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17 MAY 1983

MEMORANDUM FOR WILLIAM P. TYSON
Director
Executive Office for United States Attorneys

Re: Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations

Since 1942, by agreement between the Departments of Defense and Justice, United States Attorneys have been authorized to turn over to JAG officers the task of prosecuting petty offenses committed on military reservations. 1/ The defendants in such cases are ordinarily civilian employees or visitors to the base, 2/ and trial before a United States Magistrate often takes place on the base itself. 3/ The practice appears

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1/ This "agreement" was proposed in a January 10, 1942 letter from the Secretary of War to the Attorney General, which opened with the statement that "[i]t has been found desirable to assign the duty of prosecuting petty offenses committed on military reservations to Army officers where no representative of the Department of Justice is available for this purpose." Assistant Attorney General Berge replied on January 21 that the Department of Justice approved the War Department's proposal.

2/ In recent years, and particularly since the Supreme Court's decision in O'Callahan v. Parker, 395 U.S. 258 (1969), the class of defendants prosecuted before United States Magistrates has expanded to include members of the military who would arguably also be subject to the Uniform Code of Military Justice for offenses committed on base.

3/ Under 28 U.S.C. § 3401(b), any person charged with a minor offense within the jurisdiction of a federal court may elect to be tried before a judge of the district court rather than a United States Magistrate. See United States v. Bishop, 261 F. Supp. 969 (N.D. Cal. 1966). Petty offenses are not, however, "crimes" within the meaning of Article III, nor is their prosecution a "criminal prosecution" that triggers the protections of the Sixth Amendment. See Frank v. United States, 395 U.S. 147 (1969). We understand that JAG officers have occasionally been assigned and authorized to prosecute both petty offenses and Article III crimes in federal district court.

to be widespread, given the chronic shortage of personnel in local United States Attorneys offices, although the manner in which it is handled varies from district to district. 4/ A JAG officer assigned to handle these prosecutorial duties is appointed as a Special Assistant United States Attorney under authority of 28 U.S.C. § 543. 5/ When functioning in his

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4/ The 1942 agreement contemplated that the local military commander would be responsible for ascertaining that no representative of the Justice Department was available to handle the prosecutions, and that he would then designate members of his own legal staff to represent the United States in the proceedings before the United States Magistrate. The procedure presently followed is set out in Paragraph 6-7 of Army Regulation 27-40, which provides as follows:

> If the United States attorney advises that no representative of the Department of Justice is available to conduct prosecutions of minor offenses, the commanding officer will designate one or more officers of his command, or make the necessary arrangements for the designation of one or more officers stationed on the reservation, to conduct such prosecutions. Officers of the Judge Advocate General's Corps should be utilized for this purpose, if available . . . .

We understand that in many districts the United States Attorney has delegated all responsibility for conducting the prosecutions in question to local JAG officers, which means that military officers effectively exercise prosecutorial discretion in these cases on a regular, day-to-day basis.

5/ Section 516 of title 28 requires that attorneys not employed by the Department of Justice be appointed by the Attorney General as special attorneys in the Department before they may conduct litigation for which the Department is responsible. See 28 U.S.C. § 516 (reserves to "officers of the Department of Justice, under the direction of the Attorney General," the conduct of all litigation in which the United States is a party). See also In re Persico, 522 F.2d 41 (2d Cir. 1975); In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962). The United States Attorneys Manual ("USAM") recognizes that formal appointment is a prerequisite for "the participation in court proceedings by attorneys not employed by the Department of Justice." See § 9-2.162. See also USAM at § 1-14.300 ("non-department attorneys" must be appointed before they may conduct grand jury proceedings). The Attorney

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capacity as a civilian prosecutor, a JAG officer is subject to the general supervision and direction of the United States Attorney for the particular district. See United States v. Hawthorne, 626 F.2d 87, 89 (9th Cir. 1980). See also 28 U.S.C. §§ 516, 519. 6/

In a 1962 opinion, this Office concluded that, while the practice of using JAG officers as civilian prosecutors in this context had no explicit authorization, neither did it violate any federal law. See Memorandum of June 6, 1962 from Acting Assistant Attorney General Reis to Deputy Attorney General Katzenbach ("1962 OLC opinion") (attached). The 1962 OLC opinion dealt, inter alia, with the issues raised by this practice under 10 U.S.C. § 973(b) (then 10 U.S.C. §§ 3544(b) and 8544(b)). Section 973(b) provides:

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5/ (Continued from p. 2)
General's power to appoint Assistant United States Attorneys under 28 U.S.C. § 543 has been delegated in Department of Justice regulations to the Associate Attorney General. See 28 C.F.R. § 0.19(a)(1). In a 1979 opinion prepared at your request, this office concluded that formal appointment as an attorney of the Department of Justice is necessary before a JAG officer may represent the United States in a judicial proceeding before a United States Magistrate or in a district court. See Memorandum of November 19, 1979 from Deputy Assistant Attorney General Simms to William P. Tyson, Acting Director, Executive Office for United States Attorneys ("1979 OLC opinion") (attached). JAG officers appointed as Special Assistant United States Attorneys must take an oath of office before embarking on their civilian prosecutorial duties. See 28 U.S.C. § 544. See also 5 U.S.C. §§ 3331, 2905(a).

6/ Under 28 U.S.C. § 543, Special Assistant United States Attorneys may be appointed by the Attorney General or his delegate "when the public interest so requires." See also USAM at § 1-3.540 (attorneys employed in other federal agencies may be appointed as Special Assistants "to assist in the trial or presentation of cases when their services and assistance are needed"). Attorneys appointed under authority of § 543 are subject to the direction of the relevant United States Attorney, and need not be given further specific direction by the appointing authority in order to participate in the full range of activities engaged in by Assistant United States Attorneys. In United States v. Hawthorne, supra, 626 F.2d at 89, the court of appeals approved the district court's finding that Special Assistants are "directly responsible" to the United States Attorney, who "has complete control of their activities as prosecutors for the United States."

> Except as otherwise provided by law, no regular officer of an armed force on active duty may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

The 1962 OLC opinion gave "great weight" to the view of the Departments of the Army and Air Force that § 973(b) was not applicable in these particular circumstances, and, without independently analyzing the issue, concluded that § 973(b) "should not be relied upon as a ground for regarding the practice as illegal." The opinion acknowledged, however, that "an argument can be made the other way." 7/

A January 3, 1977 opinion of the Judge Advocate General of the Army raised a question as to the current position of the military departments with respect to the applicability of § 973(b) to regular 8/ JAG officers who perform the

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7/ The 1962 OLC opinion also concluded that the practice did not violate the Posse Comitatus Act, 18 U.S.C. § 1385; that the use of JAG officers did not deprive the Attorney General of his supervision of litigation required by 28 U.S.C. § 519 (then 5 U.S.C. § 507(b)); and that the Attorney General had authority to appoint JAG officers as "special prosecuting assistants" under the predecessor statutes to 28 U.S.C. §§ 515 and 543. A question not squarely addressed in the 1962 OLC opinion was whether JAG officers had to be "appointed" by the Attorney General at all. This question was answered affirmatively in the 1979 OLC opinion. See note 5, supra.

