The original documents are located in Box 41, folder "Personnel - White House Appointment of Military Personnel to Staff" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

May 29, 1973

Honorable John E. Moss
House of Representatives
Washington, D. C. 20515

Dear Mr. Moss:

This refers to your telephone call to me on May 24, 1973 regarding precedents for the assignment of General Alexander M. Haig to the Office of the President.

General Haig is but the latest of senior military officers who have, over the years, been detailed by the President to perform a wide range of duties in the Office of the President. For examples, Admiral Leahy served from 1942 to 1949 as Chief of Staff to the Commander-in-Chief, then President Roosevelt. Major General Wilton B. Persons, USA, Retired, served President Eisenhower as Chief of the White House Staff. Brigadier General Andrew Goodpaster served President Eisenhower as Staff Secretary. General Maxwell Taylor served President Kennedy as Military Adviser to the President. In addition there have been in the past, and are at the present time, military personnel serving specifically as Military Aides to the President.

I hope the foregoing observations will be helpful to you in considering the status of General Haig.

Sincerely yours,

(Signed) H. Niederlehner

L. Niederlehner
Acting General Counsel

cc: LA
PA
OSD Files
Reading

Coordination:

ASD(LA) [signature]
ASD(PA) [signature]

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-150136

February 7, 1974

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

In view of 10 U.S.C. 973(b) questions have arisen as to the propriety of General Alexander M. Haig, Jr., USA, 195-12-3625, serving as Assistant to the President while he was an officer (O-10) on the active list of the Regular Army and Vice Chief of Staff of the Army, during the period from about May 4, 1973, until his retirement from the Army on August 1, 1973. Since the payment of active duty pay and allowances and retired pay to General Haig is involved, the matter is of concern to this Office.

The announcement of General Haig's appointment as Assistant to the President made on May 4, 1973, by White House Press Secretary Ronald L. Ziegler states as follows:

> "President Nixon has asked me to announce today the interim appointment of General Alexander M. Haig, Jr., currently the Vice Chief of Staff of the Army, to be an Assistant to the President.
>
> "In this role, General Haig will assume many of the responsibilities formerly held by H. R. Haldeman. These responsibilities include coordination of the work of the White House Staff and administration of the immediate Office of the President. General Haig will assume these responsibilities immediately.
>
> "During the past years, the President has worked closely with General Haig, who served in the key position of Deputy Assistant to the President for National Security Affairs and as Deputy to Dr. Kissinger. General Haig consulted closely with the President on national security matters and undertook a number of missions on the President's behalf in relation to the agreement to end the war in Vietnam.

"President Nixon values General Haig's experience and integrity, and has confidence in his proven abilities as an excellent administrator."

See Weekly Compilation of Presidential Documents, Monday, May 7, 1973, Volume 9, Number 18, page 450.

Also, on May 10, 1973, in announcing other appointments and changes in the Administration, Press Secretary Ziegler stated in part as follows:

"Also, this morning the President again referred to the fact that he had appointed Alexander Haig to fill the interim role which Bob Haldeman previously filled as Assistant to the President and that Alexander Haig would be continuing in this position for the immediate future."

See Weekly Compilation of Presidential Documents, Monday, May 14, 1973, Volume 9, Number 19, pages 661, 662.

As a result of a congressional inquiry concerning this matter, in May 1973 we informally contacted members of the White House staff to obtain further information concerning the duties of General Haig's position at the White House and the legal authority for his appointment. We were told that legal advice from the Department of Defense had been relied upon in assigning General Haig and we were referred to an official in the Department of Defense General Counsel's office.

The Department of Defense official advised us that General Haig was assigned on an "interim" basis to the President's staff, but continued to receive only his pay and allowances as a general and Vice Chief of Staff of the Army. The official said that General Haig's duties were such as may be assigned by the President as Commander-in-Chief, but were not the defined duties of any particular office. He also said that General Haig had not been appointed as one of the assistants to the President authorized by 3 U.S.C. 106, and that General Haig's duties more nearly resembled the duties of Chief of Staff to the President, a position authorized under 10 U.S.C. 3531 to be filled by a general officer of the Army appointed by the President, by and with the advice and consent of the Senate.

However, since General Haig was assigned as Assistant to the President only on an interim basis, the Department of Defense official

said that General Haig was not considered to have been assigned to the position of Chief of Staff to the President, and it was not known how long his assignment might continue. That official did agree, however, that if General Haig should continue indefinitely in his White House position there could arise the question of whether his name should be submitted to the Senate for confirmation as provided by 10 U.S.C. 3521.

The Department of Defense official also expressed the opinion that as Commander-in-Chief, the President had ample authority to assign General Haig to his White House position and such duties as he sees fit, on an interim basis, and that it was not an assignment to an office within the contemplation of 10 U.S.C. 973(b).

We note, however, that Mr. Ziegler's press announcements state that General Haig in his position as Assistant to the President would "assume many of the responsibilities formerly held by H. R. Haldeman" and that the President had "appointed Alexander Haig to fill the interim role which Bob Haldeman previously filled as Assistant to the President."

Subsequently, an announcement dated June 6, 1973, was released by the Office of the White House Press Secretary which stated in pertinent part as follows:

> "The President today made three announcements relating to the senior staff of the White House:
>
> "General Alexander M. Haig, Jr. will retire from active duty in the Army effective August 1, 1973, and will be appointed Assistant to the President. In this capacity General Haig will continue to exercise the same general responsibilities he has held since rejoining the White House staff on an interim basis in May. These include coordination and supervision of the day-to-day operations and responsibilities of the White House staff." (Emphasis added.)

In view of the June 6 announcement along with the previous White House announcements of May 7 and 10, 1973, it appears that General Haig as Assistant to the President was performing essentially the duties

which Mr. Haldeman exercised while occupying the position of Assistant to the President. Mr. Haldeman's position was one of six such positions authorized by 3 U.S.C. 106 which provides as follows:

> "The President is authorized to appoint not to exceed six administrative assistants and to fix their compensation in accordance with section 105 of this title. Each administrative assistant shall perform such duties as the President may prescribe."

Section 105 of title 3, United States Code, authorizes the President to fix the compensation of, among others, the six administrative assistants authorized by section 106 at rates of basic compensation not to exceed that of level II of the Federal Executive Salary Schedule. We understand Mr. Haldeman was compensated at the level II rate of pay.

Section 973(b) of title 10, United States Code, provides as follows:

> "(b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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."

To determine whether General Haig as an officer on the active list of the Regular Army was in violation of section 973(b) while serving as Assistant to the President prior to his retirement from the Army, it is necessary to determine whether that position is a "civil office" within the meaning of that section, and, if so, whether there is authority "otherwise provided by law" as prescribed in section 973(b) for him to occupy that position.

The term "civil office" as used in 10 U.S.C. 973(b) and predecessor statutes has not been statutorily defined. In 13 Op. Atty. Gen. 310 (1870), an opinion issued shortly after the original statute was enacted from which 10 U.S.C. 973(b) was derived, the Attorney General of the United States held that General George C. Meade, a

Regular Army Officer, could not exercise the functions of a park commissioner of the City of Philadelphia without vacating his military commission. The Attorney General indicated that the office of park commissioner had been established by an act of the state legislature, which act designated the mode of appointment, the term of office, and the functions to be performed which functions were of a civil nature and would fall within any authorized definition of an office. The opinion also noted that the act provided that "they shall receive no compensation for their services." In addition the Attorney General pointed out that the manifest purpose of Congress in enacting the prohibition against Regular Army officers serving in civil offices was to disencumber them "of every species of official duty not belonging to their military profession." See also in this regard 35 Op. Atty. Gen. 187, 190 (1927) wherein the Attorney General stated that the purpose of the statute was 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.

In 1873 the Attorney General held that General William T. Sherman could not act as Secretary of War, even temporarily, without vacating his commission as General of the Army. See 14 Op. Atty. Gen. 200 (1873).

The Attorney General in 18 Op. Atty. Gen. 11 (1884) has also held that notwithstanding the gravity of the penalty inflicted by the statute (10 U.S.C. 973(b)), the policy of the statute points to a very liberal interpretation of the phrase "civil office" so as to include a position on a "board of experts," established by a Philadelphia city ordinance to, in effect, advise the city councils on the paving of the city's streets.

In our decision at 29 Comp. Gen. 363 (1950) we concluded that the term "civil office," as distinguished from "military office," is synonymous with "public office" and is usually defined in much the same terms. We quoted judicial authority to the effect that the chief elements of a public office are: the specific position must be created by law; there must be certain duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power.

In our decision at 44 Comp. Gen. 830 (1965) we held that a Regular Army officer, participating in an excess leave program attending law school, who accepted a temporary appointment as a special policeman

in the Library of Congress terminated his commission. We further held that since the positions of special police appointed by the Librarian of Congress were created by a statute which defines their duties and that such police exercise some of the powers of the sovereign, the acceptance of such a position was the acceptance of a civil office.

In that decision we also stated that the fact that the appointment to perform the statutory duties of an office may be temporary provides no basis for determining that a position is not a "civil office." We also held that the fact that the officer may be on excess leave provides no basis for viewing his acceptance of the position of special policeman as not terminating his appointment as an officer in the Regular Army since, quoting from 25 Comp. Gen. 377, 381 (1945), "The statute makes the two positions incompatible as a 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." See also 25 Comp. Gen. 38, 41 (1945). We find nothing in 44 Comp. Gen. 830 which would support the view that General Haig's initial assignment and duties did not meet the criteria for a civil office as discussed in that decision.

The position of Assistant to the President previously held by Mr. Haldeman and now held by General Haig is one specifically created by law (3 U.S.C. 106) which law provides that the duties of the position shall be as prescribed by the President. It also has a statutorily described salary (3 U.S.C. 105). It is our view that such position meets the criteria for a civil office within the meaning of 10 U.S.C. 973(b) as construed in the above-cited opinions of the Attorney General and the Comptroller General.

We have previously taken no action in this matter since the matter was the subject of litigation in Alan B. Morrison v. Howard H. Callaway, Secretary of the Army and Alexander M. Haig, Jr., Assistant to the President, Civil Action No. 1108-73, which was filed June 6, 1973, in the United States District Court for the District of Columbia. That suit was dismissed by the court on January 8, 1974, on the ground that the plaintiff lacked standing. The court did not reach the issue of whether General Haig held a civil office within the purview of 10 U.S.C. 973(b), so as to terminate his military commission.

