Transcommunication Vol.8-1 Spring 2021
Graduate School of International Culture and Communication Studies

Article

Japanese Baseball Player's Cap on Interpreters' Translation Costs vs. Perpetual Silence on Interpreters' Hearsay Issue: Power and Authority of Interpreters of Law over Interpreters of Foreign Language

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Abstract

The immense power disparity between the legal community and interpreting community, the former continuously subjugating the latter, is often said to be the result of the judicial authority exercising their power to maintain their superiority as the only *interpreter of language* in a court of law, i.e., as the *interpreter of law*, the supreme rules that govern society through the means of *language*. The way their power is exercised upon foreign language interpreters, however, is actually much more complex. By applying Ian Mason's (2015) "three types of power" that come into play in interpreter-mediated discourse and Steven Lukes' (2005) "three power dimensions," this paper analyzes two most recent U.S. Supreme court cases that involved foreign language interpreters. One was *Taniguchi v. Kan Pacific*, 2012, a case of a former Japanese professional baseball player who was injured in Saipan, in which the Court determined whether *interpreters* and *translators* are the same or different, and the other was *Aifang Ye v. U.S.*, a case of a Chinese woman convicted also in Saipan of alleged passport forgery but who questioned whether or not interpreter-mediated police interview statements would become hearsay without the police interpreter's in-court testimony and cross-examination, the certiorari of which, however, was denied by the Supreme Court on June 13, 2016. By comparing how the U.S. Supreme Court treated the two interpreter-related issues, as well as how the interpreting professionals responded to these two issues, the paper demonstrates how the judicial power and authority continue to subjugate the

interpreting community, not just by direct coercion, but also through more subtle and indirect means, which continues to work successfully but also with a social cost, such as continuous silent violation of non-English-speaking criminal defendants' due process rights by the Court's perpetual silence on the hearsay issue of interpreter-mediated police interviews.

1. Introduction: Power Disparity between Lawyers and Interpreters

Despite the fact that court interpreters in U.S. courts are full-fledged "officers of the court" (Administrative Office, 2020, p. 22), their professional status and position are, more often than not, portrayed as continuously placed at a substandard level compared to other professional players in the judicial system such as judges and other lawyers who often behave as if these interpreters were not visibly existent as full members (Pym, 1999, p. 280).

Legal professionals consider themselves specifically and exclusively qualified to act as *interpreters* of law, the supreme rules that govern and bind social and human activities by and only through the means of *language*, whether it is explicitly written in statues or case laws. Thus, *foreign language interpreters*, though conventionally called *interpreters*, are repeatedly reminded *not to interpret* but just to *translate*, *word for word*, what a foreign-language-speaker has stated (Morris, 1995, p. 32), no matter how oxymoronic this may sound.

The same is true not only of ordinary court interpreters. Other judicial interpreters, such as police interpreters or asylum/immigration court interpreters have also been experiencing the same or even worse predicament, regularly regarded as expendable ad hoc interpreters procured at low costs (Mason, 2015, p. 315), a situation which also means no quality assurance for the most vulnerable users of their services, e.g., witnesses of minor languages (González, Vásquez, & Mikkelson, 2012, pp. 295-296). This seems to be the lasting situation with no signs of improvement ever seeming to appear on the horizon.

Even the legal definition of the *role* of an *interpreter* continuously stays in the gray zone, as U.S. courts perpetually remain unresolved as to whether an *interpreter* is an *agent* (a legal representative of the user of the interpreting service such as a suspect in a police interview, even when no explicit legal authorization was given to the interpreter by the service user or the suspect), or a *conduit* (a factually existing extra linguistic layer fictitiously deemed as non-existent for judicial expediency), or a completely independent *declarant* (a speaker actually making her/his own original statements under the disguise of *translation* of the statement made by the user of the interpreting service), thus never giving an answer to the 200-year-old pending question as to whether or not

interpreter-mediated police interview statements become hearsay without the police interpreter's in-court testimony (Tamura, 2019; Bolitho, 2019).

The fundamental reason for this is of course the immense institutional power disparity between the legal community and the interpreting community, with the former subjugating the latter in a direct coercive manner commanding the latter with a long list of norms to be obeyed. However, the power disparity between the judicial community and the interpreting community, this paper argues, is also a result of a more complex power exercise by the judicial authority, the highest of which in the U.S. is the U.S. Supreme Court.

By applying Ian Mason's (2015) "three types of power" that come into play in interpreter-mediated discourse and Steven Lukes' (2005) "three power dimensions," this paper analyzes two most recent U.S. Supreme court cases on *language interpreters*. One was *Taniguchi v. Kan Pacific*, 2012, a case of a former Japanese professional baseball player who was injured in Saipan, in which the Court determined whether *interpreters* and *translators* are the same or different, and the other was *Aifang Ye v. U.S.*, a case of a Chinese woman convicted also in Saipan of alleged passport forgery but who questioned whether or not interpreter-mediated police interview statements would become hearsay without the police interpreter's in-court testimony and cross-examination, the certiorari of which, however, was denied by the Supreme Court on June 13, 2016. This paper demonstrates how the judicial power and authority in the U.S. continue to subjugate the interpreting community, indirectly and astutely, but also decisively and successfully, though with an inevitable social cost.

2. Analytical Framework: Power and Control by Mason (2015) and Lukes (2005)

2.1 Mason's Three Types Power That Come into Play in Interpreter-Mediated Discourse

Interpreting is a "socially situated activity," involving "power and control" (Mason, 2015, p. 314) exercised by multiple parties, each coming with different, often conflicting, goals and interests, a most typical example of which would be judicial interpreting, where the ultimate goal of the adversarial discourse is to decide the winner and the loser. Mason (2015) notes three types of power constantly at play in interpreter-mediated discourse: 1) power relations between languages; 2) institutionally pre-determined power disparities; and 3) interpreters' interactional power advantage (pp. 314-316).