8/ Section 973(b) applies only to "regular" officers, and accordingly presents no obstacle to reserve officers' holding a civil office or exercising its functions. Any such activity on the part of reserve officers on active duty must, of course, comply with the provisions of subsection (a) of § 973, which since 1980 has prohibited all active duty officers, both regular and reserve, from accepting employment which interferes with the performance of their military duties. See § 116 of Pub. L. 96-513, 94 Stat. 878, and note 17, infra.

prosecutorial functions in question. See DAJA-AL 1976/6127 (January 3, 1977); DAJA-AL 1977/6193 (January 17, 1978). 9/ At your request, and in consultation with members of the staff of the General Counsel of the Department of Defense and of the Judge Advocate General of the Army, we have undertaken a full and independent review of the matter. 10/

As discussed in detail below, a thorough examination of § 973(b) as it has been construed and applied over the years in other contexts leads us to conclude that the practice of appointing regular JAG officers as Special Assistant United States Attorneys, and their exercise of the functions of this office, is inconsistent with that statute's prohibition. Furthermore, we are unaware of any statutory authority for the practice which would suffice to constitute an exception to § 973(b). In reaching this conclusion, we are mindful of

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9/ The apparent position of the Army Judge Advocate General, as set forth in these two opinions, is that § 973(b) does not prohibit a regular JAG officer from conducting the prosecutions in compliance with military orders, but that the officer may not accept formal appointment as a Special Assistant United States Attorney, or take an oath of office in that capacity, without triggering the statutory penalty. But § 973(b) by its terms prohibits not only the acceptance of a civil office, but also "the exercise of its functions." Therefore, any objection to the practice under § 973(b) could not depend upon the formality of appointment. See 14 Op. A.G. 200 (1873) (General Sherman may not be authorized to perform duties of Secretary of War during the temporary absence of that officer). See also Riddle v. Warner, 522 F.2d 882, 884 (9th Cir. 1975) (statute may be applicable even if civil office "not legally conferrable" upon the military officer).

10/ The 1979 OLC opinion noted the questions which had been raised respecting the current position of the military departments on the applicability of § 973(b). However, because the 1962 OLC opinion had deferred to and relied upon what we understood the position of the military departments then to be, it was thought advisable to determine whether that position had in fact changed. On November 19, 1979 we wrote to Leonard Niederlehner, then Acting General Counsel of the Department of Defense, asking for the current views of the Department of Defense on the applicability of § 973(b) in this context. We understand that the legal issues involved were studied within the Department of Defense over the course of several years, but that no firm conclusions were reached with respect to the matter. In a meeting in the fall of 1982 with staff members from the DOD General Counsel's office and from the Office of the Army Judge Advocate General, it was agreed that this Office would prepare a formal legal opinion on the applicability of § 973(b) to the practice in question.

the principle, alluded to in the 1962 OLC opinion, that a longstanding and consistent administrative construction of a statute is entitled to "great deference." See United States v. National Assn. of Securities Dealers, 422 U.S. 694, 719 (1975); Saxbe v. Bustos, 419 U.S. 65, 74 (1974). However, we do not believe it "an argument of sufficient force in this case to overcome the clear contrary indication of the statute itself." S.E.C. v. Sloan, 436 U.S. 103, 117 (1978). 11/ Accordingly, unless and until Congress acts in some fashion to permit regular JAG officers to perform the functions of a civilian prosecutor in this context, we do not believe that they may, in the future, be authorized to do so. 12/

Implicit in the above conclusion is our belief that § 973(b) as construed in this opinion should be given only prospective application to the practice in question. That

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11/ Neither the Department of Defense nor this Department has ever sought to justify the practice by a thorough analysis of the statute and its legislative history. The Supreme Court has repeatedly held that one factor to be considered in giving weight to an administrative interpretation of a statute is "the throughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Adamo Wrecking Co. v. United States, 434 U.S. 275, 287, n.5 (1978), citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). See also F.M.C. v. Seatrain Lines, 411 U.S. 726, 745 (1973).

12/ A violation of § 973(b) would, in the future, result, according to the statute, in the "termination" of an officer's "military appointment." This statutory provision has been construed by the Comptroller General to subject an officer to loss of military pay and allowances. See 44 Comp. Gen. 830 (1965); 25 Comp. Gen. 903 (1946); 1 Comp. Gen. 499 (1922). We assume that regular JAG officers receive no pay for performing these civilian prosecutorial functions in addition to their military salaries, so that no question of restitution would be presented under the laws prohibiting dual compensation. Johnston v. United States, 175 F.2d 612 (4th Cir. 1949), discussed at p. 27, infra. We understand that the Department of Defense has recently been considering a legislative proposal which would amend § 973(b) so as to permit regular officers to exercise the functions of certain civil offices under certain circumstances. It is our understanding that this legislation, if enacted, would permit regular JAG officers to perform the civil prosecutorial functions in question here, pursuant to military orders. We do not, however, know the present status of this legislation.

is, in our view, any regular JAG officers who have in the past served as civilian prosecutors pursuant to the 1942 agreement, should not be penalized for conduct which has been regarded by both this Department and the Department of Defense as permissible under § 973(b) and its predecessor statutes. Any other outcome would be unfair to those officers who have relied in good faith upon the administrative interpretation given § 973(b) by their military superiors and by the civil authorities. Cf. Badeau v. United States, 130 U.S. 439, 452 (1889) (retired military officer who had been continued on the retired list while also holding a salaried office in the diplomatic corps, in violation of a statute barring military officers from holding a diplomatic appointment, could not be compelled to return pay received in the latter capacity: "inasmuch as the claimant, if not an officer de jure, acted as an officer de facto, we are not inclined to hold that he has received money which, ex aequo et bono, he ought to return.")

## I. The Statutory Text

It is a well-settled rule of statutory construction that "the meaning of a statute must; in the first instance, be sought in the language in which the act is framed . . . ." Caminetti v. United States, 242 U.S. 470, 485 (1917). See also Group Life and Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979). If the statutory language is clear, it is often regarded as conclusive. See Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 109 (1980). Our inquiry into the applicability of § 973(b) to the practice at issue here must therefore begin with the terms of § 973(b) itself.

Section 973(b) prohibits a regular military officer on active duty from "hold[ing] civil office by election or appointment." The statutory term "civil office" is, however, not defined, nor is its intended scope otherwise made clear in the text of the statute itself. The prosecution of offenses committed by persons not subject to the Uniform Code of Military Justice seems clearly a "civil" function, whether or not those offenses are committed on a military reservation. 13/

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13/ Notwithstanding the recognized power of the military to preserve order on its own reservations, see Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); 3 Op. A.G. 264 (1837), prosecution of offenses against the United States committed on military bases by persons not subject to the Uniform Code of Military Justice is the responsibility of the United States Attorney for the district in which the base is located. See 28 U.S.C. §§ 516, 547. While military personnel may participate in on-base civil law enforcement activities without violating the Posse Comitatus Act, 18 U.S.C. § 1385, see United States v. Banks, 539 F.2d 14 (D.S.D. 1976), the military has no authority to prosecute persons or offenses except pursuant to the Uniform Code of Military Justice. Cf. Toth v. Quarles, 350 U.S. 11 (1955); O'Callahan v. Parker, supra.

And, as already noted, JAG officers acting as civilian prosecutors are required by statute to be appointed as "officers" of the Department of Justice. See note 5, supra. Under a natural reading of the statutory terms, therefore, the appointment of a regular JAG officer as a Special Assistant United States Attorney would seem to be within § 973(b)'s prohibition against a military officer's holding a "civil office."

