不然案件尚未起訴，何來審問，另所謂「追究」亦係「追訴」之意。五、就制憲沿革論，訓政時期約法規定為「審判機關」，而其後之五五憲草及現行憲法均規定為「法院」，捨「審判機關」之語於不用，可見其係採廣義法院。六、憲法第八條第二項規定之性質為迅速移送條款，乃繼受自外國立法例，參酌一九五三年九月三日生效之「歐洲保障人權及基本自由公約」第五條、一九七六年三月二十三日生效之「聯合國公民及政治權利國際盟約」第九條、一九七八年六月生效之「美洲人權公約」第七條，其對因犯罪嫌疑而遭逮捕拘禁之人，一致規定其應迅速解送至「法官或其他依法執行司法權之官員」，顯然上開公約均認為受理解送人犯之機關並不限於法官，僅受理提審聲請之機關，始限於狹義之審判法院。七、我國檢察官係偵查

tence, of the Constitution should be referred to as a court in an expansive to include the prosecutor's offices. Moreover, in 1927, we established the system attaching the prosecutor's offices to the courthouses, and this basic framework has never been changed, notwithstanding the fact that the Court Organic Act has been enacted and subject to numerous amendments already. Therefore, the conclusion that the abovementioned "court" should include the prosecutor's office is beyond doubt. [4]Although "punishment" is a prerogative of the court, the term "trial" involved herein should refer to interrogations made by the prosecutor in the investigative stage. Otherwise, how could a trial precede an indictment? Besides, the term "investigation" herein shall refer to "indictment", too. [5]When reviewing the constitutional history, the Provisional Constitution for the Period of Political Tutelage used the term "tribunal," while the Double Five Constitutional Draft and the text of the present Constitution both employed the term "court," not "tribunal." This shows that it refers to a "court" in an expansive definition. [6]The nature of

之主體，且為公益代表，非以追求被告有罪判決為唯一目的，與他國之單純公訴人不同，而其原具預審法官之性質，自不能謂其不應擁有羈押權。八、提審法第一條所稱「非法逮捕拘禁」，係指無逮捕拘禁權力之機關而為逮捕拘禁，或雖有逮捕拘禁權而逮捕拘禁後超過二十四小時之情形而言，與憲法第八條第二項後段之規定，並無不符，亦無另加限制之情形；且同詞異義所在多有，本條項前段之法院自可與後段之法院作不同之解釋。九、憲法之解釋不能不兼顧「合理」與「可行」，認憲法第八條第二項所稱之法院僅為狹義之法院，將使逮捕後須將犯罪嫌疑人於二十四小時內解送法官，從而迫使檢察官須與警察合用二十四小時，比較各國法制，該合用之二十四小時顯然過短，既不合理又不可行云云。

Article 8, Paragraph 2, of the Constitution is a prompt transfer provision. It was modeled after foreign legislation. This concept was reflected in Article 5 of "the European Convention for the Protection of Human Rights" and Fundamental Freedom effective on September 3, 1953; in Article 9 of the United Nations' "International Covenant on Civil and Political Rights" effective on March 23, 1976; and in Article 7 of "the Continental American Human Rights Convention" effective in June, 1978. They required that an arrested criminal suspect be promptly surrendered to "a judge or an official exercising judicial power prescribed by law." Apparently, the abovementioned international conventions and treaties have determined that the organ accepting the surrender of a detainee shall not be limited to a judge, but that the organ issuing a writ of habeas corpus shall be limited to a court in a restrictive definition. [7]The prosecutors of this state form an investigative body which also represents the public interest. They do not make pursuing convictions of defendants their sole purpose. They differ from the prosecutors of other states in that

they possess the qualities of a pre-trial judge. Therefore, they should not be denied the detention power. [8]The "unlawful arrest and detention" in Article 1 of the Habeas Corpus Act shall refer to situations where an organ without power of arrest and detention makes an arrest or detention, or where an organ with power of arrest and detention makes an arrest or detention exceeding the 24-hour limit. It does not conflict with Article 8, Paragraph 2, second sentence, of the Constitution, nor does it impose extra restrictions. Moreover, it is not unusual that a term sometimes may imply multiple meanings. Therefore, the "court" referred to in the first sentence of said Paragraph may have a slightly different meaning than the court of the second sentence of said Paragraph. [9]Constitutional interpretation must be both "reasonable" and "feasible." Confining the meaning of "court" in Article 8, Paragraph 2, of the Constitution to a court of a restrictive definition would mean that the arrested criminal suspects must be transferred to a judge within 24 hours. This would mandate the prosecutor and the police to share their 24 hours jointly.

Compared with the laws of other states, this 24-hour joint requirement apparently is too short, neither reasonable nor feasible ...and so on.

THIS YUAN, after considering the arguments made by the Petitioners, the Respondent government agency, and the amicus curiae briefs presented by the representative judges, legal scholars and lawyers, has written this Interpretation with reason as follows:

本院斟酌聲請人等及關係機關之主張暨法官代表、法律學者、律師代表陳述之意見，作成本解釋，其理由如左：

The notion of "judiciary" is relative to legislation and administration (in the constitutional framework of this state, relative to examination and control, too). Conceptually, this is a legal term that connotes multiple meanings. Distinctions can be made between judiciary of a substantive meaning v. judiciary of a formal meaning, and judiciary of a restrictive definition v. judiciary of an expansive definition. Judiciary of a substantive meaning refers to declarations made by a state for resolution of a controversy (i.e., a trial), as well as any state function auxiliary to this trial power (i.e., judicial ad

按所謂「司法」，觀念上係相對於立法、行政而言（我國之憲制則尚包括考試、監察）。概念上原屬多義之法律用語，有實質意義之司法、形式意義之司法與狹義司法、廣義司法之分。其實質之意義乃指國家基於法律對爭訟之具體事實所為宣示（即裁判）以及輔助裁判權行使之作用（即司法行政）；其形式之意義則凡法律上將之納入司法之權限予以推動之作用者均屬之─如現行制度之「公證」，其性質原非屬於司法之範疇；但仍將之歸於司法予以推動，即其一例。所謂狹義之司法、即固有意義之司法，原僅限於民刑事裁判之國家作用，其推動此項作用之權能，一般稱

ministration). Judiciary of a formal meaning extends further to include any state function provided by law to the judicial power to further its purpose -- for example, the "notary public" by its nature is not within the category of the judiciary, however, it was annexed to the judicial department to further its purpose. Judiciary of a restrictive definition is the common meaning for the judiciary. It refers to state functions in civil and criminal trials, and the capacity to carry out this function is called judicial power or adjudicative power. Because it refers to the civil and criminal trials, it is also called trial power. Whereas in this state, the administrative litigation, the disciplinary measures against public functionaries, judicial interpretation, the trial for dissolution of unconstitutional political parties and any sort of "state functions of adjudication" shall also be included. That is to say, any of those state functions implicating a judicial independence are within this meaning of judiciary. Therefore, the position and duty of the Judicial Yuan provided by Chapter 7 of the Constitution, i. e., the Judicial Yuan shall be the highest "judicial

