J. Y. Interpretation No.392（December 22, 1995）*

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

RELEVANT LAWS:

Articles 8 ,9 ,52, 77, 82 and 97 of the Constitution（憲法第八條、第九條、第五十二條、第七十七條、第八十二條及第九十七條）; Article 4, Paragraph 2, of the Amendments to the Constitution（憲法增修條文第四條第二項）; Article 1 of the Habeas Corpus Act（提審法第一條）; Articles 71, Paragraph 4, 101,102, Paragraph 3, 105, Paragraph 3, 120, 121, Paragraph 1 and 259, Paragraph 1 of the Code of Criminal Procedure（刑事訴訟法第七十一條第四項、第一百零一條、第一百零二條第三項、第一百零五條第三項、第一百二十條、第一百二十一條第一項、第二百五十九條第一項）;Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act（司法院大法官審理案件法第十三條第一項）; Article 40, Paragraph 2, of the Court Organic Act（法院組織法第四十條第二項）; J. Y. Interpretation Yuan-je tze No. 4034（司法院院解字第四〇三四號解釋）.

KEYWORDS:

judicial organ（司法機關）, court（法院）, prosecutor（檢

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察官）, arrest（逮捕）, detention（拘禁）, investigation（調查、偵查）, indictment（起訴）, trial（審問）, habeas corpus（人身保護令狀）. **

HOLDING: Criminal procedure, the judicial proceeding to try criminal cases, is one of the powers held by the judicial branch. It is a process with the purpose of carrying out the penal power of a state. A criminal trial begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to carry out its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. There-

解釋文：司法權之一之刑事訴訟、即刑事司法之裁判，係以實現國家刑罰權為目的之司法程序，其審判乃以追訴而開始，追訴必須實施偵查，迨判決確定，尚須執行始能實現裁判之內容。是以此等程序悉與審判、處罰具有不可分離之關係，亦即偵查、訴追、審判、刑之執行均屬刑事司法之過程，其間代表國家從事「偵查」「訴追」「執行」之檢察機關，其所行使之職權，目的既亦在達成刑事司法之任務，則在此一範圍內之國家作用，當應屬廣義司法之一。憲法第八條第一項所規定之「司法機關」，自非僅指同法第七十七條規定之司法機關而言，而係包括檢察機關在內之廣義司法機關。

fore, the term "judicial organ" used in Article 8, Paragraph 1, of the Constitution would not have the same meaning as the term "judicial organ" used in Article 77 of the Constitution. Instead, the term is applied as an expansive definition in order that the prosecutor's offices may be included therein.

The term "trial" defined in Article 8, Paragraphs 1 and 2, of the Constitution means trial by court. He who has no authority to try a case cannot conduct this proceeding. The "court" defined in Article 8, Paragraphs 1 and 2, means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2, of the Constitution, if any organ other than a court arrested or detained a person, such organ shall surrender the detainee to a competent court for trial within 24 hours of said action. Therefore, the Code of Criminal Procedure, Article 101, and Article 102, Paragraph 3, applies mutatis mutandis to Article 71, Paragraph 4, and Article 120, which empowers a prosecutor other than a judge to detain suspects; Article 105,

憲法第八條第一項、第二項所規定之「審問」，係指法院審理之訊問，其無審判權者既不得為之，則此兩項所稱之「法院」，當指有審判權之法官所構成之獨任或合議之法院之謂。法院以外之逮捕拘禁機關，依上開憲法第八條第二項規定，應至遲於二十四小時內，將因犯罪嫌疑被逮捕拘禁之人民移送該管法院審問。是現行刑事訴訟法第一百零一條、第一百零二條第三項準用第七十一條第四項及第一百二十條等規定，於法院外復賦予檢察官羈押被告之權；同法第一百零五條第三項賦予檢察官核准押所長官命令之權；同法第一百二十一條第一項、第二百五十九條第一項賦予檢察官撤銷羈押、停止羈押、再執行羈押、繼續羈押暨其他有關羈押被告各項處分之權，與前述憲法第八條第二項規定之意旨均有不符。

Paragraph 3, of the same Code which empowers a prosecutor to grant a request for detention submitted by the chief officer of the detention house; Article 121, Paragraph 1, and Article 259, Paragraph 1, of the same Code which empowers a prosecutor to withdraw, suspend, resume, continue detention, or to take any other measures in conjunction with a detention.

These provisions are incongruous with the spirit of the aforementioned Article 8, Paragraph 2, of the Constitution. Article 8, Paragraph 2, of the Constitution merely provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. Said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of said person for trial." It does not impose an "unlawful arrest or detention" condition

憲法第八條第二項僅規定：「人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並至遲於二十四小時內移送該管法院審問。本人或他人亦得聲請該管法院，於二十四小時內向逮捕之機關提審。」並未以「非法逮捕拘禁」為聲請提審之前提要件，乃提審法第一條規定：「人民被法院以外之任何機關非法逮捕拘禁時，其本人或他人得向逮捕拘禁地之地方法院或其所隸屬之高等法院聲請提審。」以「非法逮捕拘禁」為聲請提審之條件，與憲法前開之規定有所違背。

for surrendering the detainee to court for trial. Whereas Article 1 of the Habeas Corpus Act prescribes that "When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition the District Court or High Court of the arresting place to issue a writ directing the detainor to surrender the detainee to court for trial." It does add an extra term "unlawful arrest or detention" as a condition for petitioning the writ. Therefore, this provision violates the aforementioned Article 8, Paragraph 2, of the Constitution.

It is hereby declared that the above-mentioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Yuan-je Tze No. 4034 of this Yuan shall be modified accordingly. As to the 24-hour requirement stated in the "turn over within 24 hours" clause of Article 8, Paragraph 2, of the Constitution, it shall refer to objectively feasible time for conducting an investigation. Interpretation No. 130 of this Yuan

上開刑事訴訟法及提審法有違憲法規定意旨之部分，均應自本解釋公布之日起，至遲於屆滿二年時失其效力；本院院解字第四〇三四號解釋，應予變更。至於憲法第八條第二項所謂「至遲於二十四小時內移送」之二十四小時，係指其客觀上確得為偵查之進行而言。本院釋字第一三〇號之解釋固仍有其適用，其他若有符合憲法規定意旨之法定障礙事由者，自亦不應予以計入，併此指明。

shall still be binding. In the case where good causes exist, any other constitutionally permissible defenses for timeliness shall also be exempted from the 24-hour limit. It is hereby pointed out as well.

REASONING: This case has been brought before this Yuan on the following grounds: [1]Petitioner Legislative Yuan, while performing its duty to revise the Code of Criminal Procedure, questioned whether the prosecutor's office is included in the meaning of "judicial organ" provided in Article 8, Paragraph 1, of the Constitution. Therefore, it has petitioned this Yuan for an interpretation; [2]Petitioner Hsu, Shin-Lian claimed that his constitutionally protected right had been infringed upon unlawfully. He had litigated the issue in lower courts, and had exhausted all appeals available. Therefore, he asked this Yuan to review the issue of whether the relevant laws applied in his final and binding judgment were constitutional. [3]Petitioners Chang, Chun-Shong et al., 52 members of the Legislative Yuan, while exercising their legislative functions and duties, had a question about

解釋理由書：本件係因：一、立法院依其職權審查刑事訴訟法修正案，為憲法第八條第一項前段所稱之「司法機關」是否包括檢察機關，發生疑義，聲請本院解釋；二、許信良於其憲法所保障之權利，認為遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律發生有牴觸憲法之疑義，聲請本院解釋；三、立法委員張俊雄等五十二名就其行使職權適用憲法發生疑義，聲請解釋，均符合司法院大法官審理案件法第五條第一項之規定；四、臺灣臺中地方法院法官高思大於行使職權適用憲法發生疑義，依本院釋字第三七一號解釋，聲請解釋，亦屬有據；經大法官議決應予受理及將上開各案合併審理，並依司法院大法官審理案件法第十三條第一項通知聲請人等及關係機關法務部指派代表，於中華民國八十四年十月十九日及十一月二日到場，在憲法法庭行言詞辯論，同時邀請法官代表、法律學者、律師代表到庭陳

the meaning of a constitutional provision. Therefore, they had petitioned this Yuan for an interpretation; [4] Petitioner Gao Shi-Da, judge of the Taichung District Court, Taiwan, while exercising his function and duty as a judge, was in doubt about the meaning of certain constitutional provisions. Therefore, he had adjourned the trial proceeding sua sponte and petitioned this Yuan to render an interpretation based on the rule promulgated by Interpretation No. 371. The Grand Justices granted review for these petitions and consolidated them into one case. In accordance with Article 13, Paragraph 1, of the Constitutional Interpretation Procedure Act, the Grand Justices held two oral argument sessions in the Constitutional Court on October 19, 1995, and November 2, 1995, respectively, and notified the petitioners, and the respondent government agency--The Ministry of Justice, to present their cases respectively. It also invited representative judges, legal scholars and lawyers, respectively, to present their amicus curiae briefs before the court. This is a brief account of the background of this case.

