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MILITARY LAW REVIEW

HEADQUARTERS, DEPARTMENT OF THE ARMY SEPTEMBER 1958

PREFACE

This pamphlet is designed as a forum for the military lawyer, active and reserve, to share the product of his experience and research with fellow lawyers in the Department of the Army. At no time will this pamphlet purport to define Army policy or issue administrative directives. Rather, the *Military Law Review* is to be solely an outlet for the scholarship prevalent in the ranks of military legal practitioners. The opinions reflected in each article are those of the author and do not necessarily reflect the views of the Judge Advocate General or the Department of the Army.

Articles, comments, and notes treating subjects of import to the military will be welcome and should be submitted in duplicate to the Editor, Military Law Review, The Judge Advocate General's School, U. S. Army, Charlottesville, Va. Footnotes should be set out on pages separate from the text, be carefully checked prior to submission for substantive and typographical accuracy, and follow the manner of citation in the *Harvard Blue Book* for civilian legal citations and *The Judge Advocate General's School Uniform System of Citation* for military citations. All cited cases, whether military or civilian, shall include the date of decision.

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MILITARY SEARCHES AND SEIZURES*

BY CAPTAIN CABELL F. COBBS AND 1ST LT. ROBERT S. WARREN**

The Uniform Code of Military Justice[1] contains no protection of the serviceman from searches and seizures conducted by military authorities. The Manual for Courts-Martial, 1951, merely provides a rule of evidence banning the results of certain searches from evidence before courts-martial.[2] Is there then no affirmative provision of law portecting a member of a military service from an invasion of his legitimate interests in privacy?

Various commentators have advanced the proposition that the proscriptions of the fourth amendment against unreasonable search and seizure, or for that matter any of the protections in the Bill of Rights, play no role in the administration of military justice.[3] Their opinions are predicated upon a rather elderly Supreme Court decision dealing with the administrative discharge of an officer,[4] certain remarks of the Court of Military Appeals in the *Clay* case,[5] boards of review decisions misciting certain Federal cases,[6] and the *Quirin* denial of the right to trial by jury before a military commission.[7] However, more recently,

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[1] 10 U.S.C. § 801–940 (Supp. IV).

[2] Par. 152, MCM, 1951.

[3] *E.g.*, Wurfel, *Military Due Process: What Is It?* 6 Vand. L. Rev. 251, 280–281 (1953); Note, 101 U. Pa. L. Rev. 851, 853 (1953). But see a more recent article presenting and excellent exposition of the legislative history of the Bill of Rights and concluding that a good portion of their protections were intended to apply to the military. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[4] *Creary* v. *Weeks*, 259 U.S. 336, 343 (1922).

[5] *U.S.* v. *Clay*, 1 USCMA 74, 1 CMR 74, 79 (1951).

[6] *E.g.*, ACM 4332, Kofnetka, 2 CMR 773, 777 (1952), citing *Richardson* v. *Zuppann*, 81 F. Supp. 809 (M.D. Pa. 1949). Actually, the Richardson court held that the facts showed no violation of the fourth.

[7] *Ex Parte* Quirin, 317 U.S. 1 (1942).

in the case of *Burns* v. *Wilson*,[8] the United States Supreme Court has given clear indication that at least the basic constitutional guarantee of a fair trial applies to proceedings before military tribunals.

> "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. . . . For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted . . . [that it fails to adhere] to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."[9]

The opinions of the inferior Federal judiciary subsequent to the *Burns* decision indicate that the above point of view has begun to pervade the Federal system.[10] Of course, it is yet recognized that certain guarantees of the Bill of Rights have no application to military proceedings, as is so provided in the Constitution either expressly[11] or by clear implication.[12] The Court of Military Appeals has been more reluctant to accept the applicability of the various constitutional provisions. Chief Judge

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[8] 346 U.S. 137, *reh, den.*, 346 U.S. 844 (opinion on denial of rehearing by Frankfurter, J.) (1953).

[9] *Id.* at 142-143. However, in *Reid* v. *Covert*, 354 U.S. 1 (1956), Justice Black felt constrained to remark that: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." (at p. 37). On the other hand, in the same case, Justice Frankfurter expressed no doubt that "proceedings before American military tribunals . . . are subject to the applicable restrictions of the Constitution." (at p. 56). Although the defendant was not a serviceman, it is yet significant that the fourth amendment was held applicable to the military trial of a civilian overseas and subject to the Uniform Code of Military Justice. Best v. U.S., 184 F.2d 131 (1st Cir. 1950), *cert. den.*, 340 U.S. 939. See also Collins, *Constitutional Rights of Military Personnel* (Thesis filed at The Judge Advocate General's School 1957).

[10] *Day* v. *Wilson*, 247 F.2d 60, 62 (D.C. Cir. 1957); *Dickenson* v. *Davis*, 245 F.2d 317, 320 (10th Cir. 1957); *Michaelson* v. *Herren*, 242 F.2d 693, 696 (2d Cir. 1957) (per Medina, J.); *Dixon* v. *U.S.*, 237 F.2d 509, 510 (10th Cir. 1956); *Day* v. *Davis*, 235 F.2d 879, 884 (10th Cir. 1956).

[11] U.S. Const. amend. V, cl. 1, excusing "cases arising in the land or naval forces" from the indictment by grand jury requirement.

[12] *Ex Parte* Quirin, 317 U.S. 1, 38 (1942), dispensing with the necessity of a jury trial in a military proceeding.

Quinn has upon various occasions expressed his viewpoint that a majority of the first ten amendments apply in court-martial proceedings.[13] However, Judges Latimer and Ferguson have been more equivocal. They seem to afford the serviceman the identical protections as are contained in the Constitution, but refuse to specify whether they do so because of the application of the Constitution or because of a judicially erected "military due process" based on statutory provisions.[14] The reason for their hesitation may have been expressed by the late Judge Brosman in a case wherein the constitutionality of a provision of the Uniform Code of Military Justice was questioned.[15] There, Judge Brosman indicated his doubts that a court created by Congress in the Uniform Code could by judicial fiat declare a portion of that same statute violative of the Constitution and thus invalid.[16] At any rate, it may be safely ventured that the military appellate agencies will afford an accused the basic constitutional guarantees, whether expressly or via another route.

As regards the fourth amendment, no reason exists to deny its application in the administration of military justice. The protection is against "unreasonable" searches and seizures; and what is unreasonable may be worked out within the context of military necessity. As shall be seen, both the executive[17] and judicial[18] interpretation of the "reasonable" test has been arrived at with due regard for the authoritarian discipline and global operation peculiar to the military.

Assuming the application of the fourth, what sanctions exist against its violation? The United States Supreme Court, in the exercise of its supervisory power over the inferior Federal judiciary,[19] has adopted a rule of exclusion barring evidence obtained in violation of the amendment from admission in Federal courts.[20]

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[13] *U.S.* v. *Brown*, 7 USCMA 251, 22 CMR 41, 50 (1956) (concurring opinion); *U.S.* v. *Sutton*, 3 USCMA 220, 11 CMR 220, 228 (1953) (dissent).

[14] *U.S.* v. *Brown*, 7 USCMA 251, 22 CMR 41, 47 (1956) (public trial); *U.S.* v. *Swanson*, 3 USCMA 671, 14 CMR 89, 91 (1954) (search and seizure); *U.S.* v. *Sutton*, 3 USCMA 220, 11 CMR 220 (1953) (confrontation).

[15] *U.S.* v. *Sutton*, *supra*, note 14.

[16] *Id.* at 227.

[17] Par. 152, MCM, 1951.

[18] See footnotes 26, 27, 44, 46, 56, 57, and 84, *infra*.

[19] There is no constitutional requirement that the fourth amendment be enforced by means of an evidentiary rule of exclusion. *Wolf* v. *Colorado*, 338 U.S. 25 (1948).

[20] *Weeks* v. *U.S.*, 232 U.S. 383 (1914).

Similarly, the President, as Commander-in-Chief of the Armed Forces, propounded an exclusionary rule for use in courts-martial.

> "Evidence is inadmissible against the accused if it was obtained as the result of an unlawful search of his property conducted or instigated by persons acting under the authority of the United States, or if it was obtained under such circumstances that the provisions of Section 605 of the Communications Act of 1934 . . . would prohibit its use against the accused were he being tried in a United States district court. All evidence obtained through information supplied by such illegally obtained evidence is likewise inadmissible. . . ."[21]

The Manual for Courts-Martial then proceeded to spell out just what conduct would be "unreasonable" and require rejection of the evidence obtained as a result. In so doing, the drafters considered Federal decisions and attempted to pattern the military rule thereafter insofar as could be done consistent with the needs of the military.[22] The balance of this paper will, in the main, be devoted to a consideration of the specific search authorizations contained in the Manual.

I. SEARCHES AUTHORIZED BY A WARRANT

A valid search may be "conducted in accordance with the authority granted by a lawful search warrant."[23] Of course, the warrant must have been issued by a proper tribunal. Some problems in this regard may arise when a warrant issued by a state court is attempted to be employed upon a Federal reservation.[24] Otherwise, no particular difficulties arise in this area and the civilian rules may properly be considered applicable.

II. SEARCHES AUTHORIZED BY A COMMANDING OFFICER

A. *Of Government Quarters and Offices*

> "A search of property which is owned or controlled by the United States and is under the control of an armed force, or of property which is located within a military installation or in a foreign country or in occupied territory and is owned,

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[21] Par. 152, MCM, 1951.

[22] Legal and Legislative Basis, Manual for Courts-Martial, 1951 p. 240; *U.S.* v. *Dupree*, 1 USCMA 665, 5 CMR 93 (1952).

[23] Par. 152, MCM, 1951.

[24] Note, 101 U. Pa. L. Rev. 851, 860–861 (1953). *See also* Note, 101 U. Pa. L. Rev. 124 (1952).

used, or occupied by persons subject to military law or to the law of war, which search has been authorized by a commanding officer (including an officer in charge) having jurisdiction over the place where the property is situated or, if the property is in a foreign country or in occupied territory, over personnel subject to military law or to the law of war in the place where the property is situated. The commanding officer may delegate the general authority to order searches to persons of his command. This example of authorized searches is not intended to preclude the legality of searches made by military personnel in the areas outlined above when made in accordance with military custom."[25]

The power of a military commander to authorize and conduct searches on-post is based on the reason that "since such an officer has been vested with unusual responsibilities in regard to personnel, property, and material, it is necessary that he be given commensurate power to fulfill that responsibility."[26] In essence, the commander is the government of the military community. Since no magistrate exists in the nature of a civilian judge, it is the senior officer who is most likely to give dispassionate consideration to a request for a search and to weigh the necessity therefor against the resultant invasion of the serviceman's privacy. Federal decisions considering the matter have unanimously endorsed the entrustment of this power to the commander.[27] However, a *caveat* is in order. The Court of Military Appeals has indicated that the commander's discretion in ordering a search of property within his control may not be unlimited.[28] Perhaps a commander, is his capacity as a magistrate, may only issue his warrants upon the basis of probable cause.[29]

Under this rule, a search of quarters of military personnel,[30] a trunk in a commissary office,[31] a barracks not located within

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[25] Par. 152, MCM, 1951.

[26] ACM 11753, Walsh, 21 CMR 876, 883 (1956).

[27] *Richardson* v. *Zuppann*, 81 F. Supp. 809 (M.D. Pa. 1949), *aff'd per curiam*, 174 F.2d 829 (3d Cir. 1949); *Grewe* v. *France*, 75 F. Supp. 433 (E.D. Wis. 1948).

[28] *U.S.* v. *Doyle*, 1 USCMA 545, 4 CMR 137, 140 (1952).

[29] *E.g.*, *in* CM 354324, Heck, 6 CMR 223 (1952), military police conducted general exploratory night "raids" upon the quarters of all military personnel in a German city in the hope of discovering instances of illegal fraternization. Would such a search be upheld if authorized by the appropriate commander?

[30] CM 335526, Tooze, 3 BR–JC 313, 346 (1949).

[31] CM 209952, Berry, 9 BR 155, 167 (1938).

the confines of a reservation,[32] and a footlocker in a military government headquarters[33] have all been approved. Nor does it seem to matter whether such quarters are located in this country or overseas.[34]

A search may also be authorized by one to whom the commander has delegated his general authority to order searches.[35] Since unqualifiedly authorized by the Manual for Courts-Martial, 1951, the power to expressly delegate such authority is apparently without limit. Accordingly, it has been held proper to delegate it to an adjutant[36] and to all non-commissioned officers of the detachment while serving as commanders-of-the-guard.[37] The Judge Advocate General of the Air Force has entertained some reservation about the ultimate extent of this power to delegate general authority and has stated:

> ". . . . I would interpret this section of the Manual as requiring that a person desiring to conduct a particular search must obtain in each case the authority of either the commanding officer or his delegatee. . . . [U]nder my present view, a search conducted under a purported delegation of authority that was in fact an abandonment of discretion, as, for example, by a 'delegation' to each and every member of a squadron of Air Force policemen, could not be sanctioned."[38]

Although the provisions of the Manual do not appear to be so limited, it is obvious that delegation in the manner stated by The Judge Advocate General of the Air Force would be inappropriate as a matter of policy and might well lead to legal difficulties on review in view of the touchstone of reasonableness frequently applied by the Court of Military Appeals.[39]

A more difficult problem arises when the commanding officer is absent or unavailable for the purpose of authorizing a search, and no express authority has been delegated. Do his search powers devolve upon another officer? Although the Court of Military Appeals has not yet had occasion to view this problem, the service boards of review have rendered decisions on its various aspects. The fair essence of their decisions is that the

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[32] CM 248379, Wilson, 31 BR 231, 235 (1944).
[33] CM 328248, Richardson, 77 BR 1, 20 (1948).
[34] CM 335526, Tooze, 3 BR–JC 313, 346 (1949).
[35] Par. 152, MCM, 1951.
[36] ACM 4426, Taylor, 1 CMR 847 (1951).
[37] NCM 129, Boone, 4 CMR 442 (1952).
[38] Cited, in ACM 4426, Taylor, 1 CMR 847, 849 (1951).
[39] *U.S.* v. *Doyle*, 1 USCMA 545, 4 CMR 137, 140 (1952).

person who is normally in command in the absence of the commander may authorize the search. In order for the search to be held proper, it must be found that the person who authorized it was, in fact, acting as the commanding officer, although he may not have possessed that title. For example, in *Holt*,[40] the executive officer customarily assumed command of the post in the absence of the commanding officer. His search of the accused's room, after receiving reports of thefts, was held legitimate as he ". . . was in fact, acting as the commanding officer of the installation. . . ."[41] Similarly, an adjutant who is directed by the commanding officer to "act in his absence" may authorize a search.[42] However, an adjutant, as such, has no power to so authorize searches in the absence of any implied grant by the commander,[43] nor does an officer-of-the-day.[44]

Finally, what of searches conducted entirely without the authorization of the commander or his delegatee—and not justifiable under some other clause of the Manual? In the case of a general, exploratory police search, the search is undoubtedly illegal and evidence obtained as a result thereof inadmissible.[45] However, in at least two instances, searches have been upheld which were not authorized by a commander and were not apparently justifiable on some other ground. In *United States* v. *Rhodes*,[46] a staff judge advocate conducted a search of his claims officer's desk at the request of agents of the Criminal Investigation Detachment. A diary recording the officer's criminal activities was seized therefrom. In deciding that the search was proper, although not authorized by the appropriate commander, the court stated:

> ". . . . [I]n the military service certain persons other than commanding officers—depending upon their official positions and responsibilities—possess inherent power to conduct searches on military installations or of property within military

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[40] CM 357002, 8 CMR 360 (1952), *pet. den.*, 8 CMR 178.

[41] *Id.* at 365.

[42] ACM 5796, Toreson, 8 CMR 676 (1953); ACM 4332, Kofnetka, 2 CMR 773 (1952).

[43] ACM S–6534, Guest, 11 CMR 758, 761 (1953).

[44] CM 389786, Washington, 22 CMR 346 (1956); ACM 4351, Gosnell, 8, CMR 646 (1952). *But see* NCM 380, Triplett, 18 CMR 421 (1954), holding that the burden is on the accused to show that authority to search had not been delegated to an officer-of-the-day.

[45] CM 354324, Heck, 6 CMR 223 (1952); CM 354571, La Mothe, 6 CMR 257 (1952); CM 354597, Thomas, 6 CMR 259 (1952).

[46] 3 USCMA 73, 11 CMR 73 (1953).

control. Paragraph 152 of the Manual, *supra*, likewise recognizes expressly that legal searches may be effected by persons other than commanding officers so long as such searches are '*made in accordance with military custom.*' . . . The office desk, the object searched, was military property safely within the ambit of the direct responsibility of the officer who conducted the search. The latter was the superior officer of the accused. He had been informed reliably and officially that there was good reason to believe that the accused was engaged in an unlawful enterprise. . . . The search was in no sense general and exploratory, but instead was narrowly restricted in scope, purpose, and physical area. It was, therefore—under all of the circumstances, including the exigencies of the military service—entirely reasonable. . . ."[47]

In *United States* v. *Doyle*,[48] the evidence established that a Navy master-at-arms had searched the accused's locker without his commanding officer's authority after it had been reported that shoes had been stolen and had been seen later in the accused's locker. In stating that the master-at-arms had the power to search under the circumstances, it was remarked:

". . . . Here, an eye-witness had informed the master-at-arms that petitioner had in his possession the clothing of another. He, therefore, had reasonable and probable cause to believe that an offense had been committed by petitioner. . . . Inability to take direct and prompt action in such a situation would seriously impair the performance of a master-at-arms' duties and responsibilities in regard to enforcement of laws and regulations and, under other circumstances, the protection of government property. . . ."[49]

The only possible justification of the foregoing decisions is to be found in the Manual authorization of a search in accordance with "military custom." However, "custom" is a word of limited connotation, referring only to a military usage or practice of long standing.[50] This writer is aware of no service usage permitting a section chief to rifle through the personal effects in a subordinate's desk in search of contraband. The justification for *Doyle* is even

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[47] *Id.* at 75, emphasis added. *See also* CM 201878, Bashein, 5 BR 303 (1934), holding that a club officer has authority to search the room of the club secretary, inasmuch as he was the latter's superior and occupied a position analogous to his commanding officer.

[48] 1 USCMA 545, 4 CMR 137 (1952).

[49] *Id.* at 140–141.

[50] Winthrop, Military Law and Precedents 42 (2d ed. 1920).

more tenuous. Navy regulations reveal that a master-at-arms is nothing more or less than a man detailed to police duty, with no special, customary search powers.[51] As has been suggested,[52] these cases permit a brand of search which would never be countenanced in the Federal civil courts.[53] Inasmuch as the years since the enactment of the Uniform Code have produced only these two mutations of the Manual exclusionary rule, it is not likely that the doctrine they purport to announce will be used to justify a rash of questionable military searches.

B. *Of Off-Post Quarters*

A command-ordered search of the serviceman's private, off-post home within the United States "is an unwarranted invasion of the soldier's constitutional rights"[54] and obviously has no connection with the commander's responsibility for and control over government property.[55] Significantly, the Manual for Courts-Martial, 1951, fails to include authorization for any such search.

However, with respect to the serviceman's off-post living quarters overseas, the Manual expressly authorizes their search upon authority of the commanding officer having jurisdiction over personnel subject to military law or to the law of war in the foreign countries or occupied zones in which the property is located.[56] There can be no question of the practical soundness of this rule. In overseas areas, there is no tribunal competent to issue warrants which would conform to the provisions of the fourth amendment; and, in the case of occupied territory, members of the occupation forces are not usually subjected to the jurisdiction of the indigenous courts if, indeed, there are any tribunals operative other than those of the military commander.[57] Various Federal courts

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[51] Navy Regs. § 0806 (1948).

[52] Note, 101 U. Pa. L. Rev. 851, 857 (1953).

[53] *Johnson* v. *U.S.*, 333 U.S. 10, 13 (1947); *Taylor* v. *U.S.*, 286 U.S. 1, 6 (1932). Both *Johnson* and *Taylor* reject the proposition that a Federal agent may lawfully search without a warrant on the basis of probable cause to believe that his search will uncover incriminating evidence.

[54] CM 161760 (1924), Dig. Op. JAG 1912-40, § 395(27); CM 264149, Engelhardt, 42 BR 23, 25 (1944) (dicta). *See* CM 252103, Selevitz, 33 BR 383, 394 (1944).

[55] CM 319591, Pogue, 68 BR 385, 393 (1947).

[56] Par. 152, MCM, 1951.

[57] See *Coleman* v. *Tennessee*, 97 U.S. 509 (1878).

have examined this extension of a commander's powers overseas and have approved it as reasonable and appropriate.[58]

A similar problem arises here as in the case of a search on-post authorized by a commander within the United States; namely, what is the validity of searches conducted by law enforcement officials without the blessing of any commander? As was seen above, "military custom" justifies in very limited situations searches not authorized by a commander. Apparently, that principle has been extended to a considerable degree overseas. For example, in *United States* v. *DeLeo*,[59] a French national was arrested for counterfeiting American currency and implicated the accused as an accomplice. On the basis of certain "letters rogatory" issued by a French magistrate, authorizing the police to search whatever they should deem necessary, an American Criminal Investigation agent accompanied French police to the accused's base, placed him in custody, searched him (finding counterfeit bills), and told his commanding officer they intended to search his off-post quarters. A subsequent search of his premises resulted in evidence used to convict him of the crime of forgery. Although the Court of Military Appeals based its decision upholding the search upon alternate grounds, the major premise behind the opinion seems to have been that the search, under the circumstances, was simply reasonable. The non-existence of tribunals competent to issue a proper warrant, existence of probable cause to search from the evidence in possession of the police, and the desirability of encouraging American law enforcement agents to participate in investigations conducted by foreign police which involve military personnel appear to be the major factors contributing to the finding. Similar searches have been upheld because they were in accordance with French law;[60] pursuant to the terms of a properly procured English search warrant;[61] or necessary to recover a classified document.[62] But a general, exploratory nar-

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[58] *Best* v. *U.S.*, 184 F.2d 131, 140 (1st Cir. 1950); *Richardson* v. *Zuppann*, 81 F. Supp. 809, 813 (M.D. Pa. 1949), *aff'd per curiam*, 174 F.2d 829 (3d Cir. 1949).

[59] 5 USCMA 148, 17 CMR 148 (1954).

[60] CM 345745, Sherwood, 11 BR-JC 239, 252 (1951).

[61] ACM 4948, Whitler, 5 CMR 458, *pet. den.*, 2 USCMA 672, 5 CMR 131 (1952).