之為司法權或審判權，又因係專指民刑事之裁判權限，乃有稱之為裁判權者；惟我國之現制，行政訴訟、公務員懲戒、司法解釋與違憲政黨解散之審理等「國家裁判性之作用」應亦包括在內，亦即其具有司法權獨立之涵義者，均屬於此一意義之司法，故憲法第七章所規定之司法院地位、職權，即其第七十七條所稱司法院為國家最高「司法機關」、第七十八條之司法解釋權，與增修條文第四條第二項之審理政黨違憲之解散事項均可謂之為狹義司法。至於其為達成狹義司法之目的所關之國家作用（即具有司法性質之國家作用），則屬廣義司法之範圍。

organ" of the state provided by Article 77, the judicial interpretation provided by Article 78, and the trials for dissolution of unconstitutional political parties provided by Article 4, Paragraph 2, of the Amendment of the Constitution, shall be deemed the judiciary of a restrictive definition. As to those state functions to further the purpose of the judiciary of a restrictive definition (i.e., state functions with a judicial nature), they are included in the category of the judiciary of an expansive definition.

A court is an organ to try cases. It has definitions of both a restrictive and expansive denotations, too. A court of a restrictive definition refers to a tribunal composed of an individual judge or a panel of judges to try cases, i.e., the organ exercising adjudicative power, which is the meaning of a court in a procedural law sense. A court of an expansive definition refers to an organ with its personnel and facilities set up by a state to adjudicate, i.e., it is the meaning of a court in an organizational law sense. Hence, a court of a restrictive definition is confined to those possessing power to try cases (adjudica-

法院係職司審判（裁判）之機關，亦有廣狹兩義，狹義之法院乃指對具體案件由獨任或數人合議以實行審判事務，即行使審判權之機關，此即訴訟法上意義之法院；廣義之法院則指國家為裁判而設置之人及物之機關，此即組織法上意義之法院。故狹義之法院原則上係限於具有司法裁判之權限（審判權）者，亦即從事前述狹義司法之權限（審判權）而具備司法獨立（審判獨立）之內涵者，始屬當之；而其在此一意義之法院執行審判事務（即行使審判權）之人即為法官，故構成狹義法院之成員僅限於法官，其於廣義法院之內，倘所從事者，並非直接關於審判權之行

tive power) while retaining independence when exercising this restrictively defined power. A person carrying out trial affairs (i.e., exercising adjudicative power) in a court thus defined is a judge. Therefore, a member of a court of a restrictive definition is limited to judges only. Yet in a court of an expansive definition, if a person is engaged in activities not directly related to exercising adjudicative power, said person is not a judge and said organ is not a court of a restrictive definition. Therefore, in a procedural sense, a court (a court of a restrictive definition) is equated with a judge. Both of them refer to a body exercising adjudicative power and are interchangeable. Consequently, if a statutory provision uses the term "judge," we must look further to see whether it refers to matters of exercising adjudicative power. Except in a "personal" context (e.g., legal status, job security, and recusal of judges, etc.), the judge is on a par with the court in most statutory provisions. The constitutional provisions referring to the "court" and "judge" should be treated the same way also.

使，其成員固非法官，其機關亦非狹義之法院，故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為替代之使用。因是法條本身若明定為「法官」，則除其係關於法官其「人」之規定外（如法官身分、地位之保障、法官之迴避等），關於審判權行使之事項，其所謂之法官當然即等於法院。憲法各條有關「法院」「法官」之規定，究何所指，當亦應依此予以判斷。

In this state, the prosecutors are the body of investigations. They prosecute criminal cases and they entreat courts to act according to law. They take charge of the supervision for the proper execution of judgments. In civil matters, they also play an important role as the representatives of public interest (See Article 60 of the Court Organic Act, and Article 228 infra of the Code of Criminal Procedure). Yet their principal duty remains criminal investigation and the exercise of public charge power. Although they may act with certain discretion in the "litigation" (See Article 61 of the Court Organic Act), they still have obligations to obey the orders of their superiors (the chief prosecutor) (See Article 63 of the Court Organic Act). This is quite a separate matter from the outward independence they enjoyed -- to be free from interference of any other state organ when carrying out their duties, and the inward independence they enjoyed -- to act only according to laws in a trial. The prosecutor's office is a government organ where the prosecutors carry out their duties. Although it is physically attached to the courthouse (See Article 58

我國現制之檢察官係偵查之主體，其於「刑事」為公訴之提起，請求法院為法律正當之適用，並負責指揮監督判決之適當執行；另於「民事」復有為公益代表之諸多職責與權限，固甚重要（參看法院組織法第六十條、刑事訴訟法第二百二十八條以下）；惟其主要任務既在犯罪之偵查及公訴權之行使，雖其在「訴訟上」仍可單獨遂行職務（法院組織法第六十一條參看）；但關於其職務之執行則有服從上級長官（檢察首長）命令之義務（法院組織法第六十三條），此與行使職權時對外不受任何其他國家機關之干涉，對內其審判案件僅依據法律以為裁判之審判權獨立，迥不相侔。至於檢察機關則係檢察官執行其職務之官署，雖配置於法院（法院組織法第五十八條），但既獨立於法院之外以行使職權，復與實行審判權之法院無所隸屬，故其非前述狹義之法院，其成員中之檢察官亦非法官之一員，要無疑義；惟雖如此，其實任檢察官之保障，除轉調外，則與實任法官同，此業經本院以釋字第十三號解釋有案，其仍應予適用，自不待言。

of the Court Organic Act), yet it acts independently outside the court system and is not subordinated to the court that exercises adjudicative power. Therefore, it is beyond doubt that it is not a court of a restrictive definition, and that its member prosecutors are not judges. However, the protection of job security of a prosecutor, except for matters of job transfer, is the same as that of an active judge in all respects. This has been declared previously in Interpretation No. 13 of this Yuan, and it remains operative without the need for further elaboration here.

