



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 10, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Dalmazzi v. United States, No. 16-961
Cox v. United States, No. 16-1017
Ortiz v. United States, No. 16-1423

Dear Mr. Harris:

These consolidated cases are scheduled for argument on January 16, 2018. The principal question presented concerns the interpretation of 10 U.S.C. 973(b), and the parties' briefs cite and discuss a number of relevant opinions issued by the Attorney General, the Office of Legal Counsel, and the Comptroller General.

During the preparation of the government's brief, the Department of Justice asked the United States Government Accountability Office (GAO) for a copy of an unpublished 1971 Comptroller General opinion addressing the application of Section 973(b)'s predecessor provision to certain offices in the Department of Defense. (The opinion is quoted in a law review article cited in the government's brief (at 32 n.9). See Lt. John H. Stassen, Military Administrative Law: The Civil Office Prohibition, 26 JAG J. 268, 274 & n. 25 (1972).)

Although the GAO was unable to locate a copy of the opinion at that time, it has now made the opinion available on its website. See Comp. Gen. Ms. B-174218 (Nov. 28 1971), <https://www.gao.gov/assets/690/689219.pdf>.

I would appreciate it if you would distribute this letter and the attached opinion to the Members of the Court. Thank you for your assistance.

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

16-0961
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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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Dear Mr. Chairman:

Further reference is made to your letter dated September 27, 1971, in which you request our comments on an enclosed copy of a draft of chapter 4, from a book by Mr. Jethro K. Lieberman, which refers to decisions of this Office concerning regular officers of the armed forces holding civil offices. You specifically request our opinion as to whether nine officers listed in Mr. Lieberman's book have violated or are violating the law by holding civil offices. You also requested as extensive a list as possible of military men holding statutory civil offices.

The point of chapter 4, entitled "Crimes Affecting Everyone," seems to be that the provisions of section 973(b) of title 10, United States Code, are being violated in that certain officers of the regular components of the armed forces are holding what Mr. Lieberman considers to be civil offices. Specifically, Mr. Lieberman lists the following officers in the Department of Defense:

Deputy Assistant Secretary (Inspection Services):
Lieutenant General , USA

Deputy Assistant Secretary (Intelligence): Vice
Admiral , USN

Prin. Deputy Assistant Secretary (Health &
Environment): Brigadier General , USA

Deputy Assistant Secretary (Material): Vice
Admiral , USN

Deputy Assistant Secretary (Military Assistance &
Sales): Lieutenant General , USAF

Deputy Assistant Secretary (Manpower & Reserve
Affairs): Vice Admiral , USN

Deputy Assistant Secretary (Military Personnel
Policy): Major General , USA

Deputy Assistant Secretary (Public Affairs):
Brigadier General , USAF

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The current United States Government Organization Manual (1971/72), pages 119-121, indicates that the position of Deputy Assistant Secretary (Inspection Services) has been eliminated. The position of Deputy Assistant Secretary, Environmental Quality, has been established with Colonel [redacted], USA, acting, in that position. In addition it appears that Lieutenant General [redacted], USA, is now Principal Deputy Assistant Secretary, Manpower and Reserve Affairs, replacing Vice Admiral [redacted], USN. Also, Major General [redacted], USA, apparently replaced Lieutenant General [redacted], USAF, as Deputy Assistant Secretary, Military Assistance and Sales.

On similar grounds Mr. Lieberman also questions the propriety of Vice Admiral [redacted], USN, holding the position of Assistant Director, Weapons Evaluation and Control Bureau, United States Arms Control and Disarmament Agency.

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 selection 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."

Section 973(b) was derived from the act of July 15, 1870, ch. 294, section 18, 16 Stat. 319, section 1222, Revised Statutes, which as originally enacted applied only to officers "of the Army on the active list." It was recodified and extended to include regular officers on the active lists of the Army, Navy, Air Force, Marine Corps and Coast Guard by the act of January 2, 1968, Pub. L. 90-235, section 4(a)(5)(A), 81 Stat. 759, 10 U.S.C. 973(b).

