

J. Y. Interpretation No.704 (November 16, 2012) *

【The protection of the status of a military judge who applies to voluntarily remain in military camp】

ISSUE: Is it unconstitutional that the post of a military judge who has not yet reached the maximum number of years (or age) for military service should be ruled by the Procedure for Approval of Voluntarily Remaining in Camp and the Regulations for Exemption from Drafting upon Completion of Military Service ?

RELEVANT LAWS:

Articles 16 and 80 of the Constitution (憲法第十六條、第八十條) ; J.Y. Interpretations Nos. 436 and 601 (司法院釋字第四三六號、第六〇一號解釋) ; Articles 17, 21 and 22 of the Act of Military Service for Officers and Noncommissioned Officers of the Armed Forces (陸海空軍軍官士官服役條例第十七條、第二十一條及第二十二條) ; Article 9, Subparagraph 1 of the Act of Assignment for Officers and Noncommissioned Officers of the Armed Forces (陸海空軍軍官士官任職條例第九條第一款) ; Articles 3, 4, 5 and 7 of the Regulation of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (amended and promulgated on November 27, 2002) (中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士

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官志願留營入營甄選服役規則第三條、第四條、第五條及第七條) ;Points 12.1, 12.3 and 13.6 of the Operating Regulations of Military Service for Selecting Voluntary Personnel as Officers, Noncommissioned Officers and Soldiers of the Armed Forces (陸海空軍軍官士官士兵志願留營入營甄選服役作業規定拾貳、一、三及拾參、六)。

KEYWORDS:

Voluntarily remain in military camp (志願留營), exemption from drafting upon completion of military service (服役期滿解除召集), military judge (軍事審判官), judicial authority based on constitutional principles (司法權建制之憲政原理), judicial independence (審判獨立), protection of status (身分保障), right of instituting legal proceedings (訴訟權), due process of law (正當法律程序).**

HOLDING: That Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces, as amended on November 27, 2002—All articles were subsequently amended and promulgated on November 13, 2006, but the said article number and contents remain unchanged— with regard to Standing Officers on Reserve Service, who join the camp voluntarily, on com-

解釋文：中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則第七條(九十五年十一月十三日全文修正，條次、內容無異)，關於後備役軍官志願入營服役期滿而志願繼續服現役者，應依志願留營規定辦理，其中應經之核准程序規定，適用於經考試院特種考試及格志願入營服役，而尚未經核准得服現役至最大年限(齡)之軍事審判官部分，以及陸海空軍軍官士官服役條例第

pletion of military service, yet are willing to continue, by which they shall observe the rules applying to persons who voluntarily remain in camp, including the procedural norms for approval, should apply to those military judges who voluntarily join the service after passing the Special Examination by the Ministry of Examination, but have yet to receive approval for service up to the maximum number of years (or age) and Article 17 of the Act of Military Service for Officers and Noncommissioned Officers of the Armed Forces, concerning exemption from drafting upon completion of military service should apply to the afore-mentioned situation does not conform to the adjudicative independence of a tribunal established by judicial authority on constitutional principles, or to the right to institute legal proceedings as safeguarded by Article 16 of the Constitution, and so, from the date of the publication of this Interpretation to a maximum of two years, the said provisions shall become inapplicable to the foregoing military judges.

十七條關於服現役期滿予以解除召集之規定，適用於上開情形部分，與司法權建制之審判獨立憲政原理及憲法第十六條保障人民訴訟權之意旨不符，應自本解釋公布之日起至遲於屆滿二年時，對於上開類型軍事審判官不予適用。

To protect the status of the said military judges, the relevant competent authority shall, within the prescribed period, amend the pertinent laws and regulations in compliance with this Interpretation, and clearly stipulate the selection standards for the foregoing military judges, who voluntarily remain in camp, and the due process of law to be followed.