Typically, those requiring interpreters in judicial procedures are witnesses who do not speak the language of the majority, which in "colonial times" was the language of the "conquers" and in the "current hegemony" is English as a lingua franca (Mason, 2015, p. 314), the language of international business and politics. Being unable to use the

majority's language, therefore, is associated with the socially low status of the uneducated, and the language they speak is also looked down upon. The interpreters for these minor languages often come from the same linguistic and cultural group as heritage speakers, so the speakers of the majority's language may also look down on these interpreters with similarly low respect.

Such interpreters may also be put into a similar category as what Cronin (2002) referred to as "heteronomous" (p. 393), those who belong to the other side and thus inherently unreliable. Also, interpreters, reliable or unreliable, come with interactional power advantage, being the only bilingual person who can steer the discourse (Mason, 2015, pp. 315-316), another reason why judges, lawyers, or law-enforcement officers may try to reinforce their rein using their "institutional power" (Mason, 2015, p. 315). The perpetual mantra commanding *not to interpret but translate word-for-word as a language conduit* is one of the most problematic examples of such institutional power execution by the judicial authority, which the interpreting community has repeatedly criticized but nonetheless has persisted (Morris, 1995, p. 32).

2.2 Steven Lukes' Three Power Dimensions

The interplay of power and conflict in interpreting has often been analyzed using such theories as those by Steven Lukes (2005), Michel Foucault (e.g. 1997), or Pierre Bourdieu (e.g. Bourdieu, 1991; Bourdieu and Wacquant, 1992) (Strowe, 2016, p. 120). For example, Baker (2006) referred to Lukes (2005) in her analysis of translation issues in military conflict, and Inghilleri (2003, 2005) employed Bourdieu's idea of "habitus" (Bourdieu, 1991; Bourdieu and Wacquant, 1992) for interpreter-mediated asylum court proceedings.

In addition to Mason's three types of power, this paper also draws on Lukes' three power dimensions (2005), which are three ways through which X exercises power over Y: 1) X exercises power to force Y to make decisions contrary to Y's interest; 2) X exercises power to pre-empt potential conflict that may arise between X and Y; and 3) X exercises power to influence Y's wishes and desires, so Y will wish for what may be against Y's interest. This paper applies Luke's second and third power dimensions in the analysis of the interpreter-related U.S. Supreme Court cases mentioned above to demonstrate how the judicial power is exerted upon the interpreting community in order for the former to maintain the latter under firm control.

3. *Taniguchi v. Kan Pacific* (2012): Background of the Story

3.1 U.S. Supreme Court Agrees to Hear a Japanese Baseball Player's Case

Every year, nearly 10,000 cases are appealed to the United States Supreme Court, of which the Court hears and decides barely one percent (Epstein and Walker, 2011, p. 14). In light of this lottery-like probability, as to why *Taniguchi v. Kan Pacific* (2012), a seemingly trifle civil suit between Koichi Taniguchi, a Japanese citizen and a former professional baseball player, and a resort hotel in Saipan, on a small dispute involving only a little over $5,000 for the cost of a court interpreter, ever caught the attention of the Supreme Court justices, therefore, was a big mystery to the author at first. As a Japanese citizen and an interpreter trainer, the author was strongly compelled to find out how this case ever managed to find its way from a remote, Western Pacific island all the way up to the nine justices in a high seat of the U.S. Supreme Court in Washington, D.C.

3.2 Legal Question: Are Interpreters and Translators the Same or Different?

The story began on November 6, 2006, when the petitioner, Taniguchi, a former Japanese professional baseball player, got injured when his leg fell through a broken wooden deck on the property of the Mariana Resort and Spa in Saipan, a hotel run by Kan Pacific, the respondent. On February 11, 2008, Taniguchi filed a suit against the hotel in the U.S. District Court for the Northern Mariana Islands, alleging that the resulting injuries caused large medical expenses and also incapacitated him from assuming contractual duties (*Taniguchi*, pp. 562-563)

The district court, in its summary judgment, ruled in favor of Kan Pacific on the ground that Taniguchi had failed to prove that Kan Pacific had knowingly neglected the care of the defective deck. The court then ordered Taniguchi to pay Kan Pacific $5,517.20 for their "interpreter cost," out of which only $260 was the actual cost Kan Pacific had paid to their interpreter, with the remaining $5,257.20 paid to the translator of the documents Kan Pacific used for this litigation. This cost taxation was based on 28 U.S. Code §1920(6), which allows the district court judge or clerk to order the losing party to pay the prevailing party's "cost of interpreters" (*Taniguchi*, p. 563). The provision stipulates as follows.

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
(underlined by the author)

The item (6) above was added to the preceding five items in 1978, when Congress passed the Court Interpreters Act (*Taniguchi*, p. 562) for the purpose of facilitating the use of more qualified court interpreters by introducing a certification system. Unfortunately, however, the Court Interpreters Act itself did not define the word "interpreter" (*Taniguchi*, p. 566). Taniguchi appealed, arguing that 28 U.S. Code §1920(6) only covers the cost of "interpreters for spoken speech," not "translators of written documents." The Ninth Circuit, however, affirmed the district court's cost taxation, ruling that 28 U.S. Code §1920(6) also covers "document translation," not just oral interpreting of live speech in court (*Taniguchi*, p. 563)

On September 27, 2011, the U.S. Supreme Court granted a writ, to answer the question as to whether 28 U.S.C. §1920(6), which awards the prevailing party "compensation of interpreters," also covers the cost of "document translation" (*Taniguchi*, pp. 563-564). Thus, the nine justices of the Supreme Court of the United States, then still including the late Ruth Bader Ginsburg and the late Antonin Scalia, decided to hear the case of a Japanese baseball player, for the purpose of determining whether *interpreting* and *translation* are the same or not.

