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JUDICIAL POWER & ILLUSION: THE REPUBLIC OF CHINA'S COUNCIL OF GRAND JUSTICES AND CONSTITUTIONAL INTERPRETATION

F. Fraser Mendel

Abstract: The Republic of China underwent a rapid political transformation from an authoritarian nation to a democratic state which required change at every level of the government. The ROC's Council of Grand Justices has contributed to this period of reform through a number of constitutional interpretations which have resulted in greater individual liberties and further restrictions on government actions. This has been accomplished even though the Council operates against substantive and procedural limitations on its powers. A review of these Council interpretations from the past decade reveals that the Council has made steady inroads towards fulfilling its role as the supreme judicial body of the ROC. The Council, however, is not sufficiently protected from the influence of other government branches and still issues decisions carefully. The ROC government must ensure the Council is isolated from political influences before the Council will be able to impartially exercise the full range of its constitutionally mandated authority.

In the last decade, the Republic of China (ROC) experienced extensive political reform.¹ Although its Constitution proclaimed the ROC a representative democracy in 1947, a single political party led by the President controlled the government from World War II until the 1980s,² indicating a lack of full democratic representation. As the ROC experienced rapid economic development and the population benefited from increased standards of living and education, the ruling party responded to growing public pressure for change by reforming the government.³ While significant, these reforms did not occur quickly or equally in all branches of the government; for those branches still unable to exercise the full scope of their constitutionally authorized power, the struggle for reform continues.

A primary actor in this ongoing reform process is the Council of Grand Justices (Council), in which the ROC Constitution vests the power to interpret the Constitution and unify conflicting laws.⁴ The interpretive power

¹ Nicholas D. Kristof, *Taiwan Walks Gingerly on the Path to Reform*, N.Y. TIMES, February 24, 1991, at D4.

² JOHN K. FAIRBANK & EDWIN O. REISCHAUER, CHINA: TRADITION AND TRANSFORMATION 477 (1989).

³ SHAW YU-MING, BEYOND THE ECONOMIC MIRACLE 22 (1989).

⁴ See CHUNG-HUA MIN-KUO HSIEN-FA (CONSTITUTION OF THE REPUBLIC OF CHINA) (promulgated Jan. 1, 1947, effective Dec. 25, 1947) [hereinafter ROC CONST.] at art. 78 in HSIN-PIEN LIU FA TS'AN-K'AO FA-LING P'AN-CHIEH CH'UAN-SHU (CURRENT COMPLETE REFERENCE BOOK OF THE SIX LAWS,

implies a responsibility for the Council to uphold the Constitution and promote the people's constitutional liberties.⁵ In the past, however, the Council rarely championed individuals' constitutional rights, suggesting that despite the significant powers delegated to it by the Constitution, its actual authority was illusory.⁶ The Council's vulnerability to external political pressures resulted in tepid judicial decisions that merely served to screen the government's autocratic actions from public view.⁷ Although the political and economic reforms of the past fifteen years have increased the ability of the Council to operate in its interpretative capacity, the Council continues to be restricted by other barriers.

This Comment analyzes the progress of the Council in reclaiming and exercising its constitutional powers of interpretation and unification. Part I reviews the historical setting, constitutional structure and judicial organization of the ROC government. Part II focuses on the Council, the structural limitations placed on the Council, and the resulting impact on Council interpretations. Part III traces the dichotomy found in many of the Council's judicial decisions: interpretations alternatively either exemplify the Council's progressive trend and reflect the Council's inaction when faced with potential political conflict. This Comment concludes that the Council, despite structural and procedural restrictions, is successfully expanding its authority to fulfill its constitutional role. Although this progress is gradual, recent judicial interpretations show a considerable increase in the Council's willingness to protect individuals' constitutional liberties and to define constitutional limits on government activities. The Council's ultimate success, however, depends on further government reform to effectively isolate the Council from external influences.

DECISIONS, AND INTERPRETATIONS) (Wu-nan t'u-shu kung-ssu) [hereinafter BOOK OF THE SIX LAWS (Wu-nan)], translated in MAJOR LAWS OF THE REPUBLIC OF CHINA ON TAIWAN 9 (James C. Liu et al. eds., 1991) [hereinafter MAJOR LAWS].

⁵ See Herbert H.P. Ma, *The Council of Grand Justices of the Republic of China: Its Role in a Changing Society*, in Secretariat of the Judicial Yuan, SZU-FA-YUAN TA-FA-KUAN SHIH-HSIEN SSU-SHIH-CHOU-NIEN CHI-NIEN-LUN-WAN-CHI (SYMPOSIUM IN HONOR OF THE 40TH ANNIVERSARY OF CONSTITUTIONAL INTERPRETATIONS MADE BY THE GRAND JUSTICES, JUDICIAL YUAN) 520, 516 (1988) [hereinafter SYMPOSIUM].

⁶ From 1948 to 1976, the Council rendered only one interpretation at the petition of a citizen; from 1976 to 1985 it rendered 28; and since 1985 it has rendered more than 30. See Tables of Statistics in SYMPOSIUM, *id.* at 570.

⁷ See *e.g. infra* text accompanying note 131-137, where the Council's vulnerability to coordinate branches' angry reactions is exemplified by the Legislative Yuan passing the Council Law, restricting the Council's authority.

I. FORMATION OF THE ROC

The ROC was formed after the overthrow of the Ch'ing Dynasty in 1911.⁸ Despite the immediate declaration of the Republic, President Yuan Shih-kai's attempt to become the new emperor initiated a period of civil war lasting through the 1920s.⁹ During that decade the Nationalist Party (Kuomintang or KMT) and the Chinese Communist Party (CCP) worked together in an uneasy alliance to reunite China.¹⁰ The Nationalist Government launched the Northern Expedition in 1926 and, by the end of 1928, most of the country was reunified.¹¹

This brief respite ended in 1931 when the Japanese, tempted by the rich natural resources in Manchuria and the perceived weakness of the Chinese government, began military incursions.¹² The Chinese Communists, purged from the KMT in 1927 and living primarily on the Kiangsi-Hunan border, posed an additional threat to the Nationalist Government and kept the country in turmoil.¹³ The ROC had not yet adopted a constitution and World War II further disrupted the drafting process as the country endured the Japanese invasion.¹⁴ Following Japan's defeat, the KMT and the Communists, who had forged a precarious alliance against the Japanese, renewed their civil war.¹⁵

Although the KMT suffered military and political setbacks against the Communists, the Constituent National Assembly adopted a Constitution in

⁸ 11 THE CAMBRIDGE HISTORY OF CHINA 532 (Denis Twitchett & John K. Fairbank eds., 1983) [hereinafter CHOC]. At this time, the ROC included only continental China. The island of Taiwan had been ceded to Japan in the aftermath of the Sino-Japanese war, an act which spurred popular protest against the government and hastened the end of the Ch'ing Dynasty. Taiwan did not come back under Chinese suzerainty until the end of World War Two.

⁹ The overthrow of the Ch'ing dynasty resulted in extreme instability in China. Dr. Sun Yat Sen realized that a strong military force was needed to keep China unified, so he relinquished his position as President to General Yuan Shih-kai, the governor-general of the Hebei region. 11 CHOC, *supra* note 8, at 532; FAIRBANK & REISCHAUER, *supra* note 2, at 421.

¹⁰ Though the KMT and CCP separated as foes, it has been argued that both inherited Dr. Sun Yat Sen's legacy — the KMT for its military strength in unifying the country and ending the "unequal treaties" which western countries had imposed on it, and the CCP in pursuing social reforms and identifying the People's Livelihood with communism. See CONRAD BRANDT ET AL., A DOCUMENTARY HISTORY OF CHINESE COMMUNISM 66-69 (1966).

¹¹ The Northern Expedition, a military and political offensive which started in the south and ended in Peking, brought most of the independent warlords under Nationalist control. 12 CHOC, *supra* note 8, at 575.

¹² 13 CHOC, *supra* note 8, at 129.

¹³ *Id.* at 183.

¹⁴ *Id.* at 513.

¹⁵ 13 CHOC, *supra* note 8, at 728.

January 1947.¹⁶ Due to the civil war with the Communists, President Chiang Kai-shek promptly suspended the Constitution with an Emergency Decree authorized by the "Temporary Provisions for the Duration of Mobilization to Suppress the Rebellion."¹⁷ The autumn of 1949 brought the end of KMT control of the Mainland and the retreat of Chiang Kai-shek with his forces to Taiwan.¹⁸ This war, however, remained active until 1978¹⁹ and it was not until the reforms of the 1980s that the government finally repealed martial law.²⁰

A. *Constitutional Development in the ROC*

The Republic of China officially came into existence on January 1, 1912.²¹ Dr. Sun Yat Sen, who played an instrumental role in the revolution, envisioned a complex government utilizing Western government elements and traditional Chinese structures.²² Dr. Sun's political theory outlined three stages of revolution: national unification by military means, political tutelage, and promulgation of a constitution.²³ Essentially reunified by the Northern Expedition in 1928, China entered its period of political tutelage under the KMT.²⁴ Dr. Sun intended to use this period to train the Chinese people in exercising their political rights and to educate them sufficiently to achieve

¹⁶ Hungdah Chiu & Jyh-pin Fa, *The Legal System of the Republic of China in Taiwan*, in MODERN LEGAL SYSTEMS CYCLOPEDIA 610, 605-661 (Kenneth Robert Redden, ed., 1984).

¹⁷ See REPUBLIC OF CHINA YEARBOOK 1990-91 at 90 (1990) [hereinafter YEARBOOK].

¹⁸ The KMT's defeat has been attributed to the Japanese invasion which drove the KMT out of the cities where their base of support existed. Combined with widespread economic disruption, this resulted in the almost total demoralization of KMT forces. See 13 CHOC, *supra* note 8, at 584-99.

