

J. Y. Interpretation No.250 (January 5, 1990) *

ISSUE: Is a military personnel whose active service was suspended for taking a civil office in violation of Article 140 of the Constitution?

RELEVANT LAWS :

Article 140 of the Constitution (憲法第一百四十條) ; Article 12, Paragraph 1, Subparagraph 6, of the Armed Forces Officers Service Act (陸海空軍軍官服役條例第十二條第一項第六款) ; Article 9, Paragraph 1, Subparagraph 8, and Paragraph 2 ; Article 10 and Article 12 of the Enforcement Rules of the Armed Forces Officers Service Act (陸海空軍軍官服役條例施行細則第九條第一項第八款及第二項、第十條、第十二條) ; Article 25, Subparagraph 1, of the Conscription Act (兵役法第二十五條第一款) .

KEYWORDS:

military personnel in active service (現役軍人) , civil office (文官職務) , military personnel in the reserved forces service (後備軍人) , suspension (停役) , suspension for taking an outside position (外職停役) , retirement from the military (退役) .**

* Translated by Huai-Ching Tsai, Esq.

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

HOLDING: Article 140 of the Constitution provides: “No military personnel in active service may concurrently hold a civil office.” The purpose of prohibiting military personnel in active service from holding civil positions is to preclude their involvement in politics and to maintain the normal functions of democratic constitutionalism. A military personnel whose active service was suspended for cause will be transferred to the reserved forces service, managed by the reserved forces system, and enlisted as a military personnel in the reserved forces service. If, at the request of a civil agency, a military personnel in active service who qualified for a civil office applies for a suspension from an outside position prior to retirement from the military in order to serve in the civil office commensurate with his qualification, this is different from the aforementioned prohibition of holding concurrent positions, and cannot be said to be in conflict with the aforementioned constitutional provision. However, the conditions for a military personnel officer to suspend active service and transfer to a civil office, as well as the

解釋文：憲法第一百四十條規定：「現役軍人，不得兼任文官」，係指正在服役之現役軍人不得同時兼任文官職務，以防止軍人干政，而維民主憲政之正常運作。現役軍人因故停役者，轉服預備役，列入後備管理，為後備軍人，如具有文官法定資格之現役軍人，因文職機關之需要，在未屆退役年齡前辦理外職停役，轉任與其專長相當之文官，既與現役軍人兼任文官之情形有別，尚難謂與憲法牴觸。惟軍人於如何必要情形下始得外職停役轉任文官，及其回役之程序，均涉及文武官員之人事制度，現行措施宜予通盤檢討，由法律直接規定，併此指明。

procedure for returning from civil office to military service, both involve the personnel system of public service. It is pointed out herein that current measures in these regards should be reviewed thoroughly and prescribed directly by law.

REASONING: Article 140 of the Constitution provides: “No military personnel in active service may concurrently hold a civil office.” The purpose of prohibiting military personnel in active service from holding civil office is to preclude their involvement in politics and to maintain the normal functions of democratic constitutionalism. As for military personnel officers who have been removed from active service, retired, or suspended and transferred to the reserved forces service, they have no active military power. Consequently, we are not concerned here with their political involvements.

Pursuant to Article 12, Paragraph 1, Subparagraph 6, of the Armed Forces Officers Service Act and Article 9, Paragraph 1, Subparagraph 8, and Paragraph 2

解釋理由書：憲法第一百四十條規定：「現役軍人，不得兼任文官」，係指正在服役之現役軍人不得同時兼任文官職務，旨在防止軍人干政，以維民主憲政之正常運作，至已除役、退伍或因停役等情形而服預備役之軍人，既無軍權，自無干政之虞。

依陸海空軍軍官服役條例第十二條第一項第六款、同條例施行細則第九條第一項第八款及第二項規定，常備軍官在現役期間，經核准任軍職以外之公

of the Enforcement Rules of the Act, a regular officer in active service who has been approved to serve in a public office outside the military shall be suspended from the military service on the date of approval. The military personnel suspended for an outside position must be in the reserved forces service. When the Ministry of Defense gives its approval for a change of status, it shall notify the agency managing the reserved forces and enlist the person in the reserved forces system for personnel management. According to Article 25, Subparagraph 1, of the Conscription Act, the abovementioned suspended person must be a military personnel in the reserved forces service and does not have the status of a military personnel in active service. If, at the request of a civil agency, a military personnel in active service who qualified for civil office applies for a suspension from an outside position prior to retirement from the military in order to serve in the civil office commensurate with his qualification, this is different from the aforementioned prohibition of holding concurrent positions, and cannot be said to be in conflict with

職者，自核准之日起為外職停役。外職停役人員係服預備役，經層報國防部核定後，通知後備軍人管理機關列入後備管理。依兵役法第二十五條第一款規定，是項停役人員為後備軍人，已無現役軍人身分。如具有文官法定資格之現役軍人，因文職機關之需要，在未屆退役年齡前辦理外職停役，轉任與其專長相當之文官，與現役軍人兼任文官之情形有別，尚難謂與首開憲法規定有何牴觸。

the aforementioned constitutional provision.

The Current Armed Forces Officers Service Act provides for “suspension” only, and does not directly provide for “suspension for taking an outside position.” The term “suspension for taking an outside position” is found only in Article 9, Paragraph 1, Subparagraph 8, Article 10 and Article 12 of the Enforcement Rules of the Act. Military personnel suspended for taking a civil position can return to the military service and can advance in the military ranks. This may raise a concern of commingling the civil track with the military track. The conditions for a military personnel to be suspended from active service and transferred to a civil office, as well as the procedure for returning from civil office to military service, both involve the personnel system of public service. It is pointed out herein that current measures in these regards should be reviewed thoroughly under guidance of the Constitution and prescribed directly by law.

Justice Tieh-Cheng Liu filed dissenting opinion.

現行陸海空軍軍官服役條例僅有「停役」之規定，並未直接規定「外職停役」，「外職停役」一詞，見之於該條例施行細則第九條第一項第八款、第十條、第十二條等有關規定，而外職停役人員轉任文官後，又得回服現役或晉任軍階，易滋文武不分之疑慮，且軍人於如何必要情形下，始得以外職停役方式轉任文官，其停役及回役之程序如何，均涉及文武官員之人事制度，現行措施宜本憲法精神通盤檢討改進，由法律直接規定，併此指明。

本號解釋劉大法官鐵錚提出不同意見書。