4. Translation v. Interpretation: Interpreting Studies and Interpreting Practice

In the discipline of translation and interpreting studies, is the distinction between translation and interpretation always unambiguously clear? Generally, what Pöchhacker (2016) stated at the outset of the book's first chapter that "interpreting" is a "translational activity" which should be written with a capital letter "T" as "Translation" to denote its "generic, hypernymic sense" (p. 9) is more or less the common understanding in this academic field. In other words, in the field of translation and interpreting studies, the generic word "Translation" is used to refer to both subfields: translation and interpreting.

What would then distinguish interpreting and translation with a small letter "t"? Surprisingly, the first feature Pöchhacker (2016) mentions is *not* "oral vs. spoken," as that would exclude *sign language* interpreting (p. 10). Instead, the initial distinctive feature is

"immediacy" for "immediate use" in "real-time communication" (pp. 10-11). Traditionally, therefore, interpreting has always been associated with ephemeral communicative activity the product of which was very difficult to preserve perhaps until the invention of an audio-recorder, whereas even an ancient-day translation, if preserved physically, has remained till today and can be studied for scholastic analyses.

In real practice, however, the distinction becomes more blurred. For instance, interpreters engage in what is called *sight-translation*, an immediate oral translation of a written text. As another example, broadcast interpreters, e.g., those in Japan, have commonly practiced what is known as *jisa-tsūyaku* or voice-over interpreting with a pre-translated text (Ino & Kawahara, 2008). Also, court interpreters in many countries are often given a text in advance, e.g., an indictment, an opening statement, or even a sentence, which they translate beforehand and read aloud simultaneously to the defendant by using a wireless system (Nagao and Watanabe, 1998, pp. 179-201; Tsuda, Sano, Asano, & Nukada, 2016, pp. 92-93, p. 97).

In U.S. courts, too, document translation has become a "core job function of the court interpreter" especially since the enactment of Title VI of the Civil Rights Act of 1964, that ensures the production of translated documents for trials to protect the rights of language minorities (González, Vásquez, & Mikkelson, 2012, p. 907), which is evinced, for example, by the standard procedural guidelines for court interpreter services of the state of Massachusetts, which clearly include productions of written translations as a part of court interpreters' work (Committee, 2009, p. 8, pp. 14-15).

In addition, depending on what kind of terminology is available in each language to refer to the actual activities, the distinction between *interpreting* and *translation* becomes even more vague. The Japanese language fortunately has two distinct terms, one of which is *tsūyaku* that refers to *interpreting*, while the other, *honyaku*, refers to written translation. However, in English, it is not uncommon to use the verb *translate* just to refer to the act of providing a rendition from the SL (Source Language) to the TL (Target Language). Thus, an interpreter saying something like 'I should have translated it differently' would mean 'I should have used a different expression to render the meaning of the SL into the TL in my interpreting (oral translation),' though it is also possible to say 'I should have interpreted it differently.' Here, however, the statement 'I should have interpreted it differently' may have a slightly different nuance or meaning as the verb *interpret* also means to *understand something to have a particular meaning*. Thus, 'I should have interpreted it differently,' could also mean 'I should have understood the SL to mean something different from how I understood it and rendered it into the TL.'

Similarly, those who are not so familiar with the fine terminological distinctions may commonly say something like 'I don't speak Japanese, so I need a translator to come

with me,' meaning 'I need an interpreter who can speak my language.' Thus, it seems rather common to observe people using *a translator* to denote *an interpreter*, though the author has never heard the other way; i.e., people using the term *an interpreter* to refer to *a translator of a written text*, although as has been mentioned, *interpreters* are actually expected to, or due to circumstances often forced to do *written document translation* as a part of their *interpreting* work.

5. Translation vs. Interpretation: Lawyers' Debate

In preparation for the oral argument scheduled for February 21, 2012, briefs were submitted by both sides, Taniguchi, the petitioner, arguing that "interpreters" do not include "translators of a written text," and Kan Pacific, the respondent, arguing that they do. Both parties presented arguments basically in the following three areas: A) *ordinary meaning* according to dictionary definitions; B) actual practice in the two professions; and C) harm or benefits of including translation costs in interpreter costs; which are explained below.

A. *Ordinary Meaning*: Dictionary Definitions and Ordinary Usage

Ordinary meaning is a legal term. As has been mentioned in Section 1 above, legal professionals consider themselves specifically and exclusively qualified to act as *interpreters of law*, the most authoritative of whom in the U.S. are the nine justices of the Supreme Court, who are endowed with the ultimate prerogative to interpret and define the law of the land. As to how this is done, however, is in the realm of legal methods (Epstein and Walker, 2011, p. 23) on which these justices commonly and often vehemently disagree with one another.

For example, in interpreting the U.S. Constitution, some of the common methods used by the Supreme Court justices are: 1) *original intent*, which asks what the framers, or those who drafted the Constitution in 1787, wanted to do; 2) *textualism*, which simply focuses on what the Constitution textually says; 3) *original meaning*, which looks at what a clause meant or was understood by those who enacted it; or 4) *stare decisis*, a Latin term which means 'let the decisions stand,' and which tries to draw on the Court's previously made decisions, or precedents; in addition to others (Epstein and Walker, 2011, p. 25).

In the case of *Taniguchi v. Kan Pacific* (2012), since the Court Interpreters Act of 1978 did not define the word "interpreter" at the time of its enactment, and no other relevant statutory provisions define "interpreter" (*Taniguchi*, p. 566), the method expected to be used by the Supreme Court was *ordinary meaning*, based on *stare decisis*; i.e., a method used in one of the Court's precedents, *Asgrow Seed Co. v. Winterboer* (1995). Here, the Supreme Court tried to determine if the two verbs "to market" and "to sell" had the same

meaning or not, by exploring its ordinary use and also by referring to major dictionaries, such as *The Oxford universal dictionary* (Murray, Little, & Onions, 1955) or *Webster's new international dictionary* (Neilson and Knott, 1935).