In view of the precedents set out above and the reported factual situation concerning General Haig's functions and duties at the White House, we have tentatively concluded that when he began to exercise those functions and duties on or about May 4, 1973, he occupied a civil office and that his military appointment terminated by operation of law under 10 U.S.C. 973(b). In addition with the termination of his military appointment he would not appear to have been a "commissioned officer of the Army" under 10 U.S.C. 3911, the law under which we understand he retired on July 31, 1973. This of course brings into question the legality of the payment to General Haig of active duty pay and allowances during the period May 4 to July 31, 1973, and retired pay from and after August 1, 1973. We are now giving consideration to taking exceptions to such payments. However, before doing so we would like an expression of your views in this matter.

An early reply will be appreciated.

Sincerely yours,

Elmer B. Staats

Comptroller General
of the United States

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20310

22 April 1974

Honorable Elmer Staats
Comptroller General of the United States
Washington, D. C. 20548

Re: General Alexander M. Haig, Jr., United States Army (retired); Your Letter of February 7, 1974, No. B-150136

Dear Mr. Comptroller General:

I have been asked to respond on behalf of the Department of Defense to your letter of February 7, 1974, to the Secretary of Defense. That letter concerns the applicability of 10 U.S.C. § 973(b) (1970), to the service from May 4 through August 1, 1973, of General Alexander M. Haig, Jr., United States Army (retired), on the White House staff. Your letter tentatively concludes

> that when he [General Haig] began to exercise those functions and duties on or about May 4, 1973, he occupied a civil office and that his military appointment terminated by operation of law under 10 U.S.C. 973(b). In addition with the termination of his military appointment he would not appear to have been a "commissioned officer of the Army" under 10 U.S.C. 3911, the law under which we understand he retired on July 31, 1973.

Before discussing the views of the Department, permit me to set out the correct, verifiable facts of the case. You will note a substantial difference between that which follows and the statement of facts set out in your letter of February 7, 1974, which relied heavily on White House press releases concerning Haig's return to the White House. Those releases, insofar as Haig's employment status is concerned, were inaccurate in part and inartfully misleading in the whole.

Statement of Facts

After serving for almost four years in the Office of the President, first as Military Assistant to the President for National Security Affairs and subsequently as Deputy Assistant to the President for National Security Affairs, General Alexander M. Haig, Jr., returned on January 4, 1973, to the Army staff, having been assigned on that date as Vice Chief of Staff of the Army.

On April 30, 1973, the White House announced the resignation of two of the President's senior assistants: Messrs. H. R. Haldeman and John Ehrlichman. Because of his confidence in General Haig and because of his uncertainty as to the future roles of his personal staff, on May 3, 1973, the President directed Haig to assist him temporarily with the functioning of the White House staff in order to help fill the void left by the resignations. Haig complied with this order and assumed his new duties the following day. Because the assignment was a temporary one, id., Haig retained his assignment as Vice Chief of Staff of the Army. He planned to return on a full-time basis to his Army post at the conclusion of his temporary service at the behest of the President.

During the period May 4 through July 31, Haig performed for the President duties essentially of an administrative nature. Representative examples of Haig's duties included coordinating dissemination of presidential directives, insuring receipt by the President of information necessary for decision making, coordinating staff actions, and supervising the operation of the White House staff. These functions correspond to some extent, but not entirely, with those previously performed by H. R. Haldeman. However, Haig did not assume Haldeman's position, which remained vacant.

After the lapse of some time, the President and General Haig agreed that Haig's services would be required for a longer period than had originally been anticipated and that his role should be expanded to include a more substantive, policy-oriented area of responsibility. General Haig immediately took steps to be retired

from the Army. He chose August 1, 1973, as the effective date of his retirement to allow time for administrative processing and Senate confirmation of his retirement request, for moving to civilian quarters, and for the transfer of authority to his successor as Vice Chief of Staff of the Army.

On June 14, 1973, the President nominated General Haig for retirement and on July 14, 1973, the Senate duly voted its advice and consent. See 119 CONG. REC. S13516 (daily ed. July 14, 1973). General Haig retired on July 31, and his name was placed on the retired list on August 1, 1973. On the latter date, the President for the first time appointed Haig an Assistant to the President, under title 3 of the United States Code, and Haig for the first time took an oath of office, received a presidential commission, and was placed on the White House payroll by salary order.

Discussion

10 U.S.C. § 973(b) (1970), derives from the Act of July 15, 1870, ch. 294 § 18, 16 Stat. 319. As most recently amended and recodified, see Act of Jan. 2, 1968, Pub. L. No. 90-235, §4(a)(5)(A), 81 Stat. 759, it reads:

> Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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.

Based upon the facts outlined above, the Department of Defense concludes that at no time prior to his retirement did General Haig either accept any civil office within the meaning of the quoted statute, nor did he exercise the functions of any such office. We further conclude that there is statutory authority for the type of service which General Haig rendered during the period in question. Lastly, we conclude that even if section 973(b) is applied to General Haig's performance of his duties, the de facto officer doctrine should foreclose any forfeiture.

1. General Haig Did Not, While An Officer Of The Regular Army, Hold Any Civil Office By Election Or Appointment, Nor Did He Exercise The Functions Thereof.

The term "civil office" is a term of variable meaning, the connotation of which changes with the context in which it is used. Morganthau v. Barrett, 108 F. 2d 481, 483 (D.C. Cir. 1939). The meaning to be given the term when used in a statute should be that which will effectuate the purposes of the statute being construed. See, e.g., Pardon v. Puerto Rico ex rel. Castro, 142 F. 2d 508, 510 (1st Cir. 1944).

From the debate on the floor of the Senate in 1870 regarding the antecedent of section 973(b), it appears that the primary concern of the Congress was the exercise of civil authority by military officers. CONG. GLOBE, 41st Cong., 2d Sess. 3393-3404 (1870). To this end, the Congress sought to prevent "the union of the civil and the military authority in the same hands," id. at 3401, in part because it was concerned that a military officer exercising such authority would be subject to the commands of his military superiors. The Congress did not intend to prevent civilian officials from seeking advice or administrative assistance from military officers. See id. at 3403 (remarks of Sen. Trumbull).

Past Comptrollers General, in interpreting section 973(b), have consistently ruled that in order to constitute a "civil office" within the meaning of that section, a position must fall within the definition of an "office" developed by the Comptroller of the Treasury in 4 COMP. DEC. 696 (1898). See, e.g., 25 COMP. GEN. 377, 383-85 (1945). In that opinion, the Comptroller described the fundamental elements of an office:

> The exercise of a function of government is clearly an attribute of a public office. When it is considered what the functions of government are, and how they are administered, this attribute is seen to be fundamental. The chief functions of government are to make laws, to execute them, and to administer justice. Under our system of government there can be no laws enacted or executed, nor justice administered, except by persons authorized by law to perform those functions. Not one

> of the powers of the Government can be legally exercised until authority has been granted by law for the purpose.
>
> In accordance with this view, an office may be defined as authority to exercise a function of government.

4 COMP. DEC. 696, 701 (1898).

Applying this definition, both you, e.g., 44 COMP. GEN. 830 (1965), and The Judge Advocate General of the Army, e.g., JAGA 1968/4441, Sept. 9, 1968, have consistently required that the position possess the formal attributes of a public office.

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

44 COMP. GEN. at 832; cf. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).[1/] State courts applying provisions in their

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1/ A contrary definition sometimes, compare 35 OP. ATT'Y GEN. 187, 190 (1927), with 13 OP. ATT'Y GEN. 310 (1870), relied on by the Attorney General is premised on a faulty reading of the purpose of the prohibition. The Attorney General has stated that in his view

> [w]hether a [position] is an office within the meaning of § 1222, R.S., [the predecessor of section 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. 35 OP. ATT'Y GEN. at 190. The legislative history demonstrates, however, that Congress was concerned not with protecting military officers from the demands of other duties but rather with preventing the exercise of civilian authority by military officers. See p. 4, supra. Moreover, the statute's inapplicability to employment by the federal government or by state government which does not rise to the level of an office and its inapplicability to position of any kind in the private sector discredits the Attorney General's interpretation. Presumably for these reasons, as well as a total lack of textual support, see 25 COMP. GEN. 377, 385 (1945), you have adhered to the sovereign functions test.

state constitutions and codes similar to section 973(b) have also so construed the term. E.g., Martin v. Smith, 239 Wis. 314, 1 N.W. 2d 163, 172 (1941).

The Court of Appeals for the Sixth Circuit in Pope v. Commissioner, 138 F. 2d 1006, 1009 (6th Cir. 1943), has elaborated in another context the applicable indices of a civil officer:

> There must be a delegation of a portion of the sovereign powers of government to be exercised for the benefit of the public . . . .
>
> The duties must be performed independently and without control of a superior power other than the law.

The court in Pope also identified several other indicia, including creation by positive law, a formal appointment, an oath of office, and a well-defined tenure. Id. See also 44 COMP. GEN. 830, 832 (1965).

An examination of the facts in the instant case demonstrates that General Haig did not occupy a civil office, as defined in these criteria, during the period in question.

First, assuming that General Haig did occupy the position of Assistant to the President created by 3 U.S.C. § 106 (1970), that position is not a "civil office" within the meaning of the tests described above.

One of the touchstones of a "civil office," see 44 COMP. GEN. 830, 832 (1965), is the presence of "certain definite duties imposed by law on the incumbent." 3 U.S.C. § 106 (1970), authorizes the President to appoint up to six administrative assistants and delegates to the President authority to define the duties of such assistants as he may appoint. If the President delegates no functions or purely administrative functions, it may well be that the position is more that of a personal assistant than that of a civil officer. Indeed, the President may, if he so chooses, never call on the incumbent to do anything. Cf. Letter from Assistant Att'y Gen., Office of Legal Counsel to The Judge Advocate General of the Air Force, Oct. 7, 1971 (notary public not civil officer because he may never be called upon to perform any duties). In any event, whatever the duties which a particular President may assign to those assistants

which he chooses to appoint, Congress cannot be said to have imposed "certain definite duties . . . by law on the incumbent."

More significantly, the position does not "involve the exercise of some portion of the sovereign power," another of the applicable touchstones. 44 COMP. GEN. at 832. As previously noted, see p. 5, supra, "sovereign power" contemplates the authority to act legislatively, administratively, or judicially with binding legal effect and without the need for approval by a higher power. Manifestly, General Haig was in no position to legislate or to adjudicate; and any executive function which he may have had was not committed by law to an Assistant to the President, assuming that he held such a position, but would have been wholly derivative from the President.