¹⁹ The PRC continued artillery bombardment of ROC-controlled islands in the Taiwan Straits until 1978. YEARBOOK, *supra* note 17, at 90.

²⁰ FAIRBANK & REISCHAUER, *supra* note 2, at 477-478.

²¹ See *id.* at 414.

²² Chinese reformers at the turn of the century implemented a Western style legal structure over China's social structure as a means of gaining independence from Western powers. See Jerome A. Cohen, *China's Changing Constitution*, 76 CHINA Q. 794, 795 (1978); Herbert H.P. Ma, *General Features of the Law and Legal System of the Republic of China*, in TRADE AND INVESTMENT IN TAIWAN: THE LEGAL AND ECONOMIC ENVIRONMENT IN THE REPUBLIC OF CHINA 4 (Herbert H.P. Ma ed., 1985); an important element which made integration of Western political theory into Chinese society difficult was the Chinese dichotomy between the *li* and *fa* concepts of law. *Li* can be translated as "guidance by right example," whereas *fa* is "guidance by punishment." At least as far back as 535 B.C., a conflict has existed between these two concepts of law. For more than two millennia, Chinese society stressed *li* and the personal relationship, rather than the rigid structure of *fa*, which is the basis of Western law. See 2 JOSEPH NEEDHAM, SCIENCE & CIVILIZATION IN CHINA 519 (1956).

²³ Chiu & Fa, *supra* note 16, at 609.

²⁴ *Id.* at 610.

local self-government.²⁵ According to his theory, China could then move into self-rule under a republican constitution.²⁶

The escalating conflict with Japan and the domestic turmoil in the early 1930s prompted a growing public demand for a constitution as a national unifying symbol.²⁷ The KMT formed various committees that worked on drafts during the 1930s and promulgated a draft constitution in 1936 as a stopgap measure.²⁸ The drafting process, resumed after World War II, was influenced by severe political pressures generated from the civil war with the Communists.²⁹ The KMT conceded major changes to various interest groups, such as wealthy landowners, in order to pass the Constitution and legitimize the ROC government.³⁰ The Constitution became effective in December 1947 and remains in effect today.³¹

The Constitution outlined a government structure headed by a President whom the National Assembly selects.³² The President appoints the Presidents of the Executive, Judicial and Examination Yuans.³³ The Executive Yuan formulates policies,³⁴ the Examination Yuan controls the selection process of government officials,³⁵ and the Judicial Yuan interprets laws and adjudicates cases.³⁶ The Presidents of the Legislative and Control Yuans are elected from among their respective members.³⁷

Chiang Kai-shek became the first President of the ROC. He first gained effective control of the ROC in 1943 when he became chairman of the Supreme National Defense Council, in addition to his roles as chairman of the Military Affairs Commission and as Director-General of the KMT.³⁸ In 1948, the National Assembly convened in Nanking to confirm Chiang as President and adopt a set of Temporary Provisions aimed at assisting the

²⁵ *Id.*

²⁶ FAIRBANK & REISCHAUER, *supra* note 2, at 412.

²⁷ Chiu & Fa, *supra* note 16, at 610.

²⁸ Lawrence Shao-liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 Am. J. Comp. L. 1001, 1006-1007 (1991).

²⁹ Chiu & Fa, *supra* note 16, at 610.

³⁰ *Id.*

³¹ *Id.*

³² ROC CONST., *supra* note 4, at art. 27, "The functions of the National Assembly shall be as follows: (1) To elect the President and the Vice President . . ."

³³ *Id.* at arts. 55 (Executive Yuan), 78 (Judicial Yuan), 84 (Examination Yuan).

³⁴ *Id.* at art. 57.

³⁵ *Id.* at art. 86.

³⁶ *Id.* at art. 78.

³⁷ *Id.* at arts. 66 (Legislative Yuan) and 92 (Control Yuan).

³⁸ JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 459 (1990).

government in its fight against the Communists.³⁹ The Temporary Provisions gave the President extensive powers to run the country unhampered by constitutional procedures.⁴⁰ Under Temporary Provisions 1 and 2, the President could take any emergency measure needed to protect the state or the people from immediate dangers or serious financial crises.⁴¹

These Temporary Provisions were enacted in accordance with Articles 39 and 43 of the Constitution. Article 39 grants the President power to declare martial law with the approval of the Legislative Yuan,⁴² and Article 43 gives the President authority to issue Emergency Decrees by resolution of the Executive Yuan.⁴³ President Chiang used Articles 39 and 43 to justify issuing orders during the ensuing martial law period.⁴⁴

After the 1949 move to Taiwan, the KMT amended the Temporary Provisions several times. One amendment, adopted in 1960, waived the constitutionally mandated two-term limit on the President, allowing Chiang Kai-shek to remain in power until his death in 1976.⁴⁵ Another amendment, adopted in 1972, authorized the government to conduct supplementary elections for representative bodies in areas of China that it actually controlled.⁴⁶

The adoption of the Temporary Provisions, the suspension of the Constitution, and the implementation of various Emergency Decrees began the period of strong martial law in the ROC. After the Communist's mainland victory and the KMT's subsequent retreat to Taiwan, the KMT undertook extensive reforms of its political party structure and the government.⁴⁷ Chiang Kai-shek used martial law powers to control the economy and

³⁹ See Chiu & Fa, *supra* note 16, at 610-611.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² ROC CONST., *supra* note 4, at art. 39, "The President may, in accordance with law, declare martial law with the approval of, or subject to confirmation by, the Legislative Yuan. When the Legislative Yuan deems it necessary, it may by resolution request the President to terminate martial rule."

⁴³ *Id.* at art. 43, "In case of natural calamity, an epidemic, or a national financial or economic crisis that calls for emergency measures, the President, during the recess of the Legislative Yuan, may, by resolution of the Executive Yuan Council and in accordance with the Law on Emergency Orders, issue emergency orders, proclaiming such measures as may be necessary to cope with the situation. Such orders shall, within one month after issuance, be presented to the Legislative Yuan for confirmation; in case the Legislative Yuan withholds confirmation, the said orders shall forthwith cease to be valid."

⁴⁴ Chiu & Fa, *supra* note 16, at 611.

⁴⁵ *Id.*

⁴⁶ *Id.* Because the ROC government only controlled Taiwan and several small islands, nationwide elections could not be held. As a temporary measure, until the government could regain control of the mainland, these supplementary elections were held to replace elected officials who retired.

⁴⁷ Wu Wen-cheng, "Transformation of the KMT," in GETTING TO KNOW THE KMT SERIES K-4 (1989).

develop agriculture and industry.⁴⁸ Due to the relative lack of an indigenous political structure on Taiwan, little opposition existed to the implementation of the wide-ranging social reform policies.⁴⁹ The reform programs were so extensive that neither Chiang Kai-shek's death in 1976 nor the volatile political atmosphere created by the U.S. withdrawal of its official recognition in 1979 seriously disturbed the ROC's stability.⁵⁰ These policies contributed significantly to the ROC's economic growth.

Chiang Ching-kuo, the son of Chiang Kai-shek, became President of the ROC in 1978.⁵¹ Chiang Ching-kuo's rule ushered in the beginning of political liberalization.⁵² As the authoritarian grip of the KMT government loosened, opposition groups formed even before the repeal of the anti-sedition laws.⁵³ Under Chiang Ching-kuo's economic modernization plan, by the end of 1986 the ROC prospered with a rapid growth rate, a rising annual per capita income and the world's largest foreign exchange reserves of \$76 billion.⁵⁴ He also made political concessions to the Taiwan-born middle-class majority that resented the past political domination by the KMT's post-1945 mainland immigrants.⁵⁵ His death in 1987 came in the midst of political reforms that faced stiff conservative resistance within the KMT.⁵⁶

Vice-president Lee Teng-hui succeeded Chiang Ching-kuo as President. As the first Taiwan-born President, he has continued the reform movement.⁵⁷ President Lee finalized the repeal of the Emergency Decree, ended the Temporary Provisions, implemented a Council ruling which limited National Assembly member terms, and supported government restructuring.⁵⁸ Although the reform movement produced tangible economic results, it did not fully address the legal issues which arose when the ROC returned to constitutional rule. Even the government restructuring under President Lee

⁴⁸ See FAIRBANK & REISCHAUER, *supra* note 2, at 479.

⁴⁹ Prior to the KMT's retreat to Taiwan, KMT garrison forces violently suppressed an uprising by local residents. This event, which occurred February 28, 1947, is known as "228" and may be another reason that the KMT reforms of following years met little opposition. *Id.* at 475.

⁵⁰ See *id.* at 480-481.

⁵¹ *Id.* at 478.

⁵² *Id.*

⁵³ See e.g. *Transition on Trial: Politics of Destiny*, ECONOMIST, Mar. 5, 1988, at S16.

⁵⁴ Selig S. Harrison, *Taiwan After Chiang Ching-kuo*, FOREIGN AFF. 790 (Spring 1988).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See FAIRBANK & REISCHAUER, *supra* note 2, at 478.

⁵⁸ See YEARBOOK, *supra* note 17, at 199.

has not clarified the Council's constitutional authority nor has it ended the political power struggles which impact Council interpretations.

B. *Current Government Structure in the ROC*

In order to understand the role of the Council and the structural limitations upon its power, a brief introduction to the framework and political development of the ROC government is necessary. The ROC government consists of five branches (yuans) with an extensive system of checks and balances, although for many years this was not the *de facto* form of government. The exigencies of war, insurrection, economic dislocation, and political isolation distorted the constitutionally established structure of government; the reforms of the early 1980s, however, forced a return to the ROC's original democratic ideal. Although entrenched interests often made implementing institutional and political change difficult during the ROC's period of political reform,⁵⁹ the governing power shifted from the Executive Yuan, where the recently terminated Emergency Decree had placed it, to the Legislative Yuan, as originally delegated by the Constitution.⁶⁰

1. *The President and the National Assembly*

The President of the ROC has considerable powers as chief of state. Selected by the National Assembly every six years,⁶¹ the President commands the military, convenes the National Assembly, promulgates laws and appoints civil service officials and military officers.⁶² The President also has three special powers: nominating high-ranking officials, resolving inter-Yuan disputes, and exercising emergency powers.