REASONING: The functioning of military tribunals, which are one kind of national criminal law authority, is judicial in nature. The initiation of proceedings and running of this judicial authority should conform to the minimum requirements of due legal process, including such matters as there being an independent and impartial legal body and process. Furthermore, it should not infringe Article 80 or other relevant provisions in the Constitution that deal with the constitutional origin on which the judicial authority is founded (cf. J.Y. Interpretation No. 436). However, it is not necessary that judges be in a position of lifetime tenure (cf. J.Y. Interpretation No. 601). Just as the guarantees given to judges are not the

為保障上開類型軍事審判官之身分，有關機關應於上開期限內，依本解釋意旨，修正相關法律，明定適用於上開類型軍事審判官志願留營之甄選標準及應遵循之正當法律程序。

解釋理由書：按軍事審判機關所行使者，屬國家刑罰權之一種，具司法權之性質。其審判權之發動與運作應符合正當法律程序之最低要求，包括獨立、公正之審判機關與程序，並不得違背憲法第八十條等有關司法權建制之憲政原理（本院釋字第四三六號解釋參照）。次按職司審判者固不以終身職為必要（本院釋字第六〇一號解釋參照），然如同法官身分之保障與一般公務員不同，軍事審判官身分之保障亦應有別於一般軍官。為確保職司審判之軍事審判官唯本良知及其對法律之確信獨立行使審判職權，使受軍事審判之現役軍人能獲獨立、公正審判之憲法第十六條所保障之訴訟權得以實現，軍事審判官非受刑事或懲戒處分、監護宣告或有與受刑事或懲戒處分或監護宣告相當程

same as those for ordinary civil servants, so too the guarantees offered to military judges should differ from those applicable to ordinary military officers. To ensure that the judicial action of a military judge is undertaken solely on the basis of his/her conscience and an independent ruling based on the law, such that military persons in current service may receive an independent and fair trial as guaranteed by article 16 of the Constitution dealing with the right to institute legal proceedings, no military judge shall be removed from office unless he or she is guilty of a criminal offense or subject to disciplinary action, or declared to be under supervision, or to be in receipt of other legal measures equivalent to criminal conviction, disciplinary sanction or supervision, nor according to due legal process may he/she be removed from office. Unless the law provides otherwise, he/she may not be suspended, transferred or have his/her emolument annulled. These are important components of the principles founding judicial authority.

度之法定原因，並經正當法律程序，不得免職；非依法律，不得停職、轉任或減俸。此亦為司法權建制原理之重要內涵。

As amended and promulgated on November 27, 2002, Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (hereafter referred to as the “Military Service Regulations”) states that: “An Officer on Reserve Service ... who voluntarily joins the camp for service may serve within the term of service, which is three years per term. Yet a Standing Officer on Reserve Service... who seeks to reapply to enter the camp after completing the period of service should apply to continue to serve. Once approved, he/she may continue to serve up to the maximum number of years or up to the age limit (Paragraph 1). Persons coming under the above paragraph who apply to continue to serve on completion of their term shall follow the provisions of these Regulations regarding voluntarily remaining in military camp. (Paragraph 2)” (All articles as amended on November 13, 2006, but the said article number and contents remain unchanged; hereinafter referred to as the “Disputed Provision I”). According to this regulation, (with reference to

中華民國九十一年十一月二十七日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則（下稱服役規則）第七條：「後備役軍官……志願入營，服役期限，以三年為一期。但後備役常備軍官……再入營服現役期滿後，申請繼續服現役，經核准者，得繼續服現役至最大年限或年齡（第一項）。前項人員服役期滿志願繼續服現役者，依本規則志願留營之規定辦理（第二項）。」（九十五年十一月十三日全文修正，條次、內容無異；下稱系爭規定一）依此規定，應召（陸海空軍軍官士官士兵志願留營入營甄選服役作業規定《下稱服役作業規定》拾參六參照）申請志願入營服役經核准之後備役常備軍官，服役期限為三年，三年期滿時需再申請志願留營，經核准者，始得繼續服現役至最大年限（齡）。而應召申請志願入營服役經核准之後備役預備軍官，於服役三年期滿，亦需再申請志願留營，經核准者，始得依其被核准之一或二或三年之志願留營年限（服役規則第四條參照），繼續服現役；於各該繼續服役之年限屆滿時，需再為志願留營之申請，至前後經核准之志願服役年限滿六年時（陸海空軍軍官士官服役條例《下稱服役條例》第二十二條參照），始得轉