In actuality, General Haig exercised none of these functions. His only assignment was to perform certain administrative functions at the request of the President, to coordinate the work of the White House staff, and, perhaps, to discuss policy issues with the President. See p. 2, supra. None of these is the function of a civil office, as opposed to the function of an agent. See 44 COMP. GEN. at 832; cf. CONG. GLOBE, 41st Cong., 2d Sess. 3403 (1870) (detail of officer to perform clerical duty). He made no final operational decisions; that is, his duties were not "performed independently and without control of a superior power other than the law." Pope v. Commissioner, 138 F. 2d 1006, 1009 (6th Cir. 1943). Nor could the President have delegated governmental functions to him, since 3 U.S.C. § 301 (1970), authorizes such delegations only to

> the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate . . . .

An Assistant to the President falls into neither of these categories.

All final delegations of authority are required to be published in the Federal Register. See 3 U.S.C. § 301 (1970); 5 id. § 552(a). Since no delegations to the position of Assistant to the President held by Mr. Haldeman appear in the Federal Register, no sovereign authority has been delegated to that position. Therefore, the position General Haig is alleged to have occupied is not a civil office within the meaning of section 973(d).

Second, from May 4 through July 31, 1973, General Haig served the Government only as Army Vice Chief of Staff. He did not become Assistant to the President until August 1, 1973. Prior to his retirement, General Haig neither held, nor exercised the functions of Mr. Haldeman's position within the meaning of section 973(b).

The ordinary tests of when one holds an office supports this conclusion. No formal instrument appointing General Haig to the statutory position of Assistant to the President or to any other office outside the military was executed until that date. Cf. 1 COMP. GEN. 499, 503 (1922) (although a military officer could conceivably have served on military orders on Alaskan Engineering Commission without breaching § 973(b)'s predecessor, since he was formally appointed by the President, military commission vacated.) Nor was there any other indicium of appointment. General Haig had taken no oath of office. He had been given no tenure. Rather, General Haig was assisting the President only in a temporary capacity, until permanent arrangements for a successor to Mr. Haldeman could be made. General Haig received no "emoluments" for his service; his only compensation was the pay and allowances to which he was entitled as a general in the United States Army. Throughout his temporary assignment, General Haig retained his military assignment as Vice Chief of Staff of the Army. Thus, General Haig did not occupy the position of Assistant to the President prior to August 1, 1973.

The characterization of General Haig's service as an "appointment" by Mr. Ronald Ziegler, then White House press secretary, upon which your letter of February 7 principally relies, should not be determinative. Mr. Ziegler's imprecise use of the word "appointment" in the informal atmosphere of a press conference is without legal effect.

Although he did not become Assistant to the President until August 1, General Haig did perform prior to that date some of the same tasks as Mr. H. R. Haldeman had previously. That General Haig may have performed certain functions which some might deem not purely "military" in nature, however that concept may be defined, does not mean that he exercised the functions of a civil office so long as he performed them as part of his military duties under orders

through the chain of command.[2/] In enacting section 973(b)'s predecessor, Congress intended not to interfere with the so-called "detail rule," allowing a military officer to be detailed to another agency of the Government to perform certain duties civil in nature. When queried about the limits placed by the proposed law on the President's authority to detail officers, Senator Trumbull, one of the sponsors of the legislation, responded "Anything that a detail covers this section does not interfere with." CONG. GLOBE, 41st Cong., 2d Sess. 3403 (1870). To the further suggestion that "performing the duties of a clerk, whether by detail or anything else, is fulfilling the functions of a civil office," Senator Trumbull replied:

> 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.

The detail rule was first relied upon in a reported opinion to approve the performance of civilian service by a military officer, notwithstanding section 973(b)'s predecessor, by the Attorney General just ten years after the statute's enactments. In 16 OP. ATT'Y GEN. 499 (1880), he ruled that a military officer could be assigned to duty in the United States Geological Survey, under the Department of the Interior, without contravening the statute. In what remains the classic statement of the rule, the Attorney General concluded:

> [W]hile the service to which the officer might be assigned would be civil and lie 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 which it was 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.

[2/] If one concludes that Assistant to the President is not a civil office, one need not consider this point to conclude that the violation of section 973(b) has not occurred.

Id. at 499-500. The Attorney General has consistently adhered to this rule. See 20 OP. ATT'Y GEN. 604, 605-06 (1893) (detailed officers "do not, within the meaning of the Revised Statutes, hold any civil office"); cf. 35 OP. ATT'Y GEN. 187, 188 (1927). The Comptroller General has followed the lead of the Attorney General in adopting this construction of section 973(b). E. g., DEC. FIRST COMP. 1893-1894, at 88, 92-93 (1893) (holding that military officers could be detailed by the President to the Boundary Commission without vacating their commissions); see 25 COMP. GEN. 38, 40 (1945); 1 COMP. GEN. 499 (1922); 4 COMP. DEC. 696, 701 (1898).

The detail need not be specifically authorized by statute. In 29 COMP. GEN. 363, 365, 368-69 (1950), the Comptroller General ruled, in the absence of any legislation specifically authorizing it, that an Army officer could, without having his commission vacated, be "loaned or assigned to the Department of the Interior for a period of several years" as Commissioner of Roads for Alaska, on the understanding that he "has not executed an oath of office as such commissioner and that he continues to draw the pay and allowances of a colonel in the Army," since none of the technical attributes of "office" were involved.

The judicial gloss given to section 973(b) in Johnston v. United States, 175 F. 2d 612 (4th Cir. 1949), reflects approval of the detail rule. In Johnston, plaintiff had been detailed by his military superiors to duty as an assistant counsel to the National Recovery Administration. Plaintiff tried to recover from the United States the extra compensation to which he would have been entitled as an employee of the NRA, arguing, inter alia, that his Army commission had been vacated by operation of law and that he was therefore entitled to pay as a de facto officer of the NRA. The court rejected his claim, noting that

> Revised Statutes § 1222 [now 10 U.S.C. § 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. 16 Op. Attys. [sic] Gen. 499; Decisions of the First Comptroller 88, 93.

Id. at 618.

This rule is now embodied in section III. D. of Department of Defense Directive 1344.10 (September 23, 1969), which provides:

> Civil office is an office, not military in nature, that involves the exercise of the powers of authority of civil government. It may be either an elective or an appointive office under the United States. . . . The term "civil office" shall not include offices to which military personnel may be assigned in a military status.

Such a regulation, adopted by the agency most intimately involved with the subject, is, of course, entitled to considerable respect.

In summary, General Haig occupied no office other than Vice Chief of Staff of the Army until August 1, 1974; rather, he was detailed to perform certain tasks for the President, within the scope of the administratively and judicially approved "detail rule," now embodied in departmental regulations.

As already noted, Congress, in enacting section 973(b), was concerned with preventing the exercise of civilian authority by military officers and not with the performance by military officers of administrative tasks normally performed by civilians. For this reason, in applying section 973(b), a "civil office" is identified by its occupant's authority to exercise sovereign functions. The performance of administrative duties, even those normally associated with an "office," is not the exercise of the functions of that office. The "exercise of its functions," when used with reference to a civil office, means the exercise of whatever sovereign functions the office has been assigned. You have, for instance, stated in the past that an agent may perform any number of duties which have devolved on another as the head of a department without thereby becoming a "civil officer" so long as he is not given authority to exercise a function of government, 4 Comp. Dec. 696, 701 (1898). Moreover, fear of directions from a military officer's military superior conflicting either with directions from his civilian superior or from his conscience (as when the officer is a legislator who must exercise independent judgment) is unwarranted in this case, since the President is both the civilian superior and the military commander-in-chief of the officer in question. U.S. CONST. art.

II, §2. Cessante ratione legis, cessat et ipsa lex.

Three additional factors militate for accepting the conclusion reached herein.

First, this conclusion is in accord with an administrative practice of longstanding. Historically, Congress has left unfettered the President's freedom to seek assistance and advice from whomever he chose so long as he did not delegate any of the sovereign authority of the President to such men. See generally E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 71, 300-01 (4th rev. ed. 1957). Indeed, although "Presidents have, of course, 'always had some kind of help in the discharge of their duties,' . . . it was not until 1857 that Congress appropriated money for a presidential clerk." Id. at 300-01. This manifests the understanding that the President's authority to seek assistance is not limited to those whom the Congress authorizes him to employ.

Among those from whom Presidents have sought assistance in the past are a number of active duty military officers. The most recent example is then Brigadier General Andrew Goodpaster's service as an assistant to President Eisenhower. In 1870, when section 973(b) was first enacted, four officers on the active list of the Regular Army were serving as secretaries to President Grant. These secretaries performed functions beyond those of a clerical secretary. No visitor was admitted to the President until one of the secretaries had ascertained the caller's mission and had judged it worthy of the President's personal attention. In 1869, Grant sent one of the secretaries to Santo Domingo to investigate its government and finances with a view toward annexing the country by purchase. See generally U.S. GRANT, ULYSSES S. GRANT: POLITICIAN 198 ff. (1935); C. G. BOWERS, THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN 296-97 (1929). Nevertheless, although Congress' attention was called to this fact during the debates on the dual office act, CONG. GLOBE, 41st Cong., 2d Sess. 3403 (1870) (remarks of Sen. Williams), the practice continued and one of the men served President Grant as secretary until 1876.

Third, this conclusion is supported by policy considerations stemming from significant constitutional values. The President's power as commander-in-chief, U.S. CONST. art. II, §2, gives the President broad authority over the assignment of military personnel. See also 10 U.S.C. § 3012(e) (1970) (power of the Secretary of the Army to assign Army members). A statute should not be read to infringe on this authority unless its intent to do so is quite apparent on its face.

Added to the balance, as well, must be the general delegation of executive authority to the President. See U.S. CONST. art. VI, §1.

Following the sudden resignation of several top aides, the President believed it necessary to call on extremely short notice upon men in whose ability, experience, and judgment he had great trust. One of the men upon whom he called was the Vice Chief of Staff of the Army. One should be hesitant to construe an ambiguous statute so broadly as to prevent the President from seeking temporary assistance in what may fairly be characterized as near emergency conditions from the members of his executive departments, military as well as civilian, especially in view of the consistent historical practice both at the time of the 1870 statute's enactment and thereafter.