As noted earlier, the President appoints the Premier of the Executive Yuan; the President, Vice-president, and Grand Justices of the Judicial Yuan; and all members of the Examination Yuan.⁶³ Should a dispute arise between Yuans, the President has the power to call the Yuans together to solve it.⁶⁴

⁵⁹ Kristof, *supra* note 1, at D4.

⁶⁰ ROC CONST., *supra* note 4, at art. 62.

⁶¹ *Id.* at art. 27 (selected by National Assembly) and 47 (six-year terms).

⁶² *Id.* at arts. 35-52.

⁶³ *Id.* at arts. 55, 79, and 84.

⁶⁴ *Id.* at art. 44, "In case of disputes between two or more Yuan other than those concerning which there are relevant provisions in this Constitution, the President may call a meeting of the Presidents of the Yuan [sic] concerned for consultation with a view to reaching a solution." MAJOR LAWS, *supra* note 42, at 10.

The President may exercise discretionary emergency powers and take any measure necessary to ensure national security.⁶⁵ To exercise these emergency powers, the President may ignore the procedural requirements contained in the Constitution.⁶⁶

The National Assembly is responsible for electing the President and Vice-president. Although it has the power to recall the President and to amend the Constitution,⁶⁷ the National Assembly has never recalled a President or passed a constitutional amendment other than the wartime Temporary Provisions.⁶⁸

2. *The Five Yuans*

The Executive Yuan is responsible for formulating and implementing national policy. The President of the Executive Yuan, usually referred to as the Premier, has extensive authority to promulgate national policies and control their implementation.⁶⁹ The Executive Yuan has three levels of authority: the Executive Yuan Council, ministries and commissions, and subordinate departments. The primary policy-making body, the Executive Yuan Council, is composed of the Premier, Vice Premier, heads of the ministries and commissions, and the ministers of state.⁷⁰ It provides the final authorization for statutory and budgetary bills, martial law, and other vital

⁶⁵ *Id.* at art. 43.

⁶⁶ Chiu & Fa, *supra* note 16, at 611.

⁶⁷ ROC CONST., *supra* note 4, at art. 27.

⁶⁸ See Chiu & Fa, *supra* note 16, at 618. The National Assembly played an important role in validating the Temporary Provisions and Emergency Decree to suspend the Constitution during the period of Communist rebellion. The National Assembly officially meets once every six years to elect a new President and Vice-president (ROC CONST., *supra* note 4, at art. 29) or for an extraordinary session if a special event occurs (*id.* at art. 30). While the government was in Nanking, delegates from all over China were elected to the National Assembly's first session. The Constitution provided for further elections to be held throughout China every six years (*id.* at art. 28). After moving to Taiwan, the National Assembly became a permanent organization with a fixed membership. President Chiang Kai-Shek had the National Assembly form committees to study how to retake the mainland and then granted committee members high "stipends" for their work. The delegates were "frozen" in their positions until elections could be held again in all provinces of China.

The delegates' more than forty years of tenure and compensation became the subject of bitter opposition and resulted in a constitutional challenge to the validity of the law keeping them in office. In June 1990, the Council of Grand Justices announced an interpretation stating that National Assembly members who had been elected on the mainland had to retire by December 31, 1991. This interpretation played a major role in Taiwan's reforms by removing a powerful group of conservative politicians who had dampened reform efforts. YEARBOOK, *supra* note 17, at 9.

⁶⁹ See ROC CONST., *supra* note 4, at art. 57.

⁷⁰ *Id.* at art. 58.

matters of state which are to be submitted to the Legislative Yuan.⁷¹ The eight ministries and various commissions comprise the Executive Yuan's primary administrative level and handle affairs such as domestic and foreign, defense, finance, education, justice, economics and communications.⁷²

The Legislative Yuan enacts legislation and confirms certain orders issued by the Executive Yuan.⁷³ Although the Constitution set the Legislative Yuan's membership at 773, membership steadily decreased since the ROC's move from the mainland because no elections had been held to replace the original mainland positions of members who had died or retired.⁷⁴ By the end of 1991, however, all legislators who had held positions since the last ROC mainland election in 1948 had retired, and full elections took place in December 1992.⁷⁵ The Legislative Yuan's primary powers include confirming emergency orders and martial law and examining budget bills.⁷⁶

The Control Yuan, as the highest supervisory governmental branch of the ROC, oversees the other branches of government.⁷⁷ It must approve any official appointed to an office and can impeach officials who violate their official duties. The Control Yuan censures officials who commit infractions and audits other government branches' activities.⁷⁸

The Examination Yuan, established under Article 83 of the Constitution, manages the employment of all civil service personnel.⁷⁹ It is divided into three bodies: a policy-making Council, the Ministry of Examination, and the Ministry of Personnel. These bodies regulate the examination system through which all non-presidential appointees must pass in order to qualify for government employment.

The Constitution established the Judicial Yuan as the highest judicial government branch of the state.⁸⁰ It has the exclusive power of constitutional interpretation and maintains jurisdiction over all civil, criminal and administrative cases as well as disciplinary proceedings against public

⁷¹ *Id.*

⁷² YEARBOOK, *supra* note 17, at 115.

⁷³ ROC CONST., *supra* note 4, arts. 62 and 57.

⁷⁴ FAIRBANK & REISCHAUER, *supra* note 2, at 477.

⁷⁵ In that election the KMT won only 53 percent of the legislative seats while the Democratic Progressive Party, the main opposition party, won 32 percent. Although the KMT maintained control of the legislature, the full elections were viewed by many, including Secretary-General Dr. James Soong of the KMT, as a significant defeat for the KMT. *After Election: Crisis for KMT*, SOUTH CHINA MORNING POST, Dec. 21, 1992.

⁷⁶ ROC CONST., *supra* note 4, at art. 63.

⁷⁷ *Id.* at art. 97.

⁷⁸ *Id.* at art. 90.

⁷⁹ *Id.* at art. 83.

⁸⁰ *Id.* at art. 77.

officials.⁸¹ The Judicial Yuan is basically an administrative framework linking together four distinct sub-branches: the Supreme, High and District courts (regular courts); the Administrative Court; the Committee on the Discipline of Public Functionaries; and the Council of Grand Justices. The Supreme Court is the highest adjudicatory body within the Judicial Yuan and serves as the appellate court for the High Court.⁸² The High and District Courts handle both civil and criminal cases. The Administrative Court deals strictly with cases brought against government bodies and can grant administrative relief from regulations.⁸³ The Administrative Court is a court of final appeal and its decisions are not reviewed by the regular courts.⁸⁴ The Committee on the Discipline of Public Functionaries deals only with allegations that government officials have violated their duties or committed crimes.⁸⁵ The Constitution places the responsibility for interpreting the Constitution and unifying conflicting interpretations of statutes and regulations with the "several" Grand Justices.⁸⁶ The Organic Law of the Judicial Yuan, promulgated in March 1947, authorized the formation of the Council with a maximum of 17 Grand Justice positions.⁸⁷ The issue as to whether the Council is a true "court" and the Justices true "judges" under the Constitution remains an ongoing debate.⁸⁸

II. THE COUNCIL OF GRAND JUSTICES

Created as an impartial interpreter of the Constitution, the Council could not immediately carry out its duties due to interference from the other Yuans. Dr. Sun Yat Sen had a high respect for the separation of powers concept at the time he developed his theories of politics and governing

⁸¹ See *id.* at art. 78.

⁸² Fa-yuan Tsu-chih-fa (Law of the Court Organization), (promulgated Oct. 28, 1932), at art. 48 in Book 6 in *BOOK OF THE SIX LAWS* (Wu-nan).

⁸³ Chiu & Fa, *supra* note 16, at 630.

⁸⁴ *Id.*

⁸⁵ *Id.* at 631.

⁸⁶ ROC CONST., *supra* note 4, at arts. 78 and 79; Szu-fa-yuan Tsu-chih-fa (Organic Law of the Judicial Yuan) [hereinafter Judicial Law] (promulgated Mar. 31, 1947), Book 6 in *BOOK OF THE SIX LAWS* (Wu-nan). While the President and Vice-president of the Judicial Yuan preside over the Council's meetings and their names are printed with the other Grand Justices, they vote only in the case of a tie. The Council is modeled on the European civil law countries' constitutional courts, which provide interpretations of the Constitution and of laws.

⁸⁷ Though the Judicial Law provides for up to 17 Grand Justices, the most ever seated on the Council at one time was 15. See Tables of Statistics in *SYMPOSIUM*, *id.* at 570.

⁸⁸ *Infra* text accompanying notes 129-130.

structures and the ROC Constitution incorporated this concept.⁸⁹ Despite the separation of power theory's influence on the drafting of the Constitution, the ROC did not develop strongly independent branches of government. While structurally separate from one another, during the four decades of martial law the five Yuans depended heavily on presidential directives to function.⁹⁰ This emphasis on direct control by the president reduced the importance of inter-branch cohesiveness. Information, control and power ran vertically within each Yuan from the President down, restricting communication between Yuans because the power was concentrated at the top. This limited coordination between the branches' lower levels where policies were actually implemented.

The influence of other Yuans on the Council expanded during the KMT's period of strict government and economic control. As the dominant political party, the KMT dictated ROC government policy since KMT members occupied prominent Yuan positions. While the KMT's hard-line rule has since softened, the potential still exists for one Yuan with politically favored members to influence other Yuans. The Council, as a sub-branch of the Judicial Yuan, does not operate impartially because it is not protected from the intrusions of other branches.