It must be conceded, however, that the statutory term "office" cannot be ascribed such a plain meaning as to end our inquiry with the terms of the statute. The Supreme Court has discussed the meaning of the term "office" on numerous occasions and in many different contexts, both constitutional and statutory, but has never set forth a single, all-encompassing definition of the term. Compare United States v. Hartwell, 73 U.S. 385, 393 (1868) (the term public office "embraces the ideas of tenure, duration, emolument, and duties," which duties are "continuing and permanent, not occasional or temporary"), with Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("any appointee exercising significant authority pursuant to the laws of the United States" holds an "'office under the government,'" quoting from United States v. Germaine, 99 U.S. 508, 509-10 (1879)).

For purposes of determining an individual's status as a statutory "officer," the courts have generally looked to the legislative history and purpose of the particular statute involved. See Steele v. United States, 267 U.S. 505, 507 (1925). Compare United States v. Mouat, 124 U.S. 303 (1888) with United States v. Hendee, 124 U.S. 309 (1888), in which the Supreme Court reached different conclusions with respect to the status of a Navy paymaster's clerk as an "officer" under two different federal statutes. See also 40 Op. A.G. 294, 297 (1943) ("the congressional intent is the controlling factor and the word 'officer' when used in a statute is not to be given the limited constitutional meaning if it is apparent that this would not accord with such intent"). Consistent with this rule, the applicability of § 973(b) to any particular "civil office" has been held to depend upon the intent of Congress in enacting this law. See Riddle v. Warner, 522 F.2d 882, 884 (9th Cir. 1975); 13 Op. A.G. 310, 311 (1870); 20 Comp. Gen. 885, 887 (1941). We turn, therefore, to the legislative history of § 973(b) to determine whether the term "civil office" should be construed to include the office of Special Assistant United States Attorney, and whether the practice at issue is thus embraced by the terms of that statute.

## II. The Legislative History

Section 973(b)'s prohibition against regular military officers' holding civil office was originally enacted in 1870, at the end of Reconstruction. Section 18 of the Act of July 15, 1870, 16 Stat. 319, provided:

> No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.

This provision was first introduced in March of 1870 as part of a bill to reduce the size of the Army (H.R. 987), and would have applied to retired officers as well as officers on the active list. Like other provisions of H.R. 987, it reflected the hostility toward the military establishment which pervaded the Forty-First Congress. The controversy generated by this provision led to lengthy and heated discussions on the floors of both Houses. See Cong. Globe, 41st Cong. 2d Sess. 1852-53 (Mar. 10, 1870) (discussed in House); id. at 3393-1404 (May 12, 1870) (discussed in Senate); id. at 5336-5343 (July 7, 1870) (Conference Report debated in Senate). Eventually, the bill was tabled in the Senate. See id. at 5343 (July 7, 1870). A week later, however, a compromise version of its principal provisions, including the one at issue here, was introduced as an amendment to the Army appropriations bill, H.R. 2082, and passed both Houses without extensive discussion. Id. at 5580 (July 14, 1870) (House); id. at 5586 (July 14, 1870) (Senate). The only change made in the provision barring military officers from holding civil office was its limitation to officers "on the active list." See id. at 5583. 14/

The purpose of the provision barring regular military officers from "civil office" was discussed on the occasion of the introduction of H.R. 987 by the chairman of the House Committee on Military Affairs. In extended remarks, Chairman Logan alluded to several possible problems arising when

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14/ The Army's "active list" has historically included only "regular" military personnel. See Historical and Revision Notes accompanying 10 U.S.C. § 3544 (1964 ed.), and note 21, infra. Thus the prohibition in the 1870 Act did not extend to "reserve" officers, even while they were on active duty, but only to regular career officers.

military officers perform the functions of a civil office, including the difficulty of holding military officers responsible for misconduct in their civilian capacity. See Cong. Globe, 41st Cong., 2d Sess. App. 150 (March 10, 1970). His chief concern, however, appears to have been as follows:

> the detailing of military officers to fill civil positions will . . . soon, by precedent, establish the rule that all Army officers may be detailed to fill civil positions when a civil officer could not be detailed to fill a military position; hence the military will grow to be paramount to the civil, instead of the civil being paramount to the military.

Id. Congressman Logan used three specific examples of "civil offices" to illustrate the practice which he hoped would be barred by the proposed legislation: 'Assistant Treasurer of the United States, Secretary of War, and Third Auditor. 15/

During the floor debate over this provision in the House, there was no objection voiced to barring active duty regular officers from filling any civil office, whether state or federal; it was assumed to be "inconsistent with our system of government to appoint military officers to civil positions . . . ." Id. at 1852 (March 10, 1970) (remarks of Rep. Jones). The only question upon which differences arose was whether retired officers drawing a military pension were still so much "connected with" the military that they should be made subject to the same disability as active duty officers. The House believed that they were. Id. at 1853.

In the Senate, the debate also centered around whether the prohibition should apply to retired officers. It seems to have been assumed, however, that, where applicable, the statute would create an absolute bar to a military officer's holding any appointive or elective office in the civil government, whether federal or state. A number of Senators expressed dismay that a retired officer, who had recently been barred from being recalled to military duty or otherwise assigned to

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15/ In 1870, all three of these offices were filled by persons appointed by the President with the advice and consent of the Senate. See §§ 276, 214, and 303 of the Revised Statutes.

governmental duties, 16/ should now also be barred from "any little office his neighbors might elect him to." Id. at 3321 (May 10, 1870) (remarks of Sen. Wilson). But even the most ardent opponents of applying the prohibition to retired officers assumed that allowing active duty regular military officers to hold civil office was "in conflict with the fundamental principle of republican institutions." Id. at 3403 (May 12, 1870) (remarks of Sen. Sumner). See also id. at 3399 (remarks of Sen. Thurman) ("[w]hile retired officers should be eligible for public office, I would not agree for a moment that the officers on the active list of the Army should hold civil office.") The Senators' concern was not that an officer might receive pay in addition to his military salary, or even that an officer's assignment to civil duties might interfere with his military responsibilities. Other statutes regulated administrative practice in these two areas. 17/ Rather, it was that "the theory of our Government is that the military should be separate from and subordinate to the civil authority . . . ." Id. at 3398

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16/ The Act of January 21, 1870, 16 Stat. 62, provided that "no retired officer of the army shall hereafter be assigned to duty of any kind . . . ."

17/ Numerous statutes existed in 1870 that precluded military officers and other governmental officials from receiving additional compensation for the discharge of duties belonging to another office. See 15 Op. A.G. 306 (1877). See also Converse v. United States, 62 U.S. 463 (1853). With respect to assignments that would interfere with the performance of military duties, § 31 of the Act of July 5, 1838, 5 Stat. 260, provided:

> [T]he officers of the army shall not be separated from their regiments and corps for employment on civil works of internal improvement, or be allowed to engage in the service of incorporated companies, and no officer of the line of the army shall hereafter be employed as acting paymaster, or disbursing agent for the Indian department, if such extra employment require that he be separated from his regiment or company, or otherwise interfere with the performance of the military duties proper . . . .