The questions presented as to the officers which Mr. Lieberman lists appear to be: Are the positions which they occupy "civil offices" within the meaning of 10 U.S.C. 973(b) and, if so, is there "otherwise provided by law" authority for them to hold such offices so as to prevent the termination of their commissions?

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As Mr. Lieberman indicates, the term "civil office" as used in section 973(b) has not been statutorily defined. In our decision 29 Comp. Gen. 363 (1950), copy enclosed, to which Mr. Lieberman refers, we considered the question as to whether a Regular Army officer vacated his commission by accepting appointment by the Secretary of the Interior to the position of Commissioner of Roads for Alaska, a position which was administratively created by the Secretary.

In that decision we concluded after a lengthy discussion of our previous decisions on the subject as well as decisions of the Comptroller of the Treasury, the Attorney General, the courts and other authorities, that the term "civil office," as distinguished from "military office," is synonymous with "public office" and is usually defined in much the same terms. Also, in that decision we quoted judicial decisions to the effect that the chief elements of a "public office" are: 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. Since the position in question in that decision did not meet these criteria, we concluded that it was not a civil office which would cause the Army officer's acceptance of it to vacate his Army commission.

In our decision 44 Comp. Gen. 830 (1965), copy enclosed, to which Mr. Lieberman also refers, we considered the question of whether a Regular Army officer accepted a "civil office" so as to terminate his appointment in the Army by accepting a temporary appointment as a special policeman in the Library of Congress while participating in an excess leave program attending law school. In that decision we 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.

It was also held in that decision that the fact that the officer was on excess leave at the time he accepted the office provided no basis for viewing his acceptance as not terminating his appointment as a Regular Army Officer 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."

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Also, in the 1965 decision we cited 29 Comp. Gen. 363, ~~supra~~, to the effect that whether a particular position is a "civil office" is not determined solely by the level or importance of the duties of the Office. In this connection the case of _____ v. _____, 1 N.W. 2d 163 (1941), was cited wherein the court concluded that the President of the University of Wisconsin who was elected by the Board of Regents of the University and subordinate to them did not hold a public office while a justice of the peace or a notary public is a public officer.

Title II of the National Security Act of 1947, 61 Stat. 499, created the National Military Establishment with a Secretary of Defense as its head. Included in the National Military Establishment were the Departments of the Army, Navy, and Air Force and all other agencies created by title II. Section 4 of the National Security Act Amendments of 1949, 63 Stat. 579, converted the National Military Establishment into the Department of Defense as an executive department of the Government with the Departments of the Army, Navy, and Air Force as military departments within the Department of Defense. Similar provisions of law are now codified in 10 U.S.C. 101(5), (6), (7) and 131. The character of the Department of Defense as a military establishment remains unchanged.

Under such statutory provisions, it is our opinion that offices and positions in the Department of Defense must be viewed as essentially military offices and positions and not public offices of a civil nature. In this regard, while requiring that the Secretary of Defense and three special assistants to advise and assist him be appointed from civilian life, the law specifically provides that officers of the armed services could be detailed for duty as assistants and personal aides to the Secretary of Defense. Any officer so detailed continued to serve in his respective military service and capacity.

The mentioned provisions of title II of the National Security Act are now codified in title 10 of the United States Code and as codified provide for a Secretary of Defense (section 134), eight Assistant Secretaries of Defense and a Deputy Assistant Secretary of Defense for Reserve Affairs (section 136) to be appointed from civilian life. None of these secretarial positions is occupied by a military officer and we are not aware of any military officer serving in any other position in the Department of Defense which is required by law to be filled from civilian life.

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As provided in the 1947 statute, section 718 of title 10 of the United States Code authorizes the detail of officers of the armed forces for duty as assistants or personal aides to the Secretary of Defense. In view of that specific authority and considering that the Department of Defense is a military as distinguished from a civilian establishment, there would appear to be no sound basis for viewing the officers listed by Mr. Lieberman as subject to the provisions of 10 U.S.C. 973(b) by virtue of their Department of Defense assignments. With the exception of those offices created by statute and required by law to be filled from civilian life, a similar conclusion is required with respect to any other office in the Department of Defense.