述意見，合先說明。

The Petitioners' arguments basically can be summarized as follows: [1]By the literal meaning interpretation approach, as well as by the systematic interpretation approach, the meaning of "judicial organ" in Article 8, Paragraph 1, of the Constitution should be the same as the "judicial organ" stated in Article 77 of the Constitution, which means "those governmental organs having charge of civil, criminal, and administrative cases, and over cases concerning disciplinary measures against public functionaries, and that are administered and supervised by the Judicial Yuan as the highest organ in the hierarchical structure." In view of the doctrine of the separation of powers, and its organizational structure and function, the judicial power is an adjudicative power. It possesses the unique characters of justice, passiveness, impartial third party, and independence, which are contrary to the characters of prosecutorial power, which are public interest orientation, activeness, party litigant status, and submissiveness. Interpretation No. 13 of this Yuan, which opines "The job protection for an active prosecutor, in accordance with Article 82

本件聲請人等之主張略稱：一、自文義及體系解釋之觀點，憲法第八條第一項前段所稱之司法機關，應同於憲法第七十七條所規定之司法機關，即專指「掌理民事、刑事、行政訴訟之審判及公務員之懲戒，而其行政監督系統上係以司法院為最高機關之機關」。自權力分立原理，組織結構功能之觀點，司法權即審判權，具正義性、被動性、公正第三者性及獨立性之特徵，與檢察權之公益性、主動性、當事人性及檢察一體、上命下從特徵，截然不同。司法院釋字第十三號解釋但書之說明「實任檢察官之保障，依同法第八十二條及法院組織法第四十條第二項之規定，除轉調外，與實任推事同」，則僅在說明法院組織法對檢察官之保障，係比照法官之規定現狀，不能改變檢察官在憲法上屬於行政機關之基本地位。二、依憲法第八條第一項：「非由法院依法定程序，不得審問、處罰。」是憲法所稱之「法院」，係專指有「審問處罰」權之法院而言；而所謂有「審問處罰」權之機關，依憲法第七十七條乃專指有審判權之各級法院。檢察官並未擁有「審問處罰」之權限，自非憲法上所稱之法院。憲法第八條第二項後段所稱之法院，既僅指有提審權、負責審判之狹義法院，

of the same law [the Constitution] and Article 40, Paragraph 2, of the Court Organic Act, shall be the same as a judge in every respect except provisions regarding job transfers," merely states that the job protection rendered the prosecutor by the Court Organic Act is on a par with a judge. It cannot alter the fundamental position the prosecutor occupied in the Constitution as a member of the executive branch. [2]According to Article 8, Paragraph 1, of the Constitution: "No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law." Therefore, the "law court" designated in the Constitution shall mean the courts empowered "to try and punish"; and the organs having power "to try and punish," according to Article 77 of the Constitution, are limited to the law court in the judicial branch only. The prosecutors do not hold the power "to try and punish," hence they are not the "law court" named in the Constitution. Since the competent court designated in Article 8, Paragraph 2, second sentence, of the Constitution means a court with the power to issue writs directing the detainor to sur-

不包括檢察官，則列於同條項前段之「法院」，自應與之為同一解釋，亦即同條第二項前段之「法院」僅指負責審判之法院，不含檢察官在內。三、基於保障人民訴訟權之觀念，以「當事人對等原則」配合理解憲法第八條第一項所規定正當「法律程序」之意義，益可證明同條項前段所稱之「司法機關」，不應包括檢察機關在內。若使代表國家身為刑事訴訟程序當事人之檢察官亦得決定、執行羈押者，非但不符「當事人對等」亦折損實質正當之「法律程序」之嚴肅意義，以及人民對於國家訴追犯罪之公信力。故應將檢察官排除於「司法機關」之外，始能符合正當法律程序之憲法意義。四、就我國憲法第八條之立法沿革言，歷次憲法或草案均將提審之權力，專屬於負責審判之狹義法院。提審法第一條所規定非法逮捕拘禁之要件，增加憲法第八條第二項所未規定之限制，實則依該條之意旨，縱為合法之逮捕拘禁，亦得聲請提審，且極易令人誤解「非法」與否之認定權，委之於法院以外之機關（如檢察官），無異剝奪人民之提審權，架空憲法保障人身自由之崇高內涵，顯與憲法第八條第二項之意旨不符。五、依憲法第八條第一項前段、第二項、第三項規定：「人民身體

render the detainee for trial [writ of habeas corpus] and to try a case, it does not include the prosecutor. It goes without saying that the "court" designated in the first and second sentences of the same Article and Paragraph shall be interpreted the same, i.e., the competent "court" in Article 8, Paragraph 2, of the Constitution shall mean law courts with jurisdiction to try cases. [3]On account of the concept of protecting the people's right to institute litigation, and applying "the doctrine of equal status of the litigants," we expound the meaning of "procedure prescribed by law" in Article 8, Paragraph 1, of the Constitution. It is clear that the "judicial organ" designated in the first sentence of the same Article and Paragraph does not include the prosecutor's office. Were we to permit the state's representative and a party litigant, the prosecutor, to hold the detention power, it would not be in harmony with "the doctrine of equal status of the litigants." It would also erode the strict meaning of "procedure prescribed by law." Therefore, the prosecutor's office should be excluded from the "judicial organ" to conform to the meaning of the

之自由應予保障，除現行犯之逮捕，由法律另定外，非經司法或警察機關依法定程序，不得逮捕拘禁。……人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並至遲於二十四小時內移送該管法院審問。本人或他人亦得聲請該管法院，於二十四小時內，向逮捕機關提審。法院對於前項聲請不得拒絕，並不得先令逮捕拘禁之機關查覆。逮捕拘禁之機關，對於法院之提審，不得拒絕或遲延」。由上開規定可知，法院以外之機關不得拘禁人民二十四小時以上，從而現行刑事訴訟法第一百零八條規定賦予檢察官得拘禁人民之人身自由達二月以上而不移送法院審問，顯有違憲之疑義等語。

Constitution. [4]In view of the legislative history of Article 8 of the Constitution, each version of the constitutional drafts had allocated the detention power exclusively to the law court in charge of trial. By prescribing an unlawful arrest or detention as the condition for issuing writs, Article 1 of the Habeas Corpus Act has imposed additional conditions not required by Article 8, Paragraph 2, of the Constitution. Whereas, the framers of the Constitution had intended the contrary, even a lawful arrest or detention itself would have been entitled to petition for writs. Therefore, it could easily create a misconception that the framers had assigned to an organ other than a court (e.g., the prosecutor's office) the power to determine "unlawfulness." This is tantamount to depriving the people's right to the writs, defying the noble intention of the Constitution to protect physical freedom, and conflicting with the spirit of Article 8, Paragraph 2, of the Constitution. [5]According to Article 8, first sentence of Paragraph 1, Paragraph 2, and Paragraph 3 of the Constitution: "Physical freedom shall be guaranteed to the people. Except

in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law… When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and his designated relative or friend, of the ground for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for surrender of said person for trial. The court shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for surrender of the said person for trial." It can be inferred from the abovementioned provisions that no organ other than a court can detain a person for more than 24 hours. Therefore, Article 108 of the present Code of Crimi-

nal Procedure, which confers on the prosecutor a power to detain persons and restrict physical freedom for two months without transferring to court for trial, is under suspicion of violating the Constitution...and so on.

The Respondent government agency replies as follows: [1]The definition of judicial power should also consider its purpose and function, not merely its form of hierarchical structures. Therefore, in addition to the power to try cases, judicial power should at least also include the power to interpret laws, the power to discipline public functionaries, and the power to prosecute. The majority of legal professionals and constitutional law scholars were of the opinion that the judicial organ includes the prosecutor's office. Interpretations Nos. 13, 325 and 384 of this Yuan had already affirmed, either directly or indirectly, that the prosecutor's office is a judicial organ. Although the prosecutor's office is subject to the supervision of the Ministry of Justice now, the Court Organic Act, in order to strengthen the independence of the prosecutor, has

關係機關主張略稱：一、司法權的定義應從目的性及功能性角度觀察，非單從組織配屬的形式來判斷。故司法權除審判權外，至少尚包括解釋權、懲戒權及檢察權。司法機關包括檢察機關為實務界及憲法學者通說。司法院釋字第十三號、第三二五號、第三八四號解釋，均間接或直接肯定檢察機關是司法機關。檢察機關今雖隸屬法務部，但法院組織法為強化檢察官獨立行使職權，規定法務部長僅有行政監督權而無業務指揮權，不能影響檢察官辦理個案之獨立性。二、五權憲法與三權憲法理論基礎相異，其係在揚棄三權分立之防弊制衡理念，而強調平等相維、分工合作之互助機能；現縱認為檢察官不是司法官，擁有羈押權不符合西方司法民主化分權制衡之標準，亦是立法政策問題，而非違憲問題，倘符合法定程序，檢察官應亦有羈押被告之權。三、就制憲背景而言，以立憲當時檢察官配屬法院及

provided that the Minister of Justice shall only have a power of administrative supervision, not a power of transactional supervision. It cannot interfere with the independence that a prosecutor enjoys in prosecuting a particular case. [2]The theoretical basis of a five-power constitution is different from that of a three-power constitution; it replaced the ideal of checks and balances with an emphasis on equal respect and cooperation. Even if we denied that the prosecutor is a judicial officer, hence his detention power would not be in accord with the western standard of democratic judiciary based on the doctrine of separation of powers, nonetheless this is not a constitutional issue, but a policy consideration for the legislators to decide. If we follow precisely the procedure prescribed by law, a prosecutor should have the power to detain an accused for investigation. [3]In view of the surrounding background for adoption of the Constitution, of the fact that the prosecutor's offices were physically attached to the courthouses, and of the fact that most arrests were made by the police, the "court" stated in Article 8, Paragraph 2, first sen-