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(remarks of Sen. Williams). 18/ See also id. at 3395 (remarks of Sen. Trumbull) ("I think that this Government is a civil government. It should be administered by civilians. I do not believe in having the civil offices of the country administered by the military authorities . . . ."). Id. at 3399 (remarks of Sen. Thurman) ("the theory of our Government, the genius of our institutions, is that the military and the civil authorities shall be separate . . . .").

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17/ (Continued from p. 11)
This prohibition appeared as § 1224 of the Revised Statutes, and was brought forward into the 1925 edition of the United States Code as 10 U.S.C. § 494. On codification of Title 10 into positive law in 1956, this provision became §§ 3544(a) and 8544(a). In 1968, these sections were repealed, and the prohibition was substantially revised to apply to regular officers of all of the military services, and to bar all "employment" that would interfere with military duties. It was codified as 10 U.S.C. § 973(a). In 1980, § 973(a) was revised to apply to reserve officers as well as regular officers. See § 116 of Pub. L. No. 96-513, 94 Stat. 878.

18/ Senator Williams went on to explain that:

> It might as well be argued that men who belong to the judiciary of the country, because they are eminent as judges, should be eligible to any other civil appointment, and so the legislative and judicial and executive departments of the Government should all be blended into one, and no distinction should be maintained, as to argue that the military and civil power should be blended into one, or that men who hold one office and are subject to the authority of their military superiors should be eligible to civil office.

Therefore, he concluded,

> I think that it is our duty, as far as practicable, to keep the Departments of the Government separate and distinct from each other, and so maintain the theory of the Government.

The debate in the Senate underscores the intended breadth of the prohibition. Senator Sherman noted that:

> This is a proposition that the President of the United States shall not avail himself of the benefit of the experience, patriotism, and ability of an officer of the Army for any purpose whatever for the discharge of any function in civil life. It would have prevented General Schofield from being Secretary of War. It would have prevented General Grant from holding the office of Secretary of War pro tempore, because that was an office created by law. It would have prevented General Sickles from holding the office he now holds [Minister to Spain]. It would have prevented the officers of the Army from employment on the plains now, in contact with the Indians, where their services are most needed, where they have been appointed as superintendents of Indian affairs.

Id. at 3402. Similarly, Senator Morton was concerned that there were "sixty or seventy officers who have been assigned as Indian agents, who are now performing the duties of Indian agents, and who have taken the oath required by law for the performance of those duties. They have lost their commissions and are out of the Army without knowing it, according to this argument." Id. at 3403. 19/

The Senate debate also illuminates the law's intended effect on the practice of detailing military officers to service in the civilian government, a familiar one during Reconstruction. See, e.g., id. at 3394 (remarks of Sen. Trumbull); id. at 3403 (remarks of Sen. Williams). A colloquy between

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19/ Neither Senator Sherman nor Senator Morton seem to have been aware that the President had, since 1834, been explicitly authorized to assign military officers to execute the duties of an Indian agent. See § 4 of the Act of June 30, 1834, 4 Stat. 729, 730. In 1875 Attorney General Williams ruled that this authority, then contained in § 2062 of the Revised Statutes, constituted an exception to the 1870 Act's general prohibition against Army officers holding civil office. See 14 Op. A.G. 575 (1875).

Senators Patterson and Trumbull (both of whom favored barring both active and retired officers from civil office) revealed some uncertainty over the scope of the proposed statutory prohibition with respect to the assignment of a military officer to functions arguably civil in nature. When asked by Senator Patterson whether the provision would "prevent the President from detailing an officer of the Army to perform clerical duties in the War Department," Senator Trumbull replied:

> Mr. TRUMBULL. I suppose it would not prevent his doing any duty that was connected with the military service. I understand that in active service soldiers are detailed as aids [sic] to the commanding officer, to write letters for him; but I do not suppose that makes it a civil appointment. Anything that a detail covers this section does not interfere with.
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> Mr. PATTERSON. But performing the duties of a clerk, whether by detail or anything else, is fulfilling the functions of a civil office.
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> Mr. TRUMBULL. No, sir; to fulfill the functions of an office, he must be the officer. He must have the power of the officer if he performs the functions of the office. I do not understand that a person can fulfill the functions of a civil office unless he holds the civil office. He must be the officer. That is the meaning of this section as I understand it.

Id. at 3403. The distinction thus was made between an officer's performance of civil duties "connected with the military service" at the direction of his military superior, and his exercise of the "power" of a civil "officer." While the former would be permissible under the new law, the latter would not. This distinction had been emphasized by Senator Carpenter earlier in the debate, in connection with a proposal to repeal a law barring the assignment of retired officers to "duty of any kind." See note 16, supra. When asked whether the proposed repeal would open the possibility of assigning military officers to "civil office," Senator Carpenter responded:

> I do not think there is any such thing as assigning a military officer to perform the functions of a civil office. If the Senator means to inquire whether a retired officer may be appointed by the President to a civil office, that is another question, and is certainly not provided for by this amendment. This simply authorizes the Secretary of War, or the proper superior, to assign a retired officer to the performance of some military duty. It cannot be anything else, because there is no such thing as assigning an Army officer to be a judge of the Supreme Court, or assigning him to be a postmaster or an Indian agent or an assessor of internal revenue, or anything else.

Id. at 3394. 20/

The legislative history discussed in the foregoing paragraphs indicates that the provision was intended to bar the appointment of regular military officers to any appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer's military duties. It contains no suggestion that there should be any distinctions drawn among categories of civil office for which military officers would thenceforth be ineligible. Illustrations of "offices" from which military officers would be barred ranged from the office of Secretary of War to that of "an assessor of internal revenue." While most of the offices mentioned during the floor debates were, at the time, filled by presidential appointment, it seems clear that the Congress did not intend the applicability of its new prohibition to depend upon the importance of the office, or upon the identity of the civil appointing authority. An active duty military

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20/ Both Senators Trumbull and Carpenter assumed that the prohibition in § 973(b) would not interfere with the military's authority to assign its officers to civil duties precisely because they recognized that the military could not itself confer the power of a civil office. The purpose of the statutory bar was to prevent the civil government itself from conferring authority on regular military officers, a practice which appears to have been widespread during Reconstruction.

officer was to be barred from "any little office his neighbors might elect him to," as well as from all levels of appointive office in the civil government, both state and federal.

Nor is there any indication in the legislative history that Congress intended to permit any administrative exceptions to the statute's general bar. In particular, the applicability of the prohibition was not to depend on whether the duties of the civil office were undertaken in obedience to military orders. What was intended was a strict separation of the military and civilian establishment through the elimination of any possibility that persons who were part of the military establishment and subject to military discipline could be placed in positions of authority in the civil government.