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..." As far as criminal procedure, one of the powers held by the judicial branch, is concerned, the judi-

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……」，此就司法權之一之刑事訴訟、即刑事司法之裁判言，既係以實現國家刑罰權為目的之司法程序，其審判乃以追訴而開始，追訴必須實施偵查，迨判決確定，尚須執行始能實現裁判之內容，是以此等程序悉與審判、處罰具有不可分離之關係，亦即偵查、訴追、審判、刑之執行均屬刑事司法之一連串過程，其間代表國家

cial proceeding to try criminal cases is a process with the purpose of exercising the penal power of a state. It begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to exercise its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. The Constitution further provides expressly: "...no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law..." Therefore, the judicial organ contained herein, in view of its function, shall refer to the judiciary of an expansive definition inclusive of prosecutor's offices, not to mention that it juxta-

從事「偵查」「訴追」「執行」此一階段之檢察機關，其所行使之職權，目的既亦在達成刑事司法之任務，則在此一範圍內之國家作用，如前說明，當應屬廣義司法之一；而憲法於此復明定：「……非經司法或警察機關依法定程序不得逮捕拘禁……」，是此之所謂司法機關，就其功能予以觀察，自係指包括檢察機關在內之廣義司法機關之意；何況其將司法（警察）機關與法院並舉，先後予以規定，則此之司法機關應非指憲法第七十七條之司法機關而言，亦即非僅指狹義之法院，理至明顯；且刑事司法程序，其在偵查階段係由警察與檢察官為之，後者既負責調度指揮前者，其關於公訴權之行使復由檢察官所擔任，是憲法前開規定之併列司法與警察機關之逮捕拘禁程序，其當然係包括檢察機關在內，應毋庸疑。

poses the judicial (police) organ with the court, and made provisions for each one, respectively. Hence, it is clear that the judicial organ referred to herein, not being the judicial organ stated in Article 77 of the Constitution, is not a court of a restrictive definition. Furthermore, the process of criminal justice in its investigative stage is conducted by the police and prosecutor. The latter deploys and commands the former. The prosecutor also exercises the power of public charge. Therefore, there should be no doubt that the abovementioned constitutional provisions juxtaposing the judicial and police organ for arrest and detention procedure shall include the prosecutor's offices as well.

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 in writing inform the said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for

憲法第八條第二項規定：「人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並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。」此前段之「移送該法院『審問』」與前述同條第一項之「……非由法院依法定程序不得『審

trial. The said person, or any 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." This sentence, "turn him over to a competent court for trial," and the sentence in the abovementioned Article 8, Paragraph 1, "No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law," shall both refer to the hearings conducted by courts in reviewing cases. Thus, those without authority to adjudicate cannot do so. Therefore, the "court" herein means a court paneled by a judge or judges who possess adjudicative power. It refers to a court of a restrictive definition as provided in the Code of Criminal Procedure. Moreover, since the abovementioned Article 8, Paragraph 1, first sentence, of the Constitution juxtaposes the judicial (or police) organ and the court, it confers on the former, in the process of criminal justice, the power to arrest and detain in accordance with the procedure prescribed by law, and expressly provides that only the latter has power to try cases. Therefore, it is beyond

問』」之所謂「審問」，係指法院為審理而訊問之意，其非有審判權者，自不得為之。故此之所謂「法院」當然指有審判權之法官所構成之獨任或合議之法院之謂，亦即刑事訴訟法上之狹義法院。況且前述憲法第八條第一項上段規定，既將司法（或警察）機關與法院並舉，賦予前者在刑事司法程序中有依法定程序逮捕拘禁之權，而定明唯有後者始有審問之權，則此之法院與憲法第八條第二項前段之法院均係指有獨立審判權之法官所構成者，尤屬無可置疑。

question that the "court" stated herein and the "court" referred to in the Article 8, Paragraph 2, first sentence, of the Constitution shall mean a court paneled by a judge or judges who possess independent adjudicative power.

Article 8, Paragraph 2, second sentence, of the Constitution provides: "...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"; the court referred to herein and the court referred to in Paragraph 3 of the same Article: "The 'court' shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for the surrender of the said person for trial"; and the "court" stipulated in Paragraph 4: "When a person is unlawfully arrested or detained by any organ, he or any other person may petition the 'court' for an investigation. The 'court' shall not reject such a petition, and shall, within 24

憲法第八條第二項後段：「……得聲請該管『法院』於二十四小時內向逮捕之機關提審」之法院，與同條第三項：「『法院』對於前項聲請不得拒絕，並不得先令逮捕拘禁之機關查覆。逮捕拘禁之機關對於『法院』之提審，不得拒絕或遲延」、第四項「人民遭受任何機關非法逮捕拘禁時，其本人或他人得向『法院』聲請追究，『法院』不得拒絕，並應於二十四小時內向逮捕拘禁之機關追究，依法處理」之「法院」，亦均限於擁有審判權之法院始屬相當；蓋第二項後段與第三項關於「提審」之規定，係仿自英美之「人身保護令狀」（Writ of Habeas Corpus），考之此一制度，唯有審判機關之法院方有提審權之可言，檢察機關之無此一權限，本屬無可爭議，即聲請人等與關係機關（法務部）於此亦不爭執。至於同條第四項既係承續第三項而來之規定，且又明定為「追究」，非「追訴」，自

hours, investigate the action or the organ concerned and deal with the matter in accordance with law," all are limited to the position of a court with adjudicative power only. The "surrendering a prisoner to court for trial" provisions in Paragraph 2, sentence, and Paragraph 3 originated from the "writ of habeas corpus" of the Anglo-American legal tradition, and according to this legal tradition, only a law court that functions as a tribunal has this writ-issuing power. It is unequivocal that a prosecutor does not possess this writ-issuing power, even if the petitioners and the respondent government agency (the Ministry of Justice) would not dispute this point. Paragraph 4 of the same Article followed the rule prescribed in Paragraph 3, and explicitly states "investigation," not "prosecution." Naturally, this is not necessarily limited to criminal procedures only. Therefore, the "court" stipulated in Article 8, Paragraph 2, (either the first or second sentence), Paragraph 3, and Paragraph 4 of the Constitution all have the same meaning. They all refer to tribunals paneled by judges.

不限於刑事程序。是憲法第八條第二項（不論前段、後段）與同條第三項、第四項所規定之「法院」均屬同義，亦即指法官所構成之審判機關─法院而言。

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"Arrest" means restraining one's

所謂「逮捕」，係指以強制力將

physical freedom by physical force. "Detention" means confining a person's freedom of bodily movement and making it impossible to escape from a certain space. Both are types of deprivation of physical freedom. As to the term "apprehension" provided in the Code of Criminal Procedure, it refers to a measure restraining a defendant's (criminal suspect's) freedom and forcing him to appear before the authority; and "taking into custody" refers to a measure for securing smooth criminal trial by forcefully restricting the physical freedom of the accused (criminal suspect) and taking him or her into custody in a certain place (custodial ward). Therefore, as far as deprivation of physical freedom is concerned, there are no differences between apprehension and arrest, nor are there differences between taking into custody and detention. They differ only in terms of purpose of action, method used, and length of period. Other statutory measures variations, such as "restrain," "receive," "hold," and "control," do not prevent them from being a kind of "detention," too. They should be assessed by the extent of their actual deprivation of physi-