A. *The Powers and Limitations of the Council*

The Council of Grand Justices' primary role within the ROC judicial system is to exercise constitutional review powers.⁹¹ Other branches of government can apply to the Council for an interpretation of the constitutionality of a particular course of action. In these cases, the Council's interpretations, while advisory in nature, give the Council opportunities to influence ROC policy.⁹² The bulk of cases the Council hears are advisory;

⁸⁹ See Ma, *supra* note 22, at 5. The ROC followed the Japanese and German models in establishing its judicial system, as evidenced by many parts of the legal code which refer to precedents from those countries. See e.g., references to Japanese and German law in the Civil Code. Min Fa, Book One: General Principles, Chapter Two, in *BOOK OF THE SIX LAWS* (Wu-nan). The influence of the American Constitution is also evident, particularly in regards to the separation of powers. Herbert H.P. Ma, "The Influence of the U.S. Constitution on the 1947 Republic of China Constitution," in *THE UNITED STATES CONSTITUTION AND CONSTITUTIONALISM IN CHINA* 53-55 (Kline ed., 1987).

⁹⁰ Hu Fu, *Cabinet Rule in the Republic of China: A Constitutional Argument*, 4 *J. Chinese L.* 161, 168 (1990).

⁹¹ Ssu-fa Yuan Ta-fa-kuan Hui-yi Fa (Law Governing the Council of Grand Justices of the Judicial Yuan), at art. 2 [hereinafter Council Law] (promulgated July 21, 1958), Book 6 in *BOOK OF THE SIX LAWS* (Wu-nan).

⁹² *Id.*

rarely does it play the role of an adjudicatory body.⁹³ Consequently, the Council does not operate under "case or controversy" or "political question" limitations.⁹⁴

Grand Justices serve nine-year terms after receiving the appointment of the President and the confirmation of the Control Yuan.⁹⁵ Grand Justices can be re-appointed to serve additional terms.⁹⁶ This term limit, contained in the Judicial Law, is a contentious point because the Constitution stipulates life terms for judges.⁹⁷ Although this discrepancy between the Judicial Law and the Constitution significantly affects the operation of the Council, the Council itself has not rendered an interpretation on the issue.

To date there have been five Councils of Grand Justices. The first ran from 1949 to 1958, while the current one will run from 1985 to 1994.⁹⁸ The first Grand Council was very active, but toward the end of its term the Legislative Yuan curbed the Council's powers by enacting the Council Law.⁹⁹ The second and third Councils had little opportunity to render interpretations during the height of President Chiang Kai-shek's power.¹⁰⁰ The fourth Council began its term in 1976 and became increasingly active in the reform period following President Chiang Kai-shek's death.¹⁰¹ The fifth Council has so far issued a large number of interpretations, primarily petitioned by private citizens.¹⁰²

⁹³ An important exception to this non-adjudicative rule occurred in May 1992, when the Legislative Yuan authorized the Council to form a tribunal to hear cases regarding the constitutionality of political parties. The authority to determine the constitutionality of political parties originally rested with the Executive Yuan, but in the months preceding the first free election encouraged the government to turn that authority over to a nominally impartial body. *Legislature Approves Revision of Civic Organizations Law*, CENTRAL NEWS AGENCY, 4 July 1992, available in LEXIS, Nexis Library, CNA File.

⁹⁴ Unlike the U.S. Supreme Court, which will only hear cases arising from actual controversies, the Council can entertain questions of law raised by government agencies without a preceding conflict. Further, it operates under no limitations regarding the political nature of a question which the U.S. Supreme Court would defer to either the President or Congress to resolve. See Jyh-pin Fa, *Constitutional Developments in Taiwan: The Role of the Council of Grand Justices*, 40 *Int'l & Comp. L.Q.* 198, 201 (1991).

⁹⁵ Judicial Law, *supra* note 86, at art. 5.

⁹⁶ See *id.* at art. 3.

⁹⁷ ROC CONST., *supra* note 4, at art. 81, "No judge shall be removed from office unless he has been found guilty of a criminal offense or subjected to disciplinary measures, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended or transferred or have his salary reduced."

⁹⁸ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 562-566.

⁹⁹ *Infra* text accompanying notes 131-137.

¹⁰⁰ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 563.

¹⁰¹ *Id.* at 565.

¹⁰² *Id.* at 566.

The Council is empowered to both interpret constitutional issues and unify statutory discrepancies.¹⁰³ Yet, until the 1980s, the Council did not render interpretations on many cases, confining the majority of its activities to the unification of conflicting laws.¹⁰⁴ A contributing factor to the low number of interpretations, in addition to KMT control, is that the supremacy of the Council's constitutional interpretations is still unsettled. The inference can be drawn that because the Constitution authorizes the Council to render constitutional interpretations, these interpretations are as binding as legislative enactments.¹⁰⁵ The Legislative Yuan, as the supreme law-making body in the ROC, however, can enact laws contradicting Council interpretations if the laws are not explicitly unconstitutional.¹⁰⁶ While an express constitutional provision legitimizes the Legislative Yuan's action, the authority of the Executive, Control and Examination Yuans to implement laws and regulations that are contrary to Council interpretations is also unclear. In various cases over the last 40 years, affected branches essentially ignored Council rulings under the guise of slow implementation.¹⁰⁷ The Council's subsequent inclusion in its interpretations of specific implementation deadlines in order to force compliance with its decisions eventually became effective.¹⁰⁸ The political issue over which Yuan possesses the higher constitutional power, however, has not been definitively resolved.

The Council is not vested with the discretion to select the cases it wants to hear.¹⁰⁹ If a petition requesting a constitutional interpretation meets the basic requirements spelled out in the Council Law, the Council cannot reject the petition.¹¹⁰ Resolution of these cases can be difficult because the Council Law imposes a "double three-fourths" approval requirement: three-fourths of the Grand Justices must be present to form a quorum, and three-fourths of the quorum must agree with the interpretation in order to

¹⁰³ When a government department applying a law or regulation has a different opinion from that previously expressed by the same or another department, it may petition the Council to make a binding unified interpretation. See Council Law, *supra* note 91, at art. 4.

¹⁰⁴ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 562-566.

¹⁰⁵ Nigel N.T. Li and Joyce C. Fan, *An Uncommon Case of Bigamy; An Uncommon Constitutional Interpretation*, 4 J. Chinese L. 69, 79 (1990).

¹⁰⁶ See ROC CONST., *supra* note 4, at art. 62.

¹⁰⁷ Fa, *supra* note 94, at 206.

¹⁰⁸ *Id.*

¹⁰⁹ Ma, *supra* note 5, at 513.

¹¹⁰ *Id.*

issue an opinion.¹¹¹ Compromise, therefore, is an integral element of the Council's daily work.¹¹²

The Council's quorum requirement for unifying conflicting laws is easier to meet than the quorum requirements for constitutional interpretations. The Council is able to issue a unified interpretation when it is approved by a majority of the Grand Justices at a meeting with a quorum of more than half of the total number of Grand Justices.¹¹³ Theoretically, the Council could issue a unification interpretation with only five Grand Justices in agreement; this creates the possibility that the Council could issue conflicting interpretations. The Council prevents this occurrence through the informal requirement that a minimum of twelve Grand Justices be present at all meetings.¹¹⁴

Any government agency has standing to petition the Council for an interpretation of a specific constitutional provision or a law.¹¹⁵ Private individuals may also apply for constitutional interpretations in situations where they believe the government violated their constitutional rights.¹¹⁶ With the exception of petitions from Administrative Court adjudications, an individual must have appealed the case to the Supreme Court before petitioning the Council.¹¹⁷ If the Council renders a favorable interpretation, the petitioner takes the case back to the Supreme Court for a new hearing.¹¹⁸ Prior to the reform period, government agencies, rather than individuals, brought the majority of cases heard by the Council.¹¹⁹

B. *Impediments to Attaining Full Constitutional Authority*

Although the ROC Constitution's advisory power gives the Council the potential to set national policy through its judicial interpretations, other factors limit the Council's actions. The reform period has encouraged greater judicial activism,¹²⁰ but the Council is still unable to operate at its full constitutional capacity. This will only be possible when the Council fully

¹¹¹ *Id.*

¹¹² *Id.* at 512.

¹¹³ Council Law, *supra* note 91, at art. 13.

¹¹⁴ Interview with Herbert H.P. Ma, Grand Justice of the Council of Grand Justices, in Taipei, Taiwan (July 1992).

¹¹⁵ Council Law, *supra* note 91, at art. 4.

¹¹⁶ *Id.*

¹¹⁷ Ma, *supra* note 5, at 513.

¹¹⁸ Fa, *supra* note 94, at 207.

¹¹⁹ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 563.

¹²⁰ Ma, *supra* note 5, at 510.

repairs its damaged image, separates itself from the influence of the other Yuans, and overcomes the restrictions of the Council Law.

A primary difficulty the Council labors under is its lingering image as a KMT figurehead. This image problem stems from early in the ROC's official martial law period which lasted from 1949 to 1987.¹²¹ At that time, the Temporary Provisions gave the President, and consequently the KMT, broad power to operate outside most constitutional limitations.¹²² This reduced the need for objective constitutional interpretations and forced the Council to remain dormant.¹²³ Since virtually no constitutional restrictions applied to government decisions made under martial law, the few interpretations the Second and Third Councils issued tended to legitimize the "strong-man" system of government while marking the Council as a government tool with illusory power.¹²⁴ This creates a problem for the Council today because the Council's current effectiveness depends on the deference both the public and private sectors give its otherwise unenforceable interpretations. Thus, the Council's willingness to consider and rule on an increasing number of private petitions is a wise course; the Council must shed any lingering perception that it is a government puppet if it is to garner respect as an authoritative impartial body.

