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

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

#### Issue

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

#### Holding

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

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

public functionary.

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

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

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

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

## **Reasoning**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

powers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Background Note** by Ya-Wen YANG

The Legislative Yuan deleted the budget for the specialized payments for

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

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

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

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

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

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

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

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

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