[62] ACM 8212, Cascio, 16 CMR 799, *pet. den.*, 5 USCMA 847, 18 CMR 333 (1954).

cotics "raid" upon a hotel is not lawful merely because conducted overseas.[63]

The boards of review and the Court of Military Appeals seem to recognize the problems facing personnel charged with law enforcement duties in a foreign country where legal process is not available to them and where the circumstances are often such as to require immediate action without reference to the appropriate commanding officer. For example, in *DeLeo*, the accused rented rooms in a French home, access to which could not have been gained over the objection of the landlord unless the French police interceded despite authorization by the commanding officer. These cases seem to be a proper attempt to resolve difficulties brought about by situations not envisaged by those who drafted the Bill of Rights. Since the reasonable character of a search and seizure depends so completely on the "facts and circumstances of each case,"[64] our courts have properly recognized the factual setting of these cases and attempted to remove some of the thorns from the path of military investigative agencies.

As a final refinement, suppose the military police request permission of the commander to search, are refused, but nevertheless conduct the search, will a court consider whether or not the search was "reasonable" under the circumstances? It has been held that when the commander, in the exercise of his discretion, determines that no search is to be made, any subsequent action in defiance of his directive is *per se* illegal.[65] If the police desire the commander's benediction, they must submit to the exercise of his discretion. It is to be hoped that the military courts will look with a jaundiced eye upon any deliberate failure by the police to consult with the commander in order to substitute their own judgment as to whether or not a search is reasonable under the circumstances.

III. SEARCHES INCIDENT TO A LAWFUL APPREHENSION

As in the Federal courts,[66] the results of a "search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control, conducted as an incident

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[63] ACM 4957, Thomas, 4 CMR 729, *pet. den.*, 2 USCMA 663, 4 CMR 173 (1952).

[64] *U.S.* v. *Rabinowitz*, 339 U.S. 56, 63 (1950).

[65] NCM 138, Maher, 5 CMR 318 (1952). *Accord*, *McDonald* v. *U.S.*, 335 U.S. 451 (1948) (civilian police conducted search in spite of prior denial of warrant).

[66] *U.S.* v. *Rabinowitz*, 339 U.S. 56, 60 (1950); *Weeks* v. *U.S.*, 232 U.S. 383, 392 (1914).

of lawfully apprenhending him" are admissible into evidence.[67] Of course, it is the arrest which justifies the search, not the contrary. An agent cannot search military personnel prior to taking them into custody, apprehend them on the basis of the result of the search, and later claim that the apprehension rendered the search legal.[68] However, the military courts have indicated that they will not indulge in over-technical niceties as to which came first, the arrest or the search.

> "Under military procedure arrest may be the final step in a series of disassociated acts from receipt of information of a supposed offense to confinement, or it may be the end of a sequence of events so closely interrelated that it is impossible to fix the point of actual deprivation of liberty. In this case it appears the latter situation existed and that the initiatory step in the arrest was the order directing the accused to report [to his commanding officer]. . . ."[69]

Therefore, an informal procedure such as calling the accused before the commanding officer or the Criminal Investigation Detachment may be considered a lawful apprehension for the purpose of justifying a search.[70]

An apprehension by an authorized person is lawful when it is based "upon reasonable belief that an offense has been committed and that the person apprehended committed it."[71] In this respect, the military rule is commensurate with the Federal requisites of lawful apprehension,[72] or "arrest" in civilian terminology.

However, what is the permissable area of search assuming propriety of apprehension; what property is within the suspect's "immediate possession or control"? In *United States* v. *Rabino-*

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[67] Par. 152, MCM, 1951.

[68] ACM 4957, Thomas, 4 CMR 729, *pet. den.*, 2 USCMA 663, 4 CMR 173 (1952).

[69] *U.S.* v. *Florence*, 1 USCMA 620, 5 CMR 48, 53 (1952).

[70] *Ibid.*; CM 349776, Stein and Sizemore, 8 CMR 467 (1952), *rev'd on other ground*, 2 USCMA 572, 10 CMR 70 (1953).

[71] UCMJ, Art. 7.

[72] *Clay* v. *U.S.*, 239 F.2d 196, 202 (5th Cir. 1956); *Wrightson* v. *U.S.* 222 F.2d 556 (D.C. Cir. 1955). *Caveat*, it has been held that in the absence of an applicable Federal statute, the law of the state of arrest determines the legality thereof. *U.S.* v. *Di Re*, 332 U.S. 581, 589 (1948). However, language in the *Wrightson* case, *supra*, indicates that a state law allowing an arrest on other than probable cause might run afoul of the fourth amendment if applied in Federal court to justify an arrest without a warrant. *See U.S.* v. *Walker*, 246 F.2d 519 (7th Cir. 1957).

witz,[73] the Supreme Court concluded that the arrest of a suspect in his one-room office justified a search of the entire office. An older, and possibly more questionable decision, upheld the search of a four-room apartment because of an arrest in the living room.[74] The military rule is probably coextensive. For example, the lawful apprehension of a suspect within his barracks justifies a search of his locker and effects within that barracks;[75] but if apprehended outside, his "possession and control" would not extend to items located in his barracks fifty yards away.[76] Nor does an arrest in a lobby validate the subsequent search of the suspect's hotel room.[77]

The wisdom of a rule that allows the police to choose the place of apprehension and thereby choose the locale of search may be questioned.[78] It is also conceivable that a commanding officer could direct the place of arrest in such a manner as to procure the search of off-post quarters not otherwise within the bounds of his jurisdiction. Certainly this would be a considerable abuse of a rule originally designed to allow peace officers to strip a suspect of weapons which he may use in resisting arrest and seize the fruits of his crime.[79]

IV. SEARCHES IMMEDIATELY NECESSARY

A search without the authorization of the appropriate commander is permissible "under circumstances demanding immediate action to prevent the removal or disposal of property believed on reasonable grounds to be criminal goods."[80]

This provision of the Manual is based upon what may loosely be termed the Federal "prohibition cases." In Section 25, Title II

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[73] 339 U.S. 56 (1950).

[74] *Harris* v. *U.S.*, 331 U.S. 145 (1947). *But see Kremen* v. *U.S.*, 353 U.S. 346 (1957), holding illegal the search of a four-room house, removal of all the furniture and other possessions contained therein, asportation of all such items to another locale, and subsequent minute examination of each.

[75] CM 349776, Stein and Sizemore, 8 CMR 467, 479 (1952), *rev'd on other ground*, 2 USCMA 572, 10 CMR 70 (1953). *See also* ACM 4115, Ward, 2 CMR 688 (1951) (search of automobile incident to arrest).

[76] ACM 4351, Gosnell, 3 CMR 646, 649–657 (1952).

[77] ACM 11930, Allen, 21 CMR 897, 900 (1956).

[78] *See U.S.* v. *Pampinella*, 131 F. Supp. 595 (N.D. Ill. 1955) condemning the use of an arrest as a pretext for a general exploratory search.

[79] *Agnello* v. *U.S.*, 269 U.S. 20, 30 (1925).

[80] Par. 152, MCM, 1951.

of the National Prohibition Act,[81] the possession of whiskey was declared unlawful; and Section 26 imposed a duty upon officers to seize illegally transported whiskey and the vehicle in which it was found. In *Carroll* v. *United States*,[82] as against the contention that the latter provision was unconstitutional, the Supreme Court held that the peculiarly mobile characteristics of a vehicle and the practical impossibility of timely procurance of a warrant, rendered such searches constitutionally "reasonable." However, subsequent cases indicate that the Court intended to restrict the *Carroll* doctrine not only to movable vehicle cases, but also to searches expressly authorized by Congress in order to implement enforcement of legislation.[83] The trend in military law has been in quite another direction.

Not only searches of automobiles have been upheld under this part of the Manual;[84] but also a search of a rented room for highly salable black market whiskey,[85] and of an express package in transit.[86] The ultimate extension of this doctrine was reached in *United States* v. *Swanson*.[87] There, upon receiving a report that a sum of money had been stolen, the First Sergeant ordered an immediate formation and conducted a "shake down" search of the men in the unit. The Court of Military Appeals apparently felt that the stolen money was sufficiently disposable to require an immediate search of all possible suspects. However, a recent board of review decision has indicated that not every search authorized by a first sergeant, or by one in a similar position, will be validated by his determination of the necessity therefor. In *Washington*,[88] a report reached the officer-of-the-day that certain items of clothing had been stolen within the battalion area. The resultant general, exploratory search at the request of the officer-of-the-day

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[81] 41 Stat. 305 (1919).

[82] 267 U.S. 132 (1925); *Brinegar* v. *U.S.*, 338 U.S. (1949); *Husty* v. *U.S.*, 282 U.S. 694 (1931).

[83] *U.S.* v. *Di Re*, 332 U.S. 581, 585 (1948).

[84] CGCM 9833, Woller, 19 CMR 588, *pet. den.*, 6 USCMA 827 (1955); ACM 8094, Pagerie, 15 CMR 864, 870 (1954); ACM 4115, Ward, 2 CMR 688, 693 (1951).

[85] ACM 5168, Trolinger, 5 CMR 447, *pet. den.*, 5 CMR 131 (1952).

[86] CM 264149, Engelhardt, 42 BR 23, 25 (1944). In a similar case, a search of household goods in transit was held illegal though it was suspected that they contained stolen ammunition. Navy Ct-Mtl Order 4 (1947), p. 83.

[87] 3 USCMA 671, 14 CMR 89 (1954). *See also U.S.* v. *Davis*, 4 USCMA 577, 16 CMR 151 (1954).

[88] CM 389786, 22 CMR 346 (1956).

was held illegal by the board since the bulky items of clothing were not subject to immediate secretion or disposal.

V. CONSENSUAL SEARCHES

Of course, a search "made with the freely given consent of the owner in possession of the property searched" is quite legal.[89] However, peaceful submission to the request of superior authority is not necessarily consent, and it is essential that it appear that the accused voluntarily acceded to the request and affirmatively granted permission to search.[90]

VI. SEARCHES FOR "EVIDENCE"

Where a search is for material having value as incriminatory evidence only, the military and civilian[91] rules coincide, both authorities holding such searches to be general in nature and illegal even if otherwise authorized. A search of an accused's quarters in order to procure samples of his handwriting would, therefore, be improper.[92]

VII. THE "STANDING" REQUIREMENT

". . . . Immunity from unreasonable search . . . is a personal right and the legality of the search of premises can be raised only . . . by the person whose rights have been invaded . . . ."[93] Thus, the complainant must have some proprietary, or perhaps possessory, interest in the premises searched or the property seized in order to complain of the circumstances surrounding their search or its seizure.[94]

A. *Interest in the Premises Searched*

The predilection of some military accused for attaching themselves to indigenous females and living in informal "off-post" establishments overseas has developed the law in this area to a

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[89] Par. 152, MCM, 1951.

[90] *U.S.* v. *Berry*, 6 USCMA 609, 20 CMR 325, 329 (1956); ACM 4283, Cook, 1 CMR 850 (1951).

[91] *Schwinner* v. *U.S.*, 232 F.2d 855 (8th Cir. 1956), *cert. den.*, 352 U.S. 833; *U.S.* v. *Poller*, 43 F.2d 911, 913 (2d Cir. 1930).

[92] ACM 9010, Elliott, 16 CMR 882, *pet. den.*, 17 CMR 381 (1954).

[93] CM 317327, Durant, 66 BR 277, 301 (1947).

[94] *U.S.*, v. *Bass*, 8 USCMA 299, 24 CMR 109 (1957); *U.S.* v. *Marrelli*, 4 USCMA 276, 15 CMR 276, 285 (1954). The Federal civil courts apply a similar requirement. *U.S.* v. *Jeffers*, 342 U.S. 48 (1951); Comment, 55 Mich. L. Rev. 567, 569–574 (1957).

remarkable extent. The essence of the cases seems to be that if the accused has free access to the premises searched, keeps personal effects there, and spends considerable time in occupying them, he has sufficient interest in the premises to stand in the shoes of the regular occupant and raise the question of the legality of a search.[95] In the case of a hotel room, if the accused is an actual occupant of that room it is immaterial that it is registered in the name of another.[96] On the other hand, where the premises actually are those of the paramour and the accused is merely a transient visitor thereto he has no interest sufficient to allow him successfully to complain of the nature of the search involved.[97] Under such circumstances, mere payment of the rent by the accused will not vest him with an interest in the premises.[98]

A serviceman has no proprietary interest in government property issued to him for the purpose of carrying out his assignment. Therefore, he has no standing to complain of the search of a government-owned office safe,[99] or the glove compartment of a military vehicle.[100] However, by implication, the Court of Military Appeals in *United States* v. *Rhodes*[101] indicated the military personnel may have the requisite interest in their office desks.

United States v. *Higgins*[102] is an interesting case. There, agents conducted a properly authorized search of quarters occupied by the accused and his wife, seized the wife's pocketbook, and extracted certain incriminating evidence. Though the wife's interest in her property may have been violated, the mere fact of marital relationship did not vest accused with standing to complain.

B. *Interest in the Property Seized*

Though the complainant has no interest in the premises searched, it should be sufficient that he owns the property seized.[103]

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[95] ACM 9294, Dix, 17 CMR 647 (1954); ACM 6411, Ewing, 10 CMR 612 (1953); NCM 138, Maher, 5 CMR 313 (1952); Navy Ct-Mtl Order 2 (1951), p. 66; CM 326147, Nagle, 75 BR 159, 168 (1947).

[96] *U.S.* v. *Berry*, 6 USCMA 609, 20 CMR 325, 328 (1956).

[97] *U.S.* v. *Bass*, 8 USCMA 229, 24 CMR 109 (1957); CM 392396, Sandford, 23 CMR 472, 476 (1957); ACM 5168, Trolinger, 5 CMR 447, *pet. den.*, 5 CMR 131 (1952).

[98] ACM 9294, Dix 17 CMR 647, 649 (1954).

[99] ACM 6822, Francis, 12 CMR 695, *pet. den.*, 4 USCMA 784 (1953).

[100] ACM 6187, Tomes, 9 CMR 679 (1953).

[101] 3 USCMA 73, 11 CMR 73 (1953). *See U.S.* v. *Blok*, 188 F.2d 1019, 1021 (D.C. Cir. 1951).

[102] 6 USCMA 308, 20 CMR 24 (1955).

[103] *U.S.* v. *Jeffers*, 342 U.S. 48 (1951).

Of particular interest in this regard is the situation where the accused denies any interest in contraband which has been seized. Quite naturally, he will be loath to admit any interest in stolen property or illegal narcotics. Nevertheless, by such denial, he precludes his objection to the illegality of the search.[104] Thus, the accused is placed on the horns of a dilemma; he must choose between self-incrimination and the admission of damning, illegally-obtained evidence.[105]

Although the accused once had a proprietary interest in the property seized, he may have relinquished that interest. Where the accused makes a gift to another of the property involved, he has parted with title and possession and thereafter does not have the interest to complain of its seizure.[106] In *United States* v. *Higgins, supra,* the item seized was an incriminating communication from the accused to his wife. The court indicated that the very fact that the item was intended as a communication, and came into the hands of its recipient, established the sender's lack of any further interest in the message. The issue, however, may require further thought. Might not a sender retain some "property interest" in his letters even in the hands of a recipient?[107]

VIII. SEARCHES BY OTHER THAN FEDERAL AGENTS

An accused may only exclude from evidence the results of an illegal search "conducted or instigated by persons acting under authority of the United States."[108] The mere fact that the searcher is a Federal employee, however, does not impose responsibility for his action upon the Government. He must have been acting in a law enforcement capacity.[109] The necessity for this limitation is obvious; otherwise, military law enforcement agencies would be saddled with responsibility for the acts of all members of the armed forces, in whatever capacity. A close question as to the proper application of this rule arose in *United States* v. *Volante.*[110] A post exchange steward, fearful of being held responsible for an inventory shortage, searched a subordinate's locker in an attempt

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[104] *U.S.* v. *Bass,* 8 USCMA 299, 24 CMR 109 (1957).
[105] Comment, 55 Mich. L. Rev. 567, 572–573 (1957).
[106] ACM 9294, Dix, 17 CMR 647 (1954); ACM 6411, Ewing, 10 CMR 612 (1953).
[107] *Baker* v. *Libbie,* 210 Mass. 599, 97 N.E. 109 (1912).
[108] Par. 152, MCM, 1951.
[109] Therefore, a search of accused's quarters by aggrieved victims of his thefts is not federally conducted though the searchers were Army officers. CM 242312, Gilbert, 27 BR 35, 40 (1943).
[110] 4 USCMA 689, 16 CMR 263 (1954).

to affix the blame on him. The Court found that the steward conducted the search for self-protection rather than for the purpose of enforcing military law. Thus, he acted as a "private individual" and not in an official capacity.

Similarly, courts-martial are not precluded from the consideration of evidence merely because improperly procured by agents of another sovereign; for example, state or city police.[111] Of course, the military agents may not avoid responsibility for an illegal search by inducing local police to perform the search and deliver over any evidence obtained. In such a case, the police have acted as "agents" of the Federal Government; military authorities have "instigated" the search; and the evidence seized may not be received by a military tribunal.[112] However, an agreement between military and civil authorities that, as a policy matter, all servicemen arrested locally for misdemeanor violations are to be turned over to the military authorities does not, *ipso facto*, render the police agents of the military in misdemeanor investigations.[113]

IX. THE EXCLUSIONARY RULE, HOW INVOKED AND LOST

The Manual for Courts-Martial, 1951, enacted the *Weeks*[114] exclusionary rule and the *Silverthorne*[115] refinement that all evidence obtained through information supplied by illegally obtained evidence likewise be inadmissible.[116] However, as there is no power in a court-martial to order illegally-obtained evidence suppressed

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[111] *ACM 5009, Gilbert*, 5 CMR 708 (1952); CM 273879, *Simpson*, 47 BR 99, 109 (1945); Parsons, *State-Federal Crossfire in Search and Seizure and Self Incrimination*, 42 Cornell L.Q. 346, 362 (1957).

[112] ACM 11930, Allen, 21 CMR 897 (1956).

[113] CM 392396, Sandford, 23 CMR 472, 476 (1957).

[114] *Weeks* v. *U.S.*, 232 U.S. 383 (1914).

[115] *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385 (1920). The essential element of causation is well recognized by the Court of Military Appeals. For example, in *U.S.* v. *Ball*, 8 USCMA 25, 23 CMR 249 (1957), agents were directed to place a "stake-out" near a certain baggage locker, arrest anyone opening the locker, and search its contents. The agents violated their instructions by conducting the search before the arrest, reclosing the locker, arresting accused, and then opening the locker and seizing certain stolen articles therein. The Court held that since probable cause other than the data gained from the illegal search existed to justify the arrest (and, indeed, the arrest had previously been ordered), the illegal search was not the cause of the eventual seizure of the evidence.

[116] Par. 152, MCM, 1951.

or returned to an accused, the sole mode of excluding tainted evidence is by objection.[117] Although searches are presumed proper in the absence of such an objection, once made, the Government is obliged to prove the authority therefor.[118] Since the determination of the admissibility of evidence is interlocutory in nature, the ruling on the objection rests finally with the law officer and is not submitted to the court.[119]

Suppose the accused fails to object, or objects on another ground —may he introduce the issue for the first time on appeal? The Court of Military Appeals has ruled that a failure to object at the trial when in full possession of knowledge of details of the search is a final waiver of the right to exclude.[120]

> ". . . The rule in the military, as in the Federal civilian law, has no relation to the trustworthiness of the evidence, and is personal in nature. We conclude, therefore, that this principle of Federal practice—military and otherwise—is nothing more nor less than an evidentiary rule of exclusion, provided for the protection of an individual's right to privacy in his personal property and effects. Finally and in summary, the rule confers on the individual the power to object at the trial to the reception in evidence of the products of an unlawful search. Does the failure to raise the objection waive the right? We think that it does."[121]

If an error of admission is preserved by timely objection, the military appellate agencies will test for specific prejudice to the accused (as do their civilian counterparts).[122] Therefore, if a great quantity of compelling evidence apart from that improperly admitted irrefutably establishes the guilt of the accused, the evidentiary error alone will not require a reversal.[123]

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[117] *Ibid.*

[118] *U.S.* v. *Berry*, 6 USCMA 609, 20 CMR 325, 329 (1956). *Contra*, ACM 8310, Wharton, 15 CMR 808 (1954); CM 366399, Edwards, 18 CMR 322 (1953).

[119] ACM 9817, Miller, 18 CMR 806 (1955). *Accord*, *Steele* v. *U.S.* 267 U.S. 505, 511 (1925).

[120] *U.S.* v. *Dupree*, 1 USCMA 665, 5 CMR 93 (1952).

[121] *Id.* at 96.

[122] *Agnello* v. *U.S.*, 269 U.S. 20 (1925); *U.S.* v. *Higgins*, 6 USCMA 308, 20 CMR 24, 85 (1955); Navy Ct-Mtl Order 3 (1943), p. 47; CM 196526, Ray, 3 BR 19 (1931); CM 161760 (1924), Dig. Op. JAG 1912–40, § 395(27).

[123] *U.S.* v. *Higgins*, *supra*, note 122.

X. CONCLUSION

The protection of the fourth amendment against unreasonable searches and seizures has been extended to the serviceman in a form suitably tailored to comport with military necessity. The provisions of the Manual for Courts-Martial, 1951, as interpreted by military courts, closely follow rules previously promulgated for the Federal civil courts, except: (1) A military commander is awarded the discretion to order a search of property and personnel under his control. (2) A wide latitude is allowed military police in conducting searches based upon probable cause in an overseas command. (3) The concept of searches demanding immediate action to prevent disposal of criminal goods has been extended far beyond its application in the Federal court system. (4) The Court of Military Appeals in the *Doyle* and *Rhodes* cases seems to uphold searches as in accordance with military custom because generally reasonable and based upon probable cause. With due regard for military necessity, it is hoped that the fourth-mentioned point of departure ended with *Rhodes* and that the third will be applied with the same careful discretion as by the board of review in the *Washington* case.

COMPATIBILITY OF MILITARY AND OTHER PUBLIC EMPLOYMENT*

BY CAPTAIN DWAN V. KERIG**

A member of the Armed Forces, active or retired (or a former member of the Armed Forces in receipt of retired pay), who contemplates or accepts employment with a civilian governmental agency must run the legal gauntlet of two constitutional provisions and thirteen Federal statutes which provide possibly unpleasant consequences of one sort or another as a result of the dual employment. If the affected person is prepared to offer detailed facts relating to the particular employment he is considering, he may secure an advisory opinion from an appropriate governmental agency. However, an advisory opinion must consist of a fitting of the particular fact situation within broad, generic legal guideposts. It is the purpose of this paper to assemble these guideposts and consider their sweep of operation to the end that an affected person may perceive the factual *areas* in which he might desirably accept dual employment.