Point 13.6 of the Operating Regulations of Military Service for Selecting Voluntary Personnel as Officers, Noncommissioned Officers and Soldiers of the Armed Forces; hereafter referred to as the “Service Operating Regulations”) Standing Officers on Reserve Service who apply to voluntarily join the camp, and are accepted, will fulfill a term of service of three years. Upon the completion of the three-year term they may reapply to voluntarily remain in camp. If accepted they then may continue to service up to the maximum number of years (or age). Reserve Officers who apply to voluntarily join the camp, and who are accepted, after completion of their three-year term of service are still required to reapply to voluntarily remain in camp. On acceptance they may begin to continue to serve for one, two or three years according to the time period permitted (cf. Article 4 of the Military Service Regulations). Upon completion of the agreed term, they shall reapply to voluntarily remain in camp, until they have completed a total of six years voluntary service (cf. Article 22 of the Act of Military Service for Officers and

服常備軍官，繼續服現役至最大年限（齡）。是尚未得繼續服現役至最大年限（齡）之軍官，為繼續其軍官職務，皆須申請志願留營，填具「官兵志願留營申請書」，經政戰主管、主官依據體格、考績考核、學歷、階級、職務需要、員額配置以及智力測驗等甄選標準（服役規則第三條、第五條參照）為初審，保防官、人事部門主管為複審後，由編階中將以上單位主官核定（服役規則第五條、服役作業規定拾貳一、三及附件「官兵志願留營申請書」參照）。對於未獲核准志願留營之各次申請者，即依服役條例第十七條規定：「常備軍官……預備役，應召再服現役人員，於再服現役期滿……者，予以解除召集。」（下稱系爭規定二，此規定於預備軍官準用之，服役條例第二十一條參照）並依陸海空軍軍官士官任職條例第九條第一款規定，免除其現役軍官職務。

452 J. Y. Interpretation No.704

Noncommissioned Officers of the Armed Forces; hereafter referred to as the “Military Service Act”), they will thereafter be qualified to serve as Standing Officers on Reserve Service, and continue to service up to the maximum number of years (or age). Therefore, officers who have not yet served up to the maximum number of years (or age), and who wish to retain their military post are required to apply to voluntarily remain in camp, by filling out the form “Officers and Soldiers applying to Voluntarily Remain in Military Camp”. Having passed an initial examination by the political warfare chief or officer of their physical health, service rating and appraisal, level of education, rank, the requirements of their post, the number of persons required and an intelligence test (cf. Articles 3 and 5 of the Military Service Regulations) and upon passing a higher examination by the security officer or head of personnel, they may be accepted by a departmental supervision head with a rank no lower than that of a lieutenant-general (cf. Article 5 of the Military Service Regulations, Points 12.1 and 12.3 of the Service Operating Regulations and

their appendix, “Officers and Soldiers applying to Voluntarily Remain in Military Camp”). For those applicants who do not receive approval to remain in camp, Article 17 of the Military Service Act will apply, which states: “A Standing Officer on Reserve Service ... or Reserved Officer Service, who submits an application for active service, upon the completion of the term of re-service ..., will be discharged from service” (hereinafter referred to as the “Disputed Provision II.” The above-mentioned article is applicable *mutatis mutandis* to reserve officers, cf. Article 21 of the Military Service Act). Furthermore, the said officer will be discharged from active service according to Article 9, Subparagraph 1 of the Act of Assignment for Officers and Noncommissioned Officers of the Armed Forces.