Another aspect of the Council's image problem is the controversy over the constitutionality of the advisory functions of the Council. It has been suggested that since the Council can decide the constitutionality of policies, and thus influence policy planning,¹²⁵ it infringes both on the Legislative Yuan's power to develop and implement legislation and on the Control Yuan's oversight ability. Although the Council's advisory opinions might be viewed as contravening the Constitution's separation of powers intent, the Council has an affirmative constitutional duty to decide the appropriate application of a law or the constitutionality of a planned action.¹²⁶ While the Council

¹²¹ The KMT was not only the ruling party, but the only legal political party in Taiwan until 1987. SHAW, *supra* note 3, at 27. "But the formation of new political parties was not allowed under the Emergency Decree." Cultural Affairs of Central Committee of Kuomintang, "Rising Political and Social Pluralism," in GETTING TO KNOW THE KMT SERIES I-10 (1989).

¹²² See Chiu & Fa, *supra* note 16, at 611.

¹²³ See Council Interp. Shih-86 which was adopted on August 15, 1960, but was not implemented until 1979. This interpretation said that under the Constitution the court system should be controlled by the Judicial Yuan and not the Control Yuan. See *Compilation of Council of Grand Justices' Interpretations*, in BOOK OF THE SIX LAWS (Wu-nan), *supra* note 4, at 2142.

¹²⁴ Hu Fu, *supra* note 90, at 161.

¹²⁵ Liu, *supra* note 28, at 1027.

¹²⁶ ROC CONST., *supra* note 4, at art. 78, "The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders" and art. 79, "The Judicial Yuan shall

continues to use its advisory power, these challenges threaten the Council's credibility by questioning its basic constitutional authority.

A second major impediment to the Council's effective execution of its Constitutional role is its susceptibility to internal and external political pressures. The less than harmonious relationship between some sub-branches of the Judicial Yuan and the Council has resulted in situations which challenge the Council's authority and enforcement power. Although no court likes to be reversed, more than normal dissension arises between sub-branches due to the procedural requirements of the Council's appellate process. When the Council overturns a Supreme or Administrative Court decision by ruling a law or action unconstitutional, the successful petitioner's case remands back to that original court. The Council risks antagonizing judges who correctly used the law at the time of the case, only to have the Council change the law on appeal. This resulted in several sub-branch battles, particularly between the Council and the Administrative Court, in which the other courts refused to rehear the cases.¹²⁷ If the Council could dispose of these cases, it could alleviate unproductive squabbling in the Judicial Yuan, reduce the number of times a petitioner must move between judicial sub-branches, and also lower the amount of time spent by regular court judges in retrying cases under different laws. The Council, however, has been classified as a non-adjudicative body, and considerable debate exists over the Justices' status within the Judicial Yuan. The Council does not have a specific grant of an adjudicatory power from the Constitution, but neither is it denied that power. Ironically, the simplest solution to this difficulty can not be authorized by the Judicial Yuan; only the Legislative Yuan can confer adjudicatory power on the Council.¹²⁸ Explicit authorization by the Legislative Yuan, either in a separate law or in an amendment to the Council Law, would likely enhance the consistency of decisions as well as reduce tensions within the judiciary.

Another difficulty the Council faces is the Justices' short term on the Council bench. Since the President and the Control Yuan nominate, appoint and confirm Grand Justices for only nine year terms, job security for Grand Justices is limited.¹²⁹ In contrast, all judges in the other courts of the Judicial

have a certain number of Grand Justices to take charge of matters specified in Article 78 of this Constitution"

¹²⁷ See *infra* text accompanying notes 181-189.

¹²⁸ ROC CONST., *supra* note 4, at art. 82, "The organization of the Judicial Yuan and of the law courts of various grades shall be prescribed by law."

¹²⁹ ROC CONST., *supra* note 4, at art. 79.

Yuan are career judges. Additionally, while no Grand Justice has ever been removed in mid-term, the Control Yuan has the constitutional authority to do so.¹³⁰ The lack of tenure gives the Council, at the very least, an appearance of political susceptibility. Regardless of the merits of the semantic debate over whether Grand Justices are "judges" or whether the Council is a "court" under the Constitution, the fact remains that life tenure would effectively limit the opportunity for external influence. It could also solve any existing compatibility problems between the other judicial sub-branches and the Council by clarifying the Grand Justices' positions.

Perhaps the Council's greatest limitation is the retaliatory atmosphere in which it must operate. Due to an incomplete separation of powers, the Council has never been sufficiently isolated to avoid political entanglements with other branches. A prime example of a parallel branch exerting political pressure on the Council is that of the Legislative Yuan, which has constitutional authority to limit the Council's jurisdiction by amending the Council's governing law.¹³¹ The Legislative Yuan first utilized this power in 1957, when the Council released Interpretation Shih-76, holding that the Legislative Yuan, National Assembly, and Control Yuan were each equivalent to a Congress or Parliament in the Western sense.¹³² The Legislative Yuan, which considered itself the ROC's only legislative body, enacted the Council Law a short time later.¹³³ This law restricted the Council's constitutional interpretations to those issues specifically set forth in the Council Law and in the text of the Constitution.¹³⁴ With this one enactment, the Legislative Yuan significantly narrowed the Council's previously broad advisory powers. While the Legislative Yuan's authority to amend the Council's governing law is a part of the ROC government's system of checks and balances, its broad application to strip the Council of substantial jurisdiction has been criticized as an unconstitutional abuse.¹³⁵ The Council Law also places the Council in another untenable position: the

¹³⁰ *Id.* at art. 81.

¹³¹ ROC CONST., *supra* note 4, at art. 63.

¹³² Council Interp. Shih-76 issued on May 3, 1957, which held that the Legislative Yuan, National Assembly, and Control Yuan were all equivalent to a Congress or Parliament in the Western sense. Council Interpretations bear the appellation "Shih" and are numbered chronologically. See *Compilation of Council of Grand Justices' Interpretations*, in BOOK OF THE SIX LAWS (Wu-nan), *supra* note 4, at 2141.

¹³³ Fa, *supra* note 94, at 202.

¹³⁴ "The subjects of interpretation shall be limited to the text of the Constitution." Council Law, *supra* note 91, at art. 3.

¹³⁵ Lawrence Shao-liang Liu, *Judicial Review and the Constitution: A Tale of Two Institutions*, 1988 PROC. OF THE INT'L CONF. ON "THE EVOLVING U.S. CONSTITUTION: 1787-1987" ACADEMIA SINICA 179 (1988).

possibility exists that the Council could unify several conflicting laws but be unable to interpret the constitutionality of the resulting law.¹³⁶ The Council, however, has not ruled on the enactment's constitutionality, apparently due to the issue's political sensitivity.¹³⁷

Although the Council has operated under the Council Law restrictions since 1957, the membership of the Legislative Yuan has changed. Reformist factions within the government, as well as in academic circles and opposition parties, have been working to resolve the problems of inappropriate inter-branch influences since the reforms began.¹³⁸ In recognition that the Council Law limitation prevents the Council from fulfilling its duties, the recent constitutional amendment committee issued a proposal to revise the Council Law.¹³⁹ One revision not suggested by that committee, but which would ensure greater independence for the Council, would be to require the Executive and Legislative Yuans to concur before imposing restrictions. The current system, permitting one branch of government to unilaterally limit another, does not foster a productive resolution of conflicting interests.

The Council's failure to rule on the constitutionality of the Council Law is indicative of the effect of these multiple political pressures on the Council's ability to fully exercise its interpretive powers. The Grand Justices carefully weigh each decision to ensure that the other government branches will honor its interpretations.¹⁴⁰ Though the Constitution gives the Council the potential to influence policy, the Council generally plays a non-active role, deferring to presidential or legislative intent. This is due to the Council's lack of enforcement ability, the questions regarding the constitutionality of the advisory power, and the confrontational manner in which government agencies often react to adverse Council interpretations; a realistic possibility exists that a "losing" agency will simply ignore the ruling.¹⁴¹ At a time when the Council seeks the full constitutional breadth of its powers, the failure of a

¹³⁶ This could occur because the Council can unify any type of law brought before it by government branches, yet the Council Law limits the types of issues that the Council can interpret.

¹³⁷ *Id.*

¹³⁸ LIN TSE-YI, SIAN KAI CHIEN YEN 1 [SUGGESTIONS FOR REVISING THE CONSTITUTION] (April 11, 1992).

¹³⁹ *Id.* at 16.

¹⁴⁰ See Ma, *supra* note 5, at 500.

¹⁴¹ Although Council conflicts with some agencies have been minimal, Council decisions which affect not only a yuan's power, but consequently reduce KMT power, presenting a different problem. As the KMT's direct control of the government declines, various branches of government exercise greater control and independence and often espouse more than one view. *After Election: Crisis for KMT*, *supra* note 80. The result is increasing inner-branch conflicts, for which no explicit constitutional resolution process exists. Liu, *supra* note 135, at 182.

government agency to follow or support a Council ruling could severely damage the Council's credibility with the public and other government agencies. Therefore, the Council has adopted a strategy of incrementally expanding its authority through non-confrontational interpretations, seeking thereby to reduce the risk of government branches censuring the Council or placing further limits on its powers.

III. FROM ILLUSION TO POWER: A DECADE OF REFORM

The Council's gradualist approach toward regaining its full constitutional authority has made significant contributions in the areas of individual rights and political reform. As discussed earlier, the reforms the ROC underwent during the 1980s spurred many changes in social, political and legal structures.¹⁴² In 1987, the Legislative Yuan finally repealed the 1948 "temporary" Emergency Decree,¹⁴³ reducing the President's power and removing one of the structural limitations on the Council. With a rapidly developing economy and a rising standard of living, people demanded more political and personal freedom.¹⁴⁴ The government had to respond to the pressures generated by an increasingly affluent and educated citizenry. This resulted in the shift from a heavily centralized governing structure to democratic capitalism.¹⁴⁵

The Council of Grand Justices responded to the public's dissatisfaction with the government by issuing interpretations which emphasized constitutional rights.¹⁴⁶ The number of constitutional interpretations the Council made per year increased from three in 1976 to eighteen in 1991.¹⁴⁷ The Council not only rendered more interpretations, but it also heard more cases brought by private individuals.¹⁴⁸ Prior to 1976, only one interpretation resulted from a citizen's petition; government agencies brought the remainder of interpretation requests.¹⁴⁹ Ever since, however, private citizens have presented the majority of applications considered by the Council.¹⁵⁰

¹⁴² See YEARBOOK, *supra* note 17, at 91.