The Arms Control and Disarmament Act, approved September 26, 1961, Pub. L. 87-297, 75 Stat. 631, as amended (22 U.S.C. 2551 et seq.) established the United States Arms Control and Disarmament Agency with a Director as its head who, under the direction of the Secretary of State, has primary responsibility within the Government for arms control and disarmament matters. There is also provided a Deputy Director who, under certain circumstances, may exercise the powers of the Director.

Title II, section 24 of the act (22 U.S.C. 2564) as amended by section 305 of the Federal Executives Salary Act of 1964, approved August 14, 1964, Pub. L. 88-426, 78 Stat. 424, provides for Assistant Directors of the Agency as follows:

"Not to exceed four Assistant Directors may be appointed by the President, by and with the advice and consent of the Senate. They shall perform such duties and exercise such powers as the Director may prescribe."

In addition, title IV, section 41 of the act (22 U.S.C. 2581) provides in pertinent part that:

"In the performance of his functions, the Director is authorized to--

* * * * *

"(g) delegate, as appropriate to the Deputy Director or other officers of the Agency, any authority conferred upon the Director by the provisions of this Act; * * *."

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Section 303(e)(75) of the Federal Executives Salary Act of 1964 (5 U.S.C. 5316(75)) establishes the compensation of such Assistant Directors at Level V of the Federal Executive Salary Schedule.

Accordingly, it appears that the position of Assistant Director of the United States Arms Control and Disarmament Agency is a civil office within the meaning of 10 U.S.C. 973(b) in that it is specifically created by law and has or may have definite duties imposed upon it which involve exercising a portion of the sovereign power. See 29 Comp. Gen. 363 (1950) supra, and 44 Comp. Gen. 830 (1965) supra.

The annual reports of the Arms Control and Disarmament Agency show that during most of that agency's approximately ten years of existence, the position of Assistant Director, Weapons Evaluation and Control Bureau, has been filled by a military officer. The present incumbent, Vice Admiral _____, USN, was appointed by the President and confirmed as Assistant Director by the Senate on April 6, 1970.

The Arms Control and Disarmament Act, supra, and its legislative history indicate that one of the purposes for the creation of the Arms Control and Disarmament Agency was to create an agency with the "capacity to provide the essential scientific, economic, political, military, psychological, and technological information upon which realistic arms control and disarmament policy must be based." See section 2 of the act (22 U.S.C. 2551). To enable the agency to obtain the varied resources and personnel necessary to its functioning, various provisions were made in the act to allow the agency to obtain personnel from other Government agencies. In this regard section 41(c) (22 U.S.C. 2581(c)) of the act provides that in the performance of his functions the Director is authorized to--

"(c) enter into agreements with other Government agencies, including the military departments through the Secretary of Defense, under which officers or employees of such agencies may be detailed to the Agency for the purpose of service pursuant to this Act without prejudice to the status or advancement of such officers or employees within their own agencies." (Underscoring supplied.)

Such provisions expressly provide for the detailing of a regular military officer to the Arms Control and Disarmament Agency for service pursuant to the Arms Control and Disarmament Act and we do not

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believe that the fact that the position in which Admiral is serving is a public office to which members are required to be appointed by the President with the advice and consent of the Senate removes it from the scope of section 41(c). In our opinion, section 41(c) clearly constitutes an exception to 10 U.S.C. 973(b) so as to prevent the termination of the military commissions of officers detailed pursuant to its provisions. Accordingly, it appears that Vice Admiral commission and the commissions of the other officers who previously held the position of Assistant Director, did not terminate upon their acceptance of that position.

Information relative to your request for a list of military officers holding statutory civil offices is being developed and will be forwarded to you when it is received. Since it may take some time to obtain that information, it appeared that your question regarding the officers listed in Mr. Lieberman's book should be answered prior to the submission of that information.

We hope this, together with the data to be submitted later, will serve the purpose of your inquiry.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

Enclosures

The Honorable William Prosser
Chairman, Joint Economic Committee
United States Senate