Congress's actions in subsequent years attest to its continued endorsement of the expansive definition of the term "civil office" intended by the 41st Congress. It has legislated certain specific exceptions to § 973(b), expressing permitting military officers to hold certain civil offices, notwithstanding the general prohibition contained in § 973(b). Besides allowing military officers to fill Cabinet level positions in the military departments themselves, these legislated exceptions to § 973(b) are generally to permit military officers to work in civilian agencies engaged in activities with some military nexus. 21/

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21/ Several such statutes make explicit reference to § 973(b). See e.g. 10 U.S.C. § 3017 (military officer may act temporarily as Secretary of the Army); 10 U.S.C. § 5036 (military officer may act temporarily as Secretary of the Navy); 10 U.S.C. § 8017 (military officer may act temporarily as Secretary of the Air Force); 40 U.S.C. § 758(c) (Administrator of General Services may "utilize" personnel of armed services "notwithstanding the provisions of section 973 of title 10"). A few others expressly permit the appointment of military officers to fill specfic civil offices. See e.g. 10 U.S.C. § 711 (President may appoint military officer to Military Staff Committee of United Nations); 10 U.S.C. § 720 (an officer of the Army may be appointed Chief of Staff to the President); 10 U.S.C. § 716 (military officer may be appointed in National Oceanic and Atmospheric Administration). See also 14 Op. A.G. 573 (1875) (1834 statute permits appointment to military officer as Indian agent); 20 Op. A.G. 604 (1893) (statute authorizes appointment of officer from Army Corps of Engineers to California

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The range of offices covered by these statutory exceptions to § 973(b) reflects Congress' assumption that that law's prohibition extends to all manner of civil office. The law itself has been reenacted, with minor editorial revisions, on three separate occasions. 22/

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21/ (Continued from p. 16)
Debris Commission); 19 Comp. Gen. 826 (1940) (statute authorizes appointment of officer as Engineer of Maintenance of Panama Canal). And, over the years there have been a number of private bills passed by Congress to permit the President to appoint military officers to specific civil offices. See e.g. Priv. L. No. 428, 79th Cong. 2d Sess., 60 Stat. 1129 (Lieut. Gen. Walter B. Smith as Ambassador to Russia); Priv. L. No. 140, 79th Cong. 1st Sess., 59 Stat. 741 (General Omar Bradley as Administrator of Veterans' Affairs); Priv. L. No. 367, 79th Cong., 2d Sess., 60 Stat. 1105 (Major General Graves Blanchard Erskine as Retraining and Re-employment Administrator).

A number of statutes authorize the secretary of a military department to detail military officers to duty in other federal agencies. These statutes do not, however, authorize the appointment of military officers to civil office. See e.g. 10 U.S.C. § 713 (secretaries of military departments may detail officers to Department of State as building inspectors or supervisors, and as couriers); 10 U.S.C. § 719 (detail to National Oceanic and Atmospheric Administration); 10 U.S.C. § 718 (detail to assist Secretary of Defense); 22 U.S.C. § 2581(c) (detail to Arms Control and Disarmament Agency); 49 U.S.C. § 1343(a) (detail to Federal Aviation Administration); 42 U.S.C. § 2473(b)(12) (detail to National Aeronautic and Space Administration, to perform functions "to the same extent as that to which they might be lawfully assigned in the Department of Defense"). See also Comp. Gen. Ms. B-178205 (1974) (Economic Stabilization Act permits detail to Office of Petroleum Allocation).

22/ The 1870 Act's prohibition appeared as § 1222 of the Revised Statutes, and was brought forward into the 1925 edition of the United States Code as 10 U.S.C. § 576. On codification of Title 10 into positive law in 1956, the

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## III. Administrative Interpretation and Application

Administrative interpretation and application of § 973(b) and its statutory predecessors conforms with the intent of the 41st Congress to keep the military and civilian spheres strictly separate. Both the Attorney General and the Comptroller General have construed the statutory term "civil office" broadly, and have generally declined to imply exceptions to § 973(b)'s comprehensive coverage.

Less than a month after the passage of the 1870 Act, Attorney General Akerman advised the Secretary of War that an active duty military officer was prohibited by it from accepting appointment to a parks commission in the City of Philadelphia. 13 Op. A.G. 310 (1870). He noted that the office of park commissioner had been "established by an act of the legislature of Pennsylvania, which designates the mode of appointment, the term of office, and the functions to be performed," and that the functions were "of a civil nature . . . ." It was "nonetheless an office on account of the provision that [incumbents] shall receive no compensation." Nor did it matter that the office was one created by a State, since "the manifest purpose of Congress in enacting the prohibition was to disencumber Army officers of every species of official duty not belonging to their military profession . . . ." 13 Op. A.G. at 311.

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22/ (Continued from p. 17)
prohibition was redrafted and codified at 10 U.S.C. §§ 3544(b) (Army) and 8544(b) (Air Force). An introductory phrase was added in recognition of the existing statutory exceptions to its general bar. See Pub. L. No. 84-1028, 70A Stat. 1. The "Historical and Revision notes" accompanying the sections explain that "the word 'Regular' is inserted before the word 'Army,' since [10 U.S.C. § 576] refers to officers 'on the active list,' which includes only officers of the Regular Army." 10 U.S.C. § 3544 (1964 ed.). In 1968 the prohibition was reenacted as § 973(b) of Title 10, and extended to all "officer[s] on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard." See Pub. L. No. 90-235, 81 Stat. 753, 759. Most recently, in 1980, § 973(b) was revised to simplify its language, and now applies to "regular officer[s] of an armed force on active duty." See Pub. L. No. 96-513, 94 Stat. 2878.

In 15 Op. A.G. 551 (1876), the Solicitor General opined that, if the statute were to have any "substantial operation," an Army officer could not serve as a trustee of the Cincinnati Southern Railway, a position established by Ohio statute. 23/ He concluded that the trusteeship was a "civil office" within the meaning of § 973(b), even though the courts of Ohio had determined that it was not an "office" within certain provisions of the State constitution. While he relied principally on Attorney General Akerman's opinion in 13 Op. A.G. 310 discussed above, he also cited in support of his position an opinion of Chief Justice Marshall in which an "office" was distinguished from employment under a contract. Id. at 553.

In 1884, the Secretary of War was advised by Attorney General Brewster that the 1870 prohibition barred a military officer from serving on a board of experts established by the Mayor of Philadelphia to report to him on street paving in that city. The Attorney General held that the statute must be interpreted in "the most comprehensive sense," since "the policy of [the 1870 provision] points to a very liberal interpretation of the phrase 'civil office.'" 18 Op. A.G. 11, 12 (1884). The Attorney General quoted from an opinion of the Pennsylvania Supreme Court, in which a person appointed by the Governor to collect "a single claim" due the State was held to be a public officer; the holding of that case, in his view, "convey[ed] the general legal meaning of [the word officer]." Id at 13. See also 29 Op. A.G. 298, 301 (1912) (the term 'civil office' in [§ 973(b)] means an office, whether State or Federal, whose sphere is in the ordinary customs, rules and laws of that government, as distinguished from a 'military office,' engaged with the arts of war and governed, under Courts Martial, by the Articles of War).

The Attorney General has on several occasions approved a military officer's acceptance of an appointment to "civil office" where a statute explicitly authorizes such an appointment. See e.g. 14 Op. A.G. 573 (1875) (President authorized by statute to appoint military officers as Indian agents); 20 Op. A.G. 604 (1893) (President authorized to

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23/ The trustees of the Cincinnati Southern Railway were authorized by Ohio law to issue bonds in the name of state municipalities, to control and disburse funds, to construct railroad lines, and to appoint "officers and agents, and engage with contractors." 15 Op. A.G. at 552.

appoint officers from the Army Corps of Engineers to the California Debris Commission). 24/ He has also recognized that a military officer may be assigned on detail to duty with a civilian agency as long as he is not empowered by the civil government to exercise the functions of a "civil office." For example, in 16 Op. A.G. 499 (1880), a military officer's proposed detail to duty with the Interior Department to work on the United States Geological Survey did not constitute the holding of a "civil office" within the prohibition of § 973(b)):

> [W]hile the service to which the officer might be assigned would be civil and be within the sphere of a civil office, if it were performed under the authority and in obedience to the orders of his military superior, and not as a duty incumbent upon him to perform by reason of any relation to or connection with the office, it could not be said that in thus performing the service he was "exercising the functions of such civil office."

