J. Y. Interpretation No.708（February 6, 2013）*

【Immigration Detention of Foreign Nationals Pending Deportation】

ISSUE: 1.Is it constitutional to not provide prompt judicial relief to a foreign national who is facing deportation and is being temporarily detained by the National Immigration Agency ?

2.Is it constitutional to not have a court review an extension of a foreign national's temporary detention ?

RELEVANT LAWS:

Article 8, Paragraph 1 of the Constitution（憲法第八條第一項）; Article 38, Paragraphs 1 and 8 of the Immigration Act（入出國及移民法第三十八條第一項、第八項）; J.Y. Interpretation Nos. 392, 588, and 636（司法院釋字第三九二號、第五八八號、第六三六號解釋）; Regulations Governing the

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* Translated by Yen-Chia Chen and Margaret K. Lewis.

[1] Translators' note: Although "驅逐出國"（or "驅逐"）, "遣送回國"（or "遣返"）, and "遣送" all refer to a foreign national leaving a state involuntarily, they have slightly different meanings. In order to convey these nuances (e.g., that "驅逐" has a stronger tone than "遣送"), we have used different English terms for each.

[2] Translators' note: "法官保留（原則）" refers to the principle that, before police or prosecutors carry out a compulsory measure (e.g., search, detention, or seizure), the court must review and approve the measure. Although sometimes translated as "habeas corpus," this phrase does not refer to a legal writ whereby a person requests the court to determine whether a detention is lawful（i.e., "人身保護令狀"）. In using the translation "principle of prior judicial review," this concept should not be confused with the Chinese phrase "司法審查," which is generally used to refer to the exclusive power held by the Council of Grand Justices (i.e., Taiwan's constitutional court) to review the constitutionality of a statute.

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

Detention of Foreign Nationals（外國人收容管理規則）。

KEYWORDS:

deportation （驅逐出國）, repatriation （遣返 / 遣送回國）, foreign nationals （外國人）, detention （收容）, temporary detention（暫時收容）, principle of prior judicial review （法官保留原則）, protection of physical freedom （人身自由之保障）, due process of law （正當法律程序）.**

HOLDING: Article 38, Paragraph 1, of the Immigration Act (as amended on December 26, 2007; hereinafter the "Act") provides, "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ....." (this provision is the same as the provision promulgated on November 23, 2011, which provides, "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ....."). Under this provision, the temporary detention of a foreign national for a reasonable period in order to complete repatriation does not provide the detainee with prompt judicial relief. Moreover,

解釋文：中華民國九十六年十二月二十六日修正公布之入出國及移民法第三十八條第一項：「外國人有下列情形之一者，入出國及移民署得暫予收容……」（即一００年十一月二十三日修正公布同條項：「外國人有下列情形之一，……入出國及移民署得暫予收容……」）之規定，其因遣送所需合理作業期間之暫時收容部分，未賦予受暫時收容人即時之司法救濟；又逾越上開暫時收容期間之收容部分，非由法院審查決定，均有違憲法第八條第一項保障人民身體自由之意旨，應自本解釋公布之日起，至遲於屆滿二年時，失其效力。

an extension of the aforementioned temporary detention also is not subject to judicial review. These two aspects of the provision are both in violation of the meaning and purpose of physical freedom protection guaranteed under Article 8 of the Constitution, and shall be null and void no later than two years from the issuance of this Interpretation.

REASONING: Physical freedom is fully guaranteed. It is a prerequisite to the exercise of other freedoms and rights protected under the Constitution, and a critical and fundamental human right. Therefore, Article 8, Paragraph 1, of the Constitution expressly stipulates, "Physical freedom shall be guaranteed to the people. In no case except that of flagrante delicto, which shall be separately prescribed by law, shall any person be arrested or detained other than by judicial or police authorities in accordance with procedures prescribed by law. No person shall be tried or punished other than by a court in accordance with procedures prescribed by law. Any arrest, detention, trial, or punishment not carried out in ac-

解釋理由書：人民身體自由享有充分保障，乃行使其憲法上所保障其他自由權利之前提，為重要之基本人權。故憲法第八條第一項即明示：「人民身體之自由應予保障。除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。非由法院依法定程序，不得審問處罰。非依法定程序之逮捕、拘禁、審問、處罰，得拒絕之。」是國家剝奪或限制人民身體自由之處置，不問其是否屬於刑事被告之身分，除須有法律之依據外，尚應踐行必要之司法程序或其他正當法律程序，始符合上開憲法之意旨（本院釋字第五八八號、第六三六號解釋參照）。又人身自由係基本人權，為人類一切自由、權利之根本，任何人不分國籍均應受保障，此為現代法治國家共同之準

cordance with procedures prescribed by law may be resisted." In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts a person's physical freedom—irrespective of whether the person is facing criminal charges—must have a legal basis and also fulfill required judicial procedures or other due process requirements (see J.Y. Interpretations Nos. 588 and 636). Furthermore, physical freedom is a fundamental human right and the foundation of all freedoms and rights of humankind. Protecting physical freedom of each individual, regardless of his nationality, is a common principle upheld by all modern rule-of-law states. Thus, the guarantee of physical freedom under Article 8 of the Constitution extends to foreign nationals, and they shall receive the same protection as domestic nationals.