In view of the number of constitutional provisions and statutes which expressly prohibit the dual holding of certain types of public employment, it is not surprising that the concept has arisen that employment is incompatible only when so specified by acts of Congress. Under that concept, dual office and dual employment questions are resolved *solely* on the basis of current legislation. It is submitted that such a concept is erroneous and its application can lead to results which are not legally sound. It does not at all follow, for example, that the simultaneous holding of two offices or positions under the Federal Government is legally unobjectionable if without any statutory prohibition. If

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the two offices or positions are incompatible as a matter of fact,[1] then as a matter of law a public servant may not hold them both, in the absence of express statutory authority therefor. The legal principle that one may not hold two offices which are incompatible *is of common law origin* and has been stated as follows:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in functions of the two offices in question. A public officer is, however, prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy . . . ."[2]

Thus, although there are numerous decisions to the effect that in the absence of a prohibitory statute a person holding and receiving the emoluments of an office under the Government of the United States is not thereby precluded from holding and receiving the emoluments of another,[3] an examination of cases in which it has been so held indicates that the two positions were *not* incompatible.[4] Not all decisions are subject to this criticism, however. In many the common law principle of incompatibility has been recognized and applied independent of the nonexistence of a pertinent statutory prohibition.[5] Thus, there is not in the least an inconsistency between the common law doctrine of incompatibility and the provisions of Federal statutes previously referred to. Those statutes are precise expressions by Congress of the incompatibility inherent in the holding of the dual offices prescribed.[6] To be distinguished, of course, are those statutes which except certain dual offices or positions from the application of

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[1] Two offices are incompatible when a performance of the duties of the one will prevent or conflict with the performance of the duties of the other, or when the holding of the two is contrary to the policy of the law. *Crosthwaite* v. *U.S.*, 30 Ct. Cl. 300 (1895), *rev'd on other grounds*, 168 U.S. 375 (1897). *See also* 22 Ops. Att'y Gen. 237 (1898). It has been held that the mere physical impossibility of one person performing the duties of two offices, from inability to be in two places at the same time, is not the incompatibility of common law. Bowler, Comp. Dec. 61 (1893).

[2] 67 C.J.S., *Officers* § 23a (1950).

[3] *See* 5 Comp. Dec. 9 (1898); 4 Lawrence, Comp. Dec. 486 (1883); 1 Lawrence, Comp. Dec. 380 (1880).

[4] 20 Ops. Att'y Gen. 427 (1892).

[5] *See* 30 Comp. Gen. 371 (1951); 3 Comp. Gen. 854 (1924); Bowler, Comp. Dec. 88 (1893); *id.*, at 275 (1894); 2 Lawrence, Comp. Dec. 531 (1881); 24 Ops. Att'y Gen. 12 (1902). *See also* Dig. Op. JAG 1912, p. 808.

[6] 20 Comp. Gen. 885 (1941).

the common law doctrine under discussion. The power of the legislative branch of the Government to enact laws permitting the dual holding of offices which would otherwise be incompatible cannot seriously be questioned.[7]

To complete a treatment of the common law rule, mention must be made of the legal consequence which flows from the acceptance of an office which is subsequently determined to be incompatible with an office already held. Under that rule, acceptance of the second office operates to vacate the first, *ipso facto*.[8] In the discussion following, we shall consider the extent to which this consequence has been: (1) modified by statute; (2) applied where a dual office prohibitory statute provides for no consequence; (3) applied where there is no statute; and (4) extended to situations where dual positions, not dual offices, are involved, all in cases where the individual is a member of the armed forces, or a former member in a retired status.

In any event, the continued vitality of the common law doctrine should serve as a warning to anyone offering legal advice in this area. Although not directly prohibited by statute, the simultaneous holding of public offices may result in an illegal conflict of duties and responsibilities.

I. DUAL OFFICE PROHIBITIONS

A. *An Office*

The word "office" may, and frequently does, have a different meaning as used in different statutes.[9] For example, it is well settled that the same person may not be an officer within the meaning of one statute[10] although he may be an officer within the meaning of another.[11] Therefore, the characteristics of the "office" treated in each statute and constitutional provision must be considered separately.

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[7] *See* 19 Comp. Gen. 826 (1940).

[8] Dig. Op. JAG 1912, p. 808; Bowler, Comp. Dec. 61 (1893); 1 Lawrence Comp. Dec. 380 (1880).

[9] *See Hare* v. *Hurwitz*, 248 F.2d 458 (2d Cir. 1957); 8 Comp. Dec. 87, 92 (1901); Crawford, Statutory Construction 204 (1940).

[10] *U.S.* v. *Mouat*, 124 U.S. 303 (1888).

[11] *U.S.* v. *Hendee*, 124 U.S. 309 (1888).

B. *Constitutional Prohibitions*

The word "office" as used in its constitutional sense[12] denotes a position, embracing ideas of tenure, duration, emolument[13] and duties, in the service of the United States to which an individual has been appointed by the President, by and with the advice and consent of the Senate,[14] or by the President alone, or by a court of law, or by the head of an executive department who has been authorized by law to make such an appointment.[15] "[I]t is apparent that there can be no office, [in the constitutional sense] unless it is established or recognized by the Constitution or by act of Congress . . . . The head of a Department cannot create an office . . . . The creation of an office is the exercise of legislative power . . . ."[16] If an individual is not so appointed, then he is not an officer of the United States in the constitutional sense, although, as shall be expanded upon, it does not follow at all that he is not a *public officer*.

Article I, Section 6, Clause 2 prohibits a person who holds an "Office under the United States" from being a member of Congress. Article I, Section 9, Clause 8 prohibits a person who holds "any Office" from accepting, without the consent of Congress, any emolument, office or title from a foreign government. A three-pronged analytical approach to these provisions is most helpful. To whom do they apply? What is prohibited? What are the consequences of disobedience?

1. *To whom applicable?*

Recalling the definition of an office previously advanced, and applying that definition to the constitutional provisions quoted,

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[12] [H]e [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., Art. II, Sec. 2.

[13] However, an emolument is not an element of an office of trust involving duties without profit. 2 Lawrence, Comp. Dec. 531 (1881).

[14] Officers so appointed are referred to as primary officers under the Constitution. *U.S.* v. *Germaine*, 99 U.S. 508 (1879).

[15] *U.S.* v. *Germaine*, *supra* note 14; *U.S.* v. *Smith*, 124 U.S. 525 (1888); *Hoeppel* v. *U.S.*, 85 F. 2d 237 (App. D.C. 1936). Officers appointed by the President alone, or by a court of law, or by the head of an executive department who has been authorized by law to make such an appointment are "inferior" officers under the Constitution. *Collins* v. *U.S.*, 14 Ct. Cl. 568 (1878).

[16] 4 Lawrence, Comp. Dec. 588, 607 (1883) (emphasis deleted).

we are able to determine to what members of the armed forces these prohibitions are applicable.

Regular Commissioned Officers: Officers commissioned in the regular components of the Armed Forces are required to be appointed by the President, by and with the advice and consent of the Senate.[17] Thus, they hold offices in the constitutional sense[18] whether on the active or retired list.[19]

Regular Warrant Officers: Warrant officers are appointed in the regular components by the Secretaries of the respective departments pursuant to express statutory authority.[20] Thus, they too may be considered as holding offices in the constitutional sense, whether on the active or retired list.[21]

Reserve Commissioned Officers: Reserve commissioned officers are appointed by the President alone.[22] Accordingly, when on active duty, they occupy an office in the constitutional sense.[23]

Reserve Warrant Officers: Warrant officers are appointed as Reserves by the Secretaries of the respective departments pursuant to express statutory authority.[24] Thus, they hold an office in the constitutional sense, but only when on active duty.[25]

Enlisted Men: Enlisted men are, of course, in the service of the United States, but they do not hold an appointive status, at least in the statutory sense. Accordingly, it would seem that no one would seriously suggest that they hold an office in the constitutional sense. Nevertheless, there is some military authority for the proposition that both Section 6, Clause 2 and Section 9, Clause 8 of Article I of the Constitution are applicable

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[17] *See*, for example, 10 U.S.C. 3284 (Supp. IV).

[18] As "primary" officers. *But see* JAGA 1957/1368, 18 Jan 1957, wherein it is stated that all Army officers are "inferior" officers.

[19] *U.S.* v. *Tyler*, 105 U.S. 244 (1882); 6 Bul. JAG 1; 1 Bul. JAG 152; Dig. Op. JAG 1912–40, p. 10.

[20] 10 U.S.C. 555 (Supp. IV).

[21] As "inferior" officers. Although the military departments are no longer "Executive Departments," it has not been suggested that the National Security Act of 1947 (63 Stat. 579) had the unintended effect of declassifying regular warrant officers as officers in the constitutional sense.

[22] Except that appointments as general or flag officers are required to be made by and with the advice and consent of the Senate, 10 U.S.C. 593 (Supp. IV).

[23] *U.S.* v. *Mouat*, 124 U.S. 303 (1888); 40 Ops. Att'y Gen. 301 (1943).

[24] 10 U.S.C. 597 (Supp. IV).

[25] *See* Subsec. 29(d), Act of 10 Aug 1956, 70A Stat. 632.

to enlisted men of the armed forces, whether active or retired.[26] It is suggested that the result reached in one such opinion (that a retired enlisted man of the Navy is prohibited from accepting the office of mayor of a city in the Philippine Islands), is quite correct, not because Article I, Section 9, Clause 8 applies, but because the two roles are factually incompatible.[27]

2. *What is prohibited?*

Article I, Section 6, Clause 2 prohibits membership in either house of Congress. That is obvious and requires no discussion.

Article I, Section 9, Clause 8, so far as is here pertinent, prohibits the acceptance of any "present, Emolument, Office, or Title, of any kind whatever" from a foreign government, without the consent of Congress.[28] It has been held to prohibit acceptance of an appointment as mayor of a city in the Philippines, as previously mentioned, and the acceptance of a position with the Government of Brazil to assist in establishing a Joint War College, at 12,000 Brazilian dollars per annum;[29] but not to prohibit acceptance of an unofficial position as member of a board of honorary advisors to a foreign government, without compensation.[30] Recently, it has been suggested that the United Nations might be a foreign state within the prohibition of Clause 8, *supra*, so as to preclude acceptance of a position with that organization.[31]

3. *What are the consequences?*

With respect to Article I, Section 6, Clause 2, the Attorney General has ruled that it is for the Congress to decide, case by case, whether action should be taken to terminate a member's

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[26] Dig. Op. JAG 1912–40, p. 10; Op. JAGN 1951/10, 18 Oct 1951, 1 Dig. Ops., Ret., § 81.1.

[27] ". . . . The time of one in the military service is not his own, however limited the duties of the particular assignment may be, and any agreement or arrangement for the rendition of services to the Government in another position or employment is incompatible with his military duties actual or potential." 18 Comp. Gen. 213, 217 (1938). An enlisted man on active duty may not, in the absence of specific statutory authority, be employed in another capacity under the Government and receive the pay therefor. 33 Comp. Gen. 368 (1954); 15 Ops. Att'y Gen. 362 (1877). The two roles are incompatible. 24 Comp. Dec. 209 (1917).

[28] Note that Clause 8 prohibits the acceptance of any emolument as well. The Clause is applicable to reserve personnel. 10 U.S.C. 1032 (Supp. IV).

[29] 6 Bul. JAG 1.

[30] Dig. Op. JAG 1912–40, p. 10. If an oath were involved, however, a contrary result would no doubt obtain.

[31] JAGA 1956/9064, 17 Dec 1956.

status as a Congressman upon his entry into the Armed Forces.[32] Although the roles may well be incompatible, policy considerations warrant deference to Congressional action or inaction in this situation.

With respect to Article I, Section 9, Clause 8, it is considered that in view of the incompatibility present, acceptance of an office or title "of any kind whatever" would operate to vacate, *ipso facto*, the commission of an officer to whom this clause is applicable.[33] It is believed that such a result would not be contrary to public policy since the holding of an office in a foreign government would seriously prejudice the officeholder's allegiance to the United States.

C. *Statutory Prohibitions*

1. *Title 10, United States Code, Subsection 3544(b) (Supp. IV)*

Title 10, United States Code, Subsection 3544(b) provides:

> ". . . .
>
> "Except as otherwise provided by law, no commissioned officer on the active list of the Regular Army 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 appointment in the Army."[34]

This subsection is a codification of former Section 1222 of the Revised Statutes.[35] It has been said that the evil which this provision was intended to forestall was that the military power would "grow to be paramount to the civil, instead of the civil being paramount to the military."[36] An analysis of its provisions can be developed by asking and answering the same three questions utilized in the discussion of the constitutional provisions just concluded.

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[32] 40 Ops. Att'y Gen. 301 (1943).

[33] *Accord*, JAGA 1956/2140, 24 Feb 1956. *But see* 37 Comp. Gen. 138, 140 (1957), wherein it was decided that a court crier was in receipt of an emolument from a foreign government so as to deny him the right to be paid federal compensation as a town crier.

[34] An identical statute is applicable to commissioned officers of the Regular Air Force. 10 U.S.C. 8544(b) (Supp. IV). No similar statute applies to Navy, Marine Corps, or Coast Guard officers.

[35] 20 Comp. Gen. 885 (1941).

[36] Remarks of General Logan, Chairman, Committee on Military Affairs, to the House of Representatives, 41st Cong., 2d Sess., as set forth at 29 Ops. Att'y Gen. 298, 299 (1912).

a. *To whom applicable?*

By its provisions, it is applicable only to commissioned officers of the Regular Army on the active list.[37]

b. *What is prohibited?*

The holding of a "civil office," in contrast to a military office, is prohibited. But what constitutes a "civil office"? The statute seems to intend a rather broad coverage, for it prohibits the holding of such an office "whether under the United States, a Territory or possession or a State." It will be recalled that the term "office" has previously been defined when used in its constitutional sense. Is it so used here? In determining what is meant by the term "civil office," regard must be had to the purpose of this statute rather than to the senses in which the word "office," or the term "civil office" has been used in other legislation.[38] The purpose of the statute was to disencumber Regular Army commissioned officers of official duty not belonging to their military profession.[39] Accepting the foregoing as a valid statement of Congressional intent, it is to be concluded that the term "office" is not here used in the restricted constitutional sense, but rather is used in a considerably broader, more liberal sense.[40] At the risk of indulging in semantics, a label should be found and affixed to the sense in which "office" is used here. The label "public office" has been considered acceptable.[41] If "civil office" means "public office," then it may more readily be defined. The chief elements of a "public office" are: (1) the specific position must be created by law; (2) there must be certain definite duties imposed by law, which duties continue though the person be changed; and (3) those duties must involve the exercise of some portion of the sovereign power.[42] If all three elements are present, the position may be considered a public office and Subsection

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[37] Although Rev. Stat. § 1222 formerly referred to any "officer of the Army on the active list," the present codification effected no change in substantive law. Rev. Stat. § 1222 has consistently been interpreted to be applicable only to commissioned officers of the Regular Army on the active list. 39 Ops. Att'y Gen. 197 (1938); Dig. Op. JAG 1912–40, p. 117. However, in one instance, it was held that the "spirit" of the statute applied to enlisted men of the Army (Dig. Op. JAG 1912, p. 85); and, of course, it does, for the "spirit" is the common law concept of incompatability.

[38] 35 Ops. Att'y Gen. 187 (1927).

[39] 13 Ops. Att'y Gen. 310 (1870).

[40] 18 Ops. Att'y Gen. 11 (1884).

[41] *See* 29 Comp. Gen. 363 (1950); 35 Ops. Att'y Gen. 187 (1927).

[42] *U.S.* v. *Maurice*, 2 Brock 96 (1823); 22 Ruling Case Law 388.

3544(b) applies. Anything less is a mere public employment not affected by the provisions of the statute. As regards the requirement that the position be created by law, the words "by law" mean pursuant to legislative action, either expressly or by necessary implication.[43] If the position is created by an administrative agency of a local government, then the position is not a public office, but merely a public employment, and Subsection 3544(b) is not applicable.[44] Returning to the third listed element of a "public office," detection of the exercise of some portion of sovereignty in the discharge of the duties of the civil position is not always elementary. If the position has been constituted with reference to important public needs and the discharge of an important public duty is involved, then the element can be considered to be present.[45] Certainly, where the civil position requires the substantial efforts of the incumbent and a substantial amount of his time, there is a natural tendency to resolve any doubts as to whether a public office or a public employment is involved in favor of the former. By so doing the legislative purpose of Subsection 3544(b) is served.[46]

In defining the term "civil office" and equating it to the term "public office," emphasis has thus far been given to the second of the two words which comprise the term. By now it is only fair to ask—what public office? Any public office, or inasmuch as Subsection 3544(b) says "whether under the United States, a Territory or possession, or a State," just offices under the four mentioned government entities? Under Section 1222, Revised Statutes, before codification, it was well settled that the answer was *any* public office. Thus it was held that the statutory inhibition applied where a municipality[47] or even the United Nations[48] was the

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[43] 29 Comp. Gen. 363 (1950).

[44] *Ibid.*

[45] 18 Ops. Att'y Gen. 11 (1884). The relative importance of the civic duties to be performed, *standing alone*, does not mark the line between public office and the public employment. 29 Comp. Gen. 363 (1950). All three elements must be present.

[46] *Ibid.* The fact that the governmental entity involved does not consider the civil position to be in office under local law is of some significance, however. 25 Comp. Gen. 377 (1945). If an oath is involved, however, there is little alternative but to regard the position as a public office. 25 Comp. Gen. 377 (1945); 1 Comp. Gen. 219 (1921); Bowler, Comp. Dec. 275 (1894).

[47] 18 Ops. Att'y Gen. 11 (1884); Dig. Op. JAG 1912–40, pp. 115, 117; JAGA 1956/3467, 16 Apr 1956.

[48] 25 Comp. Gen. 38 (1945); See also *Opinion to the Governor*, 116 A. 2d 474 (R.I. 1955).

employer. At the time of these opinions, however, Section 1222 provided: "No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall . . . ." Although the objective of the drafters of new Title 10 of the United States Code was to restate existing law, not to make new law,[49] the fact remains that by the addition of the phrase "whether under the United States, a Territory or possession, or a State," something new has been added. The addition, notwithstanding the stated purpose of Congress, does suggest a conclusion that the application of the statute is henceforth to be limited to public offices under the four mentioned government entities. If so, do prior opinions holding the statute to prohibit the holding of an office under a municipality and under the United Nations merit reconsideration? If a basic principle of statutory construction is accepted, namely, that where a statute is plain, certain, and free from ambiguity, a bare reading suffices and interpretation is unnecessary,[50] then there seems no alternative but to conclude that Subsection 3544(b) no longer prohibits the holding of an office under a municipality, a county, or an international organization. The ultimate question, however, is not whether Subsection 3544(b) prohibits the holding, but whether the holding is legally objectionable. When the question is thus stated, more than just Subsection 3544(b) must be considered. The common law doctrine of incompatibility is very much in point. Would not it be incompatible as a matter of law for any officer of the Armed Forces on active duty to accept an elective position under a municipal or county government and purport to discharge the duties thereof? Would not his oath to the Federal Government be in opposition to any oath he would, more than likely, be required to take under the local government? These questions should be answered in the affirmative, for that which was recognized as incompatible under Section 1222 remains incompatible—the intent of the codification not being to change substantive law. To date, however, no definitive opinion has been expressed.[51]

There is one other area in which Subsection 3544(b) is not applicable and that is within foreign countries; *i.e.*, outside the

[49] Sec. 49(a), Act of 10 Aug 1956, 70A Stat. 640.

[50] Crawford, Statutory Construction § 158 (1940).

[51] In 1952, The Judge Advocate General of the Army concluded that, as far as the Department of the Army is concerned, a reserve officer on active duty may hold an elective municipal office provided the duties of the civil office do not interfere with his military duties. JAGA 1952, 2633, 19 Mar 1952, 1 Dig. Ops., Res. F., § 101.1.

territorial and legislative jurisdiction of the United States and of Congress. For example, it has no application to the performance of civil duties by officers of the Army in occupied territory.[52] Specific statutory exceptions to Subsection 3544(b) are detailed *infra* in Appendix I.

The application of Subsection 3544(b) may be illustrated by posing a variety of factual situations and inquiring whether a Regular Army commissioned officer on the active list would be prohibited from accepting the civil position to be described.

Q—May he accept a position as park commissioner of the City of Philadelphia? The position and the duties attendant thereto have been established by the legislature of Pennsylvania. The park commissioner receives no compensation for his services.

A—No. The position of park commissioner is a public office. The absence of compensation does not detract in the least from the foregoing conclusion.[53]

Q—May he accept a position as trustee of the Cincinnati Southern Railway? The trustee is appointed by the judge of the superior court of the city. His duties are prescribed by statute. His term as trustee is undefined, although provision is made for a successor.

A—No. It is a public office. The duty is a *continuing one, is defined by rules prescribed by the State, and not by contract.* The person to perform them is *appointed by a department of the State,* and the duties of the place continue, *though the person be changed.*[54]

Q—May he accept a position on a "board of experts" created by a city ordinance to determine the most durable and best pavement for the streets of the city?

A—No. The board is constituted with reference to an important public need and is to discharge an important public duty.[55]

Q—May he accept a position as Commissioner of Roads for Alaska? The position has been created by an administrative order of the Secretary of the Interior. The duties of the position

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[52] ". . . . This is for the reason that military occupation is an incident of command and so comes within the plenary and exclusive jurisdiction of the President as commander in chief . . . . Thus, assignments of officers of the Army to be collectors of customs in Cuba and Porto Rico, when under military occupation, were assignments to military duty and not to civil offices within the meaning of section 1222 R.S." Dig. Op. JAG 1912, pp. 812, 813.

[53] 13 Ops. Att'y Gen. 310 (1870).

[54] 15 Ops. Att'y Gen. 551 (1876).

[55] 18 Ops. Att'y Gen. 11 (1884).

are prescribed by the Secretary. The duration is unlimited, with provision for a successor.

A—Yes. The position is not created by the legislative branch of the Government and is not, therefore, a "civil office." The fact that the position is of great public importance does not, of itself, require a contrary result.[56]

Q—May he be approved for designation as the executor of a will by a local United States probate court?

A—Yes. The duties of the position are personal to the incumbent and involve no exercise of sovereignty.[57]

Q—May he accept an appointment as ambassador to the Vatican?

A—No. Here all three elements of a public office are clearly identifiable.[58]

Q—May he accept the office of colonel in the National Guard of the Commonwealth of Massachusetts?

A—Subsection 3544(b) does not prohibit his accepting the position, for a military office, as distinguished from a "civil" office, is involved.[59] Query? Subsection 3544(b) having been determined not to prohibit the acceptance, does it follow that no legal objection exists to the acceptance? Are not the offices involved in fact incompatible?[60]

c. *What are the consequences?*

If he accepts such a civil office or exercises its functions, his Regular Army appointment is terminated. That is the language of the statute. "Terminated" means vacated automatically.[61] The words "the exercise of its functions" are used in order that it may not be necessary to prove in every case that an officer of the Army entering upon a civil office had qualified according to all the formalities of law, but rather, that the holding of the office

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[56] 29 Comp. Gen. 363 (1950). *But see* 25 Comp. Dec. 666 (1919) wherein the employment of a Regular Army officer while on leave of absence, to conduct a special investigation for Tariff Commission, was held incompatible.