人之身體自由予以拘束之意；而「拘禁」則指拘束人身之自由使其難於脫離一定空間之謂，均屬剝奪人身自由態樣之一種。至於刑事訴訟法上所規定之「拘提」云者，乃於一定期間內拘束被告（犯罪嫌疑人）之自由，強制其到場之處分；而「羈押」則係以確保訴訟程序順利進行為目的之一種保全措置，即拘束被告（犯罪嫌疑人）身體自由之強制處分，並將之收押於一定之處所（看守所）。故就剝奪人身之自由言，拘提與逮捕無殊，羈押與拘禁無異；且拘提與羈押亦僅目的、方法、時間之久暫有所不同而已，其他所謂「拘留」「收容」「留置」「管收」等亦無礙於其為「拘禁」之一種，當應就其實際剝奪人身（行動）自由之如何予以觀察，未可以辭害意。茲憲法第八條係對人民身體自由所為之基本保障性規定，不僅明白宣示對人身自由保障之重視，更明定保障人身自由所應實踐之程序，執兩用中，誠得制憲之要；而羈押之將人自家庭、社會、職業生活中隔離，「拘禁」於看守所、長期拘束其行動，此人身自由之喪失，非特予其心理上造成嚴重打擊，對其名譽、信用一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

cal freedom of people, not merely judged from words used superficially. The protection of the people's physical freedom provided by Article 8 of the Constitution is a fundamental right. It not only openly declares the importance it places on the protection of physical freedom, but also explicitly provides for the procedures in carrying out this protection. By tackling the aims and means simultaneously, it was indeed a refined constitutional provision. The custodial measure segregates a person from his or her family, society, and professional life, "detains" the person in a custodial ward, and restrains said person's movement for a long period of time. This deprivation of physical freedom will have a tremendous impact on the person, not only in terms of psychological effect, but also in terms of loss of reputation and credit standing – and a tremendous impact on personal rights. It is a coercive measure that has maximum impact on physical freedom. Therefore, it should be reserved as "the last measure in preventive proceedings," and must be administered with extreme caution. Unless all legal requirements are met and there are necessities, it

段」，允宜慎重從事，其非確已具備法定條件且認有必要者，當不可率然為之。是為貫徹此一理念，關於此一手段之合法、必要與否，基於人身自由之保障，當以由獨立審判之機關依法定程序予以審查決定，始能謂係符合憲法第八條第二項規定之旨意。現行刑事訴訟法第一百零一條：「被告經訊問後，認為有第七十六條所定之情形者，於必要時得羈押之。」、第一百零二條第三項準用第七十一條第四項之由檢察官簽名於押票以及第一百二十條：「被告經訊問後，……其有第一百十四條各款所定情形之一者，非有不能具保、責付或限制住居之情形，不得羈押。」等規定，於法院之外同時賦予檢察官羈押被告（犯罪嫌疑人）之權；同法第一百零五條第三項：「……束縛身體之處分，由押所長官命令之，並應即時陳報該管法院或檢察官核准。」之賦予檢察官核准押所長官命令之權；同法第一百二十一條第一項：「第一百零七條之撤銷羈押、第一百十五條及第一百十六條之停止羈押、第一百十七條之再執行羈押……以法院之裁定或檢察官命令行之。」與第二百五十九條第一項：「羈押之被告受不起訴之處分……遇有必要情形，並得命繼續羈押之。」賦予檢察官撤銷羈

should not be invoked easily. To carry through this idea of protection for physical freedom, the assessment of legality and necessity of this measure should be made by an independent tribunal in accordance with the procedure prescribed by law. Only by doing so can it be said that the spirit of Article 8, Paragraph 2, of the Constitution is upheld. The current provisions of the Code of Criminal Procedure, Article 101, stating that an accused may be detained after examination if it is deemed necessary and it is discovered that one of the conditions specified in Article 76 exists, Article 102, Paragraph 3, applying mutatis mutandis to Article 71, Paragraph 4, for the writ of detention issued by a prosecutor and Article 120 providing that after an accused has been examined...; if one of the circumstances of Article 114 is present, the accused may not be detained unless it is impossible to release him on bail or to the custody of another or with a limitation on his residence, provide the prosecutors, besides the court, with a power to take an accused (criminal suspect) into custody. Article 105, Paragraph 3, of the same Code states: ...such

押、停止羈押、再執行羈押、繼續羈押暨其他有關羈押被告（犯罪嫌疑人）各項處分之權，與前述憲法第八條第二項規定之意旨均有不符。

restraint shall be ordered by the officer in charge of the detention house, and such order shall be referred immediately to the court or prosecutor concerned for approval provides the prosecutor with a power to approve a detention order submitted by the chief officer of the detention house. Article 121, Paragraph 1, of the Same Code: "The cancellation of detention specified in Article 107,..., the suspension of detention specified in Articles 115 and 116, and the resumption of detention specified in Article 117...shall be made by a court ruling or by a prosecutor's order," and Article 259, Paragraph 1: "A detained accused who received a ruling not to prosecute,..., if the circumstances warrant, may be ordered to remain in custody," these laws provide the prosecutor with the power to cancel, cease, resume or continue detention, and the power to implement other measures in conjunction with the power to detain an accused (criminal suspect). These powers are incongruous with the spirit of the abovementioned Article 8, Paragraph 2, of the Constitution.

Article 8, Paragraph 2, of the Constitution provides: “When a person is arrested or detained on suspicion of having committed a crime ... The said person, or any 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.” It does not prescribe “unlawful arrest or detention” as a condition for petitioning the writ. Hence, regardless of whether there was an objective fact of “unlawful” arrest or detention, once the criminal suspect is detained by an organ other than a court he is entitled to petition the competent court for a writ. There should be no distinctions made between “lawful” and “unlawful” arrest. For without a hearing by the competent court, there is no way to predetermine the lawfulness of the arrest. Yet Article 1 of the Habeas Corpus Act prescribes: “When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition to the District Court or High Court of the arresting place for a writ directing the detainor to surrender the detainee to court for trial [i.e., a writ of

又憲法第八條第二項僅規定：「人民因犯罪嫌疑被逮捕拘禁時，……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。」並未以「非法逮捕拘禁」為聲請提審之前提，亦即犯罪嫌疑人一遭法院以外之機關逮捕拘禁時，不問是否有「非法」逮捕拘禁之客觀事實，即得向該管法院聲請提審，無「合法」與「非法」逮捕拘禁之分；蓋未經該管法院之審問調查，實無從為合法與否之認定，乃提審法第一條規定：「人民被法院以外之任何機關非法逮捕拘禁時，其本人或他人得向逮捕拘禁地之地方法院或其所隸屬之高等法院聲請提審。」竟以「非法逮捕拘禁」為聲請提審之條件，要與憲法前開之規定有所違背。本院院解字第四〇三四號解釋謂：「人民被法院以外之機關依法逮捕拘禁者自不得聲請提審」，既係以提審法第一條「非法逮捕拘禁」之限制規定乃屬合憲為前提而作之解釋，從而該號之解釋自應予變更。

habeas corpus].” It does add “unlawful arrest or detention” as a condition for petitioning the writ. This provision is incompatible with the aforementioned constitutional provision. Interpretation Yuan-je tze No. 4034 of this Yuan, which provides: “A person lawfully arrested or detained by an organ other than a court shall not be entitled to petition a writ directing the detainor to bring the detainee to court for trial,” was an interpretation premised on the constitutionality of the “unlawful arrest or detention” requirement of Article 1 of the Habeas Corpus Act. Therefore, said Interpretation shall be modified accordingly.

The aforementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Moreover, although Article 8, Paragraph 1, of the Constitution confers power of arrest or detention on a non-court judicial (or police) organ in accordance with procedure prescribed by law, yet Paragraph 2 of the same Article requires that the detainee

上開刑事訴訟法及提審法有違憲法規定意旨之部分，均自本解釋公布之日起，至遲於屆滿二年時失其效力。再憲法第八條第一項雖亦賦予非狹義法院之司法（或警察）機關得依法定程序逮捕拘禁之權；然於同條第二項復規定其至遲於二十四小時內移送法院審問，以決定應否繼續予以拘禁，即為刑事訴訟法上之羈押與否，此當係本於前述保障人身自由之考量，因是不許法院（法官所構成者）以外之機關得長期拘束人民

must be transferred within 24 hours to a court for determining whether continuous detention, i.e., the detention provided by the Code of Criminal Procedure, is justified. This is based on a policy consideration for protection of the aforementioned physical freedom. The Constitution does not permit an organ other than a court (composed of judges) to restrain a person's freedom of bodily movement over a long period. Although the state has the goal of finding out the truth in criminal justice proceedings, it does not mean that the state can attain this goal by whatever means available. Even a person who is suspected of committing a crime is entitled to adequate protection of physical freedom. However, the preservation of national security and the social order cannot be ignored. The reason that the Constitution conferred on the non-court judicial (or police) organ the power to arrest or detain is to provide for proper preliminary investigation in order to charge criminal offenders. The 24-hour requirement should be considered from the objective of feasibility to achieve this purpose. Therefore, Interpretation No. 130 of

身體之自由；蓋國家為達成刑事司法究明案件真象之目的，非謂即可訴諸任何手段，即使係犯罪嫌疑人，其人身自由仍亦應予適當保障。惟雖如此，國家安全、社會秩序之維護亦不能置之不顧，憲法之所以賦予非法院之司法（或警察）機關逮捕拘禁之權，要在使其對犯罪行為人得為適當之偵查與訴追，是此所謂之二十四小時當係指其客觀上確得為此項目的之進行而言。因是本院釋字第一三〇號解釋固仍有其適用，且依憲法第八條第二項前段規定，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。若該管法院於犯罪嫌疑人被逮捕拘禁時起二十四小時內，經本人或他人聲請，向逮捕之機關提審，於審問調查後認為逮捕機關逮捕拘禁犯罪嫌疑人並無不合法之情形，即應將犯罪嫌疑人移還原逮捕機關繼續偵查。提審期間不應計入逮捕機關之二十四小時拘禁期間，乃屬當然，提審法有關規定，應併配合修正。其他若有符合憲法規定意旨之法定障礙事由者，自亦不應予以計入，併此指明。

this Yuan shall still be binding. Furthermore, according to the provision of Article 8, Paragraph 2, first sentence, of the Constitution, when a person is arrested or detained on suspicion of having committed a crime, the organ conducting the arrest or detention shall, within 24 hours, turn him over to a competent court for trial. If, within 24 hours of arrest or detention, the court, upon petition made by the accused or by another person, ordered the detainor to surrender the detainee, and after a trial or hearing, is of the opinion that no irregularity occurred in the arrest or detention procedure, it shall return the detainee to the arresting organ for further investigation. Naturally, the court's hearing time ought not to count toward the 24-hour detention time. The relevant provisions in the Habeas Corpus Act shall be modified accordingly. Other constitutionally permissible defenses for timeliness shall also be exempted from the 24-hour requirement. It is hereby pointed out as well.

Promulgated in 1931, Article 8 of the Provisional Constitution for the Period of

至謂民國二十年公布之中華民國訓政時期約法第八條規定「人民因犯罪

Political Tutelage provides: “When a person is arrested or detained on suspicion of having committed a crime, the executing or detention organ shall, within 24 hours, turn him over to a tribunal for trial. The said person, or any other person, may request the detainor to surrender the detainee for trial within 24 hours according to law.” The Double Five Constitutional Draft prepared in 1936, and the text of the current Constitution promulgated in 1947, did not used the term “tribunal” as it appeared in the Basic Law. Instead, they used the term “court.” This was due to the fact that, since the legal reformation movement which occurred in the latter part of the Ching Dynasty, in the Tribunal Organization Law for Da Li Yuan promulgated in the 30th year of the reign of the Emperor Kuan Shi (1906), and the Law for Court Organization promulgated in the 1st year of the reign of the Emperor Shuan Tong (1909), all government organs performing the functions of adjudication, except for the Da Li Yuan, were called “tribunal” (e.g., higher tribunal, district tribunal). When the Republic was founded, the organization law was, in

嫌疑被逮捕拘禁者，其執行或拘禁之機關，至遲於二十四小時內移送審判機關審問，本人或他人並得依法請求於二十四小時內提審。」而於民國二十五年之五五憲草及三十六年公布之現行憲法均未援用約法所曾用之「審判機關」，而改以「法院」乙節，此當係清末變法，改革司法，於光緒三十年（一九〇六年）所擬定之「大理院審判編制法」以及宣統元年（一九〇九年）所頒行之法院編制法，其於職司審判之機關除終審之大理院外，均以審判廳稱之（如高等審判廳、地方審判廳）。迨民國肇建，此一編制法原則上暫准援用，時間既久，或不免於沿用而出以「審判機關」之語，非可以此即謂其後使用「法院」乙語係有意排除狹義法院之審判機關，而採取所謂廣義之法院─包括檢察官在內；何況即令「法院」，其涵義仍亦應自功能性之為何予以觀察、判斷，此已述之如前，憲法即已明言「審問」，自僅指狹義之法院而不及於其他；抑且檢察官署既係配置於法院，則其本非實質法院之所屬，否則，何庸「配置」之舉，更遑論兩者職權之歧異，自不能僅因配置之乙端即謂制憲者當時係將檢察機關包括於憲法第八條第二項前段所規定之「法院」內；而況就立憲之沿革

principle, adopted temporarily. As time passed and memories faded, the term "tribunal" still lingered on. It cannot be said that later adoption of the term "court" was a calculated move to deny the court or tribunal a restrictive connotation, and to assume an expansive definition for the court – that is, to include the prosecutor in it. Even for the connotation of "court," we should observe and judge from its functions. This has been discussed previously. The Constitution has used the term "trial" explicitly. That should refer to a court of a restrictive definition, and no more. Moreover, the prosecutor's offices were made to be attached to courthouses. It can be inferred from this arrangement that the prosecutor's office, by its nature, is not a court. Otherwise, there would be no need to "attach" it to another thing, not to mention these two organs each have different duties and functions. Thus, it cannot be said that the framers of the Constitution intended to have the prosecutor's office included in the "court" as provided in the Article 8, Paragraph 2, second sentence, of the Constitution. Moreover, when we reviewed the constitutional history of the