B. Whether or Not the Two Terms are Distinguished in Professional Practice

Both parties argued whether or not the two occupations or jobs were clearly distinguished in actual assignments in courts or in the interpreting industry. Taniguchi, the petitioner, was supported by two *amici* briefs, or opinion statements by those with "a strong interest in the subject matter" (Garner, 2009, p. 263), from interpreting and translation professionals, together also citing close to eighty authorities in the field of interpreting and translation studies, in addition to numerous relevant legal precedents. Kan Pacific, the respondent, emphasized how blurred the distinction frequently becomes in the actual court interpreting practice, also citing more than thirty authorities in the field, some overlapping with those cited by Taniguchi, in addition to similarly numerous legal precedents.

C. Harm of Cost Taxation vs. Harm of Ending the Current Cost Taxation

Both parties explicated the harm in continuing or discontinuing the current cost taxation system. Major issues were: 1) amount of translation costs, especially of discovery documents, and 2) potential harm on prevailing litigants who still will have to pay the translation costs.

As an additional note on awarding costs, in the United States, the basic "American Rule" is that each party generally bears responsibility for its own litigation costs such as expenses for attorneys, experts, consultants, or investigators (*Taniguchi*, P. 573), except for what the court taxed the other party based on 28 U.S. Code §1920 mentioned in Section 3.2 above, unlike in the U.K., where "the loser pays" for "the prevailing party's litigation-related fees and expenses," presumably to encourage "fairness and efficiency" and to discourage "frivolous lawsuits" (Overfield, 2013, p. 218; Kritzer, 2005).

5.1 Arguments by Taniguchi, the Petitioner: *Interpreters* Do Not Include *Translators*

Taniguchi's major arguments contending that "cost of interpreters" do not include "translators" were as follows.

A. *Ordinary Meaning*: Dictionary Definitions and Ordinary Usage

A predominant number of authoritative dictionaries, of which 10 were cited, not only defined an "interpreter" as one who translates "orally," but some even specially mentioned that the usage of "interpreter" to refer to "one who translates a written text" is "obsolete," e.g., *The Chambers dictionary* (2006) and *The Oxford English dictionary* (Simpson & Weiner,

1989) (Brief for petitioner, 2012, p. 14). Also, professional literature (e.g. González, Vásquez, & Mikkelson, 2012; de Jongh, 1992) makes a clear distinction between "translation" as written and "interpretation" as spoken, while noting that the former also generically refers to both, so "interpretation" is a "proper subset limited to the spoken mode" (Brief for petitioner, 2012, pp. 12-13).

B. Two *Amici* Briefs from Professional Community: Clear Distinction between the Two

Two *amici* briefs were also submitted from the professional community to support the distinction between interpreters and translators: one from the National Association of Judiciary Interpreters and Translators, and the other from interpreting and translation professors.

The former, commonly called the NAJIT is a nationwide organization of judicial interpreters and translators in the U.S. founded in 1978, in the same year as the establishment of the Court Interpreters Act in the U.S., to ensure quality services, due process, equal protection, and equal access, covering, as of 2012, more than 1,200 languages including American Sign Language. (Brief of the National Association, 2012, p. 1).

Noting that "interpreters speak while translators write" as the most basic distinction, the 24-page-long NAJIT brief explained how the two professions are distinguished: 1) different skills required for certification tests as well as for the actual work; 2) Congress, the Executive, and the Courts consistently distinguish the two; 3) unlike interpreter fees that are restricted to the actual time served, e.g., the trial time, translation expenses are unpredictable and outside the reach of judicial supervision; and thus, 4) awarding translation costs, or making the losing party pay the translation costs of the winning party, imposes an extra burden on district courts as they would have to check whether the costs were "necessarily incurred," by inspecting each submitted proof (Brief of the National Association, 2012, pp. 5-23).

The other brief was submitted by a group of eight professors of interpreting and translation studies across the U.S.: R. Brecht and J. Danks of the University of Maryland Center for Advanced Study of Language; F. Massardier-Kennedy, K. Washbourne, and S. E. Wright of Kent State University; D. W. Massaro of the University of California, Santa Cruz; H. Mikkelson and B. S. Olsen of the Middlebury Institute of International Studies at Monterey; all of whom collectively explicated a clear distinction both from empirical and practical standpoints, referring to Gile (2011, p. 52) that two are "even incompatible professions" (Brief of amici curiae, 2012, p. 6).

In the 38-page-long *amici*, they argued that: 1) while dictionary definitions are useful, the Court should consider how the two occupations are clearly distinguished in the industry; 2) different skills apply to each work, with *sight translation*, i.e., oral translation

of a written text, clearly a part of interpreters' work; 3) each goes through different training, and as for court interpreters, they must also pass a "rigorous" federal certification examination and a similar examination for states, while for translators no such federal or state certification examinations exist; and 4) the types of researches conducted are also different between the two disciplines (Brief of amici curiae, 2012, pp. 7-37).

C. Risk of Awarding Large Translation Costs: Not Sensible as a Policy Matter

Allowing translation costs to be taxed on the losing party may lead to an unreasonably large amount, because unlike interpreting work limited to the trial time only, the amount of necessary translation could become limitless. In addition, translation expenses for civil litigations, e.g., translation of discovery documents, have been rising recently; e.g., one federal court awarded $1,000,000 in document translation in 2009 (Brief for petitioner, 2012, pp. 37-39), and this cost-awarding practice in U.S. courts for discovery documents is now creating concern overseas regarding their citizens getting involved in such huge cost burdens (Brief for petitioner, p. 40).

5.2 Arguments by Kan Pacific, the Respondent: *Interpreters* Include *Translators*

Kan Pacific's major responses to Taniguchi were as follows.