則。故我國憲法第八條關於人身自由之保障亦應及於外國人，使與本國人同受保障。

Article 38, Paragraph 1, of the Act (as amended on December 26, 2007) provides: "The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances

九十六年十二月二十六日修正公布之入出國及移民法第三十八條第一項規定：「外國人有下列情形之一者，入出國及移民署得暫予收容……」（即一００年十一月二十三日修正公布同條

項：「外國人有下列情形之一，……入出國及移民署得暫予收容……」，下稱系爭規定）。據此規定，內政部入出國及移民署（下稱入出國及移民署）得以行政處分收容外國人。

.....” (this is the same as the provision promulgated on November 23, 2011: “The National Immigration Agency may temporarily detain a foreign national under any of the following circumstances .....”) (hereinafter the “disputed provision”). Accordingly, the National Immigration Agency (hereinafter the “Agency”) may detain a foreign national through administrative acts.

系爭規定所稱之「收容」，雖與刑事羈押或處罰之性質不同，但仍係於一定期間拘束受收容外國人於一定處所，使其與外界隔離（入出國及移民法第三十八條第二項及「外國人收容管理規則」參照），亦屬剝奪人身自由之一種態樣，係嚴重干預人民身體自由之強制處分（本院釋字第三九二號解釋參照），依憲法第八條第一項規定意旨，自須踐行必要之司法程序或其他正當法律程序。惟刑事被告與非刑事被告之人身自由限制，在目的、方式與程度上畢竟有其差異，是其踐行之司法程序或其他正當法律程序，自非均須同一不可（本院釋字第五八八號解釋參照）。查外國人並無自由進入我國國境之權利，而入出國及移民署依系爭規定收容外國

While the term “detention” prescribed in the disputed provision differs from criminal detention or punishment in nature, it confines foreign nationals at a certain place for a certain period of time in order to isolate them from the outside world (see Article 38, Paragraph 2, of the Act, and the Regulations Governing the Detention of Foreign Nationals). Such detention constitutes a form of deprivation of physical freedom and a compulsory measure that severely interferes with physical freedom (see J.Y. Interpretation No. 392). Therefore, it must fulfill the required judicial procedures and other due process requirements in accordance with the meaning and purpose of Article

8, Paragraph 1, of the Constitution. Nonetheless, given that restrictions on physical freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods, and degree, the required judicial procedures and other due process requirements for restrictions on physical freedom of non-criminal defendants and of criminal defendants need not be identical (see J.Y. Interpretation No. 588). A foreign national does not have the right to freely enter our state's territory. The Agency detains foreign nationals in accordance with the disputed provision in order to repatriate foreign nationals as soon as possible, rather than to arrest and detain them as criminal suspects. In the event that a foreign national can be quickly repatriated in a short period of time, the Agency needs a reasonable period of time to take care of repatriation related matters, such as purchasing plane tickets, applying for passports and other travel documents, contacting relevant institutions for assistance, and conducting other matters essential to repatriation. Thus, given the value judgments implicit in the entire legal system, it is reasonable

人之目的，在儘速將外國人遣送出國，非為逮捕拘禁犯罪嫌疑人，則在該外國人可立即於短期間內迅速遣送出國之情形下，入出國及移民署自須有合理之作業期間，以利執行遣送事宜，例如代為洽購機票、申辦護照及旅行文件、聯繫相關機構協助或其他應辦事項，乃遣送出國過程本質上所必要。因此，從整體法秩序為價值判斷，系爭規定賦予該署合理之遣送作業期間，且於此短暫期間內得處分暫時收容該外國人，以防範其脫逃，俾能迅速將該外國人遣送出國，當屬合理、必要，亦屬國家主權之行使，並不違反憲法第八條第一項保障人身自由之意旨，是此暫時收容之處分部分，尚無須經由法院為之。惟基於上述憲法意旨，為落實即時有效之保障功能，對上述處分仍應賦予受暫時收容之外國人有立即聲請法院審查決定之救濟機會，倘受收容人於暫時收容期間內，對於暫時收容處分表示不服，或要求由法院審查決定是否予以收容，入出國及移民署應即於二十四小時內將受收容人移送法院迅速裁定是否予以收容；且於處分或裁定收容之後，亦應即以受收容之外國人可理解之語言及書面，告知其處分收容之原因、法律依據及不服處分之司法救濟途徑，並通知其指定之在臺