Because the detailed officer had not been empowered by any civil authority to perform any official functions, but was acting solely pursuant to military orders, he could not be said to hold a "civil office." See also 19 Op. A.G. 600, 601 (1890) (detail to engineering duties in connection with World's Columbian Commission permissible, since "an examination of the act of Congress . . . providing for the organization of the [Commission] does not disclose that any 'civil office' is created by that act . . . ."). 25/ However, an officer

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24/ In 20 Op. A.G. 604, the Attorney General found that service on the California Debris Commission was not in any event inconsistent with the provisions of the 1870 Act, since the statute creating the Commission placed it "under the direction of the Secretary of War." The Commissioners therefore "do not, within the meaning of [§ 973(b)], hold any civil office or neglect any military duty proper."

25/ In both 16 Op. A.G. 499 and 19 Op. A.G. 600, the Attorney General determined that the military officer could not be detailed to perform the work in question because it would interfere with his military duties, in violation of the predecessor statute to § 973(a). See note 17, supra.

may not be "detailed" to a position which requires the exercise of civil authority absent express statutory authority. See 35 Op. A.G. 187, 196 (1927) ("there is no authority under existing statutes for detailing an officer of the Army to serve as President of the Louisiana State University"). 26/

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26/ In 35 Op. A.G. 187 (1927), the Attorney General stated that if a particular detail were authorized by statute, "[s]ervice under such a detail would not be an acceptance of a civil office within the meaning of [§ 973(b)], but if it were, the statutes providing for detail of officers would be considered as qualifying [§ 973(b)]." 35 Op. A.G. at 188. We understand this to mean nothing more than that Congress may authorize a military officer to exercise the functions of a civil office by legislating an exception to § 973(b), expressly or by implication.

This opinion also contains, in dictum, an unexplained departure from the definition of the statutory term "civil office" which had been employed in previous Attorney General opinions:

> Whether a place in the public service of a State is an office within the meaning of [§ 973(b)] depends largely on the extent of the work to be performed by the incumbent and the amount of time required to be devoted to that service, the purpose being to prevent an officer of the Army from accepting any office the duties of which will substantially interfere with the performance of his duties as an officer of the Army. This is also made clear by the fact that the section applies only to officers on the active list.

Id. at 190. This so-called "substantial interference" theory of § 973(b) finds no support in the legislative history of the 1870 Act, and is more properly associated with the 1838 prohibition against civil employment which now appears at 10 U.S.C. § 973(a). See note 17 supra. It did not, in any event, contribute to the Attorney General's conclusion in

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The Comptroller General, in advising on the applicability of § 973(b) in specific cases, 27/ has evolved a test similar to that used by the Attorney General for determining whether a particular position is a "civil office" within § 973(b).

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26/ (Continued from p. 21)
35 Op. A.G. 187 that the office in question was one whose functions the officer could not, under the law, exercise.

A subsequent opinion of this Office that appears to approve the "substantial interference" test for § 973(b) did not set forth the full legislative history of the 1870 Act, and we disagree with its analysis to the extent that it relies upon that theory. See October 7, 1971 letter from the Deputy Assistant Attorney General to the Judge Advocate General of the Army. We note, however, that its conclusion -- that § 973(b) did not bar a military officer from accepting a commission as a state notary public -- was approved by the court in Riddle v. Warner, supra. See 522 F.2d at 885, and pp. 24-25, infra. In a 1979 opinion, this Office reaffirmed that "if the prohibitions of the [statute] 'are to have any substantial operation,' the term 'officer' must be given a nontechnical interpretation and that the policy of the statute points to a very liberal interpretation of the phrase 'civil officer.'" See Memorandum for the General Counsel, General Services Administration, April 10, 1979, 3 Op. O.L.C. 148, 150 n.4 (1979).

27/ The Comptroller General is charged by statute with determining the legality of administrative expenditures for purposes of approving or disapproving disbursements from the Treasury. See 31 U.S.C. § 3524(a)(1). Under 31 U.S.C. § 3529, executive branch agencies may request the Comptroller General to render a decision on any question involving a payment to be made by them. His opinion given in advance constitutes a commitment that the General Accounting Office will not question the validity of a specific disbursement in passing upon the account of that agency, and operates as a form of estoppel against subsequent challenge by the GAO. See 31 U.S.C. § 3528. His opinion is not, however, a binding legal opinion, and may be contested in court. See Greene County Planning Board v. FPC, 559 F.2d 1227, 1239 (2d Cir. 1976) (en banc), cert. denied, 434 U.S. 1086 (1978).

> The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent; and they must involve some exercise of the sovereign power.

44 Comp. Gen. 830, 832 (1965). 28/ In this opinion, the Comptroller General ruled that an Army officer on leave of absence who accepted temporary part-time employment as a special policeman for the Libary of Congress had forfeited his military commission. The position of special policeman was created, and its duties defined, by statute; those duties included the power to enforce regulations which imposed criminal penalties for their violation, and to make arrests. As such, they involved exercise of "some of the powers of the sovereign." 44 Comp. Gen. at 832. Compare 29 Comp. Gen. 363 (1950) (position of Commissioner of Roads for Alaska not a "civil office," since it was created by administrative directive rather than by statute); and 25 Comp. Gen. 377 (1945) (temporary detail of officer to manage a particular state highway construction project held not a "civil office," since officer given "no authority to exercise a function of government"). In 25 Comp. Gen. 377, 381 (1945), the Comptroller General disagreed with a suggestion that the test for determining a "civil office" under § 973(b) was whether or not the duties "substantially interfered" with the duties of the military office.

> The statute makes the two positions incompatible as matter of law, without qualification and without regard to any showing of compatibility in fact by reason of leave of absence, or otherwise, with respect to a particular officer and a particular position.

Like the Attorney General, the Comptroller General has recognized situations in which Congress has specially authorized the appointment of a military officer to a particular "civil office." See 26 Comp. Gen. 15 (1946) (statute authorizes

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28/ The Army Judge Advocate General has adopted the Comptroller General's criteria for determining whether a particular office is within the statutory prohibition. In JAGA 1968/441 (1968), it was held that the absence of a statutory basis for the position, of definite duties prescribed by law, of exercise of sovereign power, and of a required oath all combined to remove the job of law clerk to a Supreme Court Justice from the prohibition imposed by § 973(b).

detail of officer to United Nations Relief and Relocation Administration, "to be in charge of operations in China"); 25 Comp. Gen. 677 (1946) (statute permits military officer on terminal leave to accept "employment [with] the Government of the United States," notwithstanding the provisions of § 973(b)); 19 Comp. Gen. 826 (1940) (statute expressly suthorizes appointment of military officers to civil positions in Panama Canal Zone). Following opinions of the Attorney General, the Comptroller General has emphasized that a statute may authorize a detail without at the same time authorizing an appointment to civil office. See 1 Comp. Gen. 499 (1922) (statute authorizing the President to assign officers of the Army Corps of Engineers "to perform service" on the Alaskan railroads did not authorize him to appoint an officer to the Alaska Engineering Commission).