You apparently would allow the President to seek advice from military officers on military and foreign affairs subjects but not on other matters. Thus, neither you nor any other official has questioned either General Haig's prior role as deputy to Mr. Kissinger nor the use of high ranking officers as military aides to advise the President on matters of national defense. See COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT [HOOVER COMMISSION], GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH 12-13 (1949). But the proper distinction is not based on the nature of the subject matter involved; a military man cannot serve as Secretary of State or, with one statutory exception, see 10 U.S.C. § 3017(b) (1970), as Secretary of the Army. Rather, the distinction should be based on the operative role the military man fills; i.e., whether he exercises a sovereign function. Moreover, the fact that an adviser occupies an office in the Executive Office Building, as was true of General Haig's earlier White House service, or that the course of advice is lengthy rather than brief should not be determinative of the existence of a violation of section 973(b). Cf. 44 COMP. GEN. at 833 (fact that position causing violation temporary immaterial). The level at which the officer serves is similarly immaterial. See, e.g., 29 COMP. GEN. 363, 369 (1950).

Finally, this conclusion is supported by considerations of equity. Applying the forfeiture provision of section 973(b) broadly in a borderline situation such as this could require the officer involved to make

a Hobson's choice. On the one hand, he can comply with the order of a superior assigning him to a particular duty and subject himself to loss of his commission, of his career, and of his retirement benefits. On the other hand, he can refuse the order and subject himself to trial by court-martial (see Uniform Code of Military Justice, art. 92, 10 U.S.C. § 892 (1970)), incarceration, dismissal from the service, and loss of his commission, of his career, and of his retirement benefits. To require an officer of the armed forces in such a case to refuse a direct order from a superior -- in this case, the Commander-in-Chief -- on the basis of an imprecise statute which has been given varying interpretations by administrative agencies under penalty of a substantial forfeiture if he guesses incorrectly is hardly equitable.

At least two other agencies of Government have confirmed the conclusion reached herein.

First, in order for General Haig to have retired in the grade of general, it was necessary for the Senate to advise and consent to his being placed on the retired list in that grade. 10 U.S.C. § 3963 (1970). Given this opportunity to review General Haig's military status, the Senate confirmed his retirement without debate. 119 CONG. REC. S13516 (daily ed. July 14, 1973). This action suggests that the Senate did not believe that General Haig had failed to meet the prerequisites established for retirement by the statute which your February 7 letter cites. Nor can one assume that the Senate did not consider the issue presented, since at the time of that body's action, you had already responded to an inquiry from Representative John Moss on this subject, and the litigation director of Public Interest, Inc., Alan B. Morrison, Esquire, had, with attendant publicity, filed suit in federal court to strip General Haig of his military rank.

In addition, the Attorney General has implicitly endorsed the conclusions reached herein: by his representation of defendants in Morrison v. Callaway, Civil Action No. 1108-73 (D.D.C., decided Jan. 8, 1974); by his failure to bring a quo warranto action pursuant D.C. CODE tit. 16, §§ 16-3501 to -3502 (Supp. V. 1972), the traditional manner of testing whether a Government official is illegally holding or exercising an office under the United States, civil or military; and by his preliminary conclusion, expressed in his letter of July 6, 1973, to Representative Moss, that no violation of section 973(b) had occurred.

In essence, then, because the alleged violation is far from clear, because the administrative agencies with primary responsibility in this area have concluded that no violation has occurred, and because in any event the facts do not warrant any such conclusion, I believe that you should reverse your tentative opinion that General Haig occupied or exercised the function of a civil office while a member of the Regular Army on active duty.

2. Statutory Authority for General Haig's Temporary Service To The President Excepts Him From The Operation of 10 U.S.C. § 973(b) (1970).

Wholly apart from the issue whether General Haig occupied a civil office is a second issue which, I believe, requires reversal of your tentative opinion.

Section 973(b) provides for statutory exception to its forfeiture provision. Over the years, Congress has passed a number of such exceptions to section 973(b). For example, officers may be detailed to the National Aeronautics and Space Administration, 42 U.S.C. § 2473(b) (12) (1970), without the application of the penalty of the dual office act. These exceptions need not be express. See 14 OP. ATT'Y GEN. 573, 573-74 (1875).

3 U.S.C. § 107 (1970), constitutes such an exception which authorized General Haig to render temporary assistance to the President at the latter's request. That section provides:

> Employees of the executive departments and independent establishments of the executive branch of the Government may be detailed from time to time to the White House Office for temporary assistance.

The term "employee" has variable meaning depending on the context in which it is used. Thus, for instance, title 5 of the United States Code at times defines the term to include members of the military, e.g., 5 U.S.C. §§ 7342(a)(1)(C), 8311(1)(C) (1970), and at times not to include such personnel. E.g., id. § 2105(a). Where the language of an act is silent as to the scope of the term "employee," the purpose and history of the legislation must be consulted in determining its meaning.

The legislative history of section 107 is silent as to whether military officers may be considered "employees of the executive departments" within the meaning of the statute. Its purpose, however, requires that it be interpreted broadly to include military officers.

Section 107 is a remedial statute, designed to provide to the President on a temporary basis the assistance he requires. I perceive no rationale for excluding military officers from the categories of employees for the purpose of assisting the President in such situations. The longstanding practice of military assistance to the White House Office supports this reading of the statute.

Because so interpreted, 10 U.S.C. §§ 101(5)-(6), 3031(a) (1970), read together, make the Vice Chief of Staff of the Army an employee of an executive department. General Haig, then Army Vice Chief of Staff, could have been detailed to the White House Office for temporary assistance under authority of 3 U.S.C. § 107 (1970), notwithstanding 10 U.S.C. § 973(b) (1970). That is precisely what occurred: while retaining his position as Vice Chief of Staff, General Haig provided temporary assistance to the White House Office. Consequently, even if you hold that General Haig would otherwise be within the proscription of section 973(b), this exception provides a shield from the statutory forfeiture.

3. If General Haig's Service In The White House Office From May 4 Through July 31, 1973, Is Held Violative Of Section 973(b), The De Facto Officer Doctrine Provides A Basis For Retention Of Pay And Allowances Received And For The Receipt Of Future Retirement Benefits.

Even if you should decide that General Haig's service on the White House staff during the period in question was in violation of section 973(b), I believe that General Haig should be held to have been a de facto officer during the period in question.

The de facto officer doctrine generally provides that when one occupies an office of the government and performs the functions thereof under a claim of right and color of title to the office in good faith, notwithstanding the absence of a de jure right to that office, the individual is de facto the officer. See generally United States v. Royer, 268 U.S. 394 (1925); Badeau v. United States, 130 U.S. 439, 452 (1889).

During the period in question, General Haig met these qualifications with respect to the office of general in the United States Army. He occupied that office under a claim of right and with color of title thereto. The fact that he continued to hold that office while serving on the White House staff only after receiving the advice of attorneys of this Department and the assurances of, among others, the President, moreover, makes clear that he held the office of general in the good faith belief that it was his. Thus, General Haig should be held to have been de facto a general in the United States Army during that period.

If General Haig is held to have been a de facto officer, there is little doubt that he is entitled to retain the pay and allowances which he received as an Army general during the period in question. E.g., United States v. Royer, 268 U.S. 394 (1925); 30 COMP. GEN. 195, 198 (1950).

There remains, however, the question whether General Haig is entitled to utilize his status as a de facto officer in order to qualify for retirement under 10 U.S.C. § 3962 (1970). Although there is authority to the contrary, we believe the proper holding to be that the de facto officer doctrine, at least upon the peculiar facts of this case, provides such a basis.

I have found three sources for the proposition that a de facto officer may not retire in that status. 36 COMP. GEN. 632, 634 (1957), asserts that the de facto officer doctrine evolved

> to protect the interests of the public and individuals whose interests were involved in the official acts of persons exercising the duties of an office without being lawful officers.

Consequently, it notes that de facto officers may retain salaries which have already been paid them, but it asserts that

> there appears to be no sound reason why the rule should be extended further to cover persons who are on a . . . retired list and who have no official duties to perform from day to day.

Id.

This interpretation assumes that the doctrine was in no way intended to compensate the de facto officer, but rather, that payments to him had solely been made to him to insure the adequacy of his performance of duty at the time of performance. This position is incorrect. It is significant that Badeau had held that the monies paid him should not be recovered from the de facto officer "ex aequo et bono" -- "in justice and fairness."[3/] Badeau v. United States, 130 U.S. at 452. Confirming the equitable nature of the doctrine is your predecessor's holding that not only may a de facto officer retain the pay and allowances in his possession, but "where it has been refunded to the Government he is entitled to recover it back." 30 COMP. GEN. 195, 198 (1950). Indeed, were the purpose of the doctrine solely to protect third parties, there would be no reason to allow the de facto officer, once his de facto status is discovered, to retain the monies previously paid him (assuming he thereafter no longer performs the functions of the office). This is because while he was performing the acts, he thought he would be remunerated as a de jure officer, assuming as we must that he held the office in good faith; and after the discovery of his status, there is no longer any need for an incentive, since his performance has ended.

Neither the Court of Claims decision in Heins v. United States, 149 F. Supp. 331 (Ct. Cl. 1957), nor the opinion in 44 COMP. GEN. 83, 86 (1964), add to the analysis. In the former, the court denied disability retirement pay to plaintiff because, although a de facto officer of the Air Force, plaintiff was not legally "entitled to receive basic pay" at the time his physical disability was incurred as required by the statute dealing with disability retirement.[4/] The latter merely relied upon earlier decisions, including the two cited earlier. The difficulty with Heins is that it misapprehends the nature of the de facto officer doctrine. It resorts to a purely legal analysis and therefore concludes that an equitable doctrine should not be applied, when, in truth, it should have considered the equities in determining whether an equitable doctrine otherwise applicable to the facts at hand should have been applied. 44 COMP. GEN. 83, 86 (1964), merely cites earlier precedent without analysis, and hence, its validity must be held to depend upon the validity of the precedents which it cites.

[3/] BLACK'S LAW DICTIONARY 659 (4th ed. 1951).

[4/] This is at most an alternate holding.

A proper approach would weigh the equitable considerations under the facts and circumstances described. We believe that considerations of equity militate strongly for payment of earned retirement benefits to a de facto officer.

A de facto officer, by definition serves in good faith and performs the services required of the office holder. In so doing, he relies upon his understanding (and perhaps the assurances of other, de jure, officers) that he is entitled to certain benefits. Cf. RESTATEMENT OF CONTRACTS § 90. The purpose of the de facto officer doctrine is to make him whole for his acts performed in reasonable reliance on recompense. Future pay is not required to meet this objective, because at the time he learns of his de facto status, he no longer can reasonably rely on future recompense. This is not true of retirement benefits, which by their very nature are expected payments in futuro for past service.