A. *Ordinary Meaning*: Dictionary Definitions and Ordinary Usage

Black's law dictionary (*Black's*, 1957; Garner, 2009) and *Webster's third new international dictionary* (Gove, 1976) both define "interpreter" as "a person who translates from one language to another," and then only adds with a sense divider "; esp." that it also "especially" refers to a person who "translates orally" (Brief for respondent, 2012, pp. 6-7), denoting that the general definition is "a person who translates," to which "especially, orally" is subsumed. Also, judges across the nation who regularly use interpreters as well as the Supreme Court justices themselves have referred to those who translate written language as "interpreters" (Brief for respondent, pp. 12-17).

B. Conventional Practice Inconvenienced and Immigrants Harmed by the New Change

Translated documentary evidence is as important as orally translated testimonial evidence, and court interpreters have long been engaged in document translation tasks on a regular basis such as: *sight translation*, i.e., oral translation of a written document; transcription and translation of recorded oral conversations; and other similar document translation tasks (Brief for respondent, 2012, pp. 7-8). The change will especially harm immigrants and non-English speakers, who will no longer be able to recover the translation costs even if they prevail (Brief for respondent, pp. 31-32).

With the above hybrid-type tasks that combine both spoken and written modes, the distinction seems to become even more blurred. For example, if Kan Pacific had had an interpreter sight-translate the written documents, i.e., contracts and medical records, in court instead of having them translated into written documents, would it have been completely taxable with no objections (Brief for respondent, p. 23)?

C. Risk of Awarding Large Translation Costs: Very Low & Judges Can Use Discretion

Taniguchi's concern about potential large translation cost taxation is groundless. The example of more than $1,000,000 was an extremely rare case. Among the cases cited by Taniguchi, only one awarded more than $76,000, and the rest were: 23 cases awarded less than $13,000; 16 cases awarded less than $3,000; and 8 awarded less than $1,000 (Brief for respondent, 2012, pp. 25-26). Insignificance of these costs can be evinced by the facts that no single *amicus* was filed from abroad for this case (Brief for respondent, p. 34)

More importantly, the wording of the provision 28 U.S. Code §1920(6) specifically says that a "judge or clerk of any court of the United States may tax as costs (underlined by the author)," meaning that the provision allows each judge to use discretion about awarding costs (Brief for respondent, p. 27)

6. Supreme Court's Split Judgment in Favor of Taniguchi (Petitioner)

6.1 Majority: *Ordinary* Meaning from Dictionaries & Narrower Scope for Taxable Costs

The majority (Alito, Roberts, Scalia, Kennedy, Thomas, and Kagan) ruled as follows. The statute in question, 28 U.S. Code §1920(6) "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title" was added to the preceding five taxable cost items listed in this code, in 1978, when Congress passed the Court Interpreters Act for the purpose of facilitating the use of more qualified court interpreters by introducing a certification system. However, since the act itself did not define the word "interpreter," the Supreme Court, based on a precedent, employed the method of defining the term based on its o*rdinary meaning*, by determining the most common usage at the time of the statute's legislation in 1978 (*Taniguchi*, pp. 565-566), as was explained in Section 5-A above.

Both parties thus presented how most authoritative English language and legal dictionaries defined "interpreter" in the editions that were available in 1978, at the time of the law's enactment. Most of them defined the word "interpreter" as one who "orally translates spoken language." Only one dictionary carried a gray-zone definition: *Webster's third new international dictionary* (Gove, 1976), which defined "interpreter" as "one that translates; *esp*.: a person who translates orally for parties conversing in different tongues,"

with a sense divider "*esp.* (especially)" in the middle. Kan Pacific (respondent) argued that this sense divider indicated that the definition before "*esp.*" represented a more general, commonly used definition, including both "written and oral" (*Taniguchi*, pp. 567-568)

The Supreme Court ruled, however, that "that a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense," and concluded that this sense divider specifically denoted what came after it was the most common, ordinary usage (*Taniguchi*, p. 568). Furthermore, the Court also referred to *The Oxford English dictionary* (Simpson & Weiner, 1989), which specifically mentioned that the use of the word "interpreter" to mean a "translator of written documents" was "obsolete," and noted that *Oxford* "[is] one of the most authoritative on the English language" (*Taniguchi*, p. 569).

Thus, with the definition of "interpreter" clarified and determined, the Court then noted that this decision was made in order to remain within the "narrow scope of taxable costs" (*Taniguchi*, p. 573). The taxable cost items, the Court noted, should be "limited to relatively minor, incidental expenses" such as "clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts," the assessment of which is often a simple "clerical matter that can be done by the court clerk," and is only a fraction compared to the "nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators" (*Taniguchi*, p. 573).

6.2 Dissent by Ginsburg, Sotomayor, & Breyer: Concern for Practical Implications

Ginsburg, joined by Sotomayor and Breyer, noted two issues of concern in her dissent: 1) awarding document translation costs had been a long-time practice in numerous district courts, which had also been affirmed by many appellate courts (*Taniguchi*, pp. 576-578); and 2) document translation was no less important than oral translation of testimonies for a fair and just trial, by equipping litigants to "present their cases clearly" and enabling non-English-speaking parties to "stand equal with others before the court," and for the courts to "decide the merits intelligently" (*Taniguchi*, p. 579).

Furthermore, the practice of awarding the cost for document translation went even further back before 1978, "spanning several decades" since 1930's, basing the taxation on codes which were predecessors of §1920 (*Taniguchi*, pp. 577-578). Also, the ruling based on *Taniguchi* would leave the interpreters' hybrid task zones unclear, e.g.; 1) if an interpreter spends hours outside court to translate a written document to prepare for an in-court sight translation task, the new *Taniguchi* ruling would only count the time used in court for the interpreter to orally read aloud the pre-translated document, without including the preparation time; or 2) if an interpreter listens to a recorded foreign-language speech, transcribes it, and translates it into English, the *Taniguchi* ruling would categorize

it as translation as it gives the interpreter "the luxury of multiple playbacks of the tape and the leisure to consult extrinsic linguistic sources" (*Taniguchi*, p. 580).