In sum, both the Attorney General and the Comptroller General have construed § 973(b) broadly to preclude a military officer from performing duties which by statute can be performed only by an appointed officer of the civil government. While § 973(b) does not prohibit a military officer from acting in a civil capacity "under the authority and in obedience to the orders of his military superior," he may not fill a position that requires him to perform particular duties "by reason of [their] relation to or connection with the civil office." 16 Op. A.G. at 499-500. If the position is one established by statute, and if its duties involve the exercise of "some portion of the sovereign power," it is a "civil office" within the prohibition of § 973(b).

## IV. Judicial Consideration of § 973(b)

There are only a handful of judicial opinions that mention the prohibition in § 973(b), and only one that directly implicates it. In Riddle v. Warner, 522 F.2d 882 (9th Cir. 1975), a lieutenant in the Navy JAG Corps sought to compel military authorities to release him from his military obligations on grounds that he had forfeited his military commission by accepting a commission as a state notary public. The court of appeals refused to permit the statute to be used in this fashion, holding that the office of notary public was not among those intended to be barred by § 973(b). Finding no "direct illumination of the problem" in the legislative

history of the 1870 Act, 29/ and faced with apparently contradictory opinions of the Attorney General and the Comptroller General, 30/ the court relied upon its understanding of the "purposes underlying the statute" to hold that the office of notary public was not a "civil office" within § 973(b). 522 F.2d at 884. 31/ It also found that 10 U.S.C. § 936(a) was "indicative of congressional intent that § 973(b) not reach the state commission as a notary public when held by a military JAG officer." 522 F.2d at 885. 32/

In two Supreme Court opinions, the prohibition in § 973(b) was mentioned, but did not figure in the Court's decision. In Carrington v. United States, supra, 208 U.S. 1 (1908), the fact that a military officer was entrusted with money

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29/ The court cited only the remarks of the chairman of the reporting committee on the occasion of the bill's introduction, and was apparently not aware of the debates over the provision in the House and Senate.

30/ Compare October 7, 1971 letter from the Deputy Assistant Attorney General to the Judge Advocate General, discussed in note 24, supra (commission as notary public not a "civil office" within § 973(b)); with Comp. Gen. Ms. B-127798 (1956) (commission as notary public is a "civil office" within § 973(b)).

31/ Following the construction given the statute in several early Attorney General Opinions, including 35 Op. A.G. 187, the court held that the two purposes of the statute were to "prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it," and to assure "the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers." 522 F.2d at 884. Neither of these purposes would in the court's view be undermined by a JAG officer's performance of notarial functions.

32/ Section 936(a) of Title 10 gives active duty JAG officers "the general powers of a notary public . . . in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be . . . and by all other persons subject to [Title 10] outside of the United States . . . ."

by the Philippine government to be expended in connection with his military command was held insufficient to make him a "civil officer" under the Philippine Penal Code. The Court noted that "[i]t is unnecessary to inquire whether he could have made himself a civil officer if he had tried, in view of the act of Congress absolutely prohibiting it." 208 U.S. at 6. 33/ In Badeau v. United States, supra, the Court construed an 1868 statute that prohibited military officers from holding diplomatic or consular posts. This statute was distinguished from the 1870 Act as applying to both active and retired officers, and to only a particular class of civil offices. Both statutes, however, were said to reflect the "general policy of the law" that civil and military offices were "incompatible," and that performance of civil duties by a military officer was "inconsistent with subjection to the rules and articles of war, and other incidents of military service." 130 U.S. at 451-52.

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33/ The issue in Carrington was whether a military officer could be prosecuted for misconduct under the Philippine Penal Code as a "public official." The officer, the commander of a Philippine Scout Battalion, was accused of misusing funds received from the Philippine government for the preparation and display of a Scout Exhibit at the Louisiana Purchase Exposition. He argued that he could not be regarded as a "public official" because of the statutory bar to a military officer's holding "civil office." Mr. Justice Holmes, writing for the Court, did not find it necessary to reach that issue:

> Leaving names on one side, what happened was that he received $3,500 from civil sources, to be used by him in connection with his military command, in the performance of duties incident to that command . . . . . [Carrington] was performing no public function of the civil government of the Philippines; he was performing military functions to which the civil government contributed a little money.

208 U.S. at 6-7. The Court held that Carrington's prosecution was improper, since "the acceptance of the duty of spending and accounting for this small fund did not amount to holding a civil office within the statutes of the United States." Id. at 7.

In Johnston v. United States, 175 F.2d 612 (4th Cir. 1949), the court of appeals held that a military officer detailed to duty as an assistant counsel for the National Recovery Administration was not entitled to compensation in addition to his military pay under statutes prohibiting such extra compensation. The court refused to apply the exception to these statutes that comes into play when an individual properly holds two distinct offices at the same time, since the military and civilian offices were "clearly incompatible." 175 F.2d at 617. The court declined to decide whether any detailing authority in the National Industrial Recovery Act had created an exception to § 973(b). 175 F.2d at 168. 34/

Finally, in Morrison v. Callaway, 369 F. Supp. 1160 (D.D.C. 1974), the court dismissed on standing grounds a suit challenging General Haig's simultaneous service as an Assistant to President Nixon and an active duty officer of the Army. In passing, the court described § 973(b) as "seek[ing] to guard against the potential for undue influence." 369 F. Supp. at 1163.

None of the judicial opinions discussed above draws into question a construction of the term "civil office" in § 973(b) which would extend to all positions whose functions can by law be performed only by an officer of the civil government. While the court of appeals in Riddle v. Warner suggested a somewhat narrower definition of the term than appears warranted by the statute's legislative history, the court's refusal to apply the statute as proposed in that case was consistent with the "purposes underlying the statute." Whether or not the office of notary public is a "civil office" within § 973(b), that statute was not intended to be used by military officers as a means of escaping their military obligations.

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34/ The court remarked in dictum that the prohibition in § 973(b) "has not generally been thought to apply where a military officer has merely been detailed by his military superiors to duty with a civilian agency." 175 F.2d at 618. The only authority cited for this proposition was 16 Op. A.G. 499 (1880), and 1 Comp. Dec. 88 (1893), in both of which the duties of the detail at issue were held not to be those of a "civil office" within § 973(b).

## V. Application of Textual Analysis to Position of Special Assistant United States Attorney

Applying the foregoing analysis of the statutory text to the facts at issue here, we conclude that the position of Special Assistant United States Attorney falls squarely within the definition of a "civil office" under § 973(b). The position of Special Assistant United States Attorney is one established by statute. 28 U.S.C. § 543. Before an individual may perform the functions of a Special Assistant United States Attorney, he must be formally appointed in accordance with specifications established by statute, and failure to comply with the formalities of appointment may be grounds for invalidating his official acts. See note 5, supra, and cases cited therein. Moreover, a Special Assistant United States Attorney is by law subject to the supervision and direction of the United States Attorney while performing these functions. As the court remarked in United States v. Hawthorne, 626 F.2d at 89, Special Assistants are "directly responsible" to the United States Attorney, and that officer "has complete control of their activities as prosecutors for the United States."