¹⁴³ SHAW, *supra* note 3, at 28.

¹⁴⁴ *Politics of Destiny*, *supra* note 53, at S16.

¹⁴⁵ *Politics of Change*, ECONOMIST, Oct. 10, 1992.

¹⁴⁶ See U.S. DEPARTMENT OF STATE, 1990 HUMAN RIGHTS REPORT: TAIWAN 9 (1991).

¹⁴⁷ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 565-6.

¹⁴⁸ Fa, *supra* note 94, at 207.

¹⁴⁹ See Tables of Statistics in SYMPOSIUM, *supra* note 5, at 565-6.

¹⁵⁰ *Id.*

Although the Council's authority is theoretically limited only by the Constitution, the realities of the ROC government necessitate that the Council act cautiously. When a Council interpretation minimally affects another branch, that branch generally acquiesces, but if an interpretation significantly reduces or restricts an agency's activities, it will likely retaliate.¹⁵¹ The Council's utilization of incremental precedents attempts to avoid such reactions. Once a branch acquiesces to an interpretation, the precedent makes opposition to a similar interpretation at a later date difficult.

The Council's patient approach to regaining its full authority developed against a backdrop of relative political powerlessness. Council Interpretation Shih-86, rendered in 1960, provides the clearest example of the Council's reason for carefully considering political factors.¹⁵² The Council stated that the Constitution placed the court system within the Judicial Yuan, not within the Executive Yuan, where it was located at that time.¹⁵³ This interpretation proved to be a severe miscalculation on the part of the Second Council because the government blatantly ignored it.¹⁵⁴ Only in 1980 did the government finally acknowledge the interpretation and transfer the court system to the Judicial Yuan.¹⁵⁵ This interpretation serves as an open reminder that until the Council receives its full constitutional authority, it cannot interpret the Constitution without considering political realities.

Recent interpretations have furthered individual rights and advanced political reforms.¹⁵⁶ The interpretations generally fall into three categories. First, the interpretations which strengthen individuals' personal liberties have enhanced citizens' ability to petition the Council for redress. Second, the Council used several government petitions to successfully push back the constraints of the Council Law and widen the scope of the petitions it can grant. Third, in a relatively new line of interpretations, the Council has placed certain limitations on unconstitutional government conduct.

¹⁵¹ The clearest example was the Legislative Yuan's reaction to the Council's "Congress Interpretation." See *supra* note 134.

¹⁵² See *Compilation of Council of Grand Justices' Interpretations*, in *BOOK OF THE SIX LAWS* (Wu-nan), *supra* note 4, at 2142.

¹⁵³ *Id.* During the initial period of martial law the government apparently considered grouping the regular courts with the prosecutorial department to be the most efficient way of administering the law. The Judicial Yuan at this time did not exercise much influence because its constitutionally mandated functions of the judiciary were controlled by the Executive Yuan.

¹⁵⁴ See Ma, *supra* note 5, at 501-500.

¹⁵⁵ *Id.*

¹⁵⁶ See LIN, *supra* note 138, at 16.

A. *Strengthening Personal Liberties*

The Council's activism in interpreting individual rights stemmed from its efforts early in the reform period to establish its credibility as an impartial tribunal. Due to the Council's inaction during Chiang Kai-shek's rule, the Council had emerged from its judicial dormancy with few authoritative precedents and an image of ineffectiveness. The Council, through several seminal interpretations which addressed individual freedoms, gained the confidence of the reform-minded public while incrementally establishing its base of authority.

In the first of this series of decisions, Council Interpretation Shih-154, the Council considered a petition that, if granted, would place the Council in direct opposition to the Supreme Court and the rest of the Judicial Yuan.¹⁵⁷ Failing to grant the petition, however, would indicate that the Council would not, or could not, overturn a Supreme Court precedent. Faced with the dilemma of either opposing the regular courts or acknowledging a significant limitation upon its power, the Council chose a middle course. The petitioner in this case argued that a Supreme Court precedent was unconstitutional because it deprived him of access to the courts.¹⁵⁸ The Council held that laws, regulations, and decrees of final judgments, including binding judicial precedents, could be challenged by private citizens unless the Supreme Court deemed otherwise in a special meeting.¹⁵⁹ The Council indicated it could and would review the constitutionality of judicial precedents under Article 4 of the Council Law,¹⁶⁰ however, the Council did not substantively review the decision of the Supreme Court in the petitioner's case for unconstitutionality.¹⁶¹ Since in this case it did not actually overturn the Supreme Court's decision, the Council avoided hostile reactions from the Judicial and Legislative Yuans, yet broadened its future review powers.

¹⁵⁷ 3422 TSUNG-T'UNG FU KUNG-PAO (PRESIDENTIAL PALACE GAZETTE) 2 (Sept. 29, 1978) [hereinafter PRESIDENTIAL PALACE GAZETTE].

¹⁵⁸ Liu, *supra* note 28, at 1022.

¹⁵⁹ 3422 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2.

¹⁶⁰ "The application for a constitutional interpretation is possible under the following circumstances: (1) If the national or local government department has doubts as to the proper application of the Constitution while performing its duties; or if a dispute arises between departments with regard to the application of the Constitution while performing its duties; or if a question is raised as to whether an application of a law or regulation is in conflict with the Constitution; . . ." Council Law *supra* note 91, at art. 4.

¹⁶¹ 3422 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2.

Council Interpretation Shih-177¹⁶² was a landmark interpretation in the gradual process of strengthening personal liberties. Rendered in November 1982, this interpretation held that newly decided constitutional interpretations applied to the case which petitioned the issue. Prior to this decision, a private petitioner could not benefit from a favorable Council interpretation because the ruling would not apply to the petitioner's instant case.¹⁶³ Council Interpretation Shih-177 involved the question of whether the court's failure to apply a statute affecting the result of an adjudication should be grounds for a retrial.¹⁶⁴ The Council held that an interpretation favorable to a private citizen's petition applied to that petitioner, who could then seek relief in accordance with the established legal procedures.¹⁶⁵ This interpretation furthered the Council's position as the judicial body of last resort because it expanded the applicability of Council interpretations to an additional body of cases. Moreover, the interpretation encouraged individuals to use the court system, since a petitioner could get actual relief instead of being a test case.

The Council's interpretations often protected personal liberties by limiting government discretion. In the 1988 Council Interpretation Shih-224,¹⁶⁶ the Council struck down a provision of the Tax Collection Law as unconstitutional because it interfered with citizens' right of access to the courts under three different articles:¹⁶⁷ Article 16, which protects individuals' right of access to the courts;¹⁶⁸ Article 7, which guarantees the right of equality;¹⁶⁹ and Article 19, which guarantees that taxes shall be paid only in accordance with legislation.¹⁷⁰ The Council found the provision, which required the posting of a bond before the tax office would re-examine a tax assessment, constituted an unnecessary constraint on citizens' constitutional rights.¹⁷¹ The Council then set a two year time limit for the legislature to pass amendments to bring the law into compliance with its interpretation, after which the challenged provisions would become void.

¹⁶² 4063 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (Nov. 5, 1982).

¹⁶³ *Fa*, *supra* note 94, at 207.

¹⁶⁴ 4063 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2.

¹⁶⁵ *Id.*

¹⁶⁶ 4926 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 1 (April 22, 1988).

¹⁶⁷ *Id.*

¹⁶⁸ ROC CONST., *supra* note 4, at art. 16, "The people shall have the right of petition, administrative appeal, and suit."

¹⁶⁹ *Id.* at art. 7, "All people of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."

¹⁷⁰ *Id.* at art. 19, "The people shall have the duty of paying taxes in accordance with law."

¹⁷¹ *Fa*, *supra* note 94, at 207.

The following year in June 1989, the Council rendered Interpretation Shih-242,¹⁷² re-emphasizing the Council's accessibility to the public. For the first time in ROC history, the Council declared a Supreme Court judgment unconstitutional.¹⁷³ The case arose after ROC citizens finally received official permission to travel to the mainland.¹⁷⁴ A citizen who had fled to Taiwan when the KMT forces retreated there in 1949 had been unable to locate his wife at the time of his escape.¹⁷⁵ Not knowing if his first wife had survived, he married again in 1960.¹⁷⁶ In 1986, his first wife discovered he was alive and sued for the nullification of his second marriage under Civil Law provision 992.¹⁷⁷ Since there was no explicit statute of limitation governing the annulment of bigamous marriages, the regular courts ruled in favor of the first wife.¹⁷⁸ The Council ordered a retrial, finding Civil Code provision 992 in violation of Article 22 of the Constitution¹⁷⁹ because enforcement of the Civil Code provision would disrupt social order.¹⁸⁰

The cumulative effect of these interpretations has been to significantly increase the ability of citizens to petition the Council. This enhanced accessibility to the judicial process has encouraged individuals to challenge laws and government agency actions which violate constitutionally guaranteed freedoms. The Council's willingness to address issues affecting individuals gave the Council credibility with ROC citizens and allowed the Council to establish important precedents it would use in future decisions as the basis of its authority.

2. *Overcoming Procedural Impediments*

A growing number of Council interpretations demonstrate the Council's recognition that it must protect the scope of the petitions it grants. A separate concern paralleled in many of these cases is the Council's attempt to ensure that both the litigants and the other sub-branches of the Judicial Yuan comply with its interpretations.

¹⁷² 5116 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (June 23, 1989).