7. Power Differential: Legal Debate on Interpreters without Essential Interpreting Issues

7.1 Supreme Court's Real Aim & Absence of Real Interpreting Issues

Both parties submitted arguments in order for the Supreme Court to decide whether interpreters and translators are the same or not, primarily in three areas: A) *ordinary meaning* according to dictionary definitions; B) actual practice in the two professions; and C) harm or benefits of including translation costs in interpreter costs.

As is evident from the Court's majority ruling, the real aim of the Supreme Court or the most probable reason why the Court decided to hear this small civil suit taking place in a remote Pacific island, appealed by a former Japanese baseball player over a little more than $5,000 for the costs of an interpreter, was neither because the Court was interested in the work of interpreters or the fine technical differences between interpreters and translators, nor because the Court wanted to find out about the predicaments both of court interpreters tasked with additional written translation duties or non-English-speaking litigants becoming hesitant about filing civil suits fearing a large amount of document translation costs they may have to pay even if they prevail. The only judges that were concerned about such practical matters that interpreters and non-English-speaking litigants would have to face were those of the minority dissent: the late Ginsburg, joined by Sotomayor and Breyer.

Rather, the real aim, as was noted in the last paragraph of Section 6.1 above, was most probably to make clear that the Supreme Court will stay within the "narrow scope of taxable costs" and will reject an expansive interpretation of such cost items as "clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts" (*Taniguchi*, p. 573). In other words, the Court's real aim most possibly was to place *Taniguchi*'s baseball cap on some of the rapidly increasing cost taxations, particularly those of "e-discovery (electronic discovery)," the costs for sorting out a huge amount of electronically stored data such as those in "email, hard drives, databases, and clouds" to present to the opposing party in litigations, the decision on which was becoming controversial with divided opinions among courts (Overfield, 2013, p. 217).

Thus, in order for the Supreme Court to move forward with this agenda, this small civil dispute in Saipan involving an interpreter's fee may have been chosen, after which the Court distinguished interpreters and translators, not by carefully examining the

nature and the content of each work or technical differences between the professions, but simply by determining the *ordinary meaning* of "interpreter" based on major dictionaries' definitions, which, according to legal theories, was the adequate method of deciding a term's definition.

Though *Taniguchi*, the petitioner won the case, as to how much the Court was actually influenced or enlightened by all the voluminous *amici* briefs submitted by the NAJIT and the nation's leading interpreting studies professors, explicating the fine technical details about the two professions, remains unknown. In addition, with this new distinction between interpreters and translators drawn by the Supreme Court, the trial judges' traditional dictum to interpreters *not to interpret but just to translate, word for word, what a foreign-language-speaker has stated* (Morris, 1995, p. 32) would seem to gain an additional oxymoronic dimension, but for these judges, foreign language interpreters' *interpretation* will remain just *oral translation*, not the type of *interpretation* these judges exclusively engage in.

This whole case, hence, has reminded the author of how Pym (1999, p. 280) described the complete exclusion of interpreters by lawyers (the judge, the prosecutors, and the defense counsels), who, in their heated discussions on various English-Spanish interpreting issues, never sought or even thought of seeking advice directly from the interpreters who were right there on duty during the on-going sessions of O.J. Simpson's trial. For them, interpreters may have been physically there but only as a translation device, not as professional members on an equal footing who could be consulted about how to *interpret* the meaning of a foreign language, because *interpretation* is a job that exclusively belongs to lawyers (Pym, 1999, p. 280).

7.2 *Taniguchi* Decision: Stark Contrast with Another, Long-Unresolved Interpreter Issue

Furthermore, the way the Supreme Court's majority ruling very simply, singlehandedly, almost with a single stroke, made a decision on actually rather complex issues concerning the distinction between interpreting and translation, without going into any of the fine details of necessary skills or required tasks in real work, reminded the author of another interpreter-related legal issue in the U.S., which, in stark contrast with *Taniguchi*, continues to remain unresolved: the hearsay issue of interpreter-mediated police interviews. Thus, this paper next discusses how the police interpreter's hearsay issue has been treated by the U.S. Supreme Court, comparing *Taniguchi* with another interpreter-related case that also took place in Saipan, *U.S. v Aifang Ye* (2015). Through a comparative analysis of how the Supreme Court has dealt with these two cases involving a foreign language interpreter, by using Mason's (2015) "three types of power" and Lukes' (2005) "three power dimensions," this paper delineates how the judicial authority's power is continuously exerted on foreign language interpreters.

8. *U.S. v Aifang Ye* (2015): Police Interpreter's Hearsay Issue

This is a case of a Chinese woman Ye, who was convicted of passport forgery in Saipan. In September, 2011, Ye and her husband, both Chinese citizens, travelled from China to Saipan on a tourist visa. Her husband soon returned to China but Ye, who was pregnant, overstayed her visa and gave birth to their second child in February, 2012, who was named Jessie and by the place of her birth became a U.S. citizen. Obtaining a passport for Jessie required both parents' "in person" application at the passport office, or by one of them showing a notarized statement or affidavit by the other absent parent (*U.S. v Aifang Ye*, 2015, p. 398).

Ye and her husband wished to obtain a U.S. passport for Jessie, but her husband trying to get a notarized statement would draw attention at home in China to the birth of a second child, which they wanted to prevent. Upon obtaining advice from a local agent in Saipan, Kaiqi Lin, who was helping Ye's document translation, Ye decided to have her husband's brother travel from China to Saipan to accompany her to the passport office in Saipan, disguising as her husband (*Ye*, 2015, p. 398). The case only briefly explains that Ye and her husband did this because the new-born daughter was their second child, which they wanted to keep as private as possible (*Ye*, 2015, p. 398). The author notes that this may have been related to the fact that this baby was born in February, 2012, which was before China's official abolition of the "One-Child Policy" that became effective only after January, 2016. Unfortunately for Ye, however, the DHS (Department of Homeland Security) had Lin "under their surveillance" and found that the passport of Ye's "husband" was false. Ye was arrested (*Ye*, 2015, p. 398).