[57] 7 Bul. JAG 173. *Cf.* JAGA 1952/6028, 12 Jul 1952. 2 Dig. Ops., Mil. Pers., § 83.1.

[58] JAGA 1951/6551, 23 Oct 1951.

[59] 29 Ops. Att'y Gen. 298 (1912).

[60] *Id.*, at 301; JAGA 1957/1039, 8 Jan. 1957.

[61] 1 Comp. Gen. 499 (1922).

whether by formal qualification or otherwise should have the effect of vacating his appointment in the Regular Army.[62]

2. Section 2 of the Act of 31 July 1894, as amended

A second dual-office statutory prohibition is Section 2 of the Act of 31 July 1894,[63] as amended. That act, hereinafter referred to as the 1894 Act, provides:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Air Force, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Air Force, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement."[64]

Prior to the enactment of this statute, although the receipt of extra compensation for the performance of the duties of one office was prohibited, there was no impediment to the receipt of dual compensation by appointment to more than one office.[65] The statute was designed to correct this condition.[66]

a. *To whom applicable?*

It may be applicable to those who hold an office under the Federal Government if the compensation attached to that office equals or exceeds $2,500. Certain retired military personnel are exempted from its application, however. Once again our consideration must be directed to the term "office" and to an understanding of its meaning, for if "an office" is not involved the statute has no

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[62] Dig. Op. JAG 1912, p. 809. In view of the expressed language of the statutes, it is considered that vacation would result even though the officer deliberately accepted, or validly undertook, the functions of the office in order to evade military jurisdiction. *Cf.* 25 Comp. Gen. 241 (1945); JAGA 1951/1025, 16 Apr 1951.

[63] 28 Stat. 205.

[64] 5 U.S.C. 62 (1952).

[65] *U.S.* v. *Saunders*, 120 U.S. 126 (1887); *Converse* v. *U.S.*, 62 U.S. 463 (1859); 19 Ops. Att'y Gen. 283 (1889).

[66] *Pack* v. *U.S.*, 41 Ct. Cl. 414, 428 (1906).

application—to anyone! The term "office" as used in this statute is a broad general term which includes any person holding a place or position under the Federal Government, which place or position embraces ideas of tenure, duration, assigned duties, and fixed compensation payable from government funds.[67] Therefore, the 1894 Act may apply to persons who are not officers in the constitutional sense,[68] and who are not, in a strict sense, "public officers."[69] The category of persons in the Armed Forces to whom the act may apply may be established by ascertaining if (1) he holds an office within the meaning of the act; (2) the annual compensation attached to that office equals or exceeds $2,500; and (3) he is not excepted from the application of the act by its terms or by the terms of some other act of Congress.

Regular commissioned officers on the active list: As these officers hold an office in the constitutional sense, obviously the act has application to them. Coupled with Title 10, United States Code, Subsection 3544(b), it presents an imposing obstacle to full-time Federal civil employment.

Regular commissioned officers on the retired list: Unless "retired for injuries received in battle or for injuries or incapacity incurred in line of duty,"[70] and except where elected to public

[67] See *U.S.* v. *Hartwell*, 6 Wall. 385, 393 (1868); 22 Ops. Att'y Gen. 184 (1898); 19 Comp. Gen. 751 (1940); 1 Bul. JAG 152. By "duration" something more than brief or temporary is meant. Thus, employment on a part-time, or intermittent, or "when actually employed" basis does not amount to an office. 31 Comp. Gen. 414 (1952).

[68] 8 Comp. Dec. 87 (1901).

[69] As a practical matter, the Comptroller General has ruled such unimpressive positions as that of Associate Field Representative for the Federal Security Administration, P–3, $3,200 per annum (21 Comp. Gen. 1129 (1942)); of wharf builder, $2.20 per hour (36 Comp. Gen. 803 (1957)); and of regular mail carrier (29 Comp. Gen. 277 (1949)); (but not of temporary substitute or of career substitute postal carrier (Ms. Comp. Gen. B–130882, 18 Mar 1957)) to be "officers" within the meaning of the 1894 Act.

[70] An officer retired for reasons other than physical disability, ordered to active duty, and subsequently granted retired pay computed under Subsection 402(d), Career Compensation Act of 1949, 10 U.S.C. 1401 (Supp. IV), by reason of physical disability remains subject to the 1894 Act. His retired status and the original basis for retirement remain unchanged. JAGA 1955/10273, 29 Dec. 1955, 5 Dig. Ops. (No. 3), Ret. § 81.1. Although the statute requires that the disability be incurred in line of duty, as a practical matter all retirements of officers by reason of physical disability are premised upon in line of duty determinations; except that a few officers were retired under former Section 1252, Revised Statutes, for disabilities incurred not in line of duty. JAGA 1952/4481, 15 May 1952.

office[71] or appointed to office by the President, with the advice and consent of the Senate,[72] the Act may apply to them.[73] Retired pay is "compensation."[74] The exception made in the case of officers retired for the mentioned physical disabilities[75] holds good as long as the officers remain on inactive duty. If they should be ordered to active duty, the Act would apply.[76]

Reserve commissioned officers on extended active duty: These officers hold a position under the Federal Government. Their status on extended active duty embraces ideas of tenure and duration. Their duties are assigned in the same manner as Regulars and their compensation is fixed. They therefore hold an office within the meaning of the 1894 Act.[77]

Reserve commissioned officers in a retired status: Not only are Reserve commissioned officers who have been retired for physical disabilities excepted from the application of the 1894 Act (by its terms), but all Reserve officers who have been placed on a retired list, or who are receiving retired pay in accordance with law,

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[71] There is no provision of law which stands in the way of a Regular Army retired officer becoming President of the United States. JAGA 1952/3240, 2 Apr 1952.

[72] It is not enough that he authorizes a Secretary to appoint. 21 Comp. Dec. 436 (1914).

[73] Unless, of course, the authorized retired pay amounts to less than $2,500. *U.S.* v. *Tyler*, 105 U.S. 244 (1882); 11 Comp. Dec. 422 (1905); 30 Ops. Att'y Gen. 298 (1914).

[74] At one time, the Court of Claims considered retired pay not to be compensation, but merely a pension. *Geddes* v. *U.S.*, 38 Ct. Cl. 428 (1903). *See also* Dig. Op. JAG 1912, p. 994. The accounting officers of the Government have expressly rejected the Geddes case, however, 1 Comp. Gen. 219 (1921); 19 Comp. Dec. 160 (1912).

[75] The percentage of disability is immaterial. JAGA 1956/4725, 29 May 1956.

[76] 5 Comp. Gen. 548 (1926).

[77] 1 Comp. Gen. 65 (1921); 24 Comp. Dec. 604 (1918); 39 Ops. Att'y Gen. 197 (1938).

are similarly excepted from its application by the language of Subsection 29(d), Act of 10 August 1956.[78]

Regular warrant officers on the active list: Their status under the Federal Government is much like that of commissioned officers. Accordingly, they too are considered to hold an office within the meaning of the 1894 Act.[79]

Regular warrant officers on the retired list: Their status under the 1894 Act is identical with that of Regular Army commissioned officers on the retired list. They too are "retired officers" within the exception of the ultimate sentence of the act.[80]

Reserve warrant officers on extended active duty: Unprotected by Subsection 29(d), *supra*, their status, so far as the Act of 1894 is concerned, is identical with that of Reserve commissioned officers.

Reserve warrant officers in a retired status: They are not on active duty. Thus Subsection 29(d), *supra*, applies and the Act of 1894 does not.[81]

Enlisted men on active duty: Although it is somewhat difficult to conclude from the language of the 1894 Act that enlisted men on active duty do not hold an office within the meaning of the act,[82] the act has been so construed. By invocation of the doctrine of incompatibility, however, a result is reached which is identical with that which would be reached were the act to be applied. That doctrine has been consistently invoked to deny enlisted men on active duty compensation from Federal civil employment.

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[78] "When he is not on active duty, or when he is on active duty for training, a Reserve is not considered to be an officer or employee of the United States or a person holding an office of trust or profit or discharging any official function under, or in connection, with, the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity." If retired, he is not on active duty and thus holds no office. *See* 28 Comp. Gen. 367 (1948); JAGA 1953/7480, 11 Sep 1953, 3 Dig. Ops., Ret., § 71.1, p. 782; 8 Bul. JAG 25. The term "Reserve" as used in Subsection 29(d), *supra*, does not include ROTC cadets. 35 Comp. Gen. 531 (1956). With respect to so-called Title III retirement (now 10 U.S.C. 1331 (Supp. IV)), *see* 28 Comp. Gen. 367 (1948); JAGA 1953/7480, *supra*.

[79] 23 Comp. Gen. 445 (1943); Dig. Op. JAG 1912–40, p. 119.

[80] 29 Comp. Gen. 312 (1950); 1 Bul. JAG 155; JAGA 1956/1480, 3 Feb 1956; JAGA 1955/3623, 12 Apr 1955.

[81] JAGA 1954/9039, 10 Nov 1954.

[82] If enlisted men do not hold an office, why was it necesary to except retired enlisted men from the application of the Act?

Enlisted men in a retired status: By its terms, all enlisted personnel of the armed forces who have been retired "for any cause" are excepted from its application.

Reserve personnel on inactive duty or active duty for training: Subsection 29(d), *supra*, exempts any Reservist, whether officer or enlisted, from the application of the 1894 Act when not on active duty or when on active duty for training.[83]

Enlisted personnel retired as such, but advanced to a warrant or commissioned status on the retired list: Not infrequently enlisted personnel serving on active duty as such hold, simultaneously, reserve commissions or warrants, and have served on active duty, at one time or another, in a commissioned or warrant officer status. Then, too, some enlisted personnel have served in a commissioned or warrant officer status under a temporary, war-time appointment. Subject to certain conditions, many of these enlisted personnel and warrant officers, upon retirement, are entitled to be advanced on the retired list to the highest grade satisfactorily held.[84] If so advanced, do they then hold an office within the 1894 Act? The accounting officers of the Government have consistently answered this question in the negative, concluding that they continue to hold a retired enlisted status for the purposes of the 1894 Act. The desirability of such a result negates discussion of its soundness.[85]

In addition to Subsection 29(d), previously mentioned, certain Reserve personnel are benefited by other acts of Congress so far as the application of the 1894 Act is concerned. Reserve personnel on terminal leave from the armed forces may accept employment or re-employment with the Government without suffering the consequences of the 1894 Act,[86] and, conversely, civilian employees of the United States Government who enter the armed forces may receive accrued leave compensation from their civilian position in addition to their military pay.[87]

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[83] The term "active duty for training" would appear to mean the annual 15-day summer encampment.

[84] With respect to the Army, *see* 10 U.S.C. 3964 (Supp. IV).

[85] 36 Comp. Gen. 803 (1957); 28 Comp. Gen. 727 (1949); 26 Comp. Gen. 271 (1946); Op. CCCG 1953/12, 4 Aug. 1953, 3 Dig. Ops., Ret., § 71.1, p. 729; *id.*, 1951–2, 2 Nov 51, 4 Dig. Ops., Ret., § 71.35. But with respect to certain Fleet Reserve and Fleet Marine Corps Reserve personnel, *see* 35 Comp. Gen. 657 (1956).

[86] Sec. 2, Act of 1 Aug 1941, 55 Stat. 616, as amended, 5 U.S.C. 61a–1 (1952).

[87] *Id.*, at § 61a.

To this point in the discussion, we have presupposed a holder of a military office compensated over $2,500 annually who desires to hold another governmental position. However, it must be emphasized that the statute is applicable if *either* the military office presently held *or* the contemplated position is compensated at $2,500 or more annually.[88]

In addition to the exemptions contained in the provisions of the 1894 Act, Congress has enacted various items of legislation specifically excepting certain offices from dual office prohibitions. (See Appendix II.) However, the exemptions in the act itself and the relief in external legislation relate only to the basic permissibility of the dual holding. *They do not authorize receipt of compensation from both offices without express additional language so providing.* Thus, the solution of dual office problems does not terminate upon the discovery of statutory authority for the holding of the two offices by one man. Research must next be directed toward *the amount of compensation* the individual may receive from the Government in a dual capacity.

b. *What is prohibited?*

The Act prohibits the appointment to or the holding of a second Federal office of or by a person then holding a Federal office, if the compensation attached to either of the two offices amounts to $2,500 or more; provided, of course, the individual is not otherwise exempted. It is now appropriate to explore avenues perhaps available to military personnel to accept other public employment without violating the statute.

First, we have indicated that the Act prohibits the dual holding of "positions" in the government, although they may not amount to "offices" in the constitutional sense. However, the Comptroller General has ruled that a mere *temporary* (*i.e.*, part-time, intermittent, or *per diem*) employment is not such a position.[89] Temporary employment does not embrace ideas of tenure. It is opposed to duration and continuity. Indicative of a temporary employment are duties which are intermittent and part-time, compensation

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[88] 13 Comp. Gen. 60 (1933); 1 Bul. JAG 152. *Contra*, 11 Comp. Dec 448 (1905). *See also* 39 Ops. Att'y Gen. 197 (1938) indicating that where two offices are involved, but the 1894 Act is not applicable for the reason that the compensation attached to each office is less than $2,500, the doctrine of incompatibility remains to be considered.

[89] *See* 31 Comp. Gen. 414 (1952); 19 Comp. Gen. 891 (1939); 5 Bul. JAG 329. This is true even though the compensation derived from the temporary employment amounts to more than $2,500 per year. 11 Comp. Dec. 236 (1904).

for which attaches only when the individual is actually performing duties.[90] Perhaps a better understanding of the Act and how it is applied can be reached by contrasting a position which amounts to an office with one that amounts to no more than a mere employment. Let us take a situation where a Regular Army commissioned officer, retired for reasons other than physical disability, is offered employment as a special consultant with a local Public Health Service hospital. His duty is to consult, when requested, but not more than one day a week, with medical personnel of the hospital on special cases. He is to be paid only on those days when he participates in consultation. His employment is effected by a contract with the director of the Hospital. May he accept the employment?[91] Does it amount to an office? It seems to be reasonably clear here that an intermittent employment is involved. The duties are not prescribed by government fiat and the compensation is not fixed by law but is fixed by contract. In such a case the position would not be considered an office and the mentioned officer could accept it without running afoul of the 1894 Act.[92]

A second situation may be created by changing the facts of the first to provide that the officer is to consult at the hospital three days a week, to assist in surgical operations as directed by the head of the hospital, and to perform such other duties as are assigned him for a period of three years; and that his compensation is set at so much a week. In this situation it is quite likely that the accounting officers of the Government would term the position an office. The fact that the contract might seek to avoid that result by expressly referring to the employment as temporary or part-time would be ineffectual. The Comptroller General is not at all reluctant to push an assigned label aside and decide for himself whether an employment is in fact temporary.[93]

Second, since the Act is not applicable unless some compensation is "attached" to each office, may a retired officer avoid the prohibitions of the Act by waiving either his retired pay or his

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[90] "Regardless of whether compensation be fixed on a fee basis or on a per diem basis, the appointment of a person as an expert or consultant on a 'when actually employed' basis does not constitute an appointment to an 'office to which compensation is attached,' within the meaning of the [1894 Act]. . . ." 23 Comp. Gen. 275 (1943) (syllabus). 36 Comp. Gen. 655 (1957); 30 Comp. Gen. 406 (1951); JAGA 1954/4011, 15 Apr 1954.

[91] It is assumed that the officer draws $2,500 or more retired pay.

[92] *See* 26 Ops. Att'y Gen. 460 (1907). *Cf.* 6 Comp. Gen. 712 (1927).

[93] *See* 1 Comp. Gen. 219 (1921) (employment for one year, not temporary); JAGA 1955/3623, 12 Apr 1955 (six weeks, temporary).

compensation from the civilian office, whichever would be most advantageous? He may not. The salary or pay of an office specifically fixed by or pursuant to a statute may not be waived, relinquished or witheld by administrative action.[94] Even assuming the possibility of a waiver, the dual office restrictions would yet apply since a salary would "attach" to the office though the particular office holder should relinquish his privilege to receive it.[95] The result is unfortunate because it operates to penalize a retired officer in his effort to secure active, gainful employment, and because it denies to the Government the services of experienced, highly qualified and loyal personnel.

Third, if the civilian position has no compensation attached, such as an honorary position, the Act imposes no impediment to acceptance.

Fourth, The Act prohibits the holding of dual *Federal* offices. Both offices must be Federal; if one is not, then the act is inapplicable. Obviously, the holding of a state or municipal office would not be prohibited by the Act, although other statutes and other considerations would enter into a final decision whether the holding would be legally unobjectionable. Not so obvious is the status of employment with a nonappropriated fund activity, such as a post exchange. Until recently, it had been held to constitute an office within the meaning of the 1894 Act.[96] The Comptroller General has now decided otherwise in an 11 October 1956 decision which, although conceding that nonappropriated fund activities are Federal instrumentalities (Federal funds thereby being involved), concluded that persons employed by such activities enjoy no tenure of office and exercise no function of Government.[97] The foregoing decision may well warrant reconsideration of a 1944 opinion of the Comptroller General which decided that the 1894 Act prohibited employment with a Government corporation.[98] Other decisions and opinions to the effect that employment with

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[94] 14 Comp. Gen. 289 (1934); 23 Comp. Gen. 109 (1943); 20 Comp. Gen. 41 (1940).

[95] 14 Comp. Gen. 289 (1934); 8 Comp. Dec. 87 (1901); 1 Bul. JAG 152. Conversely, if there is no compensation attached to the second office, the 1894 Act is not applicable. Dig Op. JAG 1912–40, p. 118. The fact that the officer was on a leave without pay status from the first office makes no difference. 2 Comp. Gen. 649 (1923).

[96] *See* 2 Bul. JAG. 464; JAGA 1955/3623, 12 Apr 1955.

[97] 36 Comp. Gen. 309 (1956).

[98] 23 Comp. Gen. 815 (1944).

Army Emergency Relief,[99] the National Research Council [100] and the National Home for Disabled Soldiers[101] does not constitute an office, make the result reached in the case of a Government corporation all the more difficult to rationalize. It should be observed that the decision of the Comptroller General in the case of nonappropriated fund employment was reached despite the fact that Federal funds were involved. It was emphasized in that decision that it was the nature of the position held, not the source of the funds with which he was compensated, that was critical in the resolution of the question whether an office was involved. However, several prior decisions had held that although a position embraced ideas of tenure, duration etc., it was not an office within the meaning of the 1894 Act, because the compensation was not paid from Federal funds identifiable as such.[102] Are the cited decisions now to be re-examined and a contrary result reached in each case? It is submitted that the decision in the nonappropriated fund case can be reconciled with that reached in the cited decisions rather simply by stating three propositions:

Premise: The 1894 Act prohibits the holding of two Federal offices.

Conclusion (1): If the position does not constitute an office, then the source of the funds is immaterial (this is the nonappropriated fund case).

Conclusion (2): If the position constitutes an office, it is not a Federal office unless the compensation is in the form of Federal funds identifiable as such (the cited cases).

c. *What are the consequences?*

One of two consequences must result; either the second appointment is a nullity, or the second appointment is valid and the first office vacated. It will be recalled that under the common law as it has survived in this country, no person was permitted to hold two incompatible public offices. It was well established that the acceptance of an office by one who already held another office which was incompatible with the second, *ipso facto* vacated the

[99] A.E.R. is not an agency of the Government. 26 Comp. Gen. 192 (1946).

[100] JAGA 1955/4103, 21 Apr 1955, 5 Dig. Ops., Ret., § 81.1.

[101] 8 Comp. Dec. 443 (1902).

[102] 27 Comp. Gen. 12 (1947); 26 Comp. Gen. 205 (1946); 25 Comp. Gen. 868 (1946); 20 Comp. Gen. 179 (1940); 14 Comp. Gen. 916 (1935). *See also* JAGA 1955/10227, 22 Dec 1955, 5 Dig. Ops., Ret., § 71.1 In all the cited cases the employment was with either a state or the United Nations in an activity subsidized by Federal funds. The funds were considered to have lost their identity as Federal upon receipt by the state or the U.N.

first office without any other act or proceeding.[103] As the 1894 Act may be considered a statutory expression of incompatibility, with provisions for exceptions, it would seem to follow that the common law rule of vacation of the first office will follow as a consequence in all cases. When applied to retired military personnel such a consequence is indeed a drastic one and, not unnaturally, it is to be avoided if at all possible. Thus there have developed two lines of decisions by the Comptroller General. One holds that the purported appointment to a second office is a nullity; that the individual remains in a *de jure* status in the first office and acts merely *de facto* in the second; and that he is entitled to no compensation for services performed in the second.[104] The second line of decisions holds that the second appointment is valid[105] and that its acceptance operates to vacate the first office.[106] This degree of flexibility, although difficult to sustain on legal grounds, as a practical matter gives the Comptroller General broad descretion in passing upon the disposition to be made of a claim for money by a person who has occupied two Federal offices at the same time.[107] Perhaps his inclination to treat the appointment of a retired member of the military to a civil office in the Government as a nullity is prompted by a reluctance to interfere with matters pertaining to the status of military personnel, commissioned officers especially. Historically, commissioned officers of the Armed Forces have occupied a status to which the civil common law was not always applicable. Thus, in the absence of

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[103] Bowler, Comp. Dec. 61 (1893).

[104] 36 Comp. Gen. 803, 804 (1957) (void *"ab initio"*); 24 Comp. Gen. 52 (1944); 21 Comp. Gen. 1129 (1942); 20 Comp. Gen. 288 (1940); 14 Comp. Gen. 179 (1934); 10 Comp. Gen. 85 (1930); 26 Comp. Dec. 49 (1919); 3 Bul. JAG 136. *See also* 2 Bul. JAG 378. All these decisions involved the holding of a civilian-type position in the Federal Government by retired military personnel. Though an individual is held not entitled to compensation for his services under a second office, he may yet receive reimbursement for personal expenses incurred, such as traveling expenses and the like. 26 Comp. Gen. 15 (1946); 15 Comp Gen. 828 (1936).

[105] *McMath* v. *U.S.* 51 Ct. Cl. 356, 361 (1916).

[106] 32 Comp. Gen. 448 (1953); 19 Comp. Gen. 751 (1940); 1 Comp. Gen. 65 (1921); 24 Comp. Dec. 604 (1918); 23 Comp. Dec. 287 (1916). *See also* 1 Bul. JAG 152. In two of the cited cases the facts involved Federal officers who entered the military services as commissioned officers in time of war. Certainly public policy would not have countenanced a result other than that which the Comptroller of the Treasury chose to reach.

[107] One decision, now discredited, permitted the officer *to elect* which of the two positions he would hold. 11 Comp. Dec. 236 (1904).

more specific language in the 1894 Act, the accounting officers of the Government, concerned primarily with accounting for expenditure of public funds, may quite naturally doubt whether they have the authority summarily to decide that an officer of the armed forces is divested of his commission and reduced to the status of a private citizen.[108] They need not go that far in order to account for public funds. Whether the courts would recognize the validity of the alternatives the Comptroller General has chosen to apply is uncertain. Prompted by considerations of public policy, the courts may well treat the prohibition contained in the 1894 Act as a directive to Government officials having the authority to appoint individuals to office, and not as a sanction to be applied against persons who hold two offices. If so construed, the appointment to a second office would be a nullity, and the individual's status as a retired member of the military would remain intact[109] —a desirable result.