言，民國二年之中華民國憲法草案（天壇憲草）第五條就此係規定為「法庭」，十二年公布之「曹錕憲法」第六條亦規定為「法院」，迨十九年之「太原約法草案」第二十九條仍規定為「法院」，二十年之中華民國訓政時期約法第八條雖規定為「審判機關」；但二十五年之中華民國憲法草案（五五憲草）第九條及三十六年公布施行之中華民國憲法均規定為「法院」，似此先後或稱「法庭」、「法院」、「審判機關」以迄於「法院」，雖用語不一，但就內涵言，實則均係指職司審判之機關，即狹義之法院；固然憲法之解釋有其多種方法，惟單就本解釋案所涉及之客觀說與主觀說而論，前者係以憲法之客觀規範意旨為解釋之依據，後者則須忠實反映制憲者之原意；然其雖係如此，仍亦應以制憲者已明確表明之憲法文字為依據，唯有在憲法文義不明，方應併將制憲當時之史料或背景加以佐証；蓋制憲原意之探求並非易事，其涉及起草者與制定者（批准者）之關係與各種史料紀錄之差異，若無一定之標準或依據，極易流於獨斷與恣意；況且所謂制憲當時存在之事實，本即屬憲法規範之對象，又何能再執該項事實以解釋憲法？茲憲法第八條之文義至為明白，其所稱之

Republic, Article 5 of the 1913 ROC Constitutional Draft (the Tien Tan Constitutional Draft) used the term “bench,” Article 6 of the “Tsau Kun Constitution” promulgated in 1923 used the term “court,” and Article 29 of the “Tai Yuan Basic Law Draft” prepared in 1930 used the term “court.” Although Article 8 of the Provisional Constitution for the Period of Political Tutelage promulgated in 1931 used the term “tribunal,” Article 9 of the Draft of the Constitution (Double Five Constitutional Draft) prepared in 1936 and the Constitution promulgated in 1947 [the current Constitution] both used the term “court.” It would appear that the various terms used at different times – “bench,” “court,” “tribunal” and eventually “court”-- connoted the same organ of adjudication, i.e., the court of a restrictive definition. There are various methods for constitutional interpretation. Comparing the objective theory with the subjective theory for this case, the former interpreted according to the normative intent reflected objectively in the words of constitutional articles, while the latter had to mirror the framer’s subjective intent faithfully. Even

「法院」，倘遵循該條文字具體所顯示之整體意涵為客觀之解釋，實應僅指職司審判而具有審問、處罰之法官所構成之法院，此種解釋結果，不特符合憲法保障人身自由之精神，抑亦與先進民主憲政國家保障人身自由制度相契合，畢竟通常法律用語之「法院」，本即指行使審判權之機關。

so, the latter method still must abide by the letters of the Constitution chosen explicitly by the framers. Only when the literal meaning of the Constitution is ambiguous can the historical materials or the contextual information be supplemented. The search for the framers' original intent is not an easy task. It involves clarifying the relations between the drafter and the maker (the approver), and resolving the discrepancies among historical records from various sources. If there is no certain standard or criterion, the determination may become arbitrary and unscrupulous. Moreover, the fact that it existed in the time of the preparation of the Constitution was itself the normative object for the Constitution. How could the interpretation of the Constitution be built on this fact? The literal meaning of Article 8 of the Constitution is clear. The "court" it refers to, if we take the language of the provision as a whole and give it an objective, literal interpretation, should mean a court composed of judges conducting trials and having authority to examine and to punish. The result from this line of interpretation will not only be in harmony with the

spirit of the Constitution for the protection of physical freedom, but also in congruence with the system established by most modern constitutional democratic states for the protection of physical freedom. After all, the word "court," in general usage, commonly refers to an organ that exercises adjudicative power.

Article 9 of the Constitution has expressly provided "Except for those in active military service, no person shall be subject to trial by a military tribunal." Thus, it cannot be said that the "judicial organ" provided in Article 8, Paragraph 1, of the same law is intended to exclude the trial and punishment of a military tribunal from it. The term "trial" does not necessarily always refer to proceedings commenced after the indictment. The "trial" prescribed in Article 8, Paragraph 2, is a hearing to determine the necessity of continuous "detention" or custody of the accused. It is not a trial on substantive issues. The Haftpruefung provided in Article 117 and the Muendliche Verhandlung in Article 118 of the German Code of Criminal Procedure are similar provisions for

憲法第九條已明定「人民除現役軍人外，不受軍事審判。」自不得謂同法第八條第一項所規定之「司法機關」旨在排除軍事機關之審問、處罰；且所謂「審問」原非必限於案件起訴之後，憲法第八條第二項所規定之「審問」意在審查其繼續「拘禁」、即羈押之必要與否，並非對案件之實體為審理，如德國現行刑事訴訟法第一百十七條之「羈押審查」（Haftpruefung），第一百十八條之羈押「言詞審理」（Muendliche-Verhandlung）即均係起訴前決定羈押與否之規定，另日本刑事訴訟法第八十三條、第八十四條、第八十五條等關於羈押理由之告知，亦係在法庭為之。其主張前開憲法規定之「審問」係指檢察官偵查之訊問，並以此謂該條項規定之法院應包括檢察官云云，要非確論。

pre-indictment hearings of custody issues. Articles 83, 84 and 85 of the Japanese Code of Criminal Procedure, regarding the order to show causes for reason of detention, also are provisions for conduct of the court. The assertions that the "trial" provided in the aforementioned constitutional provisions refers to interrogations conducted by the prosecutor, hence the court shall include the prosecutor's office, and so on, are not accurate statements.

Article 8, Paragraph 4, of the Constitution provides: "When a person is unlawfully arrested or detained...for an investigation, the court shall not reject such a petition, and, shall, within 24 hours, investigate...deal with the matter in accordance with the law." It uses the word "investigate" which differs from Article 52: "the President shall not...be liable to criminal prosecution." The term "investigation" is distinct from "prosecution." It is argued that, under such circumstances, citizens may, as a right, report to or inform the prosecutor about the crime. Public servants on duty, if they happen to know a crime has been committed, have

憲法第八條第四項規定「人民遭受任何機關非法逮捕、拘禁……追究，法院不得拒絕，並應於二十四小時內……追究，依法處理」既係明定為「追究」，而與第五十二條「總統……不受刑事上之『訴究』」不同，顯見此之所謂「追究」與檢察官之「追訴」有間。或謂此種情形人民原得自行向檢察官告訴、告發；公務員執行職務知有犯罪嫌疑者亦應為告發，何庸多此一舉？然憲法之所以為如此之規定者，無非在於強調人身自由之保障，故將此一「追究」及「依法處理」於憲法內為規定，俾直接之保護。因是更規定「法院不得拒絕，並應於二十四小時內追究，依法處理」，亦即不許法院為「追究」與否

an obligation to report the crime, too. Why do we need this superfluity? The reason why the Constitution was devised as such was but to emphasize the protection of physical freedom. It places "investigation" and "in accordance with the law" in the same constitutional provision of direct protection. It further provides "the court shall not reject such a petition, and, shall, within 24 hours, investigate...deal with the matter in accordance with the law." Therefore, it left no discretion for the court to decide whether to "investigate" or not. It also mandates the court to conduct this investigation within 24 hours, and the court cannot use excuses allowed by other laws to delay the action. This is the reason why Paragraph 3 of the same Article does not allow the court the right to reject the petition, nor the right for a court order to the organ concerned to investigate and report first.