and necessary that the disputed provision provides the Agency with a reasonable period for the repatriation operation, and permits the Agency to temporarily detain foreign nationals during this short period in order to prevent escape and to achieve quick repatriation. This is also an exercise of sovereignty and does not contravene the meaning and purpose of physical freedom protection under Article 8, Paragraph 1, of the Constitution. Accordingly, such temporary detention need not be subject to court review. However, based on the meaning and purpose of the aforementioned constitutional provision, and in order to ensure prompt and effective protection, foreign nationals under the foregoing temporary detention should be afforded a remedial opportunity to request an immediate judicial review of the detention. If a detainee objects to the temporary detention or requests judicial review while under detention, the Agency must transfer the detainee to the court within twenty-four hours for speedy review whether detention should be imposed. Once a temporary detention is imposed via an administrative act or a

親友或其原籍國駐華使領館或授權機關，俾受收容人善用上述救濟程序，得即時有效維護其權益，方符上開憲法保障人身自由之意旨。至於因執行遣送作業所需暫時收容之期間長短，則應由立法者斟酌行政作業所需時程及上述遣送前應行處理之事項等實際需要而以法律定之。惟考量暫時收容期間不宜過長，避免過度干預受暫時收容人之人身自由，並衡酌入出國及移民署現行作業實務，約百分之七十之受收容人可於十五日內遣送出國（入出國及移民署一０二年一月九日移署專一蓮字第一０二００一一四五七號函參照）等情，是得由該署處分暫時收容之期間，其上限不得超過十五日。

court ruling, the detained foreign national shall be notified in writing using a language comprehensible to him. The written notice should provide the rationale and the legal basis of the detention, as well as the channels for requesting judicial relief. In order that the detainee can avail himself of the aforementioned procedures for relief to promptly and effectively protect his rights, and thus comply with the meaning and purpose of physical freedom protection under the Constitution, notice shall also be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized agency of the detainee's national origin. With regard to the length of the temporary detention for the enforcement of repatriation, the legislature should prescribe it by law after taking into consideration the time frame required for administrative processing and the practical concerns in the prerepatriation operations. Nonetheless, the length of the temporary detention may not be too long so as to avoid excessively interfering with the detainee's physical freedom. Moreover, the Agency's current practice results in around seventy percent of de-

tainees being repatriated within fifteen days (see National Immigration Agency Memorandum Yi-Shu-Zhuan-Yi-Lian No. 1020011457, January 9, 2013). Given the foregoing considerations, the maximum duration for the temporary detention imposed by the Agency shall not exceed fifteen days.

In the event that a detainee does not object to or request judicial review of the detention during the period of temporary detention and the detention period is about to expire, if the Agency deems it necessary to continue the detention, an impartial and independent court shall, in accordance with the law, review and decide whether the temporary detention, as stipulated in the disputed provision, shall be extended. This is because such extension involves a longterm deprivation of physical freedom and thus must comply with the due process requirements for physical freedom protection under the Constitution. Ac-cordingly, the Agency shall transfer the detainee to the court prior to the expiration of the temporary detention and petition for a ruling

至受收容人於暫時收容期間內，未表示不服或要求由法院審查決定是否收容，且暫時收容期間將屆滿者，入出國及移民署倘認有繼續收容之必要，因事關人身自由之長期剝奪，基於上述憲法保障人身自由之正當法律程序之要求，系爭規定關於逾越前述暫時收容期間之收容部分，自應由公正、獨立審判之法院依法審查決定。故入出國及移民署應於暫時收容期間屆滿之前，將受暫時收容人移送法院聲請裁定收容，始能續予收容；嗣後如依法有延長收容之必要者，亦同。

to continue the detention; thereafter, if, in accordance with the law, it is necessary to extend the detention again, such extension shall be handled in the same manner.