逮捕拘禁機關多為警察機關之事實，憲法第八條第二項前段規定之「法院」，應指包含檢察機關在內之廣義法院；況自民國十六年建立檢察官配置法院之體制，雖歷經法院組織法之制定及多次修正，迄今均未改變，則上開「法院」之應包括檢察機關，要無疑義。四、「處罰」固為審判機關之職權；但「審問」則係指檢察官偵查中之訊問，不然案件尚未起訴，何來審問，另所謂「追究」亦係「追訴」之意。五、就制憲沿革論，訓政時期約法規定為「審判機關」，而其後之五五憲草及現行憲法均規定為「法院」，捨「審判機關」之語於不用，可見其係採廣義法院。六、憲法第八條第二項規定之性質為迅速移送條款，乃繼受自外國立法例，參酌一九五三年九月三日生效之「歐洲保障人權及基本自由公約」第五條、一九七六年三月二十三日生效之「聯合國公民及政治權利國際盟約」第九條、一九七八年六月生效之「美洲人權公約」第七條，其對因犯罪嫌疑而遭逮捕拘禁之人，一致規定其應迅速解送至「法官或其他依法執行司法權之官員」，顯然上開公約均認為受理解送人犯之機關並不限於法官，僅受理提審聲請之機關，始限於狹義之審判法院。七、我國檢察官係偵查

tence, of the Constitution should be referred to as a court in an expansive to include the prosecutor's offices. Moreover, in 1927, we established the system attaching the prosecutor's offices to the courthouses, and this basic framework has never been changed, notwithstanding the fact that the Court Organic Act has been enacted and subject to numerous amendments already. Therefore, the conclusion that the abovementioned "court" should include the prosecutor's office is beyond doubt. [4]Although "punishment" is a prerogative of the court, the term "trial" involved herein should refer to interrogations made by the prosecutor in the investigative stage. Otherwise, how could a trial precede an indictment? Besides, the term "investigation" herein shall refer to "indictment", too. [5]When reviewing the constitutional history, the Provisional Constitution for the Period of Political Tutelage used the term "tribunal," while the Double Five Constitutional Draft and the text of the present Constitution both employed the term "court," not "tribunal." This shows that it refers to a "court" in an expansive definition. [6]The nature of

之主體，且為公益代表，非以追求被告有罪判決為唯一目的，與他國之單純公訴人不同，而其原具預審法官之性質，自不能謂其不應擁有羈押權。八、提審法第一條所稱「非法逮捕拘禁」，係指無逮捕拘禁權力之機關而為逮捕拘禁，或雖有逮捕拘禁權而逮捕拘禁後超過二十四小時之情形而言，與憲法第八條第二項後段之規定，並無不符，亦無另加限制之情形；且同詞異義所在多有，本條項前段之法院自可與後段之法院作不同之解釋。九、憲法之解釋不能不兼顧「合理」與「可行」，認憲法第八條第二項所稱之法院僅為狹義之法院，將使逮捕後須將犯罪嫌疑人於二十四小時內解送法官，從而迫使檢察官須與警察合用二十四小時，比較各國法制，該合用之二十四小時顯然過短，既不合理又不可行云云。

Article 8, Paragraph 2, of the Constitution is a prompt transfer provision. It was modeled after foreign legislation. This concept was reflected in Article 5 of "the European Convention for the Protection of Human Rights" and Fundamental Freedom effective on September 3, 1953; in Article 9 of the United Nations' "International Covenant on Civil and Political Rights" effective on March 23, 1976; and in Article 7 of "the Continental American Human Rights Convention" effective in June, 1978. They required that an arrested criminal suspect be promptly surrendered to "a judge or an official exercising judicial power prescribed by law." Apparently, the abovementioned international conventions and treaties have determined that the organ accepting the surrender of a detainee shall not be limited to a judge, but that the organ issuing a writ of habeas corpus shall be limited to a court in a restrictive definition. [7]The prosecutors of this state form an investigative body which also represents the public interest. They do not make pursuing convictions of defendants their sole purpose. They differ from the prosecutors of other states in that

they possess the qualities of a pre-trial judge. Therefore, they should not be denied the detention power. [8]The "unlawful arrest and detention" in Article 1 of the Habeas Corpus Act shall refer to situations where an organ without power of arrest and detention makes an arrest or detention, or where an organ with power of arrest and detention makes an arrest or detention exceeding the 24-hour limit. It does not conflict with Article 8, Paragraph 2, second sentence, of the Constitution, nor does it impose extra restrictions. Moreover, it is not unusual that a term sometimes may imply multiple meanings. Therefore, the "court" referred to in the first sentence of said Paragraph may have a slightly different meaning than the court of the second sentence of said Paragraph. [9]Constitutional interpretation must be both "reasonable" and "feasible." Confining the meaning of "court" in Article 8, Paragraph 2, of the Constitution to a court of a restrictive definition would mean that the arrested criminal suspects must be transferred to a judge within 24 hours. This would mandate the prosecutor and the police to share their 24 hours jointly.

Compared with the laws of other states, this 24-hour joint requirement apparently is too short, neither reasonable nor feasible ...and so on.

THIS YUAN, after considering the arguments made by the Petitioners, the Respondent government agency, and the amicus curiae briefs presented by the representative judges, legal scholars and lawyers, has written this Interpretation with reason as follows:

本院斟酌聲請人等及關係機關之主張暨法官代表、法律學者、律師代表陳述之意見，作成本解釋，其理由如左：

The notion of "judiciary" is relative to legislation and administration (in the constitutional framework of this state, relative to examination and control, too). Conceptually, this is a legal term that connotes multiple meanings. Distinctions can be made between judiciary of a substantive meaning v. judiciary of a formal meaning, and judiciary of a restrictive definition v. judiciary of an expansive definition. Judiciary of a substantive meaning refers to declarations made by a state for resolution of a controversy (i.e., a trial), as well as any state function auxiliary to this trial power (i.e., judicial ad

按所謂「司法」，觀念上係相對於立法、行政而言（我國之憲制則尚包括考試、監察）。概念上原屬多義之法律用語，有實質意義之司法、形式意義之司法與狹義司法、廣義司法之分。其實質之意義乃指國家基於法律對爭訟之具體事實所為宣示（即裁判）以及輔助裁判權行使之作用（即司法行政）；其形式之意義則凡法律上將之納入司法之權限予以推動之作用者均屬之─如現行制度之「公證」，其性質原非屬於司法之範疇；但仍將之歸於司法予以推動，即其一例。所謂狹義之司法、即固有意義之司法，原僅限於民刑事裁判之國家作用，其推動此項作用之權能，一般稱

ministration). Judiciary of a formal meaning extends further to include any state function provided by law to the judicial power to further its purpose -- for example, the "notary public" by its nature is not within the category of the judiciary, however, it was annexed to the judicial department to further its purpose. Judiciary of a restrictive definition is the common meaning for the judiciary. It refers to state functions in civil and criminal trials, and the capacity to carry out this function is called judicial power or adjudicative power. Because it refers to the civil and criminal trials, it is also called trial power. Whereas in this state, the administrative litigation, the disciplinary measures against public functionaries, judicial interpretation, the trial for dissolution of unconstitutional political parties and any sort of "state functions of adjudication" shall also be included. That is to say, any of those state functions implicating a judicial independence are within this meaning of judiciary. Therefore, the position and duty of the Judicial Yuan provided by Chapter 7 of the Constitution, i. e., the Judicial Yuan shall be the highest "judicial

之為司法權或審判權，又因係專指民刑事之裁判權限，乃有稱之為裁判權者；惟我國之現制，行政訴訟、公務員懲戒、司法解釋與違憲政黨解散之審理等「國家裁判性之作用」應亦包括在內，亦即其具有司法權獨立之涵義者，均屬於此一意義之司法，故憲法第七章所規定之司法院地位、職權，即其第七十七條所稱司法院為國家最高「司法機關」、第七十八條之司法解釋權，與增修條文第四條第二項之審理政黨違憲之解散事項均可謂之為狹義司法。至於其為達成狹義司法之目的所關之國家作用（即具有司法性質之國家作用），則屬廣義司法之範圍。

organ" of the state provided by Article 77, the judicial interpretation provided by Article 78, and the trials for dissolution of unconstitutional political parties provided by Article 4, Paragraph 2, of the Amendment of the Constitution, shall be deemed the judiciary of a restrictive definition. As to those state functions to further the purpose of the judiciary of a restrictive definition (i.e., state functions with a judicial nature), they are included in the category of the judiciary of an expansive definition.

A court is an organ to try cases. It has definitions of both a restrictive and expansive denotations, too. A court of a restrictive definition refers to a tribunal composed of an individual judge or a panel of judges to try cases, i.e., the organ exercising adjudicative power, which is the meaning of a court in a procedural law sense. A court of an expansive definition refers to an organ with its personnel and facilities set up by a state to adjudicate, i.e., it is the meaning of a court in an organizational law sense. Hence, a court of a restrictive definition is confined to those possessing power to try cases (adjudica-

法院係職司審判（裁判）之機關，亦有廣狹兩義，狹義之法院乃指對具體案件由獨任或數人合議以實行審判事務，即行使審判權之機關，此即訴訟法上意義之法院；廣義之法院則指國家為裁判而設置之人及物之機關，此即組織法上意義之法院。故狹義之法院原則上係限於具有司法裁判之權限（審判權）者，亦即從事前述狹義司法之權限（審判權）而具備司法獨立（審判獨立）之內涵者，始屬當之；而其在此一意義之法院執行審判事務（即行使審判權）之人即為法官，故構成狹義法院之成員僅限於法官，其於廣義法院之內，倘所從事者，並非直接關於審判權之行

tive power) while retaining independence when exercising this restrictively defined power. A person carrying out trial affairs (i.e., exercising adjudicative power) in a court thus defined is a judge. Therefore, a member of a court of a restrictive definition is limited to judges only. Yet in a court of an expansive definition, if a person is engaged in activities not directly related to exercising adjudicative power, said person is not a judge and said organ is not a court of a restrictive definition. Therefore, in a procedural sense, a court (a court of a restrictive definition) is equated with a judge. Both of them refer to a body exercising adjudicative power and are interchangeable. Consequently, if a statutory provision uses the term "judge," we must look further to see whether it refers to matters of exercising adjudicative power. Except in a "personal" context (e.g., legal status, job security, and recusal of judges, etc.), the judge is on a par with the court in most statutory provisions. The constitutional provisions referring to the "court" and "judge" should be treated the same way also.