This concludes a discussion of the dual office statutes of general application. A few illustrative problems involving the application of the act are presented, in question and answer form, on the following pages. There are a few additional statutes which prohibit some military personnel from holding certain specified positions in the Federal Government. As these statutes are of specific and infrequent application, they require no discussion. They are simply listed and cited for reference purposes at Appendix III, hereto.

d. *Problems illustrating the 1894 Act*

Q—A regular warrant officer retired for length of service ($2,400 per annum) is offered full-time employment with the Government as a warehouseman, GS–2 ($2,450 per annum). Is there a legal objection to his accepting the employment?

A—No. Although two offices are involved, neither his retired pay nor the compensation attached to the civil position amounts to $2,500. The act is not concerned with *combined* compensation (39 Op. Att'y Gen. 197 (1938)). Presumably there is no incompatibility.

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[108] For example, the Comptroller General once indicated that "matters respecting retired status primarily are for determination by the Department of the Army." 29 Comp. Gen. 203, 205 (1949).

[109] For an opinion to the contrary, *see* SPJG 210.715, 31 Mar 1942, *cited at* 1 Bul. JAG 152, 154.

Q—May a warrant officer of the Regular Army, retired for length of service, who is in receipt of retired pay in excess of $2,500, accept an appointment as a geographer in the United States Census Office? The appointment is to be made by the Director of the Census pursuant to express statutory authority given him to employ a geographer. The annual compensation of the civilian job is $2,200, but the warrant officer involved is willing to waive that compensation if necessary.

A—No. A retired Regular warrant officer holds an office under the Act. As his retired pay amounts to $2,500, and he is not retired for physical disability, he is not excepted from the application of the Act. The job of geographer amounts to an office within the meaning of the 1894 Act. Therefore, he is precluded from accepting the appointment, it being immaterial that he is willing to waive the civil pay. The Act prohibits acceptance of the office, not merely receipt of the compensation (8 Comp. Dec. 87 (1901)).

Q—May a retired Regular Army commissioned officer accept an appointment as Commissioner of Roads, Bexar County, Texas (annual salary, $7,000), without incurring the consequences of the Act?

A—Yes. The Act is inapplicable where the civil office is not under the United States Government (14 Comp. Gen. 916 (1935); *see also* JAGA 1952/8902, 24 Nov 1952, 2 Dig. Ops., Ret. § 81.1; *id.*, 1953/1643, 6 Feb 1953, 3 Dig. Ops., Res F., § 101.1.) Title 10, United States Code, Subsection 3544(b) would also be inapplicable, since the officer is not on the active list.

Q—The Attorney General desires to employ "temporarily" a commissioned officer of the Marine Corps (USMC), retired for length of service, as a special assistant in connection with certain military procurement investigations. He is to be employed for one year and is to be paid $8,500. An oath is involved. May the officer accept the employment? If not, would the fact that he is willing to relinquish his retired pay make any difference?

A—As a special assistant, he would perform official duties and render service to the United States under a commission from the Attorney General and under an oath of office. A proposed appointment for one year for the purposes indicated would establish duration as one of the incidents of the appointment. An office is therefore involved which the act precludes his holding (1 Comp. Gen. 219 (1921)). It is immaterial that he is willing to waive his retired pay, for notwithstanding his willingness, such pay may not legally be relinquished (14 Comp. Gen. 289 (1934)).

Q—A Navy Commander, retired for physical disability, was subsequently ordered to active duty with his consent. While on active duty, he accepted a civil service appointment with the Department of Commerce as an inspector of hulls at an annual compensation in excess of $2,500 per annum. Does the fact that he had been retired for physical disability except him from the consequences of the act?

A—No. The exception in favor of officers retired for physical disability applies only to cases of officers who are holding civil offices in the Government service while on inactive duty. In any event, service as a hull inspector for the Commerce Department is incompatible with active duty as an officer of the Navy. Accordingly, he is entitled to no compensation for his services with the Commerce Department. His appointment was a nullity (5 Comp. Gen. 548 (1926)).

Q—The Clerk of a Federal District Court held a commission as Major in a local Marine Corps Reserve Unit. He and his unit were ordered to active duty during the Korean emergency. What effect did this action have on his clerkship?

A—He cannot be considered as holding the office of clerk after the date he entered active military service, at least so far as entitlement to compensation is concerned (23 Comp. Dec. 287 (1910); 24 Comp. Dec. 604 (1918); 1 Comp. Gen. 65 (1921)).

II. DUAL EMPLOYMENT PROHIBITIONS

A. *Statutory Prohibitions*

Title 10, United States Code, Subsection 3544(a) (Supp. IV) provides:

"(a) No commissioned officer of the Regular Army may be—

(1) employed on civil works or internal improvements;

(2) allowed to be employed by an incorporated company; or

(3) employed as acting paymaster or disbursing agent of the Bureau of Indian Affairs;

if that employment requires him to be separated from his organization or branch, or interferes with the performance of his military duties."[110]

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[110] Any identical statute is applicable to commissioned officers of the Regular Air Force, but not to Navy, Marine and Coast Guard officers. 10 U.S.C. 8544(a) (Supp. IV).

This subsection is a codification of former Section 1224 of the Revised Statutes. An analysis of its provisions can be developed by asking and answering the same three questions utilized in connection with a discussion of the Constitutional prohibitions, Subsection 3544(b) and the 1894 Act, *supra*.

a. *To whom applicable?*

The statement "No commissioned officer of the Regular Army" makes it clear that commissioned officers of the other services, warrant officers and enlisted men, in general, and Reserve officers, in particular, are not subject to its provisions.[111] Obviously, it has no application to retired personnel for they have no organization from which to be separated and no military duties with which to be interfered.[112] Consequently, subparagraph (a) is clearly applicable only to Regular Army commissioned officers on the active list.

b. *What is prohibited?*

Subsection 3544(a) prohibits three types of employment, if such employment results either in separating the officer from his organization or in interfering with his military duties. Conversely, if the officer is not to be separated from his organization *and* it will not interfere with his military duties, the mentioned employments are not prohibited.[113] In the usual situation, any such employment of an officer would interfere with his military duties, and for that reason alone is prohibited.[114] The foregoing statement assumes, of course, that the officer then has military duties with which there will be interference. If he does not have such duties, as, for example, when he is on authorized leave, the employment would not be prohibited.[115] He may not be placed on leave solely for the purpose of accepting the employment, however, *for that would result in an unwarranted evasion* of the statutory language.[116] Similarly he may not be detailed, pursuant to military orders, to duty on civil works or internal improve-

[111] Note that former Section 1224 of the Revised Statutes was worded: "no officer of the Army." 10 U.S.C. 495 (1952). Accordingly, it appears that opinions construing Section 1224 to be applicable to Reserve officers are not now pertinent. *See*, for example, JAG 013.2, 8 Nov 1941, Dig. Op. JAG 1912-40, Supp. I, 1941, p. 7.

[112] *See* 19 Ops. Att'y Gen. 283 (1889).

[113] Note that both conditions, separation and interference, must be overcome before the employment can be considered as being without the statutory prohibition.

[114] *See* Dig. Op. JAG 1912-40, p. 122.

[115] 25 Comp. Gen. 377 (1945); Dig. Op. JAG 1912-40, p. 115.

[116] 30 Ops. Att'y Gen. 184 (1913); Dig. Op. JAG 1912-40, pp. 116, 122, 123.

ments etc., unless, and this is important, *there is a showing of a clear military duty connected with the employment.*[117] While under such detail, the officer must remain under the control of the Department of the Army.[118] Regardless of the fact that an employment (use) will result in an officer being separated from his organization, he may be detailed to such duty if: (1) it is not one of the three types prohibited by Subsection 3544(a), and is a proper military function;[119] or (2) it is expressly authorized by statute.[120]

c. *What are the consequences?*

The statute makes no provision for the imposition of a sanction upon an officer who accepts employment in violation of its language. Accordingly, it seems reasonable to conclude that Congress did not intend that such a drastic consequence as vacation of his commission would result from a Regular Army commissioned officer's acceptance of employment prohibited by the act. There is no basis to reach a contrary result by implication, for as previously mentioned, the common law rule of incompatibility as it survived in this country required a vacation only where two offices were involved. The type of employment intended to be prohibited by Subsection 3544(a) falls short of equating to an office.[121]

B. *Common Law Prohibitions*

Since an enlisted man in all probability does not hold a true "office" in the Federal Government, are there no restrictions on

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[117] The following details were held military in character, and thus not prohibited by statute: To make a survey for the purpose of enlarging a military reservation (Dig. Op. JAG 1912–40, p. 116); as advisor to an International Boundary Commission (*id.*, p. 814); as liaison with the Post Office Department in connection with the development of Air Mail service (*id.*, p. 122). *See also* 16 Ops. Att'y Gen. 499 (1880). *Cf.* Dig. Op. JAG 1912–40, pp. 115, 116. Prohibited was a proposed detail to the Department of Agriculture for the purpose of helping conduct a scientific experiment. Dig. Op. JAG 1912–40, p. 122.

[118] Dig. Op. JAG 1912–40, p. 122, JAGA 1955/4611, 10 May 1955.

[119] Including duty as an instructor in marksmanship at a Boy Scout encampment. JAGA 1956/5639, 10 Jul 1956.

[120] 10 U.S.C. 713 (Supp. IV) authorizes members of the Armed Forces to be assigned for detail to duty with the State Department as inspectors of buildings owned or occupied abroad by the United States; as inspectors or supervisors of buildings under construction or repair abroad by or for the United States; and as couriers. As to dual compensation, *see* par. 1, App. IV, *infra*.

[121] *Cf.* 10 U.S.C. 3544(b) (Supp. IV).

the dual public employment of enlisted men? The accounting officers of the Government have ruled that it is incompatible with his status as a soldier for an enlisted man on active duty to be employed concurrently by the Government in a civilian capacity.[122] By incompatibility is meant something akin to the common law rule prohibiting the holding of incompatible offices. Rather than advance the proposition that he holds an *office*, the Comptroller General has decided that it is the *status* of the soldier which limits his pay and emoluments to that of his grade and length of service as an enlisted man, *and nothing more*.[123] Thus, the Comptroller General has denied payment to enlisted men for services performed as a laborer on a Federal project during duty hours, even though the employment was with the permission of the immediate commanding officer and was of benefit to the Government,[124] for services as an observer for the Weather Bureau under circumstances not amounting to interference with his military duties,[125] and for services as an emergency forest fire-fighter while on furlough.[126] Why? Because such employment was incompatible with his status as a soldier. This answer does no more than prompt a further question; namely, how can that be said to be true in the absence of a statute prohibiting such employment? The reply of the Comptroller General is that there is no statute specifically *authorizing payment to him* for services performed in a civilian capacity.[127] Remaining unsatisfied, the question may then be asked how is it reasoned that such employment is incompatible when performed off-duty, while on furlough and the like. The answer given, citing *United States* v. *Badeau*,[128] is:

> "If it is incompatible and against the general policy of the law for a retired officer, who is only subject to the rules and articles of war and certain limited other incidents of military service, to hold a civil office in a foreign country, obviously, any appointment in the civil branch of the Government would be incompatible with service on the active list of the Army. The fact that during hours of relaxation or relief from the actual performance of duties the individual has time to devote

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[122] 3 Comp. Gen. 40 (1923); 24 Comp. Dec. 209 (1917).
[123] 18 Comp. Gen. 213 (1938), citing 15 Ops. Att'y Gen. 362 (1877).
[124] 22 Comp. Dec. 259 (1915).
[125] 18 Comp. Gen. 213 (1938).
[126] 33 Comp. Gen. 368 (1954).
[127] 18 Comp. Gen. 213 (1938).
[128] 130 U.S. 439 (1889).

to his personal affairs and that normally such time is available for the performance of other duties is not the test. Compatibility is determined by the individual's freedom to perform both services, the one without interference from the other. The superior—the controlling—obligation to render military service thus makes impossible the acceptance without qualification of another obligation to the Government to render service in a civilian capacity at the same time. . . ."[129]

As the Comptroller General usually has the last word in enlisted men's cases, it has not, thus far, been possible to point out to him that the *Badeau* case is inapplicable today because—

(1) Enlisted men engaged in emergency fire-fighting and other temporary work receive no appointment in a civil branch of the government; and

(2) The status of a Regular Army officer is hardly comparable to that of an enlisted man.

The foregoing discussion may serve to raise the specter in some minds that the enlisted man on active duty is being discriminated against. The suggestion that they are being discriminated against by the decisions of the Comptroller General is derived from the fact that the Act of 1894 does not prohibit officers on active duty from accepting and being compensated for part-time or intermittent employment with the Government in a civil capacity and does not in any event apply when neither the officer's military compensation nor his civil compensation amounts to $2,500. The validity of this argument is premised, however, upon an assumption that if the civil employment is without the application of the 1894 Act, the officer may accept it and be compensated therefor. The assumption is fallacious and the argument invalid. It is equally incompatible with his status for an officer on active duty to accept *any* civil employment under the Federal Government, unless expressly authorized by law so to do.[130] He certainly may not be compensated for such employment, if performed without statutory authority, because such is specifically prohibited by Section 1763, Revised Statutes, as amended.[131] Little used, little understood, and little realized, Section 1763 is a statutory expression of incompatibility designed to provide a legal basis for denying *compensation* for Federal civil employment to any member of the military on active

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[129] 18 Comp. Gen. 213, 216 (1938).
[130] 30 Comp. Gen. 371 (1951).
[131] 5 U.S.C. 58 (1952).

duty whose pay amounts to $2,000 per year. All officers and most enlisted men receive $2,000 or more per year. With respect to the few enlisted men whose annual military pay amounts to less than $2,000 per year, there is no statute which prohibits them from performing, and receiving compensation therefor, civilian employment under the Federal Government unrelated to their military duties. Only the doctrine of incompatibility exists as a legal impediment—incompatibility as a matter of law,[132] not as a matter of fact—for reasonable people will have difficulty in perceiving incompatibility in the actions of a soldier on furlough accepting temporary employment with a Government agency at some useful and necessary task. Be that as it may, the accounting officers of the Government stand firm and refuse to allow him to be compensated from appropriated funds. The result is all the more illogical to most persons who simply find no incompatibility at all in the off-duty employment with pay, of enlisted personnel by nonappropriated fund activities (Federal instrumentalities). Indeed, such a practice is, with limitations, expressly authorized by service regulations.[133] Although such employment and compensation are not in contravention of Section 1763,[134] it is a second employment under the Federal Government so as to invoke concepts of incompatibility. As a practical matter, nonappropriated fund vouchers and expenditures are not subjected to the scrutiny of the Comptroller General. Hence, there is no occasion for payments to enlisted personnel to be questioned. Although illogical, that is precisely the situation today.

III. DUAL COMPENSATION RESTRICTIONS

Thus far we have examined the law to determine in what instances a member of the Armed Forces, active or retired, regular or reserve, is precluded from holding concurrently a civil office under the Federal Government. In some instances we have seen that the dual holding is specifically prohibited by statute; in others we have seen that although no statute is pertinent, the dual holding is prohibited under the common law doctrine of

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[132] Regardless of the insignificance of the combined compensation, an enlisted man on active duty may not draw both active duty pay and pay as civilian employee. 22 Comp. Dec. 209 (1915).

[133] *See*, for example, par. 6*c*, AR 230–5, 18 Jul 1956, as changed.

[134] Sec. 1763 is, by its terms, a restriction upon the expenditure of *appropriated* funds.

incompatibility. Then too, despite the applicability of a dual office statute of general application and/or the common law doctrine, a particular dual holding may not be illegal by virtue of specific permissive legislation. We are concerned here with a situation in which the holding of two offices or positions under the Federal Government is not illegal, either because the facts and circumstances of the situation are without the application of any statutory or common law prohibition, or because the situation is specifically provided for and authorized by special legislation. In this situation, may the incumbent of the two positions draw the Federal pay of both positions? A fraction of both? Only that of the larger? The answers to these questions direct us to a consideration of certain statutes of general application, which are customarily identified as dual compensation statutes. To reiterate, they do not authorize or prohibit the holding of dual offices or positions. They merely affect the amount of compensation an individual may receive from two sources under the Federal Government.[135]

A. *Economy Act*

The dual compensation statute of most frequent application is Section 212 of the so-called Economy Act,[136] which, as recently amended, provides:

> "(a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government or the municipal government of the District of Columbia or under any corporation, the majority of the stock of which is owned by the United States, shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in the Army of the United States, Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $10,000; and when the retired pay amounts to or exceeds the rate of $10,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term 'retired pay' shall be construed to include credits

[135] 29 Comp. Gen. 203 (1949).

[136] 47 Stat. 406.

for all service that lawfully may enter into the computation thereof.

"(b) This section shall not apply to any person whose retired pay, plus civilian pay, amounts to less than $10,000: *Provided,* That this section shall not apply to any regular or emergency commissioned officer retired for disability (1) incurred in combat with an enemy of the United States, or (2) caused by an instrumentality of war and incurred in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1(a), part I, paragraph 1."[137]

1. *To whom applicable?*

Generally, the Act is applicable to one who is in receipt of retired pay for or on account of service as a commissioned officer in the Armed Forces and who, at the same time, holds a civil office or position under the United States, the District of Columbia or a Federal corporation. The foregoing statement presents two possible ambiguities: (1) Who in the military is in receipt of retired pay for or on account of services as a commissioned officer; and (2) what is a civilian office or position within the meaning of this act? Both ambiguities, if they are such, must be resolved, for they embrace the key criteria of the act. Unless both criteria are found to be present, the act is inapplicable, regardless of the stated monetary limitation and of the complexities involved in establishing how a disability was incurred.

Retired pay for or on account of services as a commissioned officer. If a commissioned officer is retired as such, this criterion is met without regard to the particular statute pursuant to which he served on active duty or was retired from active service.[138] In all other cases the meeting of this criterion is dependent upon the particular statute under which the individual has been retired and, in some cases, upon the particular statute under which his retired pay is computed. Generally, it may be said,

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[137] 5 U.S.C. 59a (Supp. IV).

[138] 24 Comp. Gen. 407 (1944). An officer on the Temporary Disability Retired List is in receipt of "retired pay" within the meaning of the Act. Op. JAGN 1951/17, 11 Jul 1951, 1 Dig. Ops., Ret., § 71.1. Navy nurses retired prior to 16 Apr 1947, the date of the Army and Navy Nurses Act, 61 Stat. 4, are in a unique status, however. When they were on active duty they held relative rank only. Accordingly, they do not now receive retired pay for or on account of services as commissioned officers within the purview of the Act. 29 Comp. Gen. 80 (1949); 8 Bul. JAG 182.

however, that any enlisted person or warrant officer, persons to whom the act would ordinarily not be applicable,[139] who is:

(a) retired in a commissioned grade,[140] or

(b) retired in an enlisted or warrant grade but subsequently advanced on the retired list to a commissioned grade which he had held satisfactorily while on active duty,[141]

is to be considered in receipt of retired pay[142] "for or on account of services as a commissioned officer."

A civilian office or position. The words "civilian office *or position,* appointive or elective" (emphasis supplied), are much broader in scope than the words "no person who holds an office,"

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[139] If retired as such, even though commissioned service is used in computing years of service for longevity purposes. 25 Comp. Gen. 521 (1946); 3 Bul. JAG 137; JAGA 1955/7633, 21 Sep 1955.

[140] 25 Comp. Gen. 612 (1946); JAGA 1952/6458, 28 Aug 1952, 2 Dig. Ops., Ret., § 71.1.

[141] *Hayes* v. *U.S.*, 88 Ct. Cl. 309 (1939); 21 Comp. Gen. 72 (1941); 8 Bul. JAG 110; JAGA 1952/6458, 28 Aug 1952, *supra* note 140. Unless of course, the act pursuant to which the appointment was effected provided that his permanent enlisted or warant status and the rights and benefits thereof were not to be prejudiced by acceptance of the appointment. *E.g.*, 10 U.S.C. 5596 (Supp. IV); 36 Comp. Gen. 503 (1957).

[142] In the case of an enlisted man or warrant officer who is advanced on the retired list to a commissioned grade, *all* retired pay (not merely the amount by which the retired pay was increased as a result of the advancement in grade) *thereafter* received is considered to be "for or on account of services as a commissioned officer." 28 Comp. Gen. 727 (1949). A now superseded statute required a contrary conclusion with respect to enlisted personnel with World War I service. 21 Comp. Gen. 72 (1941); 12 Comp. Gen. 36, 46 (1932). The inequity which results from this decision raises a substantial doubt whether it would withstand judicial appraisal. If the retired person's retirement pay coupled with the pay from his civilian office totaled more than $10,000 prior to his promotion, his appointment to a commissioned grade would thereby work a forfeiture of retired pay to which he was previously entitled. However, the Comptroller General has ruled that where an enlisted man or warrant officer, retired as such, has accepted a civilian office or position under the Federal Government and *subsequently* is advanced on the retired list to a commissioned grade, with entitlement to increased compensation retroactive to the initial retirement date, *only* the amount by which his retired pay was *increased* is considered to be "for or on account of services as a commissioned officer," in so far as the pay *retroactively* awarded is concerned. 26 Comp. Gen. 711 (1947). There must be hiatus between his enlisted retired status and his commissioned retired status, however. JAGA 1952/6458, 28 Aug 1952, 2 Dig. Ops., Ret., § 71.1.

as used in the amended 1894 statute.[143] The word "position" is a key word, for it operates to make the act applicable to compensation received by persons who are but temporarily employed by the Government[144] and who might not, strictly speaking, be regarded as civilian employees of the Government, a term usually connoting some degree of tenure.[145] Rightly or wrongly, few jobs are held not to be positions within the meaning of the Economy Act.[146] An analysis of the few instances in which such a result has been reached indicates that, first of all, the job must call for the performance of services at infrequent intervals; secondly, the compensation therefor must be payable on a fee, i.e., a lump sum payment for and upon completion of the project for which employed, as distinguished from a time basis; and, thirdly, the services to be performed must not be such as are imposed upon the employer-agency by Federal law.[147] If all three criteria are met, Section 212 is inapplicable and the member may draw his retired pay and his civil fee without regard to the monetary limitation of the act.

Under the United States Government, or the municipal government of the District of Columbia or under any corporation the majority of the stock of which is owned by the United States. Unless the office or position is under one of these three entities, the act is inapplicable. Usually no problem is presented, for the status of the employer is self-evident. There are, however, a few troublesome areas. One such area is the situation where the retired member is employed by a state or private agency on work

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[143] 19 Comp. Gen. 391 (1939).