The Disputed Provision I and Disputed Provision II are also applicable to military judges who voluntarily join the service after passing the Special Examination set by the Ministry of Examination, but have yet to receive approval for active service up to the maximum number

系爭規定一、二亦適用於經考試院特種考試及格志願入營服役之尚未經核准得服現役至最大年限（齡）之軍事審判官（以下所稱軍事審判官係指系爭類型之軍事審判官），並未因其審判官之身分而有特別考量。軍事審判官能否續任審判職務繫於權責長官對於志願留

454 J. Y. Interpretation No.704

of years (or age). (Military judges of this disputed category are hereafter referred to as “military judges”.) They are not to be granted special consideration due to their status as judges. Whether a military judge may continue at his or her adjudicative post depends on the approval of the officer in charge of applications to remain in camp voluntarily. Moreover the grounds for making an assessment as to whether the person may continue to remain in camp, except in the case where the procedure does not follow the norms of the committee for fairness by which a military judge has an opportunity to appeal according to due process of law (cf. J.Y. Interpretation No. 491), are to follow the norms for selection and may mean that the judge is not permitted to continue in his/her post even if he/she is not guilty of a criminal offense nor subject to disciplinary action, nor declared to be under supervision, nor to be in receipt of other legal measures equivalent to criminal conviction, disciplinary sanction or supervision, nor found by due process of law to be lacking educational qualifications, dedication to work, due quality

營申請之核定。然查關此准否繼續留營申請之核定，除程序上未遵循諸如由立場公正之委員會決定、給予軍事審判官陳述申辯機會等正當法律程序為之（本院釋字第四九一號解釋參照）外，所依據之甄選標準，亦可能使軍事審判官非受刑事或懲戒處分、監護宣告且無與受刑事或懲戒處分或監護宣告相當程度之事由，又無依正當法律程序審查其學識能力、敬業精神、裁判品質及品德操守，認定確不適任軍事審判官職務之法定原因，而不能續任審判職務，致軍事審判官之身分無從確保。

of judgment or suitable moral conduct which might otherwise serve as a cause for determining incapacity for service as a military judge and so preventing the judge from continuing in office. Consequently, the status of military judge is never to be taken for granted.

The Disputed Provision I regarding a military judge of the Reserved Officer Service who, on completion of his/her period of service voluntarily applies to serve in the active service, should make use of that section which relates to military judges, following the norms for approval in the above process. The Disputed Provision II regarding the exemption from drafting granted to persons who have fulfilled their active service, when used for the above does not conform to the constitutionally guaranteed independence of judicial judgment nor to the meaning of Article 16 of the Constitution guaranteeing people's right to institute legal proceedings. Therefore, from the date of publication of this Interpretation to a maximum of two years, the said provisions shall become inapplicable to military judges.

是系爭規定一關於後備役軍官志願入營服役期滿而志願繼續服現役者，應經上開核准程序之規定，適用於軍事審判官部分，以及系爭規定二關於服現役期滿予以解除召集之規定，適用於上開情形部分，與司法權建制之審判獨立憲政原理及憲法第十六條保障人民訴訟權之意旨不符。應自本解釋公布之日起至遲於屆滿二年時，對於軍事審判官不予適用。為保障軍事審判官之身分，有關機關應於上開期限內，依本解釋意旨，修正相關法律，明定適用於軍事審判官志願留營之甄選標準及應遵循之正當法律程序。

456 J. Y. Interpretation No.704

To guarantee the status of military judges, the relevant authority shall within the prescribed period amend pertinent laws in compliance with the meaning of this Interpretation, and clearly stipulate both the selection standards for military judges who voluntarily remain in camp, and the due process of law to be followed.

The petitioner in this case raised [has] another matter regarding qualification screening, alleging that in the Supreme Administrative Court, 96-Tzai-Tze No. 3189 (2007), the Court applied Articles 23 and 24 of the Military Justice Act and Article 9 of the Regulations for Special Examination for Military Judges (as amended and promulgated July 14, 2000) (hereinafter collectively referred to as the “Disputed Provisions III”), to be in violation of Articles 77, 85, 86 and 140 of the Constitution. It should be noted that in the above-referenced Supreme Administrative Court decision, the petitioner’s appeal against the Taipei High Administrative Court, 94-Tsu-Tze No. 3084 (2005) was dismissed since the said appeal was not in conformity with the law. Hence, the

