

Why Ma Ying-jeou cannot be stopped

Written by Wu Ching-chin 吳景欽

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As former president Ma Ying-jeou (馬英九) has stepped down, prosecutors have reopened investigations into the many criminal cases in which he has been implicated. This has led to a controversy over the question of whether Ma should be barred from leaving the country, just as former president Chen Shui-bian (陳水扁) was when he left office in 2008.

According to Article 26 of the Classified National Security Information Protection Act (密防法), personnel who have handled national secrets must obtain the approval of the head of the competent authority if they want to leave the nation within three years of leaving office.

A president will naturally have handled a great deal of national secrets, in particular highly classified information, and restrictions should thus be applied to the right of a retired president to leave the nation. A retired president who wants to leave the country and perhaps travel to China would therefore have to obtain the approval of the incumbent president before doing so. Still, this would be a decision that has to be made on a case-by-case basis. In other words, it could not be equated to a ban on leaving the country.

Furthermore, according to Article 6 of the Immigration Act (入出國及移民法), the National Immigration Agency can ban a person who is “strongly suspected to be involved in major economic crimes or major criminal cases” from leaving the country. Since Ma is implicated in at least 24 criminal cases, this would appear to provide sufficient grounds for banning him from leaving.

However, there is a large gray area around the issue of what kind of offense would constitute a “major criminal case.” In addition, it is unclear which of these cases are substantial cases and which are not, so to base a decision to restrict Ma’s right to leave on such a vague and fuzzy reason would violate the principle of legal clarity and precision.

Even if someone were restricted from leaving based on this rule, the same article also stipulates that the judiciary, the Bureau of Investigation or the National Police Agency can only notify the immigration agency of a ban on a person leaving the country in urgent situations and that ban is only valid for 24 hours from the time of notification. Unless an order banning the person from leaving is issued by a judge or a prosecutor, this is only an expedient measure.

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According to Article 228 of the Code of Criminal Procedure, it is only when an accused is complying with a summons and the prosecutor believes there is a risk that the accused will escape or destroy evidence — but sees no need for detention — that the prosecutor can demand bail, or remand the accused into the custody of another, or limit their movement to their residence.

Article 52 of the Constitution exempts a sitting president from criminal prosecution, which is why even if Ma was implicated in former prosecutor-general Huang Shih-ming's (黃世銘) illegal wiretapping and leaking of classified information, he was only questioned by prosecutors as a witness. It is also why, unless prosecutors subpoena Ma as a defendant now that he has stepped down, his movements cannot be restricted to his residence and he cannot be banned from leaving the country.

When former president Chen Shui-bian stepped down on May 20, 2008, the Special Investigation Division restricted him from leaving the country before he had been subpoenaed and questioned. That was illegal and it is also why Ma cannot be restricted from leaving. A decision to restrict someone from leaving the country should not be based on precedent, but on the law.

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Translated by Perry Svensson

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