If a contrary conclusion is reached, a de facto officer must be held unknowingly to have assumed the risk that his title to the office is not valid in law. Not only must the prospective office holder assume this risk, but he must also forego other opportunities outside the Government in which this risk would be wholly absent. Such a result seems inequitable, as well as tending to discourage the acceptance of offices by qualified individuals.

Although General Haig's service as a de facto officer amounted to not more than three months, under the interpretation found in the cited cases, his reliance for this period of three months would be held to have forfeited pension rights accrued over twenty-six years of service.

In addition to the notions of reliance, there is as a corollary a reasonable expectancy of receipt of retirement benefits when sufficient employment has been performed otherwise to qualify for such benefits. Viewed from this perspective, once it is ascertained that a de facto officer has performed his duties in good faith, the formalistic approach of Heins seems wholly unreasonable.

Consider from both perspectives, reliance and expectancy, the hypothetical case of one who has served for forty years, only to learn at the time of his retirement that for that entire period he has not held the office de jure. This Department does not believe

that the Government should be prepared to say to that man that he is not entitled to the retirement benefits normally attendant to that position. Yet the principal difference between that man and General Haig is the fact that Haig served for all but three months of his Government service as a de jure officer.

General Haig's case is also distinguishable, both from the hypothetical case presented and from the three cases cited above, in that prior to the time he accepted the assignment which, at worst from his standpoint, is a de facto office, he had already performed all the service required for him to retire. Stated slightly differently, General Haig's right to retirement benefits had already been earned and his future receipt of such benefits in no way depended on his service to the Government after May 4. To deny him those benefits would be most inequitable.

Additionally, from a purely pragmatic standpoint, the approach taken is an unreasonable assignment of the risks involved. A de facto officer denied retirement benefits suffers a grievous personal loss, whereas the cost to the Government from the payment of retirement benefits to the limited number of de facto officers discovered annually to be such is miniscule. Thus, it appears desirable for the Government to act as an insurer against this possible loss.

Conclusion

Based upon the foregoing I conclude that your tentative opinion as expressed in your letter of February 7, 1974, was erroneous. I recommend that, for the reasons specified above, you will take the position that Alexander M. Haig, Jr., remains a General, United States Army (retired), and that he is entitled to retain the pay and allowances and the retirement benefits paid him to date and to continue to receive the retirement benefits which, through a long and distinguished career in the service of this country, he has fully earned.

Very truly yours,

Robert W. Berry
General Counsel

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-150136

July 2, 1974

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

Reference is made to our letter B-150136, dated February 7, 1974, requesting your views concerning the service of General Alexander M. Haig, Jr., USA, 195-12-3625, in the White House during the period from May 4 to July 31, 1973, while he was an officer on the active list of the Regular Army. In that letter we stated that in view of the factual situation (primarily as reported in White House press releases) concerning General Haig's functions and duties at the White House, we had tentatively concluded that when he began to exercise those functions and duties on or about May 4, 1973, he occupied a civil office and that his military appointment automatically terminated by operation of law under 10 U.S.C. 973(b). We also tentatively concluded that with the termination of his military appointment General Haig would not appear to have qualified as a "commissioned officer of the Army" for the purposes of 10 U.S.C. 3911, the law under which we understand he retired on July 31, 1973. As a result, there was brought into question the legality of the payment to him of active duty pay and allowances during the period May 4 to July 31, 1973, and retired pay from and after August 1, 1973.

We have now received a letter dated April 22, 1974, from the General Counsel of the Department of the Army replying on behalf of the Department of Defense to our February 7, 1974 letter. In his letter the General Counsel provides the following "Statement of Facts" concerning this matter:

> "After serving for almost four years in the Office of the President, first as Military Assistant to the President for National Security Affairs and subsequently as Deputy Assistant to the President for National Security Affairs, General Alexander M. Haig, Jr., returned on January 4, 1973, to the Army staff, having been assigned on that date as Vice Chief of Staff of the Army.
>
> "On April 30, 1973, the White House announced the resignation of two of the President's senior assistants: Messrs. H. R. Haldeman and John Ehrlichman. Because of his confidence in General Haig and because of his uncertainty as to the future roles of his personal staff, on May 3, 1973, the President

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directed Haig to assist him temporarily with the functioning of the White House staff in order to help fill the void left by the resignations. Haig complied with this order and assumed his new duties the following day. Because the assignment was a temporary one, id., Haig retained his assignment as Vice Chief of Staff of the Army. He planned to return on a full-time basis to his Army post at the conclusion of his temporary service at the behest of the President.

"During the period May 4 through July 31, Haig performed for the President duties essentially of an administrative nature. Representative examples of Haig's duties included coordinating dissemination of presidential directives, insuring receipt by the President of information necessary for decision making, coordinating staff actions, and supervising the operation of the White House staff. These functions correspond to some extent, but not entirely, with those previously performed by H.R. Haldeman. However, Haig did not assume Haldeman's position, which remained vacant.

"After the lapse of some time, the President and General Haig agreed that Haig's services would be required for a longer period than had originally been anticipated and that his role should be expanded to include a more substantive, policy-oriented area of responsibility. General Haig immediately took steps to be retired from the Army. He chose August 1, 1973, as the effective date of his retirement to allow time for administrative processing and Senate confirmation of his retirement request, for moving to civilian quarters, and for the transfer of authority to his successor as Vice Chief of Staff of the Army.

"On June 14, 1973, the President nominated General Haig for retirement and on July 14, 1973, the Senate duly voted its advice and consent. See 119 CONG. REC. S13516 (daily ed. July 14, 1973). General Haig retired on July 31, and his name was placed on the retired list on August 1, 1973. On the latter date, the President for the first time appointed Haig an Assistant to the President, under title 3 of the United States Code, and Haig for the first time took an oath of office, received a presidential commission, and was placed on the White House payroll by salary order."

The General Counsel's letter also specifically states that from May 4 through July 31, 1973, General Haig served the Government only in the capacity of Army Vice Chief of Staff; that he did not become Assistant to the President until August 1, 1973; and that prior to his retirement, he neither held, nor exercised the functions of Mr. Haldeman's position within the meaning of 10 U.S.C. 973(b). In this regard, that letter states that the characterization by the White House Press Secretary of General Haig's service as an "appointment" should not be determinative since the imprecise use of the word "appointment" in the informal atmosphere of a press conference is without legal effect. The General Counsel's letter concludes by expressing the view that our tentative conclusion is erroneous and recommends that we take the position that General Haig remains a General, United States Army (retired), and that he is entitled to retain the pay and allowances and retirement benefits paid to him to date and to continue to receive retirement benefits.

We have also received affidavits of General Haig; Mr. Jerry H. Jones, Special Assistant to the President, who is responsible for personnel administration of members of the White House Staff; and Major General H.G. Moore, USA, Commanding General, Military Personnel Center, United States Army, who is the official custodian of the personnel records of all living retired general officers of the Army, including General Haig. Those affidavits support the General Counsel's statement of the facts in this matter.

Our tentative conclusion that as a result of his White House service, General Haig's military appointment terminated on May 4, 1973, was based on a finding that on that date he began to exercise the functions of the position previously held by Mr. Haldeman. A position created by 3 U.S.C. 106 which in our view is a civil office within the meaning of 10 U.S.C. 973(b). However, as noted above, the General Counsel's letter and the supporting affidavits set forth the facts in the matter and indicate that, while General Haig performed some administrative functions for the President which correspond to some extent with some of the functions Mr. Haldeman performed, he did not substantially perform the functions of that position until after his retirement from the Army, effective August 1, 1973.

As the General Counsel's letter also points out, the Attorney General's representation of the defendants in the case of Morrison v. Callaway and Haig, Civil Action No. 1108-73, United States District Court for the District of Columbia, decided January 8, 1974, implies that the Attorney General found no impropriety in General Haig's

service in the White House. In addition, as the General Counsel's letter indicates, on July 14, 1973, the Senate confirmed General Haig's retirement in the grade of general, as is required by 10 U.S.C. 3962(a).

While the matter is not entirely free from doubt, in view of the facts set forth above and since General Haig's current service as an Assistant to the President while on the retired list of the Army clearly does not violate 10 U.S.C. 973(b) (see 25 Comp. Gen. 38, 41 (1945)), this Office will no longer question the active duty pay and allowances paid to General Haig for the period May 4 to July 31, 1973, and the payment of retired pay from and after August 1, 1973.

Sincerely yours,

Comptroller General
of the United States

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 24, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: DONALD RUMSFELD

I have read your memo to Brent Scowcroft of October 20 concerning gifts to U. S. Government Officials. It seems to me that what you ought to do is sit down with Brent and Henry and lay down the law. I don't see any need for a meeting unless that doesn't work.

Called Brent
11/7/75

THE WHITE HOUSE

WASHINGTON

October 20, 1975

MEMORANDUM FOR: BRENT SCOWCROFT

FROM: PHILIP BUCHEN P.

SUBJECT: Gifts to U. S. Government Officials

In view of the information being disclosed to the House Select Committee involving the Barzani gifts and the discussions we had last evening, I attach the following:

(1) A copy of the statute on foreign gifts and decorations (5 USCA, Section 7342).

(2) Regulations issued from the State Department on acceptance of gifts and decorations from foreign governments (22 CFR, part 3).

(3) Procedures adopted for processing of gifts received by or on behalf of the President which are from foreign sources.

(4) Page 4 of the Standards of Conduct for the White House staff with possibly relevant subparagraphs marked.

If the gifts in question were from an "official agent or representative" of a foreign government, the statute and the regulations would apply and the use or the disposition thereof would be controlled by Section 3.6 of the regulation. If the gifts are not from such an official agent or representative, they are then subject to the Standards of Conduct for the White House staff as shown in the attached excerpt.

This excerpt comes from the current Standards of Conduct, but the same provisions appeared in the Standards of Conduct which were in effect under President Nixon. I do not have copies of the State Department's standards of conduct, but I assume they contain similar provisions.

I am very fearful that unless there is compliance with the procedural requirements imposed by either the foreign gifts regulation or the standards of conduct, the Committee may use the information supplied to make telling charges of non-compliance. It is also likely that the Committee may use this opportunity to investigate the whole story of gifts involving persons in the service of the State Department, CIA, and the White House insofar as gifts or other favors have come from governments, organizations, or persons benefiting from covert activities or other intelligence related functions of the U. S. government.