[144] *Ibid.*

[145] 24 Comp. Gen. 771 (1945).

[146] *E.g.*, although employment of retired commissioned officers by nonappropriated fund activities does not amount to an "office" under the 1894 Dual Office Act, it does amount to a "position . . . under the United States" within the application of the Economy Act. 26 Comp. Gen. 122 (1946); 24 Comp. Gen. 771 (1945); JAGA 1953/7480, 11 Sep 1953, 3 Dig. Ops., Ret., § 71.1; 2 Bul. JAG 373. Similarly, persons employed by contract to perform duties imposed by law upon an agency and who are subject to direct control and supervision of administrative officials are employees holding positions under the United States Government within the contemplation of the Economy Act. 26 Comp. Gen. 720 (1947).

[147] The typical example of this situation is the on-call consultant who receives a fee for his advice on the infrequent and irregular occasions when his services are engaged. *See* 28 Comp. Gen. 381 (1948); 26 Comp. Gen. 720 (1947); 26 Comp. Gen. 501 (1947); JAGA 1955/3591, 13 Apr 1955.

subsidized with Federal funds. Until recently it seemed well settled that by utilizing the "source of funds" test, a conclusion that a Federal position was not involved would be reached if payment was made *by* the state or private agency.[148] In other words, if Federal funds were not identifiable as such, then a Federal position was not involved. Such is no longer the view of the Comptroller General, however. Although granting that "source of funds" remains the test for the purposes of the Dual Office Act of 1894, and Section 1763 of the Revised Statutes, as amended, that officer now takes the position that, for the purposes of Section 212 of the Economy Act, the source of funds test alone is insufficient. If the individual is actually engaged in the performance of Federal functions authorized by Federal statutes, and under the supervision of Federal officials, he holds a position under the Federal Government. This is so even though the individual: (1) is not hired or fired by the Federal Government; (2) the Federal funds granted to support the work have been receipted for by the participating state or local agency; and (3) the agency pays the individual.[149] Aside from the correctness of this decision from a legal standpoint, a matter with respect to which reasonable minds may differ, it is suggested that the result reached is unnecessary, harsh, and unwise. The decision operates to interfere with the disposition a state may make of funds granted to it, funds granted without a condition that they not be expended to compensate retired commissioned officers whose services might be engaged. It operates to deny society, except in the case of a dedicated public servant, the useful services of highly skilled and experienced military men. It operates to apply a sanction against the retired officer who desires to put his later years to a useful and constructive purpose in the fields he knows best. Last, but certainly not least, it operates to invite the unwelcome rebuke that here the Government has, by withholding the salary into the Treasury, obtained a gratuity.

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[148] Federal funds receipted for lose their identity as such. 25 Comp. Gen. 868 (1946); 14 Comp. Gen. 916 (1935); JAGA 1955/10227, 22 Dec 1955.

[149] 36 Comp. Gen. 84 (1956). The civilian salary will not be returned to the state or local employer, however. It will be regarded as received for the account of the United States and covered into the Treasury.

One would rather doubt that the Congress intended such a result.[150]

The term "any coporation," in referring to those corporations in which the United States owns the majority of the stock, contemplates corporations which properly may be regarded as instrumentalities of the United States.[151]

There is one further group of persons to whom the act is *normally* applicable, and that is those who are authorized to hold dual offices or dual positions under the authority of one of the statutes listed in Appendix II, *infra*. It must be understood that the mere fact that a special statute permits one to hold two positions does not, of itself, without more, mean that the incumbent may receive the compensation of both at a rate which exceeds $10,000 per annum. Only the most clear and unequivocal language in the statute will justify a conclusion that the incumbent may receive dual compensation, without limitation, as well as hold dual positions.[152]

Subsection (b) of Section 212 *excepts* from the application of Subsection (a) persons whose retired pay, plus civilian pay, "amounts to less than $10,000"[153] and commissioned officers who have been retired for: (1) a combat incurred disability or (2) a disability caused by an instrumentality of war, if the individual was in line of duty at the time, and the incident took place during a period administratively classified as wartime under the

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[150] Although not expressly overruled, it would seem that the decision in 25 Comp. Gen. 912 (1946) to the effect that Section 212 was inapplicable to a salary paid a retired officer by the Territory of Hawaii because territorial, not Federal, funds were involved is now to be regarded with some uncertainty. 36 Comp. Gen. 84 (1956) did expressly overrule 14 Comp. Gen. 916 (1935) and 25 Comp. Gen. 868 (1946), *supra*, however. *See also* Op. CCCG 1951–3, 3 Dec 1951, 3 Dig. Ops., Ret., § 71.23, wherein the opinion was expressed that a retired Coast Guard officer might accept employment as a marine engineer on board a vessel operated by a private steamship company, but under a general agency agreement with the National Shipping Authority, without his combined salary being subject to the provisions of the Economy Act. However, this opinion relied upon 24 Comp. Gen. 344 (1944), a decision based upon a statute no longer on the books.

[151] It does not embrace wholly private corporations seized by the Government under the Trading With the Enemy Act. 32 Comp. Gen. 98 (1952). *Contra*, JAGA 1951/5553, 25 Sep 1951.

[152] 31 Comp. Gen. 150 (1951); 27 Comp. Gen. 439, (1948). *See also* 29 Stat. 235 (1896), as amended, 5 U.S.C. 63 (1952).

[153] The ommission of the word "rate" from Subsection 212(b) was inadvertent. 12 Comp. Gen. 256, 257 (1932).

regulations of the Veterans Administration. If an individual falls within either of the latter two exceptions, he is entitled to receive compensation from the two sources within the Federal Government without regard to the $10,000 limitation.[154]

Disability incurred in combat with an enemy of the United States. If it can be shown that at the time of the injury or disease[155] which resulted in a disability[156] (a) the individual was engaged in combat with the enemy,[157] and (b) there was sufficient casual relation between the *combat* and the *injury* or *disease,*[158] then the individual is disabled within the meaning of the first exception to the act. But when is he in combat with the enemy? Numerous cases involving the entitlement of officers retired for disability incurred as a direct result of brutality or maltreatment in a prisoner of war status to exemption from the application of the Economy Act have been decided solely upon a determination that the individual was not engaged in combat with the enemy at the time the injury or disease which gave rise to the disability was incurred.[159] Undoubtedly, such a result is hardly a popular one. It is not the purpose of this study, how-

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[154] Assuming the inapplicability of dual office statutes.

[155] It is the time when the injury or disease was incurred, not the time when the injury became a disability, that is controlling. JAGA 1952/4390, 13 May 1952, 2 Digs. Ops. Ret., § 71.3 *Cf.* JAGA 1955/1029, 6 Jan 1955, 4 Dig. Ops., Ret., § 71.3. Disability is not limited to that resulting from injuries. *E.g.*, disabilities resulting from frost bite (6 Bul. JAG 54) and psychoneurotic disorders (JAGA 1955/1561, 3 Feb 1955) may be considered combat incurred so as to come within the exception.

[156] Determination of the question whether a disability was caused by a certain injury or disease primarily involves medical judgment rather than legal opinion.

[157] The "incurred in combat" exemption is not dependent upon the officer's injuries having been incurred during a particular period of time. Ms. Comp. Gen. B–120868, 4 May 1955; *id.*, B–12177, 4 May 1955; JAGA 1954/9618, 8 Dec 1954. The contrary is true with respect to the "instrumentality of war" exemption, *infra*, however.

[158] The Judge Advocate General of the Army has stated that medical authorities are competent to express an authoritative opinion on the question whether a disability was incurred in combat with an enemy. JAGA 1954/2758, 1 Apr 1954, 4 Dig. Ops., Ret., § 71.3; *id.*, 1952/6458, 28 Aug 1952, 2 Dig. Ops., Ret., § 71.3; *id.*, 1951/5450, 5 Sep 1951. However, these opinions are questionable in so far as they hold purely medical testimony competent to prove that a disability was incurred in *combat with an enemy.*

[159] JAGA 1952/4390, 13 May 1952; Op. JAGN 1951/17, 11 Jul 1951, 1 Dig. Ops., Ret., § 71.3.

ever, to advocate that other factors, other considerations, should have influenced administrative agencies to have reached a contrary result. A constructive note may be sounded, it is believed, with regard to prisoner of war cases occurring in the future; that is, subsequent to 17 August 1955. On that date President Eisenhower promulgated Executive Order No. 10631, which prescribed a "Code of Conduct" for all members of the Armed Forces.[160] The provisions of that Code merit examination in the light of the question under consideration; namely, the status as combatant or noncombatant of a member of the Armed Forces of the United States while a prisoner of war in the hands of an enemy. The Code of Conduct provides pertinently:

"I

"I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense.

". . . .

"III

"If I am captured I will continue to resist by all means available. I will make every effort to escape and aid others to escape. I will accept neither parole nor special favors from the enemy."

When read in the light of the events which prompted its drafting and promulgation, the training and instruction in implementation thereof given members of the Armed Forces, and the intent of Congress and the President, indeed our country as a whole, to instill and reward resistance to their captors, cannot it reasonably *and legally* be concluded that the Code of Conduct stands for the proposition that our soldiers retain a status as combatants while held by the enemy? If so, then certainly a disease or injury which disables an officer, and which was incurred while he was a prisoner of war, should be considered as having been incurred in combat with the enemy within the purposes and intent of Subsection (b) of Section 212 of the Economy Act; *provided,* of course, that the officer so conducted himself while a prisoner of war as to leave no doubt that he discharged fully his duties under the Code of Conduct.[161] If the Code provisions are so construed, then a result will be reached which will in

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[160] Set forth in the note to 50 U.S.C. 552 (Supp. IV).

[161] In an unpublished opinion, The Judge Advocate General of the Air Force has indicated that henceforth he will consider such disabilities *combat incurred.* Op. JAGAF 83–71.3, 30 Dec. 1955.

effect permit "disability incurred in combat with an enemy" to be construed in all cases as any disability incurred in a combat area as a direct or indirect result of enemy action or efforts to resist the enemy.[162] Although it has been said that the injury must bear a direct casual relation to combat with an enemy,[163] it is submitted that, in fact, the decisions reached did not insist upon a *direct* casual relation. An *indirect* causation is sufficient. The doctrine of casual relation is, of course, useful to dispose of certain nebulous and spurinous claims.[164]

Disability caused by an instrumentality of war, while in line of duty, and during a period of service as provided in Veterans Regulation Numbered 1(a), part I, paragraph I. Although an individual may not have been disabled as a result of combat with the enemy, he may nonetheless be entitled to claim exemption from the application of the Economy Act if his disability was (1) caused by an instrumentality of war,[165] (2) he was in line of duty at the time, and (3) the time was within a period provided for in the mentioned Veterans Administration Regulations.

First, what is an instrumentality of war? Weapons, of course. Proceeding from this obvious answer, opinions of the Judge Advocates General of the Armed Forces[166] disclose that some rather pacific pieces of machinery have been considered to be instrumentalities of war for the purposes of entitling an officer to the benefits of this exception to the Economy Act. For ex-

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[162] Precedent for such a construction may be found in existing opinions holding an officer's disability to have been combat incurred when as a result of an injury incurred while using a winch to pull a gun out of the mud in a combat zone (6 Bul. JAG 113), when he fell down a bank on return from a combat patrol (3 Bul. JAG 413), when he jumped into a ditch during an air raid (5 Bul. JAG 269), when his jeep driver lost control of the vehicle due to fright during a bombing (6 Bul. JAG 4), and when he became deaf as a result of bombings during air raids in England (6 Bul. JAG 54).

[163] *See* JAGA 1952/6458, 29 Aug. 1952, 2 Dig. Ops., Ret., § 71.3.

[164] *E.g.*, an officer's claim that his ulcers were incurred in combat with the enemy. JAGA 1954/7013, 20 Aug 1954.

[165] If the injury occured prior to 31 Dec 1950, the disability must have been caused by the *explosion of an instrumentality of war.* 68 Stat. 18 (1954); JAGA 1956/2607, 21 Mar 1956.

[166] The Comptroller General has deferred to the determination made by the services in this matter unless unreasonable, or contrary to the law or evidence. 34 Comp. Gen. 72, 74 (1954).

ample, a line throwing gun,[167] an engine on a Cost Guard cutter,[168] a rock thrown as a result of a dynamite blast,[169] a rock thrown by a passing Army truck,[170] and a low flying friendly airplane,[171] all have been held to be instrumentalities of war. As a practical matter, the use to which the instrumentality was being put, and the facts and circumstances of the incident have a great deal to do with the ultimate determination whether an instrumentality of war is involved. For example, a disability incurred while riding in an Army sedan which was involved in a common traffic accident,[172] as a result of the accidental discharge of one's own weapon,[173] or that of another while patronizing a shooting gallery,[174] all have been held *not* to have been caused by an instrumentality of war.[175]

If it is determined that the individual was disabled by an instrumentality of war and that he was in line of duty at the time,[176] all that remains to determine is that the incident which gave rise to the disability occurred during a period of hostility provided for by the Veterans Administration Regulations. The two hostilities normally pertinent are the World War II and the Korean combat periods. Veterans Regulations number 1(a), part I, paragraph I, which appears in Chapter 12–A, Veterans Regulations, Title 38, United States Code, defines the World War II period as the period between 7 December 1941 and prior to the termination of hostilities incident to World War II as determined by proclamation of the President or by concurrent resolution of Congress. Proclamation No. 2714 of the President, dated 31 December 1946,[177] proclaims the cessation of hostilities of World War II as being effective twelve o'clock noon December 31, 1946. Thus the period 7 December 1941 to noon, 31 December 1946, is the World War

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[167] JAGN 1955/311, 2 Nov 1955, 5 Dig. Ops., Ret., § 71.3.

[168] Op. CCCG 1954/33, 13 Sep 1954, 4 Dig. Ops., Ret., § 71.3.

[169] 6 Bul. JAG 114.

[170] JAGA 1955/2412, 11 Mar 1955, 5 Dig. Ops., Ret., § 71.3. The incident occurred during an air alert. The locale was not disclosed, however.

[171] JAGA 1956/2607, 21 Mar 1956.

[172] JAGA 1956/4337, 25 May 1956.

[173] 2 Bul. JAG 373; 3 Bul. JAG 466.

[174] 5 Bul. JAG 329.

[175] Although the case in note 169 resulted from a dynamite blast for the purpose of preparing defensive positions against enemy bombing.

[176] Not absent without leave or engaging in misconduct.

[177] 12 Fed. Reg. 1, note to 50 U.S.C. App. 601 (1952).

II period during which any disability resulting from an instrumentality of war entitles a commissioned officer to the benefits of this exception to the Economy Act.[178] With respect to the Korean action, Congress, by Public Law 239, 84th Congress[179] amended the cited Veterans Administration Regulations to include the period 27 June 1950 to 1 February 1955. Thus any line of duty disability caused "or aggravated" by an instrumentality of war during the specified dates of the Korean (police) action entitles the officer to exemption from the Economy Act.[180] An interesting question arises with respect to the applicability of this exception in view of the fact that it is the product of a recent amendment to the act.[181] Although the amendment was made retroactive to 1 January 1951, may not an individual who: (1) was retired prior to 1951 for physical disability caused by an instrumentality of war, but not by an *explosion* of an instrumentality of war (as the statute formerly read); and (2) accepts Government employment in a civil capacity *subsequent* to 1951, claim the benefits of the amendment? The Comptroller General has answered this question in the affirmative, reasoning that since the act is a restriction upon compensation from civil employment and the amendment does not specifically require that the retirement be before or after 1 January 1951, the benefits of the exception, as amended, extend to anyone *who enters upon civil employment on or after that date.*[182]

Just as Congress has been fit to enact laws specifically excepting certain persons or positions from the application of dual office acts (see appendices I and II, *infra*), so too has Congress chosen to enact legislation specifically excepting certain individuals or positions from the application of dual compensation acts. A collection of such statutes presently in effect may be found at appendix IV hereto.

2. *What is prohibited?*

The Act prohibits the receipt of retired pay "at a rate in excess of an amount which when combined with the annual rate

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[178] 34 Comp. Gen. 72 (1954).

[179] 69 Stat. 497.

[180] Prior to the enactment of Public Law 239, *supra*, it had been reasoned that the Veteran's Regulations had been amended *by implication* to include the Korean police action. Ms. Comp. Gen. B-120868, 4 May 1955, 5 Dig. Ops., Ret., § 71.3; JAGN 1955/287, 10 May 1955, 5 Dig. Ops., Ret., § 71.3.

[181] 68 Stat. 18 (1954).

[182] 34 Comp. Gen. 72 (1954). *See also* JAGA 1954/6196, 20 Jul 1954.

of compensation" from a civilian position under the Federal Government "makes the total *rate* from both sources more than $10,000" (emphasis supplied). The word "rate" is most important. It must be recognized and utilized in resolving the mathematical problems which so frequently arise when the retired officer is engaged in part-time or intermittent employment amounting to a "position" within the act. Before entering into a discussion of complex problems, however, it would be well to set forth a few basic propositions. The term "compensation" as used in identifying the monetary remuneration received from the civil employment refers to *basic* compensation only. It does not include such additionals as overtime pay,[183] overseas differential[184] and a monetary allowance for quarters.[185] If the incumbent is entitled to no compensation from his civilian position, as when he is in a nonpay status,[186] then, of course, there is nothing to be restricted and the Act is inapplicable. In applying the limitation of $10,000 per annum under the Act on the combined rate of compensation in a *full-time* civilian position and of retired pay, it is the *rate* of compensation which controls, irrespective of the number of hours or days actually worked in the civilian position. In other words, it is not necessarily the total amount of civilian pay and retired pay received during the year.[187] The maximum rate of *combined* civilian and retired pay, for purposes of the Act, is $27.77 per day,[188] $833.33 per month, and, of course $10,000 per year. The rate of pay of the civilian office or position is similarly computed, *if a full-time employment is involved.* For example, if the annual salary of the civilian position were given as $3,100 per annum, the daily rate of pay would be computed at 1/360th of $3,100, or $8.61; even though the individual may work but five days a week, the normal workweek. Nonwork days such as Saturdays, Sundays and holidays are included in computing the rate of pay per day, for *a full-time employee* is considered in a pay status at all times, unless, of course, he is expressly placed in a leave without pay status or the like.[189] To illustrate, let us take a situation where

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[183] Ms. Comp. Gen. B-32233, 12 Feb 1942, 2 Bul. JAG 92.

[184] 26 Comp. Gen. 271 (1946).

[185] *Ibid.*

[186] 28 Comp. Gen. 103 (1948); 12 Comp. Gen. 448 (1932).

[187] 12 Comp. Gen. 256 (1932).

[188] A figure derived by dividing $10,000 by 360. 35 Comp. Gen. 75 (1955); 11 Comp. Gen. 260 (1932).

[189] 28 Comp. Gen. 103 (1948); 34 Comp. Gen. 429 (1955).

a Regular Navy commissioned officer, retired for physical disability not incurred in combat or caused by an instrumentality of war, is employed full time by the Government as an attorney at $7,000 per year. Let us suppose his retired pay amounts to $5,000 per year. How does the Economy Act affect his entitlement to dual compensation? The answer is that the Act operates to permit him to receive the full pay from his civilian employment, but only so much of his retired pay as will not cause the *combined pays* to exceed $10,000—in this case $3,000. Thus he may not receive more than $3,000 in retired pay during the year he is employed in a civilian capacity.[190] This reduction in retired pay applies uniformly each of the twelve months he is employed, even though some months he may have actually worked considerably less than thirty days (as a result, for example, of Saturdays, Sundays, holidays, leave taken, illness, etc.). The foregoing illustration is typical in that most situations involve retired pay and civilian compensation neither one of which alone is at a rate in excess of $10,000 per year. In the rare situation where the retired pay itself is at a rate in excess of $10,000 per year, the Act permits the retired officer to elect whether to accept his retired pay or the compensation from the civil employment.[191] Should the rate of compensation attached to the civil position be in excess of $10,000 and the rate of retired pay amount to less than $10,000 per year, the officer is not entitled to receive any retired pay while in a pay status in the civilian position.[192] He has no right of election in this case.[193] Only the civil compensation is legally receivable.

To be distinguished from the full-time employee is the intermittent or part-time employee. The former is usually considered to hold an office under the Government, whereas the latter merely occupies a "position." The application of the Economy Act to a part-time or intermittent employee is dependent upon the terms of his employment. If the terms of his employment state that he is to be employed temporarily for a brief though stated period,

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[190] Should he terminate his civil employment short of the year, he would be entitled to receive his full monthly retired pay during the months to follow because no dual compensation situation would then exist. 19 Comp. Gen. 391 (1939); 1 Bul. JAG 152.

[191] This is so regardless of the amount of the civil compensation. Subsec. 212(b), *supra*. *See also* 13 Comp. Gen. 448 (1934).

[192] 28 Comp. Gen. 727 (1949); 10 Bul. JAG 159. *Cf.* 1 Bul. JAG 152.

[193] *Ibid.*

at a stated salary, per day or per month, he is regarded as occupying a position within the application of the Economy Act throughout the period of his employment—even on days, such as Saturdays, Sundays and holidays, when he is not actually employed.[194] Therefore he may not receive his retired pay during the period of his temporary employment if such would, when combined with his civil compensation, exceed a rate of $10,000 per year.[195] To illustrate, let us take a hypothetical situation in which a commissioned officer of the Marine Corps (USMC), retired for length of service, is offered temporary employment of one month's duration as a special examiner for the National Labor Relations Board. The pay of a full-time special examiner for the Board is $8,000 per annum. The officer's retired pay is $4,800 a year. If the officer accepts the employment and works five days a week each week until the month is up, to how much retired pay, if any, will he be entitled during that month? First, the annual *rate* of pay of the civil position is $8,000 and the annual *rate* of his retired pay is $4,800. The *combined rate* is therefore in excess of $10,000. The Economy Act operates therefore to limit the retired pay the officer may receive during the period salary accrues from the civil employment, to a rate which, when combined with the rate of the civilian salary, is not in excess of a rate of $10,000. The civil salary accrues at the rate of $666.66 a month ($\frac{1}{12}$th of $8,000), which, incidentally, is the pay he will receive, thus he will be in a pay status each day of the month, a status which, unfortunately for him, will include Saturdays, Sundays and holidays, if any. His retired pay accrues at the rate of $400 per month ($\frac{1}{12}$th of $4,800). The maximum combined rate under the Economy Act is $833.33 a month ($\frac{1}{12}$ of $10,000). Thus $833.33 less $666.66 equals $166.67, the maximum amount he may receive during the

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[194] 19 Comp. Gen. 391 (1939). Although the distinction does not appear to have been made previously, the Comptroller General has recently ruled that a full-time consultant, paid by the day, was not entitled to receive his military retirement pay on holidays falling on the Saturday, Sunday week end, but was entitled to receive that pay on *holidays falling on the Monday through Friday normal work week.* 36 Comp. Gen. 723 (1957). The contract of employment in that case provided that the officer was not required to render services on days when the employing agency was closed. It did not specify that he would be paid on holidays. However, the employing agency was "closed" on some Saturdays and Sundays too, was it not?