The duties of a Special Assistant United States Attorney include litigation functions which must be regarded as "an exercise of the sovereign power," as that phrase has been interpreted by the Attorney General and the Comptroller General. See e.g. USAM at § 1-3.540 (attorneys employed in other agencies may be appointed as Special Assistants "to assist in the trial or presentation of cases"). Depending upon the circumstances, a Special Assistant may be given considerable authority in connection with the handling of particular cases, effectively making decisions which by law are the responsibility of the United States Attorney himself. An individual who has discretionary responsibility for initiating and conducting criminal prosecutions on behalf of the government is the very embodiment of its "sovereign power." Cf. Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor enjoys absolute immunity from suit in exercise of prosecutorial discretion); Buckley v. Valeo, 424 U.S. 1, 138 (1976) ("discretionary power to seek judicial relief" is authority which can constitutionally be exercised only by officers of the Executive

branch appointed in accordance with Art. II, cl. 2, § 2 of the Constitution). 35/

The functions performed by a JAG prosecutor in his capacity as a Special Assistant United States Attorney are no less those of a "civil office" because the offenses involved were committed on a military reservation. They are nonetheless offenses against the civil laws of the United States, and the authority to prosecute them derives not from any military source but from the Attorney General. No matter how great the military's interest in seeing that the law is enforced on its own reservations, this remains the province and responsibility of the civil government. The prosecutorial duties performed by the military officer cannot therefore be said to be "performed under the authority and in obedience to the orders of his military superior," but are rather "a duty which [is] incumbent upon him to perform by reason of [its] relation to or connection with the [civil] office . . . ." 16 Op. A.G. 499, supra.

## VI. Legislative Ratification

The fact that the practice of using JAG officers as civilian prosecutors has continued for more than forty years, during which the prohibition in § 973(b) has been revised and reenacted by Congress on several occasions, makes it necessary to determine whether there is any persuasive basis to conclude that Congress has ratified the administrative construction of that statute that has permitted the practice to continue.

If an agency's interpretation of a statute has been publicly conveyed to Members and committees of Congress, see, e.g., Haig v. Agee, 453 U.S. 280, 299 (1981); S.E.C v. Sloan, supra, 436 U.S. at 119-121; Zuber v. Allen, 396 U.S. 168, 193-94 (1969), and Congress has failed to challenge the

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35/ JAG officers appointed as Special Assistant United States Attorneys often exercise considerable discretionary authority in connection with the prosecution of petty offenses committed on military reservations. See note 4, supra. However, we do not mean to suggest that the applicability of § 973(b)'s prohibition in this case depends upon the precise duties performed and responsibility exercised by individual officers. The authority which inheres in the office itself, and the duties normally attendant on it, are sufficient under § 973(b) to preclude a regular military officer from holding it or exercising its functions.

agency's position in circumstances suggesting acquiescence in it, see, e.g., Haig v. Agee, 453 U.S. at 300-01; Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367, 381-82 (1969); Zemel v. Rusk, 381 U.S. 1, 11-12 (1965), the courts have "held [the legislative acquiescence] to constitute persuasive evidence that that interpretation is the one intended by Congress." Zemel v. Rusk, 381 U.S. at 11. However, in this case we have been unable to discover any evidence in the legislative history of the laws revising and reenacting the 1870 statute, or elsewhere, that Congress has ever formally been made aware of the practice of using regular JAG officers as civilian prosecutors. Indeed, in enacting specific exceptions to § 973(b), Congress has acted consistently with the administrative construction of that law, first by the Attorney General, and more recently by the Comptroller General. See note 20, supra. We doubt in any event that the bare legislative record associated with revisions and reenactments of § 973(b) would provide any basis for a ratification argument, particularly given the Comptroller General's strict and consistent interpretation of the term "civil office" in other contexts during the years since 1942, when the practice began. 36/

In addition, as we have noted, the practice has never been justified by the Department of Defense or by this Department by the sort of detailed, persuasive legal analysis of the statute which might provide a substantial basis for a ratification argument. See S.E.C. v. Sloan, 436 U.S. at 117-19 and note 11, supra.

## VII. Conclusion

In light of the legislative history of § 973(b) and its construction and application by both the Attorney General and the Comptroller General, we find inescapable the conclusion

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36/ The 1870 prohibition has been reenacted with amendments on three separate occasions since 1942. See note 22, supra. In 1956, when Title 10 was first enacted into positive law, the prevailing legal view of the statutory term "civil office" was that set forth in 25 Comp. Gen. 377 (1945), discussed at p. 23, supra. At the time Title 10 was again enacted in 1968, and § 973(b) extended to cover all of the military departments, both the Comptroller General and the Army Judge Advocate General had recently reaffirmed a strict construction of the "civil offices" from which regular officers were barred. See 44 Comp. Gen. 830 (1965) and JAGA 1968/441 (1968), discussed at p. 23 and note 28, supra.

that the position of Special Assistant United States Attorney is a "civil office" within the meaning of that term in § 973(b), and is thus foreclosed to regular military officers. Not only is it a position established by statute within a civilian agency, but its duties involve an exercise of the sovereign power of the civil government.

We are aware of no statutory authority for the practice in question which would be sufficient to overcome the prohibition in § 973(b). No general authority in the military departments to employ their personnel to perform civilian activities or functions in other government agencies can constitute an exception to the prohibition in § 973(b), precisely because authority to perform the functions of a "civil office" can by definition come only from the civil government. While the military interest in aiding the civil authorities in connection with these prosecutions might in some cases warrant the assignment of regular military officers to assist civilian prosecutors, 37/ the duties performed under such a detail could not be such as to require them to act as statutory or constitutional officers of the civil government. Nor does this Department have any authority to employ military lawyers to assist in carrying out its responsibilities in this particular situation. 38/ Therefore, unless and until Congress takes

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37/ We express no view on any authority which the military services may have to detail military officers to this Department, or to any other government agency, to perform duties which do not fall within the definition of "civil office" under § 973(b). We assume, however, that any such details would have to satisfy the requirements of § 973(a), or otherwise be authorized by a statutory exception to those requirements. See 16 Op. A.G. 499, supra, at 501 and note 17, supra.

38/ We are aware that military lawyers have from time to time been detailed by their military services to duty in the Department of Justice, to perform a variety of activities in connection with this Department's litigating and other responsibilities. We do not know whether those lawyers are regular or reserve officers, or whether any particular duties assigned them by their civilian supervisors in this Department would be considered those of a "civil office" within § 973(b), and thus prohibited under that statute. Any duty which would require that an attorney be appointed an officer of the Department of Justice (e.g., appearance before a grand jury under Rules 6(d) and 54(c) of the Federal Rules of Criminal Procedure), would, we assume, be within § 973(b)'s prohibition.

some action which would specifically permit the practice of using regular military officers to prosecute civil offenses committed on military bases, regular JAG officers may no longer be authorized by this Department to perform the duties in question.

We recognize, of course, that the practice of employing regular JAG officers to assist United States Attorneys in this context has generally been regarded as a useful one. While some reserve officers will presumably remain available to serve as Special Assistant United States Attorneys, it may be desirable to seek legislation to permit regular officers to continue to serve in this capacity. In this connection, we would be happy to assist in developing an appropriate legislative approach to this issue.

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Attachment

cc: William H. Taft, IV
General Counsel
Department of Defense