In sum, the disputed provision authorizes the Agency to temporarily detain foreign nationals facing deportation via administrative acts. It is not unconstitutional that the disputed provision allows a temporary detention for a reasonable period due to the repatriation operation. As far as the necessary protection of a detainee is concerned, Article 38, Paragraph 8, of the Act, as amended on November 23, 2011, has already provided that the detainee shall be notified in writing using a language comprehensible to him; the written notice shall contain the rationale of the detention, and the methods, time frame, and relevant authorities for requesting relief; and that notice shall also be given to the embassy or authorized agency from the detainee's national origin. Nevertheless, the disputed provision can hardly be deemed to have sufficiently protected the fundamental human rights of detainees because it does not afford temporary de-

綜上所述，系爭規定授權入出國及移民署對受驅逐出國之外國人得以行政處分暫予收容，其中就遣送所需合理作業期間之暫時收容部分，固非憲法所不許，惟對受收容人必要之保障，雖於一００年十一月二十三日已修正增訂入出國及移民法第三十八條第八項，規定收容之處分應以當事人理解之語文作成書面通知，附記處分理由及不服處分提起救濟之方法、期間、受理機關等相關規定，並聯繫當事人原籍國駐華使領館或授權機構，但仍未賦予受暫時收容人即時有效之司法救濟，難認已充分保障受收容人之基本人權，自與憲法第八條第一項正當法律程序有違；又逾越上開暫時收容期間之收容部分，系爭規定由入出國及移民署逕為處分，非由法院審查決定，亦牴觸上開憲法規定保障人身自由之意旨。

tainees with prompt and effective judicial relief. Therefore, the disputed provision violates due process of law under Article 8, Paragraph 1, of the Constitution. Furthermore, the disputed provision's allowance for the Agency to extend the temporary detention without court review also contravenes the aforementioned meaning and purpose of physical freedom protection under the Constitution.

Amending the laws relevant to this case will require a certain period of time. The amendment should contain a thoroughly studied and comprehensive set of supporting regulations for instance, whether to allow release on bail or release of detainees to the custody of another, as well as legal aid and how to structure the mechanisms for hearing cases, such as the courts' speedy review and appellate remedies. In order to preserve human dignity while also protecting the rights of foreign nationals and ensuring national security, the amendment should provide regulations for the facilities of immigration detention centers and the reasonableness of their management. The amendment

衡酌本案相關法律修正尚須經歷一定之時程，且須妥為研議完整之配套規定，例如是否增訂具保責付、法律扶助，以及如何建構法院迅速審查及審級救濟等審理機制，並應規範收容場所設施及管理方法之合理性，以維護人性尊嚴，兼顧保障外國人之權利及確保國家安全；受收容人對於暫時收容處分表示不服，或要求由法院審查決定是否予以收容，而由法院裁定時，原暫時收容處分之效力為何，以及法院裁定得審查之範圍，有無必要就驅逐出國處分一併納入審查等整體規定，相關機關應自本解釋公布之日起二年內，依本解釋意旨檢討修正系爭規定及相關法律，屆期未完成修法者，系爭規定與憲法不符部分失其效力。

should also include comprehensive regulations on issues including the effect of the original temporary detention disposition when the detainee objects to or requests judicial review on whether to impose detention, as well as whether the scope of judicial review should necessarily include the deportation decision. In light of the foregoing, the relevant authorities should review and amend the disputed provision and the relevant laws in accordance with the intent of this Interpretation within two years from the issuance of this Interpretation. The unconstitutional portions of the disputed provision shall become null and void if they have not been amended within two years from the issuance of this Interpretation.

The petitioners contend that the term "detention" in Article 1 of the Habeas Corpus Act should include the "[immigration] detention" in the disputed provision, and thus a person who is not otherwise being arrested and detained as a criminal suspect may petition for habeas corpus. Accordingly, the petitioners challenge the appropriateness of the final criminal

聲請人主張提審法第一條之拘禁應包括系爭規定之收容，無須因犯罪嫌疑受逮捕拘禁，亦得聲請提審，而分別指摘臺灣高等法院臺中分院九十九年度抗字第三００號及臺灣高等法院九十九年度抗字第五四三號刑事確定終局裁定之見解不當云云，係爭執確定終局裁定認事用法之當否，尚非具體指摘提審法第一條之規定客觀上有何牴觸

judgments of the Taiwan High Court Taichung Branch 99 Kang No. 300 (2010) and the Taiwan High Court 99 Kang No. 543 (2010). The petitioners' arguments actually dispute the appropriateness of the fact finding and application of law in the courts' final judgments rather than specifically challenging the constitutionality of Article 1 of the Habeas Corpus Act. The petitioners also challenge the constitutionality of Article 38, Paragraphs 2 and 3, of the Act (as amended on December 26, 2007), Article 36, Paragraphs 2 to 5, and Article 38, Paragraph 1, Subparagraph 4, of the Act (as amended on November 23, 2011), as well as Article 8 of the Habeas Corpus Act. However, the petitioners may not petition for an interpretation of these provisions because the courts did not apply them in the final judgments on which the petitioners rely. The aforementioned portions of the petitions do not comply with Article 5, Paragraph 1, Subparagraph 2, of the Constitutional Interpretation Procedure Act and shall all be dismissed in accordance with Paragraph 3 of the same Article.