[195] *Ibid.*

month.[196] An interesting variation can be injected by supposing that the officer accepted the employment, worked two weeks, and then terminated his employment. How much retired pay would he be entitled to receive during that month? If he terminated after two weeks, he would be entitled to receive $311.08 ($22.22 a day ($\frac{1}{360}$ of $8,000) x 14) civil salary. Thus he was in a pay status during each of fourteen days. His rate of retired pay is $13.33 per day ($\frac{1}{360}$th of $4,800). The maximum rate of combined retired and civilian pay under the Economy Act is $27.77 per day. Thus, for each day he accrued civil compensation he would be entitled to no more than $5.55 retired pay ($27.77 less $22.22). As to the other sixteen days in the month when he was not employed and accrued no civil compensation, he is entitled to receive a full day's retired pay for each. (The Economy Act is inapplicable, for the dual compensation situation has ceased to exist.) At $13.33 a day, retired pay for sixteen days equals $213.28. Add to this, fourteen days partial retired pay at $5.55 per day and the total amount, $290.98, is found.[197] The foregoing represents one type of a part-time employment situation. A more lucrative form of employment, moneywise, exists for the retired officer who is successful in obtaining part-time employment on a "when actually employed" basis. If the terms of the part-time or intermittent employment provide that compensation is to accrue only for days he is actually performing the duties of the employment, it follows that he occupies a "position" under the Government *only* on those days when he is actually employed. Only on those days will the Economy Act limit the amount of retired pay, if any, he may receive in addition to the civil compensation. On nonwork days, including Saturdays, Sundays and holidays, he may receive his

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[196] *Ibid.* The computation here does not take into consideration the possibility of a holiday falling within the normal work week. If one, or more, did and the terms of the contract of employment presented no obstacle, presumably the rationale of 36 Comp. Gen. 723, *supra* note 194, would apply and the maximum amount receivable would be slightly in excess of $833.33.

[197] *Ibid.*

full retired pay, unaffected by the Economy Act.[198] To illustrate, suppose a situation where a commissioned officer of the Navy (USN) retired for length of service is offered a position as consultant to the office of Naval Research at $50 per day, *when actually employed.* His retired pay is $5,500 per annum. He is actually employed four days during the month of April. To how much retired pay is he entitled for that month? The answer is $397.28. For each day that he is actually employed as a consultant he holds a "position" under the Government. On those days the combined rate of his retired pay and civil pay may not exceed $27.77. As the daily rate of pay as a consultant is in excess of $27.77, he may receive that pay only on the four days he is so employed. On each of the twenty-six days that he is not *actually employed* as a consultant, however, he may receive his full retired pay, $15.28 ($\frac{1}{360}$th of $5,500). Thus $15.28 x 26 equals $397.28.

As a practical matter, the distinction between the two forms of part-time employment reveals a situation which results, it may be argued, in a circumvention of the Economy Act. For example, a retired officer, although hired on a "when actually employed" basis, may actually work five days a week for several consecutive weeks. On the Saturdays, Sundays and holidays that he performs no work he may draw his full retired pay, whereas a fellow retired officer also working part time, but not on a "when actually employed" basis, finds his retired pay subjected to the application of the Economy Act *seven days a week.*[199] This

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[198] 34 Comp. Gen. 429 (1955); 31 Comp. Gen. 126 (1951); 28 Comp. Gen. 381 (1948); JAGA 1954/4943, 27 May 1954, 4 Dig. Ops., Ret., § 71.1; JAGA 1955/3591, 13 Apr 1955. Although the Comptroller General has not chosen so to state, the conclusion seems inescapable that the decision in 13 Comp. Gen. 448 (1934) and 14 Comp. Gen. 68 (1934), in so far as they hold that the retired pay of an officer employed on a "when actually employed" basis remains subject to the Economy Act on non-work days as well as work days, should no longer be followed.

[199] The Comptroller General has frowned upon the use of this device to evade the intent of the Economy Act. 31 Comp. Gen. 126, 128 (1951) (employment of a retired officer as consultant for six consecutive weeks); 34 Comp. Gen. 429 (1955) (employment of a retired officer as an expert for 8½ days in June, 24 days in July, 17 days in August, 22 days in September, 3 days in October, 1 day in November, and 12 days in December). Retirement pay for non-work days was allowed in the first case but disallowed in the second, principally because of a provision in his appointment fixing a "regular tour of duty five days per week."

might be termed a gray area where there is a not unreasonable basis for regarding the employment as on a "when actually employed" basis. Obviously, it cannot be extended to a situation where a full-time or part-time employee, in fact, is sought to be made eligible simply by referring to him as something else.[200] A rather ingenious means of effecting the part-time employment of a retired commissioned officer *without* subjecting his retired pay to the Economy Act *on nonwork days* is suggested by a line of decisions of the Comptroller General to the effect that where the terms and conditions of his employment fix the number of hours, or days, he is to be employed so that the total amount of retired pay and civilian compensation possible to be paid him in one year will not exceed $10,000, the Economy Act is not applicable even though the combined *rate* would otherwise exceed $10,000 per year.[201] For the protection of the officer, this device should be used whenever possible.[202]

Thus far we have concerned ourselves with per diem employment. Some consultants and experts are not hired by the day, however, but are hired by the hour. What is the effect of employment but three or fours hours a day, for example? Would the officer be entitled to that part of his retired pay which when added to the civil pay *received* does not exceed a rate of $27.77 per day? The answer to this question is again found in the word "rate." In applying the limitation of $10,000 per annum under Section 212 on the combined rate of compensation in a civilian position and retired pay, it is *rate* of compensation which controls irrespective of the number of hours worked during the day and of the amount of pay actually received.[203] Thus, if the hourly rate makes for an eight hour day of more than $27.77, the officer is entitled to no retired pay for that day, even though he actually works but part of the day.[204]

3. *What are the consequences?*

The Economy Act is simply a restriction upon the amount of retired pay that a commissioned officer may receive in addi-

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[200] 36 Comp. Gen. 723 (1957); 34 Comp. Gen. 429 (1955).

[201] 36 Comp. Gen. 689 (1957); 26 Comp. Gen. 160 (1946); 25 Comp. Gen. 464 (1945); 20 Comp. Gen. 407 (1941).

[202] It would be well to emphasize that the combined compensation is fixed at or below $10,000, however. 12 Comp. Gen. 256 (1932).

[203] 12 Comp. Gen. 256 (1932).

[204] "Historically, the law never has recognized fractional parts of a day in matters of retirement . . . of military personnel . . . ." 28 Comp. Gen. 381, 383 (1948).

tion to civil compensation for an office or position held under the Federal Government. Contravention of the statute does not in the least result in the officer's retired status being jeopardized,[205] nor does it in any way affect the validity of the civil office or position held. If, through error or inadvertence, compensation is received at a combined rate in excess of that permitted by the act, and the officer, *or the civil office or position* (see app. IV, *infra*) is without any statutory exception to the act, the sole consequence is that a claim in favor of the Government exists for the excess.[206] However, should the officer have accepted the employment on the basis of advice from a responsible governmental agency, he is only liable for amounts paid to him in excess of that allowable under the Economy Act *after* he is notified that he has been violating the Act.[207]

4. *Illustrative problems*

Q—The Veterans Administration proposes to employ certain retired regular commissioned officers of the Armed Forces as consultants to the Department of Medicine and Surgery on a fee basis, whenever particularly difficult medical cases arise. When employed, the officers will not perform or supervise duties and responsibilities imposed by law upon the agency, nor will they be under the administrative control of an official of the Government in the usual sense. On the contrary, their employment will be in an advisory capacity only; that is to say their duties will consist primarily of expressing their views and giving their opinions and recommendations upon particular problems and questions presented to them for consideration. Assuming the total rate of compensation from both sources is in excess of $10,000, is the Economy Act applicable in this situation?

A—No. Under the circumstances, the employment does not amount to a "position" within the contemplation of the act, notwithstanding that the term "compensation" as used therein includes fees (26 Comp. Gen. 501 (1947)).

Q—A Navy commissioned officer (USN) retired for disability not incurred in combat and not caused by an instrumentality of war is offered part-time employment in the office of Naval Research under a personal services contract. Under the contract the officer will be required to work, in the office, on projects

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[205] 29 Comp. Gen. 203 (1949).

[206] The claim must be filed within six years or it will be barred. 68 Stat. 890 (1954), 31 U.S.C. 237a (Supp. IV).

[207] Op. JAGAF 1953/19, 26 May 1953, 3 Dig. Ops., Ret., § 71.1.

assigned him by his superiors and will be required to perform that work under their supervision. The combined compensation from both sources will be in excess of $10,000. May the officer receive both his retired pay and the civil compensation at a rate in excess of $10,000 if he accepts the employment?

A—No. The Economy Act would apply here. Persons employed by contract to perform duties imposed by law upon an agency and who are subject to the direct control and supervision of administrative officials are employees holding positions under the United States Government to the same extent as persons appointed to positions under Civil Service laws and regulations (26 Comp. Gen. 720 (1947)).

Q—A Regular Army general officer, retired for length of service and in receipt of retired pay in the amount of $10,500 per annum, was designated by the Labor Department as a conciliator during a labor dispute. The officer was authorized $60 per diem, "when actually employed," plus expenses. He performed services as a conciliator during the period April 4th to 12th inclusive and April 20th to 30th inclusive, a total of twenty days. What is the maximum combined compensation that the officer may receive during the month of April?

A—The Economy Act is applicable to this officer because (1) he is not retired for disability incurred in combat nor caused by an instrumentality of war, and no special statute exists exempting labor conciliators from dual compensation limitations; (2) under the circumstances his job as a conciliator for the Labor Department amounts to a position under the Federal Government; and (3) the combined rate of pay from both sources exceeds a rate of $10,000 per year, or for purposes of simplicity in this case, $27.77 per day. He holds a position under the Federal Government, however, *only* on those days when he is actually employed, *i.e.*, on those days when civil compensation accrues. Thus on each of the twenty days he was actually employed as a conciliator, he is entitled to $60 or to one day's retired pay, whichever he may elect (note that his retired pay alone is in excess of $10,000 per annum, hence the right of election). On the ten days that he was not employed and accrued no civil compensation, he is entitled to ten days' retired pay. (19 Comp. Gen. 391 (1939); 28 Comp. Gen. 381 (1948); 31 Comp. Gen. 126 (1951); 34 Comp. Gen. 429 (1955); *but see* 13 Comp. Gen. 448 (1934); 14 Comp. Gen. 68 (1934).)

Q—The Department of Commerce has employed temporarily a Regular Army commissioned officer who is retired because of physical disability (high blood pressure) to compile and prepare for publication a glossary of meterological terms for the United States Weather Bureau. The officer is now receiving retired pay at the rate of $5,500 annually. It is proposed to pay him $3.00 per hour (when actually employed) in the Weather Bureau. The hours per month are limited so that they will never exceed a total of 90, making the maximum annual compensation which it will be possible for him to accrue in the position $3,240, or a total of $8,740 a year with his retired pay. May the officer receive both his retired pay and the civilian compensation?

A—Yes. Although the annual rate of compensation of the civil position would otherwise be $6,240 (2,080 hours (40 x 52) x $3.00) per annum, thus making the combined rate in excess of $10,000, it is well settled that when a definite limitation on employment is made in the appointment or contract of employment to a specific number of hours per day, or days per week, month, or year, and the appointment or contract of employment provides for payment of compensation only when actually employed, the statute is not applicable if the total amount of combined compensation possible to be paid for the year does not exceed a rate of $10,000. (20 Comp. Gen. 407 (1941); *but see* 12 Comp. Gen. 256 (1932).)

B. *Revised Statute 1763*

Section 1763 of the Revised Statutes, as amended,[208] provides as follows:

> "Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2,000 per annum."

1. *To whom applicable?*

As to persons, the act is applicable to all who are not excepted from its application by Section 6 of the Act of 10 May 1916, as amended,[209] or by some other provision of law. Section 6 of the 1916 Act provides (in codified form):

> "Section 58 of this title [Title 5, United States Code] shall not apply to retired officers or enlisted men of the Army, Navy, Marine Corps, or Coast Guard, or to officers and enlisted men of the Organized Militia and Naval Militia in the several

[208] 5 U.S.C. 58 (1952).
[209] 39 Stat. 120 (1916), as amended, 5 U.S.C. 59 (1952).

States, Territories, and the District of Columbia."[210]

Subsection 29(c), Act of 10 August 1956, provides pertinently:

". . . .

"Any Reserve or member of the National Guard may accept any civilian position under the United States or the District of Columbia and may receive the pay incident to that employment in addition to pay and allowances as a Reserve or member of the National Guard . . . ."[211]

As Subsection 29(c) must be read in conjunction with Subsection 29(d), it operates to except Reserve and National Guard personnel who are not on active duty or who are merely on active duty for training from the application of Section 1763.[212] Thus, the *only persons to whom* Section 1763 is applicable, so far as the military is concerned, are officers and enlisted men of the armed forces who are on active duty in excess of fifteen days.[213]

2. *When is it applicable?*

The Act is applicable whenever a member of the military on active duty, other than active duty for training, would otherwise be entitled to receive (1) a salary, (2) in the form of appropriated funds from a source under the Federal Government, (3) for civil employment performed contemporaneously with his military employment, and (4) under such circumstances as to cause the combined rate of the civilian salary and his military pay to exceed $2,000. All four criteria must be met as a condition precedent to the Act's application to a member of the armed forces.

a. *A Salary*

Unless two (or more) *salaries* are involved, the Act is inapplicable.

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[210] The term "officers" includes warrant officers. 16 Comp. Gen. 232 (1936).

[211] 70A Stat. 632.

[212] Similar construction was given 1917 legislation. *See* 18 Comp. Gen. 94 (1938); 1 Comp. Gen. 544 (1922).

[213] Subsec. 29(c) must be read in conjunction with Subsec. 29(a), which provides pertinently: "Each Reserve of the armed forces or member of the National Guard who is an officer or employee of the United States or the District of Columbia . . . is entitled to leave of absence from his duties, without loss of pay, time, or efficiency rating for each day, *but not more than 15 days in any calendar year*, in which he is on active duty . . . ." (emphasis supplied). *See also* 24 Comp. Dec. 81 (1917), holding that civilian employees of the Government attending ROTC summer camp (six weeks) were not excepted from an act substantially similar to Subsec. 29(a), *supra*.

> "A person who is regularly and continuously employed under a definite, continuing employment, and who receives at stated intervals a fixed compensation for the service which he renders is receiving a salary within the meaning of this statute [Rev. Stat. § 1763, as amended], whether his compensation is measured by the day or by a longer period of time. . . ."[214]

Military pay, but not allowances,[215] is, of course, "salary." Thus the Act applies to any member of the Armed Forces on active duty who receives a second "salary." The broad definition given that term by the Comptroller General permits few payments to escape inclusion. Two that do escape are "fees"[216] and compensation "in kind."[217] *A fee* can be said to be distinguishable from *a salary* in that the former connotes a lump sum payment, payable normally upon completion of a short term project. As a practical matter, however, the distinction is not always readily perceptible. Thus payment at a fixed rate per hour,[218] per diem,[219] and even the nominal sum of $1.00 per annum[220] have been held to be "salary" within the meaning of the Act. Needless to say, if a person accepts civil employment without pay, the Act has no application, for no double *salary* situation results.[221]

b. *Appropriated funds from a source under the Federal Government*

Unless both positions (jobs) are under the Federal Government, and unless both *salaries* are payable from appropriated funds, the Act is inapplicable. Thus, if a member of the military is employed by a nonappropriated fund activity, his combined salary is not subject to the limitation prescribed by the Act.[222]

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[214] 22 Comp. Dec. 673, 674 (1916).

[215] 20 Comp. Gen. 764 (1941).

[216] 23 Comp. Gen. 275 (1943); 22 Comp. Gen. 312 (1942); 15 Comp. Gen. 751 (1936); 24 Comp. Dec. 532 (1918).

[217] 23 Comp. Gen. 900 (1944).

[218] 25 Comp. Dec. 611 (1919). *Contra, U.S.* v. *Gorman*, 76 F. Supp. 218 (E.D. La. 1948).

[219] 33 Comp. Gen. 368 (1954). *Contra, U.S.* v. *Shea*, 55 F.2d 382 (N.D. 1932). However, the Comptroller General has reconsidered and announced that he will follow the Gorman and Shea cases to the extent that "salary" excludes compensation received by an *intermittent* employee, but includes compensation received by a *part-time employee*. The former is an employee employed on an irregular or occasional basis whose hours or days of work are not arranged on a pre-arranged schedule and who are compensated only for the time when actually employed or for service actually rendered.

[220] 23 Comp. Gen. 900 (1944).

[221] 30 Comp. Gen. 386 (1951); 18 Comp. Gen. 1010 (1939).

[222] 20 Comp. Gen. 189 (1940).

Similarly, if he is employed by the United Nations, the Act does not limit his combined salary.[223]

c. *Services performed contemporaneously with military employment*

For the Act to apply, the two employments must take place during the same period of time.[224] Obviously, if both employments amount to offices, and the compensation attached to one is $2,500, or more, the Act of 1894 applies and any question of dual compensation is moot. There are, however, situations where one or both employments do not amount to offices. Usually, it is a case where an individual is a part-time, intermittent, or "when actually employed" employee. In such a case, the individual may be employed by two or more Government agencies without having his combined salary restricted by the statute, provided the agencies employ him on different days or at different times.[225] As military personnel receive a salary when in an active status in the service, whether or not military duties or services are actually performed,[226] this criteria offers little opportunity for such personnel to avoid the consequence of the act.

d. *Circumstances causing the combined rate of the civilian salary and his military pay to exceed $2,000*

"In determining whether the combined amount of more than one salary received in more than one position under the Government exceeds the sum of $2,000 per annum, . . . the basis is the rate per annum of the combined salaries and not the aggregate amount actually received during a portion of the year, whether the measure of time for payment of salary under one or more positions is per annum, per diem, or per hour, it being necessary

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[223] Federal funds lose their status as such when intermingled with U.N. funds. 23 Comp. Gen. 744 (1944).

[224] 18 Comp. Gen. 1010 (1939); 12 Comp. Gen. 583 (1933). It is immaterial whether the second employment is permanent or temporary. 18 Comp. Gen. 248 (1934).

[225] 15 Comp. Gen. 751 (1936); 12 Comp. Gen. 583 (1933); 11 Comp. Gen. 200 (1931). The rule is equally applicable where the two "employments" are in different branches of the same executive department. 23 Comp. Gen. 275 (1943).

[226] 13 Ops. Att'y Gen. 103 (1869). *See* 37 Comp. Gen. 64 (1957); 13 Comp. Gen. 150 (1933); 3 Comp. Gen. 434 (1924).

to determine in each instance the per annum rate equivalent to the rate based on a measure of time less than a year."[227]

3. *What are the consequences?*

The general rule is that if a government employee is the recipient of two salaries from the Federal Government under such circumstances as to contravene the provisions of the Act, he must elect which of the two salaries he desires to continue to receive;[228] and he must refund to the Government the money he has received from the employment, the salary attached to which he has rejected.[229] For example, a full-time government agronomist receives an annual salary of $2,400. Concurrently, he has been employed part time by a different Federal Agency as a forest ranger at a salary of $100 per month. Section 1763 obviously prohibits him from receiving both salaries. He must elect which of the two he wishes to continue to receive. If he elects that of an agronomist, he must refund to the Government the salary he has thus far received as a forest ranger. No doubt, he will also choose to terminate his employment as a forest ranger—this, as a practical matter since the statute does not require him to do so.[230] If the individual fails to make any election, the accounting officers will presume that he elects the greater salary.[231] This is the general rule, applicable to all except military personnel. Military personnel are denied the right to elect to receive the compensation from the civil employment, because such employment is void *ab initio*, it being incompatible with their status.[232]

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[227] 8 Comp. Gen. 261 (1928) (syllabus). *Accord*, 30 Comp. Gen. 525 (1951). As is true with respect to the Economy Act, if by the terms and conditions of the employment the rate of compensation is so fixed that the combined salaries cannot possibly exceed $2,000 per annum, the act is not a bar to receipt of both. 18 Comp. Gen. 614 (1939).

[228] 22 Comp. Gen. 654 (1932).

[229] 30 Comp. Gen. 525 (1951).

[230] Yet in a very recent decision the Comptroller General said that Section 1763 prohibits appointment to a second position. 37 Comp. Gen. 64, 66 (1957). It is submitted that such an interpretation is not technically correct. The Section does not prohibit a second appointment; it merely prohibits paying one person more than one salary in excess of a stated rate. There is a difference.

[231] 17 Comp. Gen. 238 (1937).

[232] 20 Comp. Gen. 860 (1941).

C. *Revised Statutes 1764 and 1765*

Section 1764 of the Revised Statutes[233] provides:

"No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law."

Section 1765 of the Revised Statutes[234] provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

The purpose of these statutes is to prevent persons employed in the Government service from accruing a right to compensation "in any form whatever" *in addition* to that fixed by law for the job to which they have been appointed for the performance of duties or services connected with *that job*.[235] These statutes do *not* prohibit a person from holding and receiving the compensation of two *separate and distinct* offices, positions or employments, the salary or compensation of each of which is fixed by law or regulation, where the two services are not incompatible with each other.[236] Nor do they prohibit the detail of a salaried employee of the Government to perform the duties of another position in the Government service without extra compensation therefor.[237] They should, more correctly, be termed extra compensation statutes rather than dual compensation statutes.

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[233] 5 U.S.C. 69 (1952).

[234] 5 U.S.C. 70 (1952).

[235] 23 Comp. Dec. 403 (1917); 9 Comp. Dec. 620 (1903); 9 Comp. Dec. 274 (1902); 34 Ops. Att'y Gen. 490 (1925).

[236] *U.S.* v. *Saunders*, 120 U.S. 126 (1887); 23 Comp. Gen. 900 (1944); 23 Comp. Gen. 275 (1943); 18 Comp. Dec. 247 (1911); 3 Comp. Dec. 183 (1896); 1 Comp. Dec. 366 (1895). *E.g.*, the employment at an annual salary by one Government agency of a medical advisor who was also employed by another Government agency as a consultant on a fee basis was held not to have constituted a violation of the dual compensation restrictions of Section 1765. 22 Comp. Gen. 312 (1942).

[237] 34 Ops. Att'y Gen. 490 (1925).