¹⁷³ Li & Fan, *supra* note 105, at 69.

¹⁷⁴ The official ban on travel to the mainland was lifted in July of 1987. See *Politics of Destiny*, *supra* note 53, at S16.

¹⁷⁵ Li & Fan, *supra* note 105, at 70.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ ROC CONST., *supra* note 4, at art. 22, "All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution."

¹⁸⁰ Li & Fan, *supra* note 105, at 71.

A relatively minor administrative case provided an early opportunity for the Council to address both issues. Council Interpretation Shih-148, rendered in May 1977, involved the modification of a city zoning plan.¹⁸¹ The Administrative Court ruled the modification constituted a legal administrative action uniformly affecting a class of citizens, which meant it was not justiciable. The Administrative Court indicated that in order to be challenged, the modification had to discriminate or injure a single individual, who then had standing to sue. Prior Administrative Court precedent, however, had specifically held that challenges to zoning modifications could be entered by any affected plaintiff, regardless of the number of people affected by the change.¹⁸² Ordinarily, this qualified as an administrative issue; the petitioner, therefore, could not bring the case to the Council because the subject fell outside Council Law requirements.¹⁸³ The Council, however, heard the dispute on its own resolution—a method not addressed in the Council Law.¹⁸⁴ The Council thus expanded its own jurisdiction by creating an alternative route to receive petitions.¹⁸⁵

The Council was slower, although ultimately successful, in getting the petitioner actual relief. The Council held the case should be addressed in retrial,¹⁸⁶ but the Administrative Court did not accept it for retrial.¹⁸⁷ The Council did not press the Administrative Court on this issue, but two years later released Council Interpretation Shih-156, holding that the modification of a zoning plan constituted an administrative action identifiable to a particular group or person.¹⁸⁸ The petitioner in this case was the original petitioner in Shih-48. After the Council's ruling, any citizen or citizens adversely affected by a modification could oppose the change by filing an administrative petition or bringing suit.¹⁸⁹ By expressly defining the

¹⁸¹ Council Interp. Shih-148 of May 6, 1977, SSU-FA YUAN TA-FA-KUAN HUI-YI CHIEH-SHIH HUI-PIEN (COMPILATION OF INTERPRETATIONS OF THE COUNCIL OF GRAND JUSTICES, JUDICIAL YUAN) [hereinafter CIC] 1 (4th ed. 1984).

¹⁸² *Id.* at 2.

¹⁸³ Council Law, *supra* note 91, at art. 3.

¹⁸⁴ Liu, *supra* note 28, at 1021. The specifics of the resolution process are not documented in Council interpretations and it appears to be used infrequently, due most likely to its controversial and possibly unconstitutional nature. Soon after this interpretation, the Council established several other methods to avoid the subject matter restrictions of the Council Law. See *infra* text accompanying notes 191-194 (Interpretation Shih-165) and 195-202 (Interpretation Shih-175).

¹⁸⁵ *Id.*

¹⁸⁶ "A retrial is a proceeding whereby a litigant can seek a rehearing on the basis of newly discovered facts." Liu, *supra* note 28, at 1021 n. 127.

¹⁸⁷ *Id.* at 1021.

¹⁸⁸ 3495 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 5 (April 4, 1979).

¹⁸⁹ *Id.*

modification as justiciable, this interpretation bound the Administrative Court to hear all future suits of the same nature, including the case of the rebuffed petitioner.

As previously discussed, the greatest impediment the Council faces in attaining its full constitutional authority is the Council Law. The most restrictive element of the Council Law is the provision limiting the Council to interpretations on subjects specifically written in the Constitution.¹⁹⁰ To overcome this particular limitation, the Council has made several interpretations on matters closely related to, but not actually contained in, the Constitution.

Council Interpretation Shih-165¹⁹¹ stated that the qualified speech immunity of local council members applied only to deliberations in the local council; it did not apply when council members abused such immunity by making defamatory or unlawful statements.¹⁹² The Council indicated that while the Constitution guarantees the right to freedom of speech, it does not guarantee speech immunity.¹⁹³ Although this case revolved around a constitutional issue, the Council also re-affirmed that the Legislative Yuan could create qualified speech immunity, which is a subject outside the text of the Constitution. As the Legislative Yuan was unlikely to challenge the favorable ruling, the Council established a precedent extending its jurisdiction beyond the Council Law.¹⁹⁴

The Council took a similar approach in a later case by finding jurisdiction implicit in the ROC Constitution. In Council Interpretation Shih-175,¹⁹⁵ the Council held that the Judicial Yuan had the authority to sponsor bills to the Legislative Yuan.¹⁹⁶ Although the Constitution explicitly grants the Legislative,¹⁹⁷ Executive,¹⁹⁸ and Examination¹⁹⁹ Yuans authority to sponsor legislation in specific fields, the Judicial Yuan does not have a similar explicit power. The Judicial Yuan also could not directly petition the Council for an interpretation because of the inherent conflict of interest with its sub-branch; it had to wait for a coordinate branch of government to bring the

¹⁹⁰ Council Law, *supra* note 91, at art. 3.

¹⁹¹ 3725 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (Sept. 12, 1980).

¹⁹² *Id.*

¹⁹³ Liu, *supra* note 28, at 1022.

¹⁹⁴ *Id.*

¹⁹⁵ 3989 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 3 (May 25, 1982).

¹⁹⁶ Ma, *supra* note 5, at 502.

¹⁹⁷ ROC CONST., *supra* note 4, at arts. 63 and 72.

¹⁹⁸ *Id.* at art. 57.

¹⁹⁹ *Id.* at art. 87.

petition. When the Control Yuan brought a petition to clarify its own authority to sponsor legislation,²⁰⁰ the Council worded the interpretation broadly so all branches had authority to sponsor legislation in their specific fields.²⁰¹ Thus, the Judicial Yuan could thereafter sponsor legislation related to the organic structure of judicial bodies and the exercise of judicial power.

In Interpretation Shih-185,²⁰² the Council declared its interpretations binding on all government agencies and in-country citizens; any inconsistent precedent was invalid.²⁰³ After this ruling, if a regular court applied any law, regulation or decree which the Council had found inconsistent with the Constitution, the affected litigant could seek a retrial or an extraordinary appeal based on the Council's statement of the law.²⁰⁴ This interpretation placed the Council in conflict with the Administrative Court; for the first time, the Council overruled an Administrative Court precedent. Although the Council's grounds for this decision are not clear from the opinion, the Council apparently found the court's ruling a violation of the petitioner's constitutional right of access to the courts, making the petition's subject matter irrelevant and the Council Law's restrictions inapplicable.²⁰⁵ This interpretation established the Council's authority to review regular courts' precedents while it also provided the Council with another avenue to reach non-constitutional issues.

The Council, after slowly expanding its subject matter jurisdiction and appellate review power, next addressed the difficulty of enforcing its interpretations. The effective date of Council interpretations became of greater importance when the Council began striking down unconstitutional state actions. Although some Council interpretations included mandatory deadlines for revising unconstitutional provisions,²⁰⁶ not all Council rulings required immediate action. As the Council had proclaimed the supremacy of Council Interpretations, presumably all conflicting sources of law were considered superseded. In reality, however, other branches of government reacted to restrictive interpretations by implementing the required changes slowly.²⁰⁷ This directly challenged the Council's authority and frustrated the Council's purpose, since the public still suffered the deprivation of recognized

²⁰⁰ Liu, *supra* note 28, at 1023 n. 137.

²⁰¹ *Id.*

²⁰² 4251 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 5 (Jan. 27, 1984).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Liu, *supra* note 28, at 1025.

²⁰⁶ See e.g. Council Interpretation Shih-224, *supra* text accompanying notes 166-171.

²⁰⁷ See Ma, *supra* note 5, at 500.

constitutional freedoms. In response to this situation, the Council issued Council Interpretation Shih-188²⁰⁸ in August 1987, which held that an interpretation came into effect on the date of the interpretation's issuance unless otherwise set forth in the text.²⁰⁹ The Council reiterated the applicability of constitutional interpretations to the dispute in issue, as well as all similarly pending cases.²¹⁰ This decisive interpretation indicated a significant increase in the Council's confidence that other branches recognized the Council as the supreme judicial body of government.

Procedural barriers such as the Council Law and the lack of enforcement powers have slowed the Council's progress toward claiming its constitutional status. The Council, however, has shown both creativity and great patience in overcoming these restrictions through a steadily increasing line of interpretations. The Council has escaped the unwarranted Council Law jurisdictional limitation by establishing several alternate methods to receive petitions; this expansion in the Council's subject matter and constitutional jurisdiction made it possible for the Council to authoritatively address issues affecting other Yuans.

C. *Defining the Government's Appropriate Sphere of Activity*

While the other sub-branches of the Judicial Yuan have occasionally disagreed with the Council's interpretations, the most difficult petitions the Council handles are those which challenge the constitutionality of another branch's actions. These cases necessitate the Council use a cautious approach in issuing interpretations that proscribe an agency's action in order to avoid retaliation or additional restrictions on the Council's authority.

The need for this caution became apparent in the 1980 Council Interpretation Shih-166,²¹¹ regarding the constitutionality of the Law Governing Police Offenses (LGPO) under Article 8 of Constitution.²¹² The LGPO, enacted before the adoption of the Constitution, authorized law

²⁰⁸ 4333 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (Aug. 3, 1984).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 3749 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 6 (Jan. 19, 1990).