The urgency of this situation, I believe, requires that a meeting be held promptly which should include Jack Marsh and Don Rumsfeld or someone from Don's office.

Attachments

cc: Jack Marsh
Don Rumsfeld

THE WHITE HOUSE

WASHINGTON

November 3, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: KEN LAZARUS

Attached are copies of 10 U.S.C. Section 973(b) and 50 U.S.C. Section 402.

The first prohibits any active military officer from accepting appointment to any office of the United States. The second provides that the Executive Secretary in charge of the staff of the National Security Council shall be a civilian executive.

I assume that these provisions were considered relevant to any appointment of General Scowcroft to succeed Henry Kissinger as the President's national security adviser.

Attachment

Roosevelt Smith

Temporary details 3 USC 5107

Len Nederlander

Permanent Major General & Temporary Lieutenant Gen. Air Force

3 USC 5106 (Comptroller General)

(b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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.

Added Pub.L. 90–235, § 4(a)(5)(A), Jan. 2, 1968, 81 Stat. 759.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 90–235, see 1967 U.S.Code Cong. and Adm.News, p. 2635.

Cross References

Reduction in retired or retirement pay during term of employment, see section 5532 of Title 5, Government Organization and Employees.

Library References

Armed Services ⇐15. C.J.S. Army and Navy §§ 14, 19.

Notes of Decisions

1. Standing to sue

Plaintiff could not successfully claim standing to sue on basis of his status as a citizen in action challenging legality of defendant serving simultaneously as an assistant to President of the United States and as an officer of the Army holding the rank of General, since plaintiff did not rely on the precise self-operative provision of U.S.C.A.Const. Art. 1, § 6, cl. 2, seeking to maintain independence among governmental branches but rather on a congressional enactment seeking to guard against potential for undue influence. Morrison v. Callaway, D.C.D.C. 1974, 369 F.Supp. 1160.

Plaintiff did not have standing as taxpayer to bring action challenging legality of defendant's simultaneous service as an assistant to the President of the United States and as an officer of the Army holding the rank of General under provision of this section stating that no officer on active list of regular Army may hold civil office under United States and that acceptance of civil office or exercise of its functions terminates military appointment. Id.

§ 974. Civilian employment: enlisted members

Except as provided in section 6223 of this title no enlisted member of an armed force on active duty may be ordered or permitted to leave his post to engage in a civilian pursuit or business, or a performance in civil life, for emolument, hire, or otherwise, if the pursuit, business, or performance interferes with the customary or regular employment of local civilians in their art, trade, or profession.

Added Pub.L. 90–235, § 6(a)(6)(A), Jan. 2, 1968, 81 Stat. 762.

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 90–235, see 1967 U.S.Code Cong. and Adm.News, p. 2635.

Library References

Armed Services ⇐25. C.J.S. Army and Navy § 30.

British-American command, was within import of "international organizations" in this context. Id.

"Operation Keelhaul" file, which was created in 1946 by Allied Force Headquarters, a post-World War II joint British-American command, was not subject to mandatory declassification under terms of executive order which provides automatic declassification for documents after 20 years, in view of exception for materials furnished by foreign governments or international organizations, and fact that some of documents were products of British members of the joint force. Id.

9. Record

Record did not warrant conclusion that the Industrial Security Clearance Review Office of the Department of Defense was applying a per se rule of withdrawing security clearance to homosexuals without any consideration of plaintiff's individual case; the board's remand for supplementary rehearing, even though plaintiff had admitted to being a homosexual, indicated that the determinations were not the result of a per se rule denying clearance to homosexuals. Gayer v. Schlesinger, 1973, 490 F.2d 740, 160 U.S. App.D.C. 172, amended 494 F.2d 1135.

10. Conclusiveness of findings

Some deference must be accorded by the courts to conclusion of the authorities charged with responsibility under executive order and directive of the Defense Department with regard to security clearance, and the degree of such deference must be the result of a nice but not easily definable weighing of the ingredients of which the particular case is comprised. Gayer v. Schlesinger, 1973, 490 F.2d 740, 160 U.S.App.D.C. 172, amended 494 F.2d 1135.

11. Scope of interrogation

Government officials interrogating homosexual to determine whether security clearance should be withdrawn may be relevantly and materially informed but reasonable latitude must be accorded the homosexual as to specificity of his answers to permissible questions; the identity of sex partners is not to be insisted upon, unless in a particular case some special reason can be held to justify it. Gayer v. Schlesinger, 1973, 490 F.2d 740, 160 U.S.App.D.C. 172, amended 494 F.2d 1135.

Where plaintiff who sought to set aside the withdrawal of his secret security clearance admitted that he was an active homosexual, thereby disclosing sufficient information with respect to the "sexual perversion" and probably also the "criminal conduct" factors of criterion for withholding security clearance, whatever further information was sought with respect to other criteria, it must not only be relevant but no more intrusive of the privacy than was reasonably necessary. Id.

Government officials may seek information from applicant seeking employment in defense industry as to whether he has led and intends to lead a homosexual life, and other relevant information respecting particular conduct, but information as to his sexual life must be only that which is reasonably necessary to make a determination with respect to any criteria being invoked. Id.

§ 402. National Security Council

[See main volume for text of (a) and (b)]

Executive secretary; appointment and compensation; staff employees

(c) The Council shall have a staff to be headed by a civilian executive secretary who shall be appointed by the President. The executive secretary, subject to the direction of the Council, is authorized, subject to the civil-service laws and the Classification Act of 1949, to appoint and fix the compensation of such personnel as may be necessary to perform such duties as may be prescribed by the Council in connection with the performance of its functions.

Recommendations and reports

(d) The Council shall, from time to time, make such recommendations, and such other reports to the President as it deems appropriate or as the President may require.

Library references: United States ⟹29 et seq.; War and National Defense ⟹40; C.J.S. United States §§ 24, 62; C.J.S. War and National Defense § 48.

References in Text. The Classification Act of 1949, referred to in subsec. (c), is classified to chapter 51 of Title 5, Government Organization and Employees.

Codification. Provisions in subsec. (c) which limited the compensation of the executive secretary to $10,000 a year were omitted since the position referred to is now in the classified civil service and subject to the applicable compensation schedules.

The authority for covering excepted positions into the classified civil service was given the President by former section 631a of Title 5. By Executive Order 8743, Apr. 25, 1941 the President exercised this authority with respect to many previously excepted positions.

National Security Agency. Pub.L. 86-36, §§ 1-8, May 29, 1959, 73 Stat. 63, as amended by Pub.L. 87-367, Title II, §§ 201, 204, Oct. 4, 1961, 75 Stat. 789, 791; Pub.L. 87-793, § 1001(c), Oct. 11, 1962, 76 Stat. 864; Sept. 23, 1950, c. 1024, Title III, § 306(a), as added Mar. 26, 1964, Pub.L. 88-290, 78 Stat. 170; Aug. 14, 1964, Pub.L. 88-426, Title III, § 306(h), 78 Stat. 430; Oct. 6, 1964, Pub.L. 88-631, § 3(d), 78 Stat. 1008; Sept. 6, 1966, Pub.L. 89-554, § 8(a), 80 Stat. 660; Oct. 8, 1966, Pub.L. 89-632, § 1(e), 80 Stat. 878; Pub.L. 91-187, § 2, Dec. 30, 1969, 83 Stat. 850, provided certain administrative authorities for the National Security Agency.

Sections 1 and 3 of Pub.L. 86-36 amended section 1082 of Title 5, Executive Departments and Government Officers and Employees, and section 1581(a) of Title 10, Armed Forces (as modified by section 12(a) of the Federal Employees Salary Increase Act of 1958, 72 Stat. 213), respectively.

Section 1 exempted the National Security Agency from the provisions of the

Classification Act of 1949, ch
Title 5. Section 3 deleted pr
mitting the Secretary of Def
tablish not more than 50 re
development positions in the N
curity Agency.

Sections 2, 4-8 of Pub.L. 86
ed as follows:

"Sec. 2. The Secretary of I
his designee for the purpose) i
ed to establish such positions,
point thereto, without regard t
service laws, such officers and
in the National Security Agenc
be necessary to carry out the fu
such agency. The rates of basi
sation for such positions shal
by the Secretary of Defense (o
ignee for the purpose) in relat
rates of basic compensation co
the General Schedule of the Cla
Act of 1949, as amended [char
Title 5], for positions subject to
which have corresponding levels
and responsibilities. Except as
in subsections (f) and (g) of sect
the Federal Executive Salary Ac
no officer or employee of the Na
curity Agency shall be paid ba
pensation at a rate in excess of
est rate of basic compensation
in such General Schedule. Not m
seventy such officers and employ
be paid basic compensation at ra
to rates of basic compensation c
in grades 16, 17, and 18 of such
Schedule." [As amended Pub.L
Title II, § 201, Oct. 4, 1961, 75 S
Sept. 23, 1950, c. 1024, Title III,
as added Mar. 26, 1964, Pub.L. 8
Stat. 170; Aug. 14, 1964, Pub.L.
Title III, § 306(h), 78 Stat. 430;
1964, Pub.L. 88-631, § 3(d), 78 Sta
Oct. 8, 1966, Pub.L. 89-632, § 1(e),
878].

"Sec. 4. The Secretary of Defe
his designee for the purpose) is
rized to—

"(1) establish in the National
ty Agency (A) professional engi
positions primarily concerned w
search and development and (B
fessional positions in the physic
natural sciences, medicine, and e
ogy; and

"(2) fix the respective rates
of such positions at rates equ
rates of basic pay contained in
16, 17, and 18 of the General Sc
set forth in section 5332 of t
United States Code [section 5332
tle 5, Government Organization
Employees].

Officers and employees appointed
sitions established under this s
shall be in addition to the number
ficers and employees appointed to
tions under section 2 of this Act
may be paid at rates equal to rat
basic pay contained in grades 16, 17
18 of the General Schedule."
[As amended Pub.L. 87-367, Title
204, Oct. 4, 1961, 75 Stat. 791; P
87-793, § 1001(c), Oct. 11, 1962, 76
864; Oct. 8, 1966, Pub.L. 89-632, § 1(e
Stat. 878; Pub.L. 91-187, § 2, Dec
1969, 83 Stat. 850].