使，其成員固非法官，其機關亦非狹義之法院，故就審判之訴訟程序而言，法院（狹義法院）實與法官同義，均係指行使審判權之機關，兩者原則上得予相互為替代之使用。因是法條本身若明定為「法官」，則除其係關於法官其「人」之規定外（如法官身分、地位之保障、法官之迴避等），關於審判權行使之事項，其所謂之法官當然即等於法院。憲法各條有關「法院」「法官」之規定，究何所指，當亦應依此予以判斷。

In this state, the prosecutors are the body of investigations. They prosecute criminal cases and they entreat courts to act according to law. They take charge of the supervision for the proper execution of judgments. In civil matters, they also play an important role as the representatives of public interest (See Article 60 of the Court Organic Act, and Article 228 infra of the Code of Criminal Procedure). Yet their principal duty remains criminal investigation and the exercise of public charge power. Although they may act with certain discretion in the "litigation" (See Article 61 of the Court Organic Act), they still have obligations to obey the orders of their superiors (the chief prosecutor) (See Article 63 of the Court Organic Act). This is quite a separate matter from the outward independence they enjoyed -- to be free from interference of any other state organ when carrying out their duties, and the inward independence they enjoyed -- to act only according to laws in a trial. The prosecutor's office is a government organ where the prosecutors carry out their duties. Although it is physically attached to the courthouse (See Article 58

我國現制之檢察官係偵查之主體，其於「刑事」為公訴之提起，請求法院為法律正當之適用，並負責指揮監督判決之適當執行；另於「民事」復有為公益代表之諸多職責與權限，固甚重要（參看法院組織法第六十條、刑事訴訟法第二百二十八條以下）；惟其主要任務既在犯罪之偵查及公訴權之行使，雖其在「訴訟上」仍可單獨遂行職務（法院組織法第六十一條參看）；但關於其職務之執行則有服從上級長官（檢察首長）命令之義務（法院組織法第六十三條），此與行使職權時對外不受任何其他國家機關之干涉，對內其審判案件僅依據法律以為裁判之審判權獨立，迥不相侔。至於檢察機關則係檢察官執行其職務之官署，雖配置於法院（法院組織法第五十八條），但既獨立於法院之外以行使職權，復與實行審判權之法院無所隸屬，故其非前述狹義之法院，其成員中之檢察官亦非法官之一員，要無疑義；惟雖如此，其實任檢察官之保障，除轉調外，則與實任法官同，此業經本院以釋字第十三號解釋有案，其仍應予適用，自不待言。

of the Court Organic Act), yet it acts independently outside the court system and is not subordinated to the court that exercises adjudicative power. Therefore, it is beyond doubt that it is not a court of a restrictive definition, and that its member prosecutors are not judges. However, the protection of job security of a prosecutor, except for matters of job transfer, is the same as that of an active judge in all respects. This has been declared previously in Interpretation No. 13 of this Yuan, and it remains operative without the need for further elaboration here.

Article 8, Paragraph 1, of the Constitution provides: "physical freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law..." As far as criminal procedure, one of the powers held by the judicial branch, is concerned, the judi-

憲法第八條第一項規定：「人民身體之自由應予保障，除現行犯之逮捕由法律另定外，非經司法或警察機關依法定程序不得逮捕拘禁，非由法院依法定程序，不得審問處罰……」，此就司法權之一之刑事訴訟、即刑事司法之裁判言，既係以實現國家刑罰權為目的之司法程序，其審判乃以追訴而開始，追訴必須實施偵查，迨判決確定，尚須執行始能實現裁判之內容，是以此等程序悉與審判、處罰具有不可分離之關係，亦即偵查、訴追、審判、刑之執行均屬刑事司法之一連串過程，其間代表國家

cial proceeding to try criminal cases is a process with the purpose of exercising the penal power of a state. It begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to exercise its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. The Constitution further provides expressly: "...no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law..." Therefore, the judicial organ contained herein, in view of its function, shall refer to the judiciary of an expansive definition inclusive of prosecutor's offices, not to mention that it juxta-

從事「偵查」「訴追」「執行」此一階段之檢察機關，其所行使之職權，目的既亦在達成刑事司法之任務，則在此一範圍內之國家作用，如前說明，當應屬廣義司法之一；而憲法於此復明定：「……非經司法或警察機關依法定程序不得逮捕拘禁……」，是此之所謂司法機關，就其功能予以觀察，自係指包括檢察機關在內之廣義司法機關之意；何況其將司法（警察）機關與法院並舉，先後予以規定，則此之司法機關應非指憲法第七十七條之司法機關而言，亦即非僅指狹義之法院，理至明顯；且刑事司法程序，其在偵查階段係由警察與檢察官為之，後者既負責調度指揮前者，其關於公訴權之行使復由檢察官所擔任，是憲法前開規定之併列司法與警察機關之逮捕拘禁程序，其當然係包括檢察機關在內，應毋庸疑。

poses the judicial (police) organ with the court, and made provisions for each one, respectively. Hence, it is clear that the judicial organ referred to herein, not being the judicial organ stated in Article 77 of the Constitution, is not a court of a restrictive definition. Furthermore, the process of criminal justice in its investigative stage is conducted by the police and prosecutor. The latter deploys and commands the former. The prosecutor also exercises the power of public charge. Therefore, there should be no doubt that the abovementioned constitutional provisions juxtaposing the judicial and police organ for arrest and detention procedure shall include the prosecutor's offices as well.

Article 8, Paragraph 2, of the Constitution provides: "When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform the said person, and his designated relative or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for

憲法第八條第二項規定：「人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應將逮捕拘禁原因，以書面告知本人及其本人指定之親友，並至遲於二十四小時內移送該管法院審問。本人或他人亦得聲請該管法院，於二十四小時內向逮捕之機關提審。」此前段之「移送該法院『審問』」與前述同條第一項之「……非由法院依法定程序不得『審

trial. The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial." This sentence, "turn him over to a competent court for trial," and the sentence in the abovementioned Article 8, Paragraph 1, "No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law," shall both refer to the hearings conducted by courts in reviewing cases. Thus, those without authority to adjudicate cannot do so. Therefore, the "court" herein means a court paneled by a judge or judges who possess adjudicative power. It refers to a court of a restrictive definition as provided in the Code of Criminal Procedure. Moreover, since the abovementioned Article 8, Paragraph 1, first sentence, of the Constitution juxtaposes the judicial (or police) organ and the court, it confers on the former, in the process of criminal justice, the power to arrest and detain in accordance with the procedure prescribed by law, and expressly provides that only the latter has power to try cases. Therefore, it is beyond

問』」之所謂「審問」，係指法院為審理而訊問之意，其非有審判權者，自不得為之。故此之所謂「法院」當然指有審判權之法官所構成之獨任或合議之法院之謂，亦即刑事訴訟法上之狹義法院。況且前述憲法第八條第一項上段規定，既將司法（或警察）機關與法院並舉，賦予前者在刑事司法程序中有依法定程序逮捕拘禁之權，而定明唯有後者始有審問之權，則此之法院與憲法第八條第二項前段之法院均係指有獨立審判權之法官所構成者，尤屬無可置疑。

question that the "court" stated herein and the "court" referred to in the Article 8, Paragraph 2, first sentence, of the Constitution shall mean a court paneled by a judge or judges who possess independent adjudicative power.