Ye provided her statement to the DHS through a "Language Line" interpreter, which was *not recorded*. The U.S., just like Japan, is lagging rather behind other advanced countries in the introduction of mandatory electronic recording of police interviews, especially in federal jurisdictions (Recent, 2015, p. 1559; Recording, 2017, p. 5), to which DHS belongs. Ye was indicted, convicted of aiding passport falsification, and appealed (*Ye*, 2015, p. 398). The primary focus of Ye's appeal was the inadequate translation provided by the Language Line interpreter, who was actually working from New York (Cal-Meyer & Coulthard, 2017, p. 2).

Ye argued that the telephone interpreter, who had translated what had been described as "copied" into "forged," which was a highly loaded word that would have never been used (Petition, 2016, p. 34), was biased, and because this interpreter did not testify in court, Ye was unable to verify the accuracy of the translation provided by this telephone interpreter, which in the U.S. was also a violation of Ye's confrontation right guaranteed by the Sixth Amendment, a right of a criminal defendant to cross-examine a person who

made a statement against the defendant. If what this person said is used as evidence to convict the defendant even if this person does not testify in court and undergo cross-examination, what this person said becomes *hearsay*, the use of which the U.S. Constitution prohibits. After her appeal in the Ninth circuit failed, Ye appealed to the U.S. Supreme Court, just as Taniguchi did, arguing that, by not having been given the opportunity to cross-examine the telephone interpreter, Ye's Sixth Amendment confrontation right had been violated, (Petition, pp. 25-36), which, however, was turned down by the Supreme Court.

8.1 Police Interpreter's Hearsay Issue: 200-Year-Long Unresolved Issue

As to whether or not statements translated by a police interview interpreter who does not testify in court becomes hearsay is actually a long unresolved issue in US courts, as unlike in the case of *Taniguchi*, the U.S. Supreme Court has continued to deny all the certiorari on this issue up to this very day (Brief for the United States, 2016, p. 6, p. 11; Tamura, 2019, pp. 1-2). Also, unlike the U.K. which resolved the same issue in 1958 by deciding that interpreter-mediated police interview statements become all hearsay unless the interpreter testifies in court (*R v. Attard*, 1958), in addition to introducing audio/video recording of police interviews later in 1984 by the implementation of the PACE (Police and Criminal Evidence Act), U.S. courts have continuously ruled that police interview statements translated by interpreters are not hearsay because an interpreter is a *language conduit* creating no extra layer of hearsay (e.g. *U.S. v. Nazemian*, 1991; Tamura, 2019, 2020).

This situation remains unchanged despite continuing criticisms from concerned judges (e.g. *U.S. v. Charles*, 2013; *Taylor v. State*, 2016), human rights lawyers around the world (e.g. in Australia, Laster and Taylor, 1994), as well as linguists and interpreting studies researchers who have empirically demonstrated that interlingual translation is never a mechanical process, nothing like a *conduit* (Roy, 1989, p. 1, 2000, p. 101; Wadensjö, 1998, p. 8; Berk-Seligson, 1990/2002, pp. 219-221; Angelelli, 2004, p. 19; Clifford, 2004, pp. 90-96; Morris, 1995, p. 26, 1999, p. 6). Thus, the two-century-long debate continues to remain unresolved for police interpreters as well as for the users of their services, who also remain subjected to potentially inaccurate or biased translation which also remains impossible to verify as the law refuses to require police interpreters' in-court testimony while being very slow in implementing complete digital recording of police interviews (Recent, 2015, p. 1559; Recording, 2017, p. 5), all of which result in continuous violation of non-English-speaking criminal defendants' due process rights.

8.2 Incomplete Unity among Professionals' *Amici* for Ye: Lukes' 3rd Power Dimension

Just as in the case on *Taniguchi*, two *amici* briefs were submitted from the interpreting community: one was from court interpreters, but not from the NAJIT, the nationwide

organization, but just from one state only, the Massachusetts Association of Court Interpreters, though it was a 25-page-long brief, one page longer than the one by the NAJIT for *Taniguchi*; and the other one was from interpreting studies professors, but this too, unlike the 38-page long brief submitted for *Taniguchi* by eight professors in unison, was a 13-page-long brief prepared by only two of the above eight professors, namely, H. Mikkelson and B. S. Olsen of the Middlebury Institute of International Studies at Monterey.

In addition, the opinions expressed in these two briefs were not quite in complete harmony. The former strongly and progressively contended that interpreter-mediated police interview statements are fundamentally all hearsay because: 1) an interpreter is not a *language conduit* that produces translations through an objective and precise process; but 2) rather, interpretation involves numerous subjective judgements; and thus 3) interpreters should be required to testify in court (Brief for the Massachusetts, 2016, p. 6, p. 7).

In contrast, the brief by Mikkelson and Olson (Brief of interpreting and translation professors, 2016) only stated: 1) a uniform case law in all U.S. courts was necessary (pp. 4-7); 2) judicial community must understand that accurate translation never means mechanical word-switching but is a faithful rendition of what a speaker has "meant" (pp. 7-11); and 3) clarity on testimony requirements are necessary as they will have a huge impact not only on confidentiality and impartiality codes but also on interpreter training as an interpreter may have to remember "exact words of the defendant" as well as "her own words" (pp. 11-13).