本件聲請人另因銓敘事件，認最高行政法院九十六年度裁字第三一八九號裁定所適用之軍事審判法第二十三條、第二十四條及八十九年七月十四日修正發布之特種考試軍法官考試規則第九條規定（下併稱系爭規定三），違反憲法第七十七條、第八十五條、第八十六條及第一百四十條之規定。查上開最高行政法院裁定係以聲請人就臺北高等行政法院九十四年度訴字第三〇八四號判決所為上訴不合法為由予以駁回，應以上開臺北高等行政法院判決為確定終局判決，合先敘明。

above Taipei High Administrative Court ruling shall be the final and binding judgment.

Upon the review of allegations therein, the petitioner argued that the said Court should decide whether it is right to give military accreditation to military judges who voluntarily join the camp having passed the Special Examination of the Ministry of Examination. It is hard to say that the petitioner has objectively or substantively pointed out any contravention of the Constitution by asserting the Disputed Provisions III. Since this petition is not in conformity with the requirements set out in Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act, this petition shall be dismissed pursuant to the same Article, Paragraph 3 thereof.

Justice Chen-Shan Li filed concurring opinion.

Justice Ching-You Tsai filed concurring opinion.

Justice Mao-Zong Huang filed concurring opinion.

核聲請人所陳，係在爭執法院就經考試院特種考試及格志願入營之軍法官應以武職任用等認事用法之當否，尚難謂於客觀上已具體指摘系爭規定三有何抵觸憲法之處。是其聲請，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，應不受理。

本號解釋李大法官震山提出協同意見書；蔡大法官清遊提出協同意見書；黃大法官茂榮提出協同意見書；羅大法官昌發提出協同意見書；湯大法官德宗提出協同意見書；蘇大法官永欽提出不同意見書；陳大法官新民提出不同意見

458 J. Y. Interpretation No.704

Justice Chang-Fa Lo filed concurring opinion.

Justice Dennis Te-Chung Tang filed concurring opinion.

Justice Yeong-Chin Su filed dissenting opinion.

Justice Shin-Min Chen filed dissenting opinion.

EDITOR'S NOTE:

Summary of facts: The petitioner, X, formerly a Standing Officer in the Reserve Service, passed the 2001 Special Examination for Military Judges, and voluntarily joined camp to receive training, and thereafter became qualified to assume the office of military judge. Pursuant to Article 7 of the Regulations of Military Service for Selecting Voluntary Personnel as Officers and Noncommissioned Officers of the Armed Forces (amended and promulgated on November 27, 2002), in order to continue to remain on active duty in camp, the applicant shall, three (3) years prior to the completion of the service, apply to voluntarily remain in camp, and upon approval, will then be able to continue the service. The petitioner failed

書。

編者註：

事實摘要：聲請人 X 原係後備役常備軍官，獲 90 年特種考試軍法官考試錄取，志願入營並受訓及格，擔任軍事審判官；依 91 年 11 月 27 日修正發布之陸海空軍軍官士官志願留營入營甄選服役規則第 7 條規定，應於三年役滿前，申請志願留營，經核准後，始得繼續留營服役。聲請人因未申請志願留營，嗣經國防部陸軍司令部依陸海空軍軍官士官服役條例第 17 條規定，核定解除召集，致喪失軍事審判官身分。聲請人不服，認上開規定與憲法審判獨立等原則有違，循序提起行政訴訟，均遭駁回確定，爰聲請解釋。

to apply to voluntarily remain in camp. Subsequently, the Army Command of the Ministry of National Defense, in accordance with Article 17 of the Act of Military Service for Officers and Non-commissioned Officers of the Armed Forces, duly exempted him from drafting such that the petitioner lost his position as a military judge. The petitioner did not accept this ruling, holding, *inter alia*, that the above regulation contravened the constitutionally guaranteed independence of the judiciary. The petitioner appealed for administrative litigation, but the case was dismissed. Thus he filed a petition for constitutional interpretation.