Article 8, Paragraph 2, second sentence, of the Constitution provides: "...may petition the competent 'court' that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial"; the court referred to herein and the court referred to in Paragraph 3 of the same Article: "The 'court' shall not reject the petition mentioned in the preceding paragraph, nor shall it order the organ concerned to make an investigation and report first. The organ concerned shall not refuse to execute, or delay in executing, the writ of the court for the surrender of the said person for trial"; and the "court" stipulated in Paragraph 4: "When a person is unlawfully arrested or detained by any organ, he or any other person may petition the 'court' for an investigation. The 'court' shall not reject such a petition, and shall, within 24

憲法第八條第二項後段：「……得聲請該管『法院』於二十四小時內向逮捕之機關提審」之法院，與同條第三項：「『法院』對於前項聲請不得拒絕，並不得先令逮捕拘禁之機關查覆。逮捕拘禁之機關對於『法院』之提審，不得拒絕或遲延」、第四項「人民遭受任何機關非法逮捕拘禁時，其本人或他人得向『法院』聲請追究，『法院』不得拒絕，並應於二十四小時內向逮捕拘禁之機關追究，依法處理」之「法院」，亦均限於擁有審判權之法院始屬相當；蓋第二項後段與第三項關於「提審」之規定，係仿自英美之「人身保護令狀」（Writ of Habeas Corpus），考之此一制度，唯有審判機關之法院方有提審權之可言，檢察機關之無此一權限，本屬無可爭議，即聲請人等與關係機關（法務部）於此亦不爭執。至於同條第四項既係承續第三項而來之規定，且又明定為「追究」，非「追訴」，自

hours, investigate the action or the organ concerned and deal with the matter in accordance with law," all are limited to the position of a court with adjudicative power only. The "surrendering a prisoner to court for trial" provisions in Paragraph 2, sentence, and Paragraph 3 originated from the "writ of habeas corpus" of the Anglo-American legal tradition, and according to this legal tradition, only a law court that functions as a tribunal has this writ-issuing power. It is unequivocal that a prosecutor does not possess this writ-issuing power, even if the petitioners and the respondent government agency (the Ministry of Justice) would not dispute this point. Paragraph 4 of the same Article followed the rule prescribed in Paragraph 3, and explicitly states "investigation," not "prosecution." Naturally, this is not necessarily limited to criminal procedures only. Therefore, the "court" stipulated in Article 8, Paragraph 2, (either the first or second sentence), Paragraph 3, and Paragraph 4 of the Constitution all have the same meaning. They all refer to tribunals paneled by judges.

不限於刑事程序。是憲法第八條第二項（不論前段、後段）與同條第三項、第四項所規定之「法院」均屬同義，亦即指法官所構成之審判機關─法院而言。

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"Arrest" means restraining one's

所謂「逮捕」，係指以強制力將

physical freedom by physical force. "Detention" means confining a person's freedom of bodily movement and making it impossible to escape from a certain space. Both are types of deprivation of physical freedom. As to the term "apprehension" provided in the Code of Criminal Procedure, it refers to a measure restraining a defendant's (criminal suspect's) freedom and forcing him to appear before the authority; and "taking into custody" refers to a measure for securing smooth criminal trial by forcefully restricting the physical freedom of the accused (criminal suspect) and taking him or her into custody in a certain place (custodial ward). Therefore, as far as deprivation of physical freedom is concerned, there are no differences between apprehension and arrest, nor are there differences between taking into custody and detention. They differ only in terms of purpose of action, method used, and length of period. Other statutory measures variations, such as "restrain," "receive," "hold," and "control," do not prevent them from being a kind of "detention," too. They should be assessed by the extent of their actual deprivation of physi-

人之身體自由予以拘束之意；而「拘禁」則指拘束人身之自由使其難於脫離一定空間之謂，均屬剝奪人身自由態樣之一種。至於刑事訴訟法上所規定之「拘提」云者，乃於一定期間內拘束被告（犯罪嫌疑人）之自由，強制其到場之處分；而「羈押」則係以確保訴訟程序順利進行為目的之一種保全措置，即拘束被告（犯罪嫌疑人）身體自由之強制處分，並將之收押於一定之處所（看守所）。故就剝奪人身之自由言，拘提與逮捕無殊，羈押與拘禁無異；且拘提與羈押亦僅目的、方法、時間之久暫有所不同而已，其他所謂「拘留」「收容」「留置」「管收」等亦無礙於其為「拘禁」之一種，當應就其實際剝奪人身（行動）自由之如何予以觀察，未可以辭害意。茲憲法第八條係對人民身體自由所為之基本保障性規定，不僅明白宣示對人身自由保障之重視，更明定保障人身自由所應實踐之程序，執兩用中，誠得制憲之要；而羈押之將人自家庭、社會、職業生活中隔離，「拘禁」於看守所、長期拘束其行動，此人身自由之喪失，非特予其心理上造成嚴重打擊，對其名譽、信用一人格權之影響亦甚重大，係干預人身自由最大之強制處分，自僅能以之為「保全程序之最後手

cal freedom of people, not merely judged from words used superficially. The protection of the people's physical freedom provided by Article 8 of the Constitution is a fundamental right. It not only openly declares the importance it places on the protection of physical freedom, but also explicitly provides for the procedures in carrying out this protection. By tackling the aims and means simultaneously, it was indeed a refined constitutional provision. The custodial measure segregates a person from his or her family, society, and professional life, "detains" the person in a custodial ward, and restrains said person's movement for a long period of time. This deprivation of physical freedom will have a tremendous impact on the person, not only in terms of psychological effect, but also in terms of loss of reputation and credit standing – and a tremendous impact on personal rights. It is a coercive measure that has maximum impact on physical freedom. Therefore, it should be reserved as "the last measure in preventive proceedings," and must be administered with extreme caution. Unless all legal requirements are met and there are necessities, it

段」，允宜慎重從事，其非確已具備法定條件且認有必要者，當不可率然為之。是為貫徹此一理念，關於此一手段之合法、必要與否，基於人身自由之保障，當以由獨立審判之機關依法定程序予以審查決定，始能謂係符合憲法第八條第二項規定之旨意。現行刑事訴訟法第一百零一條：「被告經訊問後，認為有第七十六條所定之情形者，於必要時得羈押之。」、第一百零二條第三項準用第七十一條第四項之由檢察官簽名於押票以及第一百二十條：「被告經訊問後，……其有第一百十四條各款所定情形之一者，非有不能具保、責付或限制住居之情形，不得羈押。」等規定，於法院之外同時賦予檢察官羈押被告（犯罪嫌疑人）之權；同法第一百零五條第三項：「……束縛身體之處分，由押所長官命令之，並應即時陳報該管法院或檢察官核准。」之賦予檢察官核准押所長官命令之權；同法第一百二十一條第一項：「第一百零七條之撤銷羈押、第一百十五條及第一百十六條之停止羈押、第一百十七條之再執行羈押……以法院之裁定或檢察官命令行之。」與第二百五十九條第一項：「羈押之被告受不起訴之處分……遇有必要情形，並得命繼續羈押之。」賦予檢察官撤銷羈

should not be invoked easily. To carry through this idea of protection for physical freedom, the assessment of legality and necessity of this measure should be made by an independent tribunal in accordance with the procedure prescribed by law. Only by doing so can it be said that the spirit of Article 8, Paragraph 2, of the Constitution is upheld. The current provisions of the Code of Criminal Procedure, Article 101, stating that an accused may be detained after examination if it is deemed necessary and it is discovered that one of the conditions specified in Article 76 exists, Article 102, Paragraph 3, applying mutatis mutandis to Article 71, Paragraph 4, for the writ of detention issued by a prosecutor and Article 120 providing that after an accused has been examined...; if one of the circumstances of Article 114 is present, the accused may not be detained unless it is impossible to release him on bail or to the custody of another or with a limitation on his residence, provide the prosecutors, besides the court, with a power to take an accused (criminal suspect) into custody. Article 105, Paragraph 3, of the same Code states: ...such

押、停止羈押、再執行羈押、繼續羈押暨其他有關羈押被告（犯罪嫌疑人）各項處分之權，與前述憲法第八條第二項規定之意旨均有不符。

restraint shall be ordered by the officer in charge of the detention house, and such order shall be referred immediately to the court or prosecutor concerned for approval provides the prosecutor with a power to approve a detention order submitted by the chief officer of the detention house. Article 121, Paragraph 1, of the Same Code: "The cancellation of detention specified in Article 107,..., the suspension of detention specified in Articles 115 and 116, and the resumption of detention specified in Article 117...shall be made by a court ruling or by a prosecutor's order," and Article 259, Paragraph 1: "A detained accused who received a ruling not to prosecute,..., if the circumstances warrant, may be ordered to remain in custody," these laws provide the prosecutor with the power to cancel, cease, resume or continue detention, and the power to implement other measures in conjunction with the power to detain an accused (criminal suspect). These powers are incongruous with the spirit of the abovementioned Article 8, Paragraph 2, of the Constitution.

Article 8, Paragraph 2, of the Constitution provides: “When a person is arrested or detained on suspicion of having committed a crime ... The said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of the said person for trial.” It does not prescribe “unlawful arrest or detention” as a condition for petitioning the writ. Hence, regardless of whether there was an objective fact of “unlawful” arrest or detention, once the criminal suspect is detained by an organ other than a court he is entitled to petition the competent court for a writ. There should be no distinctions made between “lawful” and “unlawful” arrest. For without a hearing by the competent court, there is no way to predetermine the lawfulness of the arrest. Yet Article 1 of the Habeas Corpus Act prescribes: “When a person is arrested or detained unlawfully by any organ other than a court, said person, or any other person, may petition to the District Court or High Court of the arresting place for a writ directing the detainor to surrender the detainee to court for trial [i.e., a writ of

又憲法第八條第二項僅規定：「人民因犯罪嫌疑被逮捕拘禁時，……本人或他人亦得聲請該管法院，於二十四小時內向逮捕之機關提審。」並未以「非法逮捕拘禁」為聲請提審之前提，亦即犯罪嫌疑人一遭法院以外之機關逮捕拘禁時，不問是否有「非法」逮捕拘禁之客觀事實，即得向該管法院聲請提審，無「合法」與「非法」逮捕拘禁之分；蓋未經該管法院之審問調查，實無從為合法與否之認定，乃提審法第一條規定：「人民被法院以外之任何機關非法逮捕拘禁時，其本人或他人得向逮捕拘禁地之地方法院或其所隸屬之高等法院聲請提審。」竟以「非法逮捕拘禁」為聲請提審之條件，要與憲法前開之規定有所違背。本院院解字第四〇三四號解釋謂：「人民被法院以外之機關依法逮捕拘禁者自不得聲請提審」，既係以提審法第一條「非法逮捕拘禁」之限制規定乃屬合憲為前提而作之解釋，從而該號之解釋自應予變更。

habeas corpus].” It does add “unlawful arrest or detention” as a condition for petitioning the writ. This provision is incompatible with the aforementioned constitutional provision. Interpretation Yuan-je tze No. 4034 of this Yuan, which provides: “A person lawfully arrested or detained by an organ other than a court shall not be entitled to petition a writ directing the detainor to bring the detainee to court for trial,” was an interpretation premised on the constitutionality of the “unlawful arrest or detention” requirement of Article 1 of the Habeas Corpus Act. Therefore, said Interpretation shall be modified accordingly.

The aforementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation. Moreover, although Article 8, Paragraph 1, of the Constitution confers power of arrest or detention on a non-court judicial (or police) organ in accordance with procedure prescribed by law, yet Paragraph 2 of the same Article requires that the detainee

上開刑事訴訟法及提審法有違憲法規定意旨之部分，均自本解釋公布之日起，至遲於屆滿二年時失其效力。再憲法第八條第一項雖亦賦予非狹義法院之司法（或警察）機關得依法定程序逮捕拘禁之權；然於同條第二項復規定其至遲於二十四小時內移送法院審問，以決定應否繼續予以拘禁，即為刑事訴訟法上之羈押與否，此當係本於前述保障人身自由之考量，因是不許法院（法官所構成者）以外之機關得長期拘束人民

must be transferred within 24 hours to a court for determining whether continuous detention, i.e., the detention provided by the Code of Criminal Procedure, is justified. This is based on a policy consideration for protection of the aforementioned physical freedom. The Constitution does not permit an organ other than a court (composed of judges) to restrain a person's freedom of bodily movement over a long period. Although the state has the goal of finding out the truth in criminal justice proceedings, it does not mean that the state can attain this goal by whatever means available. Even a person who is suspected of committing a crime is entitled to adequate protection of physical freedom. However, the preservation of national security and the social order cannot be ignored. The reason that the Constitution conferred on the non-court judicial (or police) organ the power to arrest or detain is to provide for proper preliminary investigation in order to charge criminal offenders. The 24-hour requirement should be considered from the objective of feasibility to achieve this purpose. Therefore, Interpretation No. 130 of

身體之自由；蓋國家為達成刑事司法究明案件真象之目的，非謂即可訴諸任何手段，即使係犯罪嫌疑人，其人身自由仍亦應予適當保障。惟雖如此，國家安全、社會秩序之維護亦不能置之不顧，憲法之所以賦予非法院之司法（或警察）機關逮捕拘禁之權，要在使其對犯罪行為人得為適當之偵查與訴追，是此所謂之二十四小時當係指其客觀上確得為此項目的之進行而言。因是本院釋字第一三〇號解釋固仍有其適用，且依憲法第八條第二項前段規定，人民因犯罪嫌疑被逮捕拘禁時，其逮捕拘禁機關應至遲於二十四小時內移送該管法院審問。若該管法院於犯罪嫌疑人被逮捕拘禁時起二十四小時內，經本人或他人聲請，向逮捕之機關提審，於審問調查後認為逮捕機關逮捕拘禁犯罪嫌疑人並無不合法之情形，即應將犯罪嫌疑人移還原逮捕機關繼續偵查。提審期間不應計入逮捕機關之二十四小時拘禁期間，乃屬當然，提審法有關規定，應併配合修正。其他若有符合憲法規定意旨之法定障礙事由者，自亦不應予以計入，併此指明。

this Yuan shall still be binding. Furthermore, according to the provision of Article 8, Paragraph 2, first sentence, of the Constitution, when a person is arrested or detained on suspicion of having committed a crime, the organ conducting the arrest or detention shall, within 24 hours, turn him over to a competent court for trial. If, within 24 hours of arrest or detention, the court, upon petition made by the accused or by another person, ordered the detainor to surrender the detainee, and after a trial or hearing, is of the opinion that no irregularity occurred in the arrest or detention procedure, it shall return the detainee to the arresting organ for further investigation. Naturally, the court's hearing time ought not to count toward the 24-hour detention time. The relevant provisions in the Habeas Corpus Act shall be modified accordingly. Other constitutionally permissible defenses for timeliness shall also be exempted from the 24-hour requirement. It is hereby pointed out as well.

Promulgated in 1931, Article 8 of the Provisional Constitution for the Period of

至謂民國二十年公布之中華民國訓政時期約法第八條規定「人民因犯罪

Political Tutelage provides: “When a person is arrested or detained on suspicion of having committed a crime, the executing or detention organ shall, within 24 hours, turn him over to a tribunal for trial. The said person, or any other person, may request the detainor to surrender the detainee for trial within 24 hours according to law.” The Double Five Constitutional Draft prepared in 1936, and the text of the current Constitution promulgated in 1947, did not used the term “tribunal” as it appeared in the Basic Law. Instead, they used the term “court.” This was due to the fact that, since the legal reformation movement which occurred in the latter part of the Ching Dynasty, in the Tribunal Organization Law for Da Li Yuan promulgated in the 30th year of the reign of the Emperor Kuan Shi (1906), and the Law for Court Organization promulgated in the 1st year of the reign of the Emperor Shuan Tong (1909), all government organs performing the functions of adjudication, except for the Da Li Yuan, were called “tribunal” (e.g., higher tribunal, district tribunal). When the Republic was founded, the organization law was, in

嫌疑被逮捕拘禁者，其執行或拘禁之機關，至遲於二十四小時內移送審判機關審問，本人或他人並得依法請求於二十四小時內提審。」而於民國二十五年之五五憲草及三十六年公布之現行憲法均未援用約法所曾用之「審判機關」，而改以「法院」乙節，此當係清末變法，改革司法，於光緒三十年（一九〇六年）所擬定之「大理院審判編制法」以及宣統元年（一九〇九年）所頒行之法院編制法，其於職司審判之機關除終審之大理院外，均以審判廳稱之（如高等審判廳、地方審判廳）。迨民國肇建，此一編制法原則上暫准援用，時間既久，或不免於沿用而出以「審判機關」之語，非可以此即謂其後使用「法院」乙語係有意排除狹義法院之審判機關，而採取所謂廣義之法院─包括檢察官在內；何況即令「法院」，其涵義仍亦應自功能性之為何予以觀察、判斷，此已述之如前，憲法即已明言「審問」，自僅指狹義之法院而不及於其他；抑且檢察官署既係配置於法院，則其本非實質法院之所屬，否則，何庸「配置」之舉，更遑論兩者職權之歧異，自不能僅因配置之乙端即謂制憲者當時係將檢察機關包括於憲法第八條第二項前段所規定之「法院」內；而況就立憲之沿革

principle, adopted temporarily. As time passed and memories faded, the term "tribunal" still lingered on. It cannot be said that later adoption of the term "court" was a calculated move to deny the court or tribunal a restrictive connotation, and to assume an expansive definition for the court – that is, to include the prosecutor in it. Even for the connotation of "court," we should observe and judge from its functions. This has been discussed previously. The Constitution has used the term "trial" explicitly. That should refer to a court of a restrictive definition, and no more. Moreover, the prosecutor's offices were made to be attached to courthouses. It can be inferred from this arrangement that the prosecutor's office, by its nature, is not a court. Otherwise, there would be no need to "attach" it to another thing, not to mention these two organs each have different duties and functions. Thus, it cannot be said that the framers of the Constitution intended to have the prosecutor's office included in the "court" as provided in the Article 8, Paragraph 2, second sentence, of the Constitution. Moreover, when we reviewed the constitutional history of the

言，民國二年之中華民國憲法草案（天壇憲草）第五條就此係規定為「法庭」，十二年公布之「曹錕憲法」第六條亦規定為「法院」，迨十九年之「太原約法草案」第二十九條仍規定為「法院」，二十年之中華民國訓政時期約法第八條雖規定為「審判機關」；但二十五年之中華民國憲法草案（五五憲草）第九條及三十六年公布施行之中華民國憲法均規定為「法院」，似此先後或稱「法庭」、「法院」、「審判機關」以迄於「法院」，雖用語不一，但就內涵言，實則均係指職司審判之機關，即狹義之法院；固然憲法之解釋有其多種方法，惟單就本解釋案所涉及之客觀說與主觀說而論，前者係以憲法之客觀規範意旨為解釋之依據，後者則須忠實反映制憲者之原意；然其雖係如此，仍亦應以制憲者已明確表明之憲法文字為依據，唯有在憲法文義不明，方應併將制憲當時之史料或背景加以佐証；蓋制憲原意之探求並非易事，其涉及起草者與制定者（批准者）之關係與各種史料紀錄之差異，若無一定之標準或依據，極易流於獨斷與恣意；況且所謂制憲當時存在之事實，本即屬憲法規範之對象，又何能再執該項事實以解釋憲法？茲憲法第八條之文義至為明白，其所稱之