之自由裁量，且限期法院必須於二十小時內為之，不許其援引一般之法令為四搪塞，此亦所以同條第三項除明定不得拒絕外，更明示不得先令查覆之原因。

What is the "court" designated in Article 97, Paragraph 2, of the Constitution meant for? Whether it has the same connotation with Article 8 is another matter. The Court Organic Act had no need to

憲法第九十七條第二項所規定之「法院」究何所指？應否與第八條所規定者作同一涵義之解釋，此乃另一事；而法院組織法原非必須為配置檢察官（署）之規定不可，此觀之日本立法例

provide for attaching the prosecutor's office to courthouses. The fact that the Japanese legislature enacted a separate "Law of the Courts" and "Law of the Prosecutor's Office" is illustrative. The "law courts" in Article 82 of the Constitution: "The organization of the Judicial Yuan and of the law courts of various grades shall be prescribed by law" are not necessarily to be interpreted as including the prosecutors. Interpretation No. 13 rendered by this Yuan was an elaboration on issues of protection for jobs of active prosecutors, not on issues of whether a prosecutor's office can be equated with a court. Since said Interpretation had stated explicitly that the judge in Article 80 of the Constitution does not include the prosecutor, it is obvious that the prosecutor is not a member of a court of a restrictive definition. Based on said Interpretation, and on discrepancies in the term "court" as it appears in various laws, the claim that the "court" in Article 8, Paragraph 2, should include "prosecutor" is a misstatement.

分別制定「裁判所法」、「檢察廳法」即可明瞭。是憲法第八十二條：「司法院及各級『法院』之組織，以法律定之」之所謂「法院」，當然亦非必須解之為包括檢察官在內始係符合憲法規定。又本院釋字第十三號解釋，旨在闡釋實任檢察官之保障，而不在於檢察機關之是否為法院；蓋其既已明示憲法第八十條之法官不包含檢察官在內，則檢察官之不應為狹義法院之一員，理至明顯。其執該號解釋以及諸多法律關於「法院」用語之歧異，主張憲法第八條第二項之法院應包括檢察官云云，要屬誤解。

The provision "other officer author

另一九五三年生效之歐洲人權及

ised by law to exercise judicial power" in Article 5, Paragraph 3, of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, effective 1953, and similar provisions in Article 9, Paragraph 3, of the International Convention for Citizens and their Political Rights, effective 1967, and Article 7, Paragraph 5, of the Continental American Human Rights Convention, effective 1978, raised a question of whether this officer includes the prosecutor. Or, put another way, whether the decision on the place a person is to be sent to after arrest and detention is limited to that of a "judge" only? Although it remains controversial, yet the judgment rendered by the European Human Rights Court in the Pauwels Case (1988) indicated that, if the law confers the authority of criminal investigation and indictment on the same officer, even though the officer exercises powers independently, his neutrality in carrying out his duties should be considered highly suspect, hence, it violates the provision "other officer authorised by law to exercise judicial power" referred to in Article 5, Paragraph 3, of said Conven-

基本自由保障公約（[European] Convention for the Protection of Human Rights and Fundamental Freedoms）第五條第三項所規定之「依法執行司法權力之其他官吏」（other officer authorised by law to exercise judicial power）暨一九七六年生效之公民及政治權利國際盟約第九條第三項與一九七八年生效之美洲人權公約第七條第五項類同之規定，是否應包括檢察官，亦即人民被逮捕拘禁後，其所應解送之處，是否僅限於「法官」？此雖各執一詞，然參以歐洲人權法院於一九八八年關於「包威爾斯」乙案之判決所稱，若法律將犯罪偵查與公訴提起之權授予同一官吏，縱其係獨立行使職權，其職務之中立性仍應受質疑，有違前開公約第五條第三項所指之「依法執行司法權力之其他官吏」之規定等語（G. Pauwels Case, Judgement of 26 May 1988, COUNCIL OF EUROPE YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 148-150（1988）），即不得賦予羈押人民之權，而我國之檢察官既為偵查之主體，且有行使公訴之權，是即令依據前述相關之國際公約，顯亦不應有刑事訴訟法上之羈押權；何況我國憲法第八條第二項既明定為「法院」如

tion. (G. Pauwels Case, Judgment of May the Protection of Human Rights and 26, 1988, COUNCIL OF EUROPE YEAR-BOOK OF THE EUROPEAN CON-VENTION OF HUMAN RIGHTS, 148-150 [1988]). That is, not to confer on the officer the right to detain people. The prosecutor of this state is the body of criminal investigation. It [the office] pos-sesses the public charge power as well. In light of the abovementioned international conventions, it is obvious that the prose-cutor shall not have the detention power enumerated in the Code of Criminal Pro-cedure. Furthermore, since Article 8, Paragraph 2, of the Constitution has ex-pressly conferred detention power on the "court," as discussed previously, and this "court" means a court of a restrictive definition composed of judges possessing independent adjudicative power, also dis-cussed previously, it is not appropriate to invoke the provisions of "international treaties," "conventions" and claims that the court in the Article 8, Paragraph 2, first sentence, of the Constitution shall include "other officers authorised by law to exercise judicial power" such as a

上，而此之所謂法院係指有獨立審判權之法官所構成之「國際盟約」、「公約」之規定狹義法院，亦已述之如前，尤不宜執此主張我國憲法第八條第二項前段所稱之法院亦應包括「依法執行司法權力之其他官吏」如檢察官在內。

prosecutor.