1. *To whom applicable?*

Both statutes are applicable to officers of the United States. The term "officer" is used in the restricted constitutional sense. As discussed previously, it means an officer in the public service; that is, one holding a permanent and continuous position of trust in the Government, or some branch of the public service, created or recognized as such by the Constitution or by authority of a statute requiring of its incumbent the performance of such duties as are prescribed or recognized by the authority under which it is created.[238] The criterion is not who appointed the incumbent, but rather is by what authority was the position created.[239] In the military, commissioned officers and warrant officers of the Regular components, both active and retired, are officers in the constitutional sense, as are Reserve commissioned and warrant officers on active duty (other than active duty for training).[240] Section 1765 (but not Section 1764) applies to a second category of persons; *viz.*, "any other person whose salary, pay or emoluments are fixed by law or regulations." This category includes not only public officers, but "quasi-public" officers as well,[241] that is, employees whose compensation is fixed either by law or regulations.[242]

That which must be fixed by law or regulation is the compensation attached to the office, or position, or employment held, not the salary he, as an individual, may have been offered or have agreed to accept.[243] This criterion is broad enough to include all members of the armed forces, active and retired, and former members in receipt of retired pay. Sections 1764 and 1765 are therefore applicable to all such personnel except to the extent that other statutes may except certain of them from the application of the sections; or, in the words of Section 1765, "unless the same is authorized by law, and the appropriation therefor explicitly

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[238] 4 Lawrence, Comp. Dec. 588 (1883). An office is the authority to exercise a function of government. 4 Comp. Dec. 696 (1898).

[239] "The head of a Department cannot *create an office* . . . . The creation of an office is the exercise of legislative power." 4 Lawrence, Comp. Dec. 588, 607 (1883).

[240] *See* Subsec. 29(d), Act of 10 Aug 1956, *supra*.

[241] *Hoyt* v. *U.S.*, 51 U.S. 109, 141 (1850).

[242] 11 Comp. Dec. 5 (1904).

[243] 16 Comp. Gen. 909 (1937); 21 Comp. Dec. 436 (1914); 20 Comp. Dec. 633 (1914). An appropriation act which merely sets a maximum sum which may be expended to compensate the incumbent of a position does not "fix" the compensation of the position. 18 Comp. Dec. 132 (1911).

states that it is for such additional pay, extra allowance, or compensation." The one significant group excepted from the application of both sections is Reserve personnel, other than those on active duty in excess of fifteen days.[244] Thus the sections are particularly applicable to active duty personnel and retired regulars, regardless of grade and regardless of the basis for retirement.

2. *What is prohibited?*

A person to whom the statutes are applicable is prohibited from receiving additional compensation, in any form,[245] from appropriated funds,[246] for the performance of so-called extra-services connected with the office; or, in the case of Section 1765, the position or employment held; unless expressly authorized by law to receive such.[247] Thus, it has been held that an Army officer detailed for duty with the United States Shipping Board was prevented (by Section 1765) from receiving any increase in compensation or additional allowance on account of such detail—except for unusual expenses, other than personal or what are usually termed living expenses, incurred as a necessary incident to the accomplishment of the work assigned to him;[248] that a civilian employee was precluded from receiving fees as a notary when his acting as a notary was required as part of his official duties and for which he was paid compensation fixed by law;[249] that Section 1765 renders legally objectionable a proposal to award cash prizes (payable out of appropriated funds) to Army recruiters;[250] that the Section prohibits a Government hospital

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[244] Subsec. 29(c), Act of 10 Aug. 1956, *supra*.

[245] Including quarters in kind. 6 Comp. Gen. 359 (1926).

[246] 11 Comp. Dec. 702 (1905). Hence, no prohibition exists where non-appropriated funds are involved. JAGA 1952/5495, 17 Jul 1952.

[247] 1 Lawrence, Comp. Dec. 317 (1880).

[248] 26 Comp. Dec. 750 (1920). *See also* 20 Comp. Dec. 694 (1914). Since the first cited decision, special statutory authority has been enacted to permit officers of the Armed Forces to receive additional compensation when detailed to the Board, now the Federal Maritime Board. *See* par. f, App. IV, *infra*.

[249] 25 Comp. Dec. 987 (1919). A contrary result would obtain, of course, were the duties of the individual unrelated to that of a notary. *See* 22 Comp. Dec. 693 (1916). Civilian employees required to perform notarial acts as part of their official duties are, by virtue of recent legislation, now entitled to be paid an allowance to cover the expense of obtaining a notary's commission. 70 Stat. 519 (1956), 5 U.S.C. 70a (Supp. IV). The allowance is payable even if the employee performs notarial acts during off-duty hours for personal profit. 36 Comp. Gen. 465 (1956).

[250] 6 Bul. JAG 232.

from paying military personnel for blood donations;[251] and that it prohibits a retired Regular Army officer from receiving compensation for certain lectures to be given at a service school.[252] The foregoing decisions illustrate that the two statutes operate to deny extra compensation even though the Government derives what may be conceded to be a substantial and additional benefit from the services rendered. There is no recovery *quantum valebat* in this situation.

A rather unexpected application of Section 1765 is found in the utilization of military personnel, particularly retired commissioned officers, as expert witnesses for the Government in civil litigation to which the Government is a party. As a general proposition, a civilian witness called to testify before a court by the Government is entitled to per diem and mileage.[253] Retired military personnel, but not military personnel on active duty, are similarly entitled when called as *ordinary witnesses*.[254] An expert witness is not in the same category as an ordinary witness, however. An ordinary witness may be compelled to testify concerning facts within his knowledge, but an "expert" cannot be so compelled. It has been held, therefore, that the services, skill, or knowledge of an

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[251] 5 Comp. Gen. 888 (1926); 5 Comp. Gen. 658 (1926). The Comptroller General is of the opinion that giving blood is rendering a service, not selling a commodity. If a true donation is involved, then he is quite correct. *See* 22 Comp. Dec. 579 (1916). But would it be legally objectionable, so far as Sections 1764 and 1765 are concerned, for a government hospital to contract with military personnel for the purchase of their blood? *See* 5 Comp. Gen. 93 (1925). Surely, a sale of a commodity would then be involved. Be that as it may, the question has been mooted by the enactment of the Act of 9 Feb 1927, 44 Stat. 1066, as amended, 24 U.S.C. 80 (1952), which authorizes the payment of up to $50 to blood donors, *whether or not the donor is in the employ of the United States.*

[253] 18 Comp. Dec. 855 (1912); Dig. Op. JAG 1912–40, p. 120.

[253] 18 Comp. Dec. 966 (1912).

[254] *See* par. 3*a*(2), AR 35-3920, 27 Apr 1954. The reason that Section 1765 does not preclude retired military personnel from receiving per diem and mileage when called to testify by the Government is because attendance as an ordinary witness is not one of the duties to which a retired member may be administratively assigned by the Secretary of the Army. 23 Comp. Dec. 207 (1916); 18 Comp. Dec. 966 (1912); 10 Comp. Dec. 51 (1903). If not a duty to which he may be assigned, then testifying as a witness is unrelated to his retired role and Section 1765 is inapplicable. Active duty personnel may receive reimbursement for actual expenses, however. *See* par. 3*a*(1), AR 35–3920, *supra*; par. 24*d*-(1), AR 27–5, 3 Apr 1951.

"expert" cannot be acquired without just compensation.[255] Certainly the foregoing is true where a civilian not in the employ of the Government is concerned, and it should be recognized that his status while performing the services for which contracted is not that of an officer or employee of the Government.[256] He appears and testifies as a private individual.[257] Applying the foregoing to the situation where the expert witness is a retired member of the Armed Forces, it follows that as the employment is a special employment personal to the expert employed, with compensation also personal to him, fixed by agreement and not by law or regulation. Thus, Section 1765 operates to prohibit the retired member from receiving any special compensation or fee for his services as an expert.[258] This result obtains even though a commissioned officer retired for physical disability is involved,[259] and even though he be retired for a physical disability incurred in combat with an enemy.[260] A distinction has been made between the expert who is employed to testify ("expert witness") and the expert who is employed principally to assist the Government in the conduct of its case ("expert").[261] In the latter case, the expert is employed *via* a personal contract precisely in the same manner as the "expert witness." Notwithstanding the similarity in the manner by which their services are engaged, it has been implied

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[255] *In re* Major William Smith, 24 Ct. Cl. 209 (1889); 6 Comp. Gen. 712 (1927).

[256] 24 Comp. Gen. 159 (1944); 12 Comp. Gen. 322 (1932).

[257] 24 Comp. Gen. 159 (1944).

[258] 27 Comp. Dec. 220 (1920). He may, of course, be reimbursed for travel and subsistence expenses actually incurred. 6 Comp. Gen. 712 (1927). *See also* par. 3*f*(3), AR 35–3920, 27 Apr 1954; par. 36, AR 35–1350, 14 Dec 1951. *But see* DA Pam 21–56, Jun 1953, p. 4.

[259] As an expert witness, he would hold no office under the Government. Thus, the Act of 1894 is not applicable. The exception in favor of physically disabled personnel benefits only those persons to whom the Act would otherwise be applicable. 6 Comp. Gen. 712 (1927).

[260] Since an expert witness does not hold an "office" or "position" under the United States, the Economy Act is inapplicable to him. As a witness, he appears to testify under oath to his personal views and opinions as an individual. He is not under Federal control or supervision. His employment does not connote conditions of tenure or duration. The Economy Act being inapplicable, officers retired for combat incurred disability enjoy no excepted status. 6 Comp. Gen. 712 (1927). *Contra*, par. 24*g*(2), AR 27–5, 3 Apr 1951, relying upon 28 Comp. Gen. 381 (1948). The latter case dealt with the employment of a retired commissioned officer as a consultant to the Atomic Energy Commission upon matters relating to explosives safety—an opinion hardly in point.

[261] 24 Comp. Gen. 159 (1944).

that the "expert," as distinguished from the "expert witness," *is* an officer or employee of the Government while so employed.[262] If the "expert" is to be regarded as an officer or employee of the Government, then problems arise. If he is considered to be an officer, the Act of 1894 would preclude most retired military officers from even accepting the employment. If he is considered to be an employee, the Economy Act would limit the dual compensation most commissioned officers could receive. The only case involving the utilization of a retired commissioned officer of the armed forces as an "expert" which could be found in the published decisions of the Comptroller General was decided prior to the enactment of the Economy Act.[263] In that case it was held that Section 1765 prohibited the officer from receiving any compensation other than reimbursement for actual travel expenses. The decision would fall right in line with those involving "expert witnesses" were it not for the fact that the Comptroller General announced therein the proposition that an "expert" was an officer or employee of the Government.[264] He made no attempt to reconcile this statement with the 1894 Act and it did not appear in the opinion that the officer was retired for physical disability. In view of the result reached in that decision, it would seem that there is a greater likelihood of an "expert" being regarded as an *employee* of the United States. If he is an employee, then he holds a position under the United States. The Economy Act would then apply to most commissioned officers who accept employment as an "expert." This result seems logical, for an "expert" is in effect a consultant working intermittently, or part time, on a time basis. As we have seen previously, the Economy Act is applicable to retired commissioned officers so employed.

One other distinction exists, and that is between the expert who is employed by the Government under a personal services

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[262] 24 Comp. Gen. 159 (1944); 6 Comp. Gen. 712 (1927). These decisions are predicated upon 27 Comp. Dec. 220 (1920). In that case, it was sought to employ a retired Regular Army officer as an "expert witness" on a per diem basis. It was held that payment of such compensation would be prohibited by Section 1765, Revised Statutes, because the compensation was fixed by agreement and not by law or regulation. The decision did not hold that an "expert" was an officer or employee of the Government; indeed, an "expert witness," not an "expert" was involved.

[263] 6 Comp. Gen. 712 (1927).

[264] *See* note 262, *supra*.

contract[265] and the expert who has been appointed by the court. In the latter situation, statutory authority exists for the appointment and fixes the compensation which may be paid. Thus the employment is created and the compensation fixed prior to the appointment, and without reference to any specified appointee; and the compensation attaches to the position and not to the person holding it. Section 1765, Revised Statutes, does not, therefore, prohibit receipt of the additional compensation.[266]

3. *What are the consequences?*

The consequences are simply that the individual to whom the sections are applicable must refund any money he has received for extra services rendered.

IV. CONCLUSION

The above pages represent a compilation of the available law relating to the compatibility of military and other public employment. However, there are a few other thoughts on the matter which might appropriately be set out under the generic title "Conclusion."

For example, a military person, active or retired, who is desirous of accepting further public employment usually cannot obtain advice from the appropriate government agency as to the *general* areas of public employment available to him without penalty. Though not authoritative in nature, some useful information can and should be given the client who wants to know whether or not, in general, it would be advisable for him to con-

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[265] In several opinions, the Comptroller General has indicated that the entering of personal service contracts between the individual employee and the Government, or the hiring agency, are to be severely discouraged. 5 Comp. Gen. 93 (1925); 27 Comp. Gen. 735 (1948); 25 Comp. Gen. 690 (1946); 21 Comp. Gen. 705 (1942); 14 Comp. Gen. 403 (1934); 13 Comp. Gen. 281 (1934). However, in not one of the cited decisions, *supra*, was the individual involved a retired member of the armed forces. Where personal services contracts with retired members of the armed forces have been considered, they have passed the scrutiny of the Comptroller General without comment as to policy. *E.g.*, 28 Comp. Gen. 381 (1948); 26 Comp. Gen. 720 (1947). As a collateral matter, a general policy objection also exists to a contract with a private person for the performance of services ordinarily required of Federal employees. There are, of course, exceptional situations. *See* 32 Comp. Gen. 427 (1953); 32 Comp. Gen. 127 (1952); 26 Comp. Gen. 468 (1947).

[266] 18 Comp. Dec. 63 (1911). But beware the application of Rev. Stat. § 1763, as amended, and the Economy Act.

sider dual public employment, appending to such information a reservation to the effect that a definitive legal opinion must await the particulars of a proposed employment.[267]

In rendering such legal advice to a client considering acceptance of civil employment in a state or local government, it is also necessary to ascertain whether the state or local law precludes the acceptance of the particular position involved by one occupying a status under the Federal Government. Usually, the opinion of an appropriate state or local official is advisable.

If the individual in question is on active duty, the statutes are not self-implementing. Here, the prerogatives of command and the requirements of the service validly impose upon the officer or enlisted man a requirement that he obtain the permission of his immediate commander, or his installation commander, or even, in some cases, his military Department, before accepting any civil-type employment unrelated to his military duties.[268] If election to a public office is involved, the Department *may* regulate the extent to which he may participate as a candidate and deny to him the right to remain on active duty if elected.[269] In the case of retired military personnel the Departments concerned are not in accord with respect to the extent, if any, the civil employment of such personnel should be monitored. The Department of the Army advises all retired personnel, regardless of grade, to consult The Adjutant General before accepting any office or position in

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[267] 1 Bul. JAG 152; *Air Force Guide for Retired Personnel,* AFP 34–4–3, DAF, 1 Jun 1955, p. 21; *Reference Guide to Employment Activities of Retired Naval Personnel,* Rev. Ed., 1 Sep 1954, Dep. NAV, JAGN, p. 2. The Navy guide indicated that legal advice may not be rendered until *after* acceptance of the proposed civilian employment.

[268] The Army may legally require its employees to certify as to current outside activities and forebearance from accepting outside employment without prior Army approval. JAGA 1953/2315, 16 Mar 1953, 3 Dig. Ops., Civ. Pers., § 51.3. For example, Army regulations charge the installation commander "with the responsibility that no military member of his command will be . . . permitted to leave his installation to engage in any pursuit, business, or performance in civil life, for emoluments, hire or otherwise, when it will interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions." Par. 38, AR 210–10, 8 Jun 1954. *See also* 10 U.S.C. 3635 (Supp. IV).

[269] With respect to the Department of the Army, *see* par. 18, AR 600–10, 15 Dec 1953.

Government service.[270] Indeed, retired commissioned officers, except those to whom the Economy Act is not applicable, are required to report to the Finance Office, U. S. Army, all employment in a civilian capacity with the United States Government.[271] The Departments of the Navy and the Air Force, on the other hand, exact no requirements of its retired personnel in this respect. Both departments merely publish a small brochure summarizing some of the dual office and dual compensation statutes of more frequent application, advising the retired member therein that it is his responsibility, as an individual, to avoid the contravention of those statutes.[272]

The multitude of existing dual office, dual employment and dual compensation statutes, and statutory exceptions thereto, create a trap for the unwary layman and indeed a formidable challenge for the attorney-advisor. Certainly, all would agree with the call of the Comptroller General for ". . . the enactment of a single revision consolidating and simplifying all of the various laws presently in effect relating to dual employment and double compensation . . . ." [273] But would it be enough merely to consolidate and simplify the current statutes? Ought not the basic and, in some cases, outmoded policy reasons behind each of the prohibitory statutes be exhumed and reevaluated? Should not the laws applicable to Armed Forces personnel on active duty be uniform regardless of armed force, regardless of component, and regardless of grade?[274] Should not the laws applicable to retired personnel be similarly uniform? Is there really a sound basis for discriminating against individuals who have been retired for reasons other than physical disability and then, with respect to the physically disabled, between those who have been disabled in combat or by an instrumentality of war and those who have been otherwise disabled in line of duty? Admittedly a formidable

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[270] Par. 40, AR 35-1350, 14 Dec 1951; DA Pam 21-56, Jun 1953, p. 3. In the case of proposed employment with a nonappropriated fund activity, the retired member is *required* to submit the matter to the Chief of Finance. Par. 6*e*(5), AR 230-5, 18 Jul 1956.

[271] Par. 11, AR 35-1350, 14 Dec 1951; DA Pam 21-56, Jun 1953, p. 4.

[272] *See* note 267, *supra*.

[273] Letter of 15 Jul 1955 to the Honorable Harry F. Byrd, Chairman, Committee on Finance, United States Senate, 2 U.S. Code Cong. and Admin. News, 84th Cong., 1st Sess., 1955, p. 2674.

[274] Related to the problem of concurrent military and civilian employment is dual status in the military itself. Should a retired regular be permitted to occupy a status in a State National Guard? In the Army National Guard of the United States?

undertaking is involved, but nonetheless it is considered that the best interests of the Government would be served thereby. The best interests of the Government are served by obtaining the best man for the job, not by closing the door on its tried and true servants under unrealistic concepts of incompatibility or outmoded concepts of economy. This contention has been proven sound in the attached appendices, for how else can the numerous statutory exceptions to the dual office, dual employment, and dual compensation acts be justified. It is just as realistic to authorize a retired Army officer to be employed with the Remount Service as it is to authorize his employment with any other agency of the Government, in any capacity, when he is the best man available for the job. Similarly, it is just as realistic to enact a private bill for the relief of a retired Regular Army commissioned officer who found, too late, that his employment with a nonappropriated fund activity caused him to run afoul of the Economy Act[275] as it is to permit any retired officer to accept dual compensation without restriction. Dual office statutes serve a useful purpose, of course, *when the individual is in an active status*, although the common law doctrine of incompatibility exists to accomplish the desired result independent of statute, admittedly with a risk of its being applied other than uniformly. Dual compensation statutes are difficult to justify today. At best they serve to save the Government a few dollars; at worst they operate to accept services without fair compensation.

It will require more than these words to stimulate legislative action, but, if and when that action comes, particularly with respect to retired military personnel, a decision must be made. Is the public good served by denying the Government the services of retired military personnel in a civil capacity? That is the only question. It is not a question of money, because Federal employment does not lead to wealth. The experience gained through full and faithful military service should be recognized and utilized, not penalized.

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[275] *See* 69 Stat. A144 (1955).

APPENDIX I

Statutory Exceptions to Title 10, United States Code, Subsection 3544(b)

a. Alaska Commissioners: Commissioned officers of the Coast Guard may be appointed as United States Commissioners or United States Deputy Marshals in and for the Territory of Alaska (Act of 4 Aug 1949, 63 Stat. 545, 14 U.S.C. 643 (1952)).

b. Army and Air National Guard: A Regular Army (or Air Force) commissioned officer detailed to duty with the Army National Guard may, with the permission of the President, accept a commission in the latter organization (32 U.S.C. 315 (Supp. IV)).

c. Atomic Energy Commission: Any officer of the armed forces on active duty may serve as Director of the Division of Military Application (part of the Atomic Energy Commission). Any active or retired officer of the armed forces may serve as Chairman of the Military Liaison Committee (to advise and consult with the A.E.C.). (Sec. 2, Act of 1 Aug 1946, 60 Stat. 756, as amended, 42 U.S.C. 2038 (Supp. IV); as to dual compensation, see par. a, App. IV, *infra.*)

d. Census Bureau: Enlisted men and officers of the armed forces may be employed by the Director of the Census to enumerate personnel of the armed forces. (Act of 18 Jun 1928, 46 Stat. 21, as amended, 13 U.S.C. 203 (1952); as to dual compensation, see par. c, App. IV *infra.*)

e. Central Intelligence: A commissioned officer of the armed forces may be appointed to the office of Director of Central Intelligence. (Sec. 102, Act of 26 Jul 1947, 61 Stat. 498, as amended, 50 U.S.C. 403(b) (Supp. IV); as to dual compensation, see par. d, App. IV, *infra.*)

f. Defense Advisory Committees: Persons holding offices under the United States may be appointed by the Secretary of Defense, the Director of the Office of Defense Mobilization, the Director of the Central Intelligence Agency, and the National Security Council to serve on advisory committees and as part-time advisors. (Sec. 8, Act of 3 Sep 1954, 68 Stat. 1228, 5 U.S.C. 171j (Supp. IV); see also 10 U.S.C. 173 (Supp. IV).) The Secretary of each of the military departments is similarly empowered. (See 10 U.S.C. 174 (Supp. IV); as to dual compensation, see par. c, App. V, *infra.*)

g. Federal Maritime Board: Five, but no more than five, officers of the armed forces may be detailed to the Federal Maritime Board. (Secs. 201 and 905e, Act of 29 Jun 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1111(f) (1952); as to dual compensation, see par. f, App. IV, *infra.*)

h. Guam: A person in the armed forces of the United States may be employed by the Government of Guam (Sec. 26, Act of 1 Aug 1950, 64 Stat. 391, 48 U.S.C. 1421d (1952)).

i. Latin America: Officers and enlisted men of the armed forces may be detailed by the President, under certain conditions, to assist the Governments of the Republics of North America, Central America, and South America and of the Republics of Cuba, Haiti, and Santo Domingo. (10 U.S.C. 712 (Supp. IV); see also subpar. 12*a*, AR 35–1350, 14 Dec 1951; as to dual compensation, see par. g, App. IV, *infra.*)

j. National Science Board: Persons holding other offices in the executive branch of the Federal Government may serve as members of the divisional committees and special commissions of the National Science Board. (Act of 10 May 1950, 64 Stat. 154, 42 U.S.C. 1873(e); as to dual compensation, see par. e, App. V, *infra.*)

k. Panama Canal: Military personnel may be employed by the President to operate the Panama Canal and administer the Canal Zone. (Act of 24 Aug 1912, 37 Stat. 560, 2 C.Z.C. 81, 82; as to dual compensation, see par. h, App. IV, *infra.*)

l. Selective Service System: Officers of the armed forces, whether active or retired, may be assigned or detailed to any office or position in the Selective Service System (Sec. 6, Act of 31 