憲法之處；又聲請人指摘九十六年十二月二十六日修正公布之入出國及移民法第三十八條第二項，與聲請人之一另指摘同條第三項，以及一００年十一月二十三日修正公布之同法第三十六條第二項至第五項、第三十八條第一項第四款，暨提審法第八條等規定違憲部分，因各該條項款未經該聲請人執以聲請之確定終局裁定所適用，自不得對之聲請解釋。上揭聲請部分核與司法院大法官審理案件法第五條第一項第二款規定不合，依同條第三項規定，均應不受理。

Justice Yeong-Chin Su filed concurring opinion.

Justice Ching-You Tsay filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

Justice Pai-Hsiu Yeh filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Chen-Shan Li filed concurring opinion in part and dissenting opinion in part.

Justice Chun-Sheng Chen filed concurring opinion in part and dissenting opinion in part.

Justice Chang-Fa Lo filed concurring opinion in part and dissenting opinion in part.

Justice Shin-Min Chen filed dissenting opinion.

本號解釋蘇大法官永欽提出之協同意見書；蔡大法官清遊提出之協同意見書；黃大法官茂榮提出之協同意見書；葉大法官百修提出之協同意見書；湯大法官德宗提出之協同意見書；李大法官震山提出之部分協同部分不同意見書；陳大法官春生提出之部分協同部分不同意見書；羅大法官昌發提出之部分協同部分不同意見書；陳大法官新民提出之部分不同意見書。

EDITOR'S NOTE:

Summary of facts: (1) In 2008, the Agency issued X, a Thai national, a deportation order because she provided false information on her immigration documents. However, X did not physically

編者註：

事實摘要：(一)X 為泰國籍人，97 年間因填載資料不實為移民署為強制驅逐出國處分，惟未實際離境，嗣於 99 年間遭逮捕。該署以其有 (96.12.26) 入出國及移民法第 38 條第 1 項所定，

leave Taiwan after receiving the order and was arrested in 2010. Based on Article 38, Paragraph 1, Subparagraph 1 (failure to depart the state in accordance with a deportation order) and Subparagraph 2 (illegal entry or overstay of his period of stay or residence) of the Act, as amended on December 26, 2007, the Agency detained X at the Nantou Detention Center for 90 days before X was repatriated.

第 1 款受驅逐出國未辦妥出國手續、第 2 款非法入國或逾期停留、居留之事由，而收容在南投收容所，至遣返日止共收容 90 日。

(2) Y, an Indonesian national, was dismissed by her employer after she fled from her place of employment at the end of 2008. In 2010, the Agency detained Y based on Article 38, Paragraph 1, Subparagraph 2 (overstaying her period of residence), of the Act. Y was detained for 145 days before being repatriated.

(二)Y 為印尼籍人，97 年底自雇主處逃離遭撤銷聘僱，99 年間經移民署以其逾期居留有上開第 2 款事由而予收容，至遣返日止共收容 145 日。二人於收容期間分別聲請提審，均遭法院以非因犯罪嫌疑被逮捕拘禁，與提審法第 1 條規定不符而裁定駁回，乃分別主張上開規定違憲，聲請解釋。

While under detention, X and Y respectively petitioned for habeas corpus but were both rejected by the courts on the ground that they did not meet the requirements of Article 1 of the Habeas Corpus Act because they were not arrested and detained as criminal suspects. X and Y then respectively petitioned for

interpretation, arguing that the foregoing provisions are unconstitutional.

Note: The calculation of X's "90-day" detention was based on the report of the National Immigration Agency Memorandum Yi-Zhuan-Yi-Lian No. 1000005823 (January 5, 2011) that X left Taiwan on June 29, 2010. However, later the National Immigration Agency Memorandum Yi-Zhuan-Yi-Lian No. 1020042646 (March 11, 2013) indicated that the departure date of X was mistakenly reported as June 29, 2010, and should be corrected as November 26, 2010. Therefore, the original 90 days of detention as indicated above should be amended to read 240 days.

註：文中所載X共收容「90日」，係依內政部入出國及移民署100.1.5移專一蓮字第1000005823號函查復X出境日期為99年6月29日而計算。嗣該署102.3.11移專一蓮字第1020042646號函「出境日期誤植為99年6月29日，應更正為99年11月26日」。是該「90日」應更正為「240日」。