The provisions of Article 8 of the Constitution regarding power of arrest, detention, investigation and punishment have the character of Verfassungsvorbehalt [of German law]. The meaning of "court" in the first sentence of Paragraph 2 of the same Article has been discussed previously. There is no validity for the claim that a prosecutor may have detention power as provided in the Code of Criminal Procedure if the procedure prescribed by law were observed. Although it is true that the prosecutor is a public interest representative, that he/she has the duty to make sure that the court applies the law properly for a judgment, that he/she does not pursue a guilty verdict for a defendant as his/her sole purpose, that the office is a judicial organ by an expansive definition, yet these factors together do not result in a conclusion that the Constitution has conferred the detention power prescribed by the Code of Criminal Procedure upon the prosecutor. Article 160, Paragraph 2, of the German Code of Criminal Procedure provides that a prosecutor must investi-

憲法第八條關於行使逮捕、拘禁、審問、處罰權限之規定具有憲法保留（Verfassungsvorbehalt）之性質，同條第二項前段之「法院」究何涵義，既如上述，自無所謂倘已符合正當程序，檢察官亦得擁有刑事訴訟法之羈押權問題。至於檢察官之為公益代表，監督法院裁判為正當之法律適用，非以追求被告有罪判決為唯一目的之諸多職責暨其係屬廣義之司法機關等等，雖屬實在，仍亦非可因此即謂憲法已同時賦予其刑事訴訟法上羈押被告之權。德國刑事訴訟法第一百六十條第二項亦明定，檢察官不僅對於不利且對於有利之情況，亦應注意發見，但仍無礙其於基本法下不擁有決定羈押被告之權。且如前述，憲法對人身自由係為直接之保障，其既明定法院以外之司法或警察機關，雖得依法定程序逮捕、拘禁人民；但仍不許逾越二十四小時，則所謂刑事訴訟法上羈押權歸屬係立法裁量之範疇云者，固非有據；而此二十四小時究竟合乎現實之需要與否？應否如同其他部分之國家然，規定為四十八小時、甚或七十二小時，此則屬於修憲之問題。

gate not only evidence adverse to, but also evidence favorable to, a defendant. Yet this requirement does not change the position of [German] Basic Law that the prosecutors do not have power to detain defendants. Also, as discussed previously, the protection rendered in the Constitution for physical freedom is a direct protection. Although it provides that a judicial or police organ other than a court may arrest or detain a person in accordance with the procedure prescribed by law, yet this detention cannot go beyond a 24-hour period. Therefore, the claim that the detention power prescribed in the Code of Criminal Procedure is a matter of legislative discretion has no validity. Whether this 24-hour requirement is realistic, whether the requirement should be changed to 48 hours, or even to 72 hours, as some other countries provide are questions for constitutional amendment.

As discussed previously, the judge acts independently free from interference from any other state organs. When trying cases, each judge is independent from others and makes a judgment according to

如前所述，法官行使職權，對外不受任何其他國家機關之干涉。其審判案件對內每位法官都是獨立，僅依據法律以為裁判；此與檢察官之行使職權應受上級長官（檢察首長）指揮監督者，

law only. This differs from the prosecutor who must observe the order and supervision from his superior (chief prosecutor) when per forming his duties. The judge's trial is an act of passive nature. It adheres to the principle that a court shall hear no suit without the plaintiff's filing a claim. It is contra to the prosecutor's investigation and indictment, which is active in nature. Since the purpose of Article 8 of the Constitution is to protect physical freedom, if we view it from the framework of the Constitution as a whole, this end is probably better served by letting the court composed of judges determine whether or not to detain a person. This does not involve the issue of assessing who is objective and impartial. Otherwise, the detention right may be conferred on the police organ as well. For from the standpoint of a state, who could doubt the objectivity and impartiality of a police organ? Therefore, we should not compare this matter with the detention power enjoyed by a court (judges) conducting trial. Although the prosecutor of this state has certain functions and duties similar to those of foreign countries' juged' instruction or Untersss-

功能上固不能相提併論；而法官之審判係出於被動，即所謂不告不理原則，其與檢察官之主動偵查，提起公訴，性質上亦截然有別。憲法第八條制定之目的既在保障人身自由，則就其規定之整體予以觀察，當以由法官構成之法院決定羈押與否，較能達成此一目的，本不涉及何者客觀公正之問題，否則警察機關豈非亦可賦予羈押之權，蓋就國家而言，何能懷疑警察機關之客觀公正性？因此，殊不得以審判中法院（法官）之得依職權為羈押乙事相比擬。又檢察官雖具有外國（如現在之法國、一九七五年前之德國、戰前之日本）預審法官（juge d'instruction; Untersuchungsrichter; 豫審判事）之部分職權；但其究非等同於預審法官；況德國於一九七五年修改刑事訴訟法，廢除預審制度後，其檢察官本於基本法之規定，仍亦未完全替代預審法官以擁有羈押被告之權。是其以我國檢察官具有預審法官之性格，即謂應有刑事訴訟法上羈押被告權限之主張，仍難認為有據。

suchungsrichter (as provided in present-day French laws, German laws prior to 1975, and pre-war Japanese laws), how ever, they cannot be equated with a pre-trial judge. Germany revised its Code of Criminal Procedure in 1975 to abolish the pre-trial system. Even in the post-revision code, the German prosecutors still do not completely assume the position of pre-trial judges to hold detention power. Therefore, the claim that the prosecutor of this state has the character of a pre-trial judge, hence should hold detention power as prescribed in the Code of Criminal Procedure, is hardly valid.

In sum, the Constitution is not a static concept. It evolves from the continued renewal and growth of a nation. Interpretive choices for the solution of contemporary social problems based on the abstract text of the Constitution cannot ignore the adjustments needed for coping with changing times. Although it is essential to find out the normative meaning of the Constitution from historical records, questions about what function a constitutional provision has and what mission it

總之，憲法並非靜止之概念，其乃孕育於一持續更新之國家成長過程中，依據抽象憲法條文對於現所存在之狀況而為法的抉擇，當不能排除時代演進而隨之有所變遷之適用上問題。從歷史上探知憲法規範性的意義固有其必要；但憲法規定本身之作用及其所負之使命，則不能不從整體法秩序中為價值之判斷，並藉此為一符合此項價值秩序之決定。人權保障乃我國現在文化體系中之最高準則，並亦當今先進文明社會共同之準繩。作為憲法此一規範主體之

undertakes will have to be answered by value judgments implicit in the entire legal system, and decisions will have to be made in accordance with it. The protection of human rights is the highest principle for the cultural system of this state. It is also a common principle observed jointly by modern civilized societies. Citizens are the normative subjects of the Constitution. Citizens express their belief in real life. When we interpret what citizens want the Constitution to do for them, we must look into the social value and order reflected in this will of the people. Physical freedom is the basis for all freedom. Without adequate protection of physical freedom, it is impossible to realize any other freedom. Since it must faithfully observe Article 8 of the Constitution, this Yuan decided to apply the text of the Constitution as reasoned above to carry through its idea, so that it may possibly attain this goal. It is hereby rendering interpretation as contained in the "HOLDING."

國民，其在現實生活中所表現之意念，究欲憲法達成何種之任務，於解釋適用時，殊不得不就其所顯示之價值秩序為必要之考量。茲人身自由為一切自由之所本，倘人身自由未能獲得嚴謹之保護，則其他自由何有實現之可能！憲法第八條之規定既應予遵守，則為求貫徹此一規定之理念，本院認其應以前開解釋之適用，始有實現其所規定之目的之可能。爰予解釋如「解釋文」所示。

Justice Young-Mou Lin filed concurring opinion in part.

本號解釋林大法官永謀提出部分協同意見書；孫大法官森焱、王大法官

Justice Sen-Yen Sun filed dissenting opinion in part.

Justice Ho-Hsiung Wang filed dissenting opinion in part.

和雄分別提出部分不同意見書。

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