²¹² ROC CONST., *supra* note 4, at art. 8 "Personal freedom shall be guaranteed to the people. Except in the 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. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be resisted."

enforcement authorities to impose administrative confinement and punitive labor on detainees.²¹³ Although the Constitution provided that the court system decide all sanctions,²¹⁴ the police force, located within the Executive Yuan, historically exercised extensive powers in this area. An interpretation drastically curtailing these police powers would inevitably draw a strong negative reaction from the Executive Yuan and other branches. Upholding the LGPO, however, would be an implicit admission that the Executive Yuan could ignore the Constitution. To resolve this dilemma, the Council refrained from issuing an interpretation declaring the law unconstitutional.²¹⁵ Rather, it indicated law enforcement officials could impose administrative sanctions, but that the LGPO should be amended expeditiously so as to provide for appropriate court procedures to govern such sanctions as required by the Constitution's Article 8.²¹⁶ The Council recognized an outright ban on police-imposed sanctions would likely be ignored, thus crippling its efforts. The Council thus implicitly declared the LGPO provision unconstitutional, but only partially limited the Executive Yuan's discretion to set punishment.

The Council was not so deferential to the administrative agencies or the Administrative Court, both of which denied petitioners reviews of critical employment decisions. In Council Interpretation Shih-187,²¹⁷ the Council clarified that the Constitution protected government personnel's right to seek the review of an agency's decision to deny the petitioner his pension because of his prior political activities.²¹⁸ The Administrative Court had refused to consider the merits of the case and rejected the petition, indicating the agency ruling was final. In its interpretation, the Council modified a pre-1947 interpretation and overturned a 1961 Administrative Court precedent to the extent they were inconsistent with its present holding.²¹⁹ In addition to the large adverse affect on government agencies as a whole, the interpretation's importance also stems from the Council's explicit use of earlier precedent to explain its decision. The Council cited Council Interpretation Shih-154 as the authority for which it could review the constitutionality of laws, regulations and decrees applied in a final adjudication challenged by a private citizen.²²⁰ The Council implicitly relied upon Council Interpretation

²¹³ Ma, *supra* note 5, at 499.

²¹⁴ ROC CONST., *supra* note 4, at art. 8.

²¹⁵ Ma, *supra* note 5, at 498.

²¹⁶ *Id.*

²¹⁷ 4301 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 3 (May 18, 1984).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

Shih-185 in that it had the authority to review the constitutionality of precedents and to invalidate them without stating specific unconstitutional grounds.²²¹ Thus, the Council was able to use the results of its incremental strategy to establish a review power over government agency decisions.

The Council ruled in favor of civil servants again a year and a half later in the 1986 Council Interpretation Shih-201,²²² in which it partially struck down a similar Administrative Court precedent that denied civil servants the right to appeal the results of internal administrative hearings. The Council indicated that while government agencies had executive discretion to hold disciplinary proceedings, denying judicial review was unconstitutionally restrictive.²²³ To review the Administrative Court's precedent, the Council again relied on its authority to review precedents as established in Council Interpretation Shih-185.²²⁴

On the strength of its prior interpretations, the Council began granting petitions to review government actions in areas traditionally regulated by other government branches. Due undoubtedly to the rapid pace of the ROC's economic development, the Council issued several interpretations addressing public and private economic liberties regulated by the Executive Yuan.²²⁵ The Council appeared to follow the same incremental strategy it had in the past, but due to a growing number of Council precedents and the Council's past successes, the interpretations on economic issues reflected the Council's progressive nature in a shorter interval than prior subject matters.

The Council addressed its first economic issue in Council Interpretation Shih-204.²²⁶ In that case, the Council upheld the criminal sanctions provisions in the Law of Negotiable Instruments (LNI) as constitutional. The Council found that the prescription of criminal penalties for loan defaults fell within the Legislative Yuan's discretion.²²⁷ While the interpretation stirred little controversy, the Council used the opportunity to show its intention to review petitions on economic matters. In a warning to private lenders, the interpretation stated that the criminal penalties were being impermissibly, and at times unscrupulously, relied upon by private lenders as

²²¹ See *supra* text accompanying notes 202-205 regarding Council Interpretation Shih-185.

²²² 4555 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (Jan. 3, 1986).

²²³ *Id.*

²²⁴ *Id.*; see *supra* text accompanying notes 202-205 regarding Council Interpretation Shih-185.

²²⁵ Liu, *supra* note 28, at 1027.

²²⁶ 4600 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 3 (April 11, 1986).

²²⁷ *Id.*

a deterrent to default; lenders therefore took fewer precautions to screen potential borrowers for their ability to repay.²²⁸

Four months later, the Council completely invalidated the implementing rules of an investment incentive statute. The Ministry of Finance formulated the regulations to limit the types of interest income that could be deemed tax-free.²²⁹ In Council Interpretation Shih-210,²³⁰ the Council found the regulations exceeded the statute's authorization and violated Article 19 of the Constitution.²³¹ This marked the first time the Council explicitly ruled a challenged government action in contravention of the Constitution.²³²

In the 1987 Council Interpretation Shih-214,²³³ the Council upheld the constitutionality of several banking decrees issued by the Executive Yuan.²³⁴ These decrees regulated the establishment of credit cooperatives, an action the Council noted fell within the Executive Yuan's discretion.²³⁵ The non-confrontational nature of this interpretation gave the Council the opportunity to establish its authority for evaluating the Executive Yuan's actions which pertained to economic matters in future petitions.

The Council effectively used this authority six months later in Interpretation Shih-218 when it struck down tax regulations issued by the Executive Yuan's Ministry of Finance. The regulation described the tax assessment method as it applied to profits from the sale of real property.²³⁶ The Council held the regulations violated the requirement of Article 19 of the Constitution that taxes be paid in accordance with legislation.²³⁷ The interpretation stated the assessment criteria, which automatically defined profit as twenty percent of the property sale proceeds, was unconstitutionally arbitrary.²³⁸ The Council placed a time limit on the validity of the tax regulation, giving the Ministry of Finance six months to bring the tax regulations into compliance.²³⁹

Although assertive in the tax regulation case, the Council recognized it risked possible retaliation if it overruled another of the Executive Yuan

228 *Id.*

229 *Id.*

230 Council Interp. Shih-210 of Oct. 17, 1986, 3 CIC 130 (1988).

231 *Id.* at 2; see *supra* text of art. 19 at note 170.

232 Liu, *supra* note 28, at 1027.

233 4764 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 1 (April 17, 1987).

234 *Id.*

235 *Id.*

236 Council Interp. Shih-218 of Aug. 14, 1987, 4 CIC 1 (1989).

237 ROC CONST., *supra* note 4, at art. 19.

238 Council Interp. Shih-218 of Aug. 14, 1987, 4 CIC 2 (1989).

239 *Id.* at 1.

agency's regulations and took a different route when it ruled on a petition challenging an agency's security regulations. The Council merely warned the Executive Yuan in Interpretation Shih-222,²⁴⁰ rendered in February 1988, of the questionable constitutionality of a ROC Securities and Exchange Commission (ROCSEC) requirement.²⁴¹ The Council upheld the regulation requiring listed companies' financial statements to be certified by public accountant firms and not individual practitioners, but stated ROCSEC should re-evaluate the need for that requirement.²⁴² This preserved the Council's ability to review the regulations if ROCSEC failed to act.

The Council has revisited issues raised in prior petitions which, at the time, the Council was unable to satisfactorily address due to the tentative nature of its authority. In 1990, the Council re-evaluated the LGPO in Council Interpretation Shih-251²⁴³ and held that certain sanctions, such as confinement in correction centers, are unconstitutional infringements upon the personal freedom of criminal defendants if authorized by the LGPO as opposed to a court.²⁴⁴ The Council also imposed an eighteen-month deadline for the Legislative Yuan to amend the unconstitutional sections of the LGPO.²⁴⁵ This, in effect, completed the ruling the Council would likely have issued ten years earlier in Constitutional Interpretation Shih-166, had a Council ruling received the same deference in 1980 that it did in 1990.²⁴⁶ A further indication of the confidence level of the Council, and of its credibility with the public and private sectors, came in the Council's release of this decision at a time when the crime rate in the ROC had reached an all time high.²⁴⁷

When compared with the interpretations of fifteen years ago, the assertive manner and speed with which the Council issues current opinions demonstrates the Council's progress in establishing itself as the supreme judicial body in the ROC government. The Council's championing of individual rights helped build a foundation of public acceptance from which it could expand its jurisdiction despite procedural barriers like the Council Law. With precedents firmly established, the Council then had the ability to restrain unconstitutional government actions. The Council has not yet gained the full

²⁴⁰ 4899 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 2 (Feb. 12, 1988).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ 5206 PRESIDENTIAL PALACE GAZETTE, *supra* note 157, at 1 (Jan. 19, 1990).

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.*

²⁴⁶ See *supra* text accompanying notes 212-217.

²⁴⁷ Liu, *supra* note 28, at 1030.

authority of its true constitutional role, however, as evidenced by current opinions that only hint at the unconstitutionality of laws or permit long implementation periods.

IV. CONCLUSION

The political reforms of the early 1980s have resulted in extensive changes to the ROC's government and political system. The Council of Grand Justices have contributed significantly to the ongoing political reforms through its constitutional interpretations which enhanced individual constitutional rights and clarified the bounds of government authority. The Council, however, continues to operate under substantive and procedural limitations which prevent it from utilizing its own constitutional authority. In addition to difficulties within its own judicial branch, the Council has to contend with challenges to its advisory powers and retaliatory actions from other branches.

Modern Council decisions have been partially protected by the national climate of political reform and the Council's own strategy to slowly regain its authority. Council interpretations of the last ten years demonstrate how the Council has incrementally expanded its authority to overcome the limitations. The Council's advocacy of individual rights helped generate popular support, allowing it to expand its jurisdiction despite procedural barriers like the Council Law. The Council has also invalidated unconstitutional government actions and regulations. Recent decisions that leave unconstitutional laws untouched, however, indicated that the Council is still unable to fully exercise the authority granted to it by the ROC Constitution. Only when reforms push the ROC government to permit the Council to exist as a separate power protected from outside influence will the Council of Grand Justices be able to fulfill its Constitutional role as the supreme judicial body of the ROC.