EXECUTI

Ex.Ord.No.10700, Feb. 25, 1957, 22
1111, as amended by Ex.Ord.No.10773,
3, 1958, 23 F.R. 5661; Ex.Ord.No.1
Sept. 8, 1958, 23 F.R. 6971; Ex.Ord
10838, Sept. 17, 1959, 24 F.R. 7519, form

§ 403. Central Intelligence
Deputy Director; appointment

**(a) There is established under
Intelligence Agency with a Direc**

THE WHITE HOUSE

WASHINGTON

November 4, 1975

MEMORANDUM FOR: GENERAL SCOWCROFT

FROM: PHILIP BUCHEN P.W.B.

SUBJECT: Assumption of the Duties of Assistant to the President for National Security Affairs

This is to present my recommendation that, prior to your retirement from the Air Force, you should refrain from assuming the office or exercising the functions currently held by Secretary Kissinger in his capacity as Assistant to the President for National Security Affairs.

Legal Constraints

10 U.S.C. §973(b) derives from the Act of July 15, 1870, ch. 294 §18, 16 Stat. 319. As most recently amended and recodified, it reads:

* * *

> "(b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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."

* * *

10 U.S.C. §8911, in pertinent part, provides that the Secretary of the Air Force ". . . may, upon the officer's request, retire

a regular or reserve commissioned officer of the Air Force who has at least 20 years of service . . ."

Thus, if the exercise of your new duties as the successor to Secretary Kissinger in his capacity as Assistant to the President would constitute a "civil office" within the meaning of 10 U.S.C. 973(b), your acceptance of such appointment or exercise of the functions of such office would have the effect of automatically terminating your military employment. Moreover, it would appear that such a termination would also have the effect of making you ineligible for military retirement benefits to which you would otherwise be entitled under 10 U.S.C. §8911.

Discussion

The term "civil office" as used in 10 U.S.C. 973(b) and predecessor statutes has not been statutorily defined. It is a term of variable meaning, the connotation of which changes with the context in which it is used. Morganthau v. Barrett, 108 F. 2d 481, 483 (D.C. Cir. 1939). The meaning to be given the term when used in a statute should be that which will effectuate the purposes of the statute being construed. See, e.g., Pardon v. Puerto Rico ex rel. Castro, 142 F. 2d 508, 510 (1st Cir. 1944).

From the debate on the floor of the Senate in 1870 regarding the antecedent of section 973(b), it appears that the primary concern of the Congress was the exercise of civil authority by military officers. CONG. GLOBE, 41st Cong., 2d Sess. 3393-3404 (1870). To this end, the Congress sought to prevent "the union of the civil and the military authority in the same hands," id. at 3401, in part because it was concerned that a military officer exercising such authority would be subject to the commands of his military superiors. The Congress did not intend to prevent civilian officials from seeking advice or administrative assistance from military officers. See, id. at 3403 (remarks of Sen. Trumbull).

The Comptroller General has consistently required that the following three criteria must be present to constitute such a "civil office":

* * *

> The specific position must be created by law, there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power [44 Comp. Gen. 830, 832 (1965)].

* * *

An application of these criteria to the facts in the instant case leads to the following conclusions.

First, it appears that your position as Assistant to the President for National Security Affairs would be one "created by law". For at least the last 15-20 years, the position of national security adviser has been one on the immediate staff of the President under 3 U.S.C. §106. Additionally, your de facto function would involve management of the staff of the National Security Council, created by 50 U.S.C. §402.

Second, it also appears that the position would include "certain definite duties imposed by law on the incumbent", viz. " . . . such duties as the President may prescribe." (3 U.S.C. §106)

Third, and most importantly, the position likely would be held to "involve the exercise of some portion of the sovereign power." Given the concerns of the drafters of 10 U.S.C. §973(b) for civilian independence from military authority, this would seem to be the most important touchstone of the three under discussion.

3 U.S.C. §107 provides authority for the detail of military officers to the White House in order to provide advice on military matters or administrative assistance. This authority has traditionally been asserted as a basis for the detail of officers for service as White House military aides and for the detail of a Deputy Assistant to the President for National Security Affairs. In these instances, the theory is that such detailees are limited to providing administrative support or advice limited to military matters. On the other hand, the President's principal national security adviser has traditionally been responsible for eliminating or minimizing differences of opinion between the Departments of State and Defense and other

interested agencies, with a right of direct access to the President.

Recommendation

The Attorney General and the Acting General Counsel of the Department of Defense agree with my conclusion that, given the substantial risks involved, i.e. loss of your military retirement and other military privileges, you are best advised to resign your commission in the Air Force prior to the acceptance of an appointment as Assistant to the President for National Security Affairs or the assumption of any duties of that office.

In closing, I should also note that retirement at the grade of Lieutenant General would require Presidential approval and the advice and consent of the Senate [10 U.S.C. 8962].

This requirement does not apply to retirement at any grade below that of Lieutenant General.

THE WHITE HOUSE

WASHINGTON

November 6, 1975

MEMORANDUM FOR: BRENT SCOWCROFT

FROM: PHILIP BUCHEN P.

SUBJECT: Assumption of Duties of Assistant to the President for National Security Affairs

This follows-up my memo to you of November 4 on the above subject.

Apparently, the quickest way for you to be eligible for assuming your duties as Assistant to the President would be for you to go immediately on terminal leave pending formal retirement from active duty. 5 U.S.C., Section 5534a makes provision that a member of the uniformed service who is on terminal leave pending separation may accept a Civilian office in the government of the United States (see copy attached).

Then when you are on terminal leave and while you are filling your new position, you can apply for retirement which would be effective on the first day of the following month.

Leonard Niederlehner tells me he has consulted with General Vague as Judge Advocate General of the Air Force and Len suggests you get immediately in touch with General Vague and the Air Force Personnel Office to go on terminal leave and to take the necessary steps toward formal retirement.

Attachment

cause his name was carried on retirement list of other than regular Air Force officers and hence could not recover amounts of retirement pay withheld from him during periods in which he was a civilian employee of government. Leonard v. U. S., 1956, 145 F.Supp. 758, 136 Ct.Cl. 686, certiorari denied 77 S.Ct. 1058, 353 U.S. 976, 1 L.Ed.2d 1136.

Under provision of former section 371b of Title 10, no existing law could be construed to prevent member of Officers' or Enlisted Reserve Corps receiving pay incident to employment in any civil branch of public service in addition to any "pay and allowances" to which he might be entitled under laws relating to the reserve corps, Army or Air Force Reserve Officers on retired list were entitled to retired pay under former section 1036 et seq. of Title 10, in addition to pay from civilian employment with Government exceeding $3,000 per year, notwithstanding provisions of former section 59a [now section 5532] of this title which would prohibit this. Tanner v. U. S., 1954, 125 F.Supp. 240, 129 Ct.Cl. 792, certiorari denied 76 S.Ct. 83, 350 U.S. 842, 100 L.Ed. 751.

The repeal of the Joint Resolution of September 22, 1941, conferring upon officers commissioned in the Army of the United States without component the rights, privileges and benefits of members of the Officers' Reserve Corps, did not have the effect of depriving those officers of any vested rights such as the right to retired pay or the right to have that pay exempt from the dual compensation prohibitions, however where the component officer is not retired until after the repeal of the Joint Resolution of September 22, 1941, effective July 1, 1948, the right to the exemption is lost. Gradall v. U. S., 1962, 157 Ct.Cl. 360.

In an action to recover Reserve officer retired pay withheld from plaintiff on the basis of the dual compensation restrictions, the exemption from such restriction contained in former section 371b of Title 10, was applicable to plaintiff even though when he reached the required age of 60 he no longer had commissioned status in any of the Reserve components of the armed services. Bowman v. U. S., 1961, 144 Ct.Cl. 448.

3. Civilian pay

In view of the fact that pursuant to former section 30r(d) [now section 2[illegible] (d)] of this title when a reservist is not on active duty, or when he is on active duty for training, he is not considered to be an officer or employee of the United States or a person holding an office of trust or profit and that he is authorized under former section 30r(c) of this title [now this section] to accept a civilian position and receive both civilian salary and retired pay, the employment of a naval reservist as full-time referee in bankruptcy is not prohibited by section 63(2) of Title 11, which provides that persons holding any office of profit or emolument under the laws of the United States or of any State shall be ineligible to serve as a full-time referee in bankruptcy, and the reservist upon appointment as a referee may receive the civilian salary of that position and in addition the retired pay authorized by section 1331 of Title 10. 1960, 45 Comp.Gen. 405.

§ 5534a. Dual employment and pay during terminal leave from uniformed services

A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave. Added Pub.L. 90-83, § 1(22), Sept. 11, 1967, 81 Stat. 199.

Historical and Revision Notes

Reviser's Note. This section amends chapter 55 of title 5, United States Code, by inserting a new section 5534a. This section is based on subsections (a) and (f) of former 5 U.S.C. 61a-1 the source statute for which (act of Nov. 21, 1945,

ch. 189, 59 Stat. 581) was repealed by the act of September 6, 1966, Public Law 89-554 (sec. 8, 80 Stat. 655). Senate Report 1380, 89th Congress, section session, pages 419, 511, explains that the source statute was repealed since it had been rendered obsolete by section 4(c) of the Armed Forces Leave Act of 1946, as amended (37 U.S.C. 501), and section 219(c) of the Public Health Service Act, as added August 9, 1950 (ch. 654, sec. 2, 64 Stat. 426, 42 U.S.C. 219-1(c)), and that any existing rights are preserved by section 8 of Public Law 89-554.

At the time of enactment of the act of November 21, 1945, there was no authority to make lump-sum leave payments to members of the uniformed services who were being separated from or released from active duty in the uniformed services. Accordingly, they were placed on terminal leave until the expiration of the unused portion of their accumulated and current accrued leave, and only then separated or released. The act of November 21, 1945, in part, authorized the employment of these members during terminal leave and provided they were entitled to receive, in addition to the payment from the employment, military pay and allowances for the unexpired portion of the terminal leave. The Armed Forces Leave Act of 1946 authorized lump-sum leave payments of unused accumulated and current accrued leave. Generally, thereafter, members of the uniformed services were not placed on terminal leave, but were separated and paid a lump-sum leave payment. However, in certain instances a member may be placed on terminal leave. Such a case was considered recently by the Comptroller General of the United States (see B-157259, Oct. 12, 1965, 45 Comp.Gen. 191). In view of the foregoing, it is concluded that subsection (a) of former 5 U.S.C. 61a-1 had prospective effect and should have been reenacted in title 5, U.S.C., by Public Law 89-554.