Republic, Article 5 of the 1913 ROC Constitutional Draft (the Tien Tan Constitutional Draft) used the term “bench,” Article 6 of the “Tsau Kun Constitution” promulgated in 1923 used the term “court,” and Article 29 of the “Tai Yuan Basic Law Draft” prepared in 1930 used the term “court.” Although Article 8 of the Provisional Constitution for the Period of Political Tutelage promulgated in 1931 used the term “tribunal,” Article 9 of the Draft of the Constitution (Double Five Constitutional Draft) prepared in 1936 and the Constitution promulgated in 1947 [the current Constitution] both used the term “court.” It would appear that the various terms used at different times – “bench,” “court,” “tribunal” and eventually “court”-- connoted the same organ of adjudication, i.e., the court of a restrictive definition. There are various methods for constitutional interpretation. Comparing the objective theory with the subjective theory for this case, the former interpreted according to the normative intent reflected objectively in the words of constitutional articles, while the latter had to mirror the framer’s subjective intent faithfully. Even

「法院」，倘遵循該條文字具體所顯示之整體意涵為客觀之解釋，實應僅指職司審判而具有審問、處罰之法官所構成之法院，此種解釋結果，不特符合憲法保障人身自由之精神，抑亦與先進民主憲政國家保障人身自由制度相契合，畢竟通常法律用語之「法院」，本即指行使審判權之機關。

so, the latter method still must abide by the letters of the Constitution chosen explicitly by the framers. Only when the literal meaning of the Constitution is ambiguous can the historical materials or the contextual information be supplemented. The search for the framers' original intent is not an easy task. It involves clarifying the relations between the drafter and the maker (the approver), and resolving the discrepancies among historical records from various sources. If there is no certain standard or criterion, the determination may become arbitrary and unscrupulous. Moreover, the fact that it existed in the time of the preparation of the Constitution was itself the normative object for the Constitution. How could the interpretation of the Constitution be built on this fact? The literal meaning of Article 8 of the Constitution is clear. The "court" it refers to, if we take the language of the provision as a whole and give it an objective, literal interpretation, should mean a court composed of judges conducting trials and having authority to examine and to punish. The result from this line of interpretation will not only be in harmony with the

spirit of the Constitution for the protection of physical freedom, but also in congruence with the system established by most modern constitutional democratic states for the protection of physical freedom. After all, the word "court," in general usage, commonly refers to an organ that exercises adjudicative power.

Article 9 of the Constitution has expressly provided "Except for those in active military service, no person shall be subject to trial by a military tribunal." Thus, it cannot be said that the "judicial organ" provided in Article 8, Paragraph 1, of the same law is intended to exclude the trial and punishment of a military tribunal from it. The term "trial" does not necessarily always refer to proceedings commenced after the indictment. The "trial" prescribed in Article 8, Paragraph 2, is a hearing to determine the necessity of continuous "detention" or custody of the accused. It is not a trial on substantive issues. The Haftpruefung provided in Article 117 and the Muendliche Verhandlung in Article 118 of the German Code of Criminal Procedure are similar provisions for

憲法第九條已明定「人民除現役軍人外，不受軍事審判。」自不得謂同法第八條第一項所規定之「司法機關」旨在排除軍事機關之審問、處罰；且所謂「審問」原非必限於案件起訴之後，憲法第八條第二項所規定之「審問」意在審查其繼續「拘禁」、即羈押之必要與否，並非對案件之實體為審理，如德國現行刑事訴訟法第一百十七條之「羈押審查」（Haftpruefung），第一百十八條之羈押「言詞審理」（Muendliche-Verhandlung）即均係起訴前決定羈押與否之規定，另日本刑事訴訟法第八十三條、第八十四條、第八十五條等關於羈押理由之告知，亦係在法庭為之。其主張前開憲法規定之「審問」係指檢察官偵查之訊問，並以此謂該條項規定之法院應包括檢察官云云，要非確論。

pre-indictment hearings of custody issues. Articles 83, 84 and 85 of the Japanese Code of Criminal Procedure, regarding the order to show causes for reason of detention, also are provisions for conduct of the court. The assertions that the "trial" provided in the aforementioned constitutional provisions refers to interrogations conducted by the prosecutor, hence the court shall include the prosecutor's office, and so on, are not accurate statements.

Article 8, Paragraph 4, of the Constitution provides: "When a person is unlawfully arrested or detained...for an investigation, the court shall not reject such a petition, and, shall, within 24 hours, investigate...deal with the matter in accordance with the law." It uses the word "investigate" which differs from Article 52: "the President shall not...be liable to criminal prosecution." The term "investigation" is distinct from "prosecution." It is argued that, under such circumstances, citizens may, as a right, report to or inform the prosecutor about the crime. Public servants on duty, if they happen to know a crime has been committed, have

憲法第八條第四項規定「人民遭受任何機關非法逮捕、拘禁……追究，法院不得拒絕，並應於二十四小時內……追究，依法處理」既係明定為「追究」，而與第五十二條「總統……不受刑事上之『訴究』」不同，顯見此之所謂「追究」與檢察官之「追訴」有間。或謂此種情形人民原得自行向檢察官告訴、告發；公務員執行職務知有犯罪嫌疑者亦應為告發，何庸多此一舉？然憲法之所以為如此之規定者，無非在於強調人身自由之保障，故將此一「追究」及「依法處理」於憲法內為規定，俾直接之保護。因是更規定「法院不得拒絕，並應於二十四小時內追究，依法處理」，亦即不許法院為「追究」與否

an obligation to report the crime, too. Why do we need this superfluity? The reason why the Constitution was devised as such was but to emphasize the protection of physical freedom. It places "investigation" and "in accordance with the law" in the same constitutional provision of direct protection. It further provides "the court shall not reject such a petition, and, shall, within 24 hours, investigate...deal with the matter in accordance with the law." Therefore, it left no discretion for the court to decide whether to "investigate" or not. It also mandates the court to conduct this investigation within 24 hours, and the court cannot use excuses allowed by other laws to delay the action. This is the reason why Paragraph 3 of the same Article does not allow the court the right to reject the petition, nor the right for a court order to the organ concerned to investigate and report first.

之自由裁量，且限期法院必須於二十小時內為之，不許其援引一般之法令為四搪塞，此亦所以同條第三項除明定不得拒絕外，更明示不得先令查覆之原因。

What is the "court" designated in Article 97, Paragraph 2, of the Constitution meant for? Whether it has the same connotation with Article 8 is another matter. The Court Organic Act had no need to

憲法第九十七條第二項所規定之「法院」究何所指？應否與第八條所規定者作同一涵義之解釋，此乃另一事；而法院組織法原非必須為配置檢察官（署）之規定不可，此觀之日本立法例

provide for attaching the prosecutor's office to courthouses. The fact that the Japanese legislature enacted a separate "Law of the Courts" and "Law of the Prosecutor's Office" is illustrative. The "law courts" in Article 82 of the Constitution: "The organization of the Judicial Yuan and of the law courts of various grades shall be prescribed by law" are not necessarily to be interpreted as including the prosecutors. Interpretation No. 13 rendered by this Yuan was an elaboration on issues of protection for jobs of active prosecutors, not on issues of whether a prosecutor's office can be equated with a court. Since said Interpretation had stated explicitly that the judge in Article 80 of the Constitution does not include the prosecutor, it is obvious that the prosecutor is not a member of a court of a restrictive definition. Based on said Interpretation, and on discrepancies in the term "court" as it appears in various laws, the claim that the "court" in Article 8, Paragraph 2, should include "prosecutor" is a misstatement.

分別制定「裁判所法」、「檢察廳法」即可明瞭。是憲法第八十二條：「司法院及各級『法院』之組織，以法律定之」之所謂「法院」，當然亦非必須解之為包括檢察官在內始係符合憲法規定。又本院釋字第十三號解釋，旨在闡釋實任檢察官之保障，而不在於檢察機關之是否為法院；蓋其既已明示憲法第八十條之法官不包含檢察官在內，則檢察官之不應為狹義法院之一員，理至明顯。其執該號解釋以及諸多法律關於「法院」用語之歧異，主張憲法第八條第二項之法院應包括檢察官云云，要屬誤解。

The provision "other officer author

另一九五三年生效之歐洲人權及

ised by law to exercise judicial power" in Article 5, Paragraph 3, of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, effective 1953, and similar provisions in Article 9, Paragraph 3, of the International Convention for Citizens and their Political Rights, effective 1967, and Article 7, Paragraph 5, of the Continental American Human Rights Convention, effective 1978, raised a question of whether this officer includes the prosecutor. Or, put another way, whether the decision on the place a person is to be sent to after arrest and detention is limited to that of a "judge" only? Although it remains controversial, yet the judgment rendered by the European Human Rights Court in the Pauwels Case (1988) indicated that, if the law confers the authority of criminal investigation and indictment on the same officer, even though the officer exercises powers independently, his neutrality in carrying out his duties should be considered highly suspect, hence, it violates the provision "other officer authorised by law to exercise judicial power" referred to in Article 5, Paragraph 3, of said Conven-