Unlike the two *amici* briefs for *Taniguchi*, which unanimously and unitedly voiced that interpreters and translators were two distinctly different professions, what can be detected from these two *amici* briefs for *Ye* is the absence of strong, completely united opinion among interpreting professionals regarding whether or not interpreter-mediated police interview statements are fundamentally hearsay requiring interpreters' in-court testimony. The ambivalence is of course understandable as it is only natural for those who have received or given professional interpreter training to feel that all the rigorous practice is for the interpreters to specifically become able to reproduce in the target language exactly the same meaning as what was expressed in the source language. In other words, interpreter training is given for the very purpose of enabling interpreters to overcome the conventional hearsay obstacle by becoming a kind of trained "non-hearsay" messengers. For this reason, interlinguistic translation by a qualified interpreter, many interpreting professionals may feel, should be regarded as fundamentally different from a typical hearsay testimony, just as an incision with a surgical knife by a medical doctor is completely different from an ordinary person cutting another person with a knife.

That said, the progressive position taken by the Massachusetts Association of Court Interpreters is that with all the diligent, hard training and practice, interpreting is never a

mechanical process like a precision machine, but instead involves numerous experience-based subjective judgments on the part of the interpreter every step along the way, and thus the interpreter is accountable for every translation decision made during the whole process, just as a medical surgeon is accountable for every step made during the surgery.

In short, the interpreting professionals' ideology on this hearsay issue is not in perfect harmony, with many believing that qualified interpreters' faithful interlingual translation can escape from creating an extra layer of hearsay, an ideology judicial community has always upheld. This is exactly where, this paper argues, Luke's third power dimension may be at work: X exercises power to influence Y's wishes and desires, so Y will wish for what may be against Y's interest. Interpreters may have been influenced to share the judicial authority's ideology even at the cost of being continuously deemed *language conduit*, which they detest.

8.3 The Court's Silence on Interpreters' Hearsay: Power Theories by Mason and Lukes

This 200-year-long interpreters' hearsay issue, however, is even more complex than the above-mentioned professional interpreters' ideological ambivalence, or more correctly, this paper argues, the issue is actually very simple. This paper has demonstrated how the Supreme Court can, if they so wish, very simply and singlehandedly decide complicated issues involving foreign language interpretation and translation. With all the technical discussions presented by the professionals, the Court, almost with a single stroke, decided that interpreters and translators are different, based simply on how dictionaries defined the two terms.

This means that if the Supreme Court really so wishes, they can end this two-century-long dispute today, by deciding that: 1) interpreter-mediated police interview statements are hearsay and thus interpreters' in-court testimonies are necessary; and 2) complete digital recording of police interviews is mandatory to help enable interpreters' translation accuracy verification. Such decisions of course would open Pandora's box as they will begin to eliminate unqualified, ad hoc, putatively bilingual police interpreters who are currently at work, the rampant practice of which is actually the real, fundamental social problem that awaits a solution, which, however, is defied by the continued absence of legislation like the Court Interpreters Act of 1978 or a decisive Supreme Court ruling (Berk-Seligson, 2009; González, Vásquez, & Mikkelson, 2012, pp. 443-530; Tamura, 2019, 2020).

The only possible reason why this is not done, this paper argues, is a result of judicial authority's complex power execution on language interpreters that can be delineated by a combination of Mason's (2015) "three types of power" and Lukes' (2005) "three power dimensions." As was mentioned in Section 2.1 above, Mason (2015) notes three types of

power constantly at play in interpreter-mediated discourse: 1) power relations between languages; 2) institutionally pre-determined power disparities; and 3) interpreters' interactional power advantage (pp. 314-316).

In U.S. courts, criminal defendants requiring interpreters are, more often than not, speakers of minority languages associated with the socially low, uneducated linguistic and cultural group, to which interpreters themselves may also belong, thus possibly inviting low social respect. However, as the only bilingual person in an interpreter-mediated discourse, interpreters also have interactional power advantage, to prevent the abuse of which, it is not unlikely that the judicial authority tries to reinforce their rein using their "institutional power," by reducing the status of language interpreters to a mere *language conduit*, who only mechanically *translates word-for-word,* without *interpreting* the meaning, or intellectually thinking as someone with a professional knowledge would do.

However, if an interpreter becomes *not a conduit* but a trained professional with technical knowledge who is also accountable for the translation judgments and decisions made during a police interview and testifies in court as an *interlingual interpretation* expert on how to *interpret* the meaning of the SL and translate it into the TL, the judicial authority's exclusive prerogative to act as *the only language interpreter in court, the interpreter of the language of law* becomes threatened, and they may lose their control over the trial they preside in.

Furthermore, by repudiating the theory of *non-hearsay by a language conduit*, the trial court judges will lose the power to exercise their discretion, which permits police interpreters, no matter how unqualified, to pass as *language conduits* with their translation issues untouched and unquestioned, so that the judges can focus on what they deem as more important issues, i.e., the conviction of the defendants who have otherwise been proven guilty beyond reasonable doubt. Only if and when there is a need, the judges can also use their discretion to raise a translation issue to influence the trial's outcome.

If there is any truth in the above observations by the author, then this may be where Lukes' second power dimension may be at work: X exercises power to pre-empt potential conflict that may arise between X and Y. The U.S. Supreme Court willingly and knowingly continues not to make a decision on the hearsay issue of interpreter-mediated police interview statements so that the judicial authority can maintain its power and superiority over foreign language interpreters.

9. Conclusion

This paper conducted a comparative analysis of the two most recent U.S. Supreme Court cases involving foreign language interpreters, *Taniguchi v. Kan Pacific*, which was

adjudicated in 2012, and *Aifang Ye v. U.S.*, the certiorari of which was denied on June 13, 2016. By applying Ian Mason's (2015) "three types of power" that come into play in interpreter-mediated discourse and Steven Lukes' (2005) "three power dimensions," the paper argued that the power disparity between the legal community and the interpreting community is not just a product of direct power exercise and coercion, but also a result of very complex power exertion, subtle and indirect but astute, by the judicial authority, successfully maintaining their superiority and prerogative to act as the only *interpreter* in a court of law, but also with a social cost such as continuous silent violation of non-English-speaking criminal defendants' due process rights by the Court's perpetual silence on the hearsay issue of interpreter-mediated police interviews.

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