In section 5534a, the words "A member of a uniformed service who has performed active service" are substituted for "Any person, who, shall have performed active service in the Armed Forces" to conform to the style of title 5 and the definition of "uniformed services" in 5 U.S.C. 2101 which is coextensive with the definition of "armed forces" in subsection (f) of former 5 U.S.C. 61a-1. Reorganization Plan No. 2 of 1965 (79 Stat. 1318), effective July 13, 1965, consolidated the Coast and Geodetic Survey and the Weather Bureau to form a new agency in the Department of Commerce to be known as the Environmental Science Services Administration. The words "subsequent to May 1, 1940" are omitted as executed. The word "territories" is substituted for "Territories" inasmuch as there now are no incorporated territories. The words "(including any corporation created under authority of an act of Congress which is either wholly controlled or wholly owned by the Government of the United States, or any department, agency, or establishment thereof, whether or not the employees thereof are paid from funds appropriated by Congress)" are omitted as included in "a civilian office or position in the Government of the United States". The word "pay" is substituted for "compensation".

Effective Date. Section effective Sept. 6, 1966, for all purposes, see section 9(b) of Pub.L. 89-83, set out as a note under section 5102 of this title.

§ 5535. Extra pay for details prohibited

(a) An officer may not receive pay in addition to the pay for his regular office for performing the duties of a vacant office as authorized by sections 3345–3347 of this title.

(b) An employee may not receive—

(1) additional pay or allowances for performing the duties of another employee; or

(2) pay in addition to the regular pay received for employment held before his appointment or designation as acting for or instead of an occupant of another position or employment.

This subsection does not prevent a regular and permanent appointment by promotion from a lower to a higher grade of employment. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 484.

THE WHITE HOUSE

WASHINGTON

November 6, 1975

MEMORANDUM FOR: JACK MARSH

FROM: PHIL BUCHEN

SUBJECT: Assistant to the President for National Security Affairs

This is to advice that an appointment by the President of an Assistant for National Security Affairs is not subject to Senate advise and consent. Statutory foundation for the National Security Council is found in 50 U.S.C. Sec. 402. The Council is composed of the President, the Vice President, certain members of the Cabinet and other officials of the Federal intelligence community. The statute also provides that the Council shall have a staff to be headed by a civilian Executive Secretary who shall be appointed by the President and for the employment of such additional personnel, subject to the Civil Service Commission laws, as may be necessary to perform the duties of the Council.

Secretary Kissinger and his predecessors in the position of Assistant to the President for National Security Affairs did not serve in any position authorized by the organic act creating the National Security Council. Traditionally, this position has had its legal foundation in 3 U.S.C. 105 and 106 which authorize the appointments of a limited number of Executive Level II assistants on the immediate staff of the President. The National Security Adviser's traditional function as head of the staff of the National Security Council does not have a statutory footing. It is therefore clear that General Scowcroft's appointment is not subject to Senate advice and consent.

Attached is a copy of a recent memorandum which I provided to General Scowcroft which notes that his retirement at the grade of Lieutenant General, prior to any appointment as Assistant to the President for National Security Affairs, would require Presidential approval and the advise and consent of the Senate in accordance with 10 U.S.C. 8962. This does not apply to retirement at any rank below that of Lieutenant General.

Procedures required by Section 8962 were followed when General Haig resigned his position as Deputy Assistant to the President for National Security Affairs and became Chief of the White House Staff during the Nixon Administration. It might be that Chairman Stennis' inquiry relating to the necessity of Senate confirmation for General Scowcroft was based on his recollection of the Haig retirement.

Attachment

THE WHITE HOUSE

WASHINGTON

November 4, 1975

MEMORANDUM FOR: GENERAL SCOWCROFT

FROM: PHILIP BUCHEN

SUBJECT: Assumption of the Duties of Assistant to the President for National Security Affairs

This is to present my recommendation that, prior to your retirement from the Air Force, you should refrain from assuming the office or exercising the functions currently held by Secretary Kissinger in his capacity as Assistant to the President for National Security Affairs.

Legal Constraints

10 U.S.C. §973(b) derives from the Act of July 15, 1870, ch. 294 §18, 16 Stat. 319. As most recently amended and recodified, it reads:

* * *

> "(b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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."

* * *

10 U.S.C. §8911, in pertinent part, provides that the Secretary of the Air Force ". . . may, upon the officer's request, retire

a regular or reserve commissioned officer of the Air Force who has at least 20 years of service . . ."

Thus, if the exercise of your new duties as the successor to Secretary Kissinger in his capacity as Assistant to the President would constitute a "civil office" within the meaning of 10 U.S.C. 973(b), your acceptance of such appointment or exercise of the functions of such office would have the effect of automatically terminating your military employment. Moreover, it would appear that such a termination would also have the effect of making you ineligible for military retirement benefits to which you would otherwise be entitled under 10 U.S.C. §8911.

Discussion

The term "civil office" as used in 10 U.S.C. 973(b) and predecessor statutes has not been statutorily defined. It is a term of variable meaning, the connotation of which changes with the context in which it is used. Morganthau v. Barrett, 108 F. 2d 481, 483 (D.C. Cir. 1939). The meaning to be given the term when used in a statute should be that which will effectuate the purposes of the statute being construed. See, e.g., Pardon v. Puerto Rico ex rel. Castro, 142 F. 2d 508, 510 (1st Cir. 1944).

From the debate on the floor of the Senate in 1870 regarding the antecedent of section 973(b), it appears that the primary concern of the Congress was the exercise of civil authority by military officers. CONG. GLOBE, 41st Cong., 2d Sess. 3393-3404 (1870). To this end, the Congress sought to prevent "the union of the civil and the military authority in the same hands," id. at 3401, in part because it was concerned that a military officer exercising such authority would be subject to the commands of his military superiors. The Congress did not intend to prevent civilian officials from seeking advice or administrative assistance from military officers. See, id. at 3403 (remarks of Sen. Trumbull).

The Comptroller General has consistently required that the following three criteria must be present to constitute such a "civil office":

* * *

> The specific position must be created by law, there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power [44 Comp. Gen. 830, 832 (1965)].

* * *

An application of these criteria to the facts in the instant case leads to the following conclusions.

First, it appears that your position as Assistant to the President for National Security Affairs would be one "created by law". For at least the last 15-20 years, the position of national security adviser has been one on the immediate staff of the President under 3 U.S.C. §106. Additionally, your de facto function would involve management of the staff of the National Security Council, created by 50 U.S.C. §402.

Second, it also appears that the position would include "certain definite duties imposed by law on the incumbent", viz. " . . . such duties as the President may prescribe." (3 U.S.C. §106)

Third, and most importantly, the position likely would be held to "involve the exercise of some portion of the sovereign power." Given the concerns of the drafters of 10 U.S.C. §973(b) for civilian independence from military authority, this would seem to be the most important touchstone of the three under discussion.

3 U.S.C. §107 provides authority for the detail of military officers to the White House in order to provide advice on military matters or administrative assistance. This authority has traditionally been asserted as a basis for the detail of officers for service as White House military aides and for the detail of a Deputy Assistant to the President for National Security Affairs. In these instances, the theory is that such detailees are limited to providing administrative support or advice limited to military matters. On the other hand, the President's principal national security adviser has traditionally been responsible for eliminating or minimizing differences of opinion between the Departments of State and Defense and other

interested agencies, with a right of direct access to the President.

Recommendation

The Attorney General and the Acting General Counsel of the Department of Defense agree with my conclusion that, given the substantial risks involved, i.e. loss of your military retirement and other military privileges, you are best advised to resign your commission in the Air Force prior to the acceptance of an appointment as Assistant to the President for National Security Affairs or the assumption of any duties of that office.

In closing, I should also note that retirement at the grade of Lieutenant General would require Presidential approval and the advice and consent of the Senate [10 U.S.C. 8962]. This does not apply to retirement at any rank below that of Lieutenant General.

#

THE WHITE HOUSE

WASHINGTON

November 5, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

SUBJECT: Senator Stennis

I met with Senator Stennis this afternoon and he was of the impression that the National Security Council post, which involves Brent, was made a confirmable position by changing the law sometime within the last two years.

He asked me if I would check on this for him.

I would appreciate your looking into this.

Scowcroft

Inv. Regretted
11/20/75
6:30 p.m.

Thursday 11/20/75

6:15 You were invited to Gen. Scowcroft's "signing ceremony" at 6:30 p.m. Sorry they couldn't have given more notice but it was the first opportunity the General had.

Told them we knew you were sorry you couldn't be there.

Eva

MEMORANDUM OF CALL

TO: Thursday

☐ YOU WERE CALLED BY— ☐ YOU WERE VISITED BY—

6:15 – Laura – Ben Scowcroft's

OF (Organization)

ofc called

☐ PLEASE CALL → PHONE NO. CODE/EXT. _____

☐ WILL CALL AGAIN ☐ IS WAITING TO SEE YOU

☐ RETURNED YOUR CALL ☐ WISHES AN APPOINTMENT

MESSAGE

Ben. Scowcroft invited Mr Buchen to his "signing ceremony" at 6:30 – Thursday. (over)

RECEIVED BY	DATE	TIME

STANDARD FORM 63
REVISED AUGUST 1967
GSA FPMR (41 CFR) 101-11.6

GPO : 1969—048—16—80341-1 332-899 63-108

She's sorry she couldn't give more notice, but this is the first opportunity the General has had.

Joyce

THE WHITE HOUSE

WASHINGTON

February 24, 1976

Marsh
John

MEMORANDUM FOR: JACK MARSH

THROUGH: PHIL BUCHEN

FROM: KEN LAZARUS

In response to your inquiry of February 17, this is to advise that we see no objection to your acceptance of a position on the Board of Visitors at Virginia State College. However, we would suggest the inclusion of a statement in your letter of acceptance along the following lines:

* * * * *

"Although I may be compelled to rescuse myself from certain individual matters which may come before the Board from time to time based on my responsibilities in government, I trust that these instances will be few in number and will not affect my ability to be of some service to the school."

* * * * *

Such a caveat would recognize that you would be precluded from participating as a Board member in matters requiring Federal government action. Additionally, in your role as a government official you should avoid participating personally and substantially in matters directly affecting the college, e.g., a government grant to the institution.

I trust this satisfies your inquiry.

THE WHITE HOUSE

WASHINGTON

February 17, 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JACK MARSH

I have been asked about the possibility of my availability to serve on the Board of Visitors at a State College in Virginia.

Is there any problem in connection with this?

Many thanks.