基本自由保障公約（[European] Convention for the Protection of Human Rights and Fundamental Freedoms）第五條第三項所規定之「依法執行司法權力之其他官吏」（other officer authorised by law to exercise judicial power）暨一九七六年生效之公民及政治權利國際盟約第九條第三項與一九七八年生效之美洲人權公約第七條第五項類同之規定，是否應包括檢察官，亦即人民被逮捕拘禁後，其所應解送之處，是否僅限於「法官」？此雖各執一詞，然參以歐洲人權法院於一九八八年關於「包威爾斯」乙案之判決所稱，若法律將犯罪偵查與公訴提起之權授予同一官吏，縱其係獨立行使職權，其職務之中立性仍應受質疑，有違前開公約第五條第三項所指之「依法執行司法權力之其他官吏」之規定等語（G. Pauwels Case, Judgement of 26 May 1988, COUNCIL OF EUROPE YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 148-150（1988）），即不得賦予羈押人民之權，而我國之檢察官既為偵查之主體，且有行使公訴之權，是即令依據前述相關之國際公約，顯亦不應有刑事訴訟法上之羈押權；何況我國憲法第八條第二項既明定為「法院」如

tion. (G. Pauwels Case, Judgment of May the Protection of Human Rights and 26, 1988, COUNCIL OF EUROPE YEAR-BOOK OF THE EUROPEAN CON-VENTION OF HUMAN RIGHTS, 148-150 [1988]). That is, not to confer on the officer the right to detain people. The prosecutor of this state is the body of criminal investigation. It [the office] pos-sesses the public charge power as well. In light of the abovementioned international conventions, it is obvious that the prose-cutor shall not have the detention power enumerated in the Code of Criminal Pro-cedure. Furthermore, since Article 8, Paragraph 2, of the Constitution has ex-pressly conferred detention power on the "court," as discussed previously, and this "court" means a court of a restrictive definition composed of judges possessing independent adjudicative power, also dis-cussed previously, it is not appropriate to invoke the provisions of "international treaties," "conventions" and claims that the court in the Article 8, Paragraph 2, first sentence, of the Constitution shall include "other officers authorised by law to exercise judicial power" such as a

上，而此之所謂法院係指有獨立審判權之法官所構成之「國際盟約」、「公約」之規定狹義法院，亦已述之如前，尤不宜執此主張我國憲法第八條第二項前段所稱之法院亦應包括「依法執行司法權力之其他官吏」如檢察官在內。

prosecutor.

The provisions of Article 8 of the Constitution regarding power of arrest, detention, investigation and punishment have the character of Verfassungsvorbehalt [of German law]. The meaning of "court" in the first sentence of Paragraph 2 of the same Article has been discussed previously. There is no validity for the claim that a prosecutor may have detention power as provided in the Code of Criminal Procedure if the procedure prescribed by law were observed. Although it is true that the prosecutor is a public interest representative, that he/she has the duty to make sure that the court applies the law properly for a judgment, that he/she does not pursue a guilty verdict for a defendant as his/her sole purpose, that the office is a judicial organ by an expansive definition, yet these factors together do not result in a conclusion that the Constitution has conferred the detention power prescribed by the Code of Criminal Procedure upon the prosecutor. Article 160, Paragraph 2, of the German Code of Criminal Procedure provides that a prosecutor must investi-

憲法第八條關於行使逮捕、拘禁、審問、處罰權限之規定具有憲法保留（Verfassungsvorbehalt）之性質，同條第二項前段之「法院」究何涵義，既如上述，自無所謂倘已符合正當程序，檢察官亦得擁有刑事訴訟法之羈押權問題。至於檢察官之為公益代表，監督法院裁判為正當之法律適用，非以追求被告有罪判決為唯一目的之諸多職責暨其係屬廣義之司法機關等等，雖屬實在，仍亦非可因此即謂憲法已同時賦予其刑事訴訟法上羈押被告之權。德國刑事訴訟法第一百六十條第二項亦明定，檢察官不僅對於不利且對於有利之情況，亦應注意發見，但仍無礙其於基本法下不擁有決定羈押被告之權。且如前述，憲法對人身自由係為直接之保障，其既明定法院以外之司法或警察機關，雖得依法定程序逮捕、拘禁人民；但仍不許逾越二十四小時，則所謂刑事訴訟法上羈押權歸屬係立法裁量之範疇云者，固非有據；而此二十四小時究竟合乎現實之需要與否？應否如同其他部分之國家然，規定為四十八小時、甚或七十二小時，此則屬於修憲之問題。

gate not only evidence adverse to, but also evidence favorable to, a defendant. Yet this requirement does not change the position of [German] Basic Law that the prosecutors do not have power to detain defendants. Also, as discussed previously, the protection rendered in the Constitution for physical freedom is a direct protection. Although it provides that a judicial or police organ other than a court may arrest or detain a person in accordance with the procedure prescribed by law, yet this detention cannot go beyond a 24-hour period. Therefore, the claim that the detention power prescribed in the Code of Criminal Procedure is a matter of legislative discretion has no validity. Whether this 24-hour requirement is realistic, whether the requirement should be changed to 48 hours, or even to 72 hours, as some other countries provide are questions for constitutional amendment.

As discussed previously, the judge acts independently free from interference from any other state organs. When trying cases, each judge is independent from others and makes a judgment according to

如前所述，法官行使職權，對外不受任何其他國家機關之干涉。其審判案件對內每位法官都是獨立，僅依據法律以為裁判；此與檢察官之行使職權應受上級長官（檢察首長）指揮監督者，

law only. This differs from the prosecutor who must observe the order and supervision from his superior (chief prosecutor) when per forming his duties. The judge's trial is an act of passive nature. It adheres to the principle that a court shall hear no suit without the plaintiff's filing a claim. It is contra to the prosecutor's investigation and indictment, which is active in nature. Since the purpose of Article 8 of the Constitution is to protect physical freedom, if we view it from the framework of the Constitution as a whole, this end is probably better served by letting the court composed of judges determine whether or not to detain a person. This does not involve the issue of assessing who is objective and impartial. Otherwise, the detention right may be conferred on the police organ as well. For from the standpoint of a state, who could doubt the objectivity and impartiality of a police organ? Therefore, we should not compare this matter with the detention power enjoyed by a court (judges) conducting trial. Although the prosecutor of this state has certain functions and duties similar to those of foreign countries' juged' instruction or Untersss-

功能上固不能相提併論；而法官之審判係出於被動，即所謂不告不理原則，其與檢察官之主動偵查，提起公訴，性質上亦截然有別。憲法第八條制定之目的既在保障人身自由，則就其規定之整體予以觀察，當以由法官構成之法院決定羈押與否，較能達成此一目的，本不涉及何者客觀公正之問題，否則警察機關豈非亦可賦予羈押之權，蓋就國家而言，何能懷疑警察機關之客觀公正性？因此，殊不得以審判中法院（法官）之得依職權為羈押乙事相比擬。又檢察官雖具有外國（如現在之法國、一九七五年前之德國、戰前之日本）預審法官（juge d'instruction; Untersuchungsrichter; 豫審判事）之部分職權；但其究非等同於預審法官；況德國於一九七五年修改刑事訴訟法，廢除預審制度後，其檢察官本於基本法之規定，仍亦未完全替代預審法官以擁有羈押被告之權。是其以我國檢察官具有預審法官之性格，即謂應有刑事訴訟法上羈押被告權限之主張，仍難認為有據。

suchungsrichter (as provided in present-day French laws, German laws prior to 1975, and pre-war Japanese laws), how ever, they cannot be equated with a pre-trial judge. Germany revised its Code of Criminal Procedure in 1975 to abolish the pre-trial system. Even in the post-revision code, the German prosecutors still do not completely assume the position of pre-trial judges to hold detention power. Therefore, the claim that the prosecutor of this state has the character of a pre-trial judge, hence should hold detention power as prescribed in the Code of Criminal Procedure, is hardly valid.

In sum, the Constitution is not a static concept. It evolves from the continued renewal and growth of a nation. Interpretive choices for the solution of contemporary social problems based on the abstract text of the Constitution cannot ignore the adjustments needed for coping with changing times. Although it is essential to find out the normative meaning of the Constitution from historical records, questions about what function a constitutional provision has and what mission it

總之，憲法並非靜止之概念，其乃孕育於一持續更新之國家成長過程中，依據抽象憲法條文對於現所存在之狀況而為法的抉擇，當不能排除時代演進而隨之有所變遷之適用上問題。從歷史上探知憲法規範性的意義固有其必要；但憲法規定本身之作用及其所負之使命，則不能不從整體法秩序中為價值之判斷，並藉此為一符合此項價值秩序之決定。人權保障乃我國現在文化體系中之最高準則，並亦當今先進文明社會共同之準繩。作為憲法此一規範主體之

undertakes will have to be answered by value judgments implicit in the entire legal system, and decisions will have to be made in accordance with it. The protection of human rights is the highest principle for the cultural system of this state. It is also a common principle observed jointly by modern civilized societies. Citizens are the normative subjects of the Constitution. Citizens express their belief in real life. When we interpret what citizens want the Constitution to do for them, we must look into the social value and order reflected in this will of the people. Physical freedom is the basis for all freedom. Without adequate protection of physical freedom, it is impossible to realize any other freedom. Since it must faithfully observe Article 8 of the Constitution, this Yuan decided to apply the text of the Constitution as reasoned above to carry through its idea, so that it may possibly attain this goal. It is hereby rendering interpretation as contained in the "HOLDING."

國民，其在現實生活中所表現之意念，究欲憲法達成何種之任務，於解釋適用時，殊不得不就其所顯示之價值秩序為必要之考量。茲人身自由為一切自由之所本，倘人身自由未能獲得嚴謹之保護，則其他自由何有實現之可能！憲法第八條之規定既應予遵守，則為求貫徹此一規定之理念，本院認其應以前開解釋之適用，始有實現其所規定之目的之可能。爰予解釋如「解釋文」所示。

Justice Young-Mou Lin filed concurring opinion in part.

本號解釋林大法官永謀提出部分協同意見書；孫大法官森焱、王大法官

Justice Sen-Yen Sun filed dissenting opinion in part.

Justice Ho-Hsiung Wang filed dissenting opinion in part.

和雄分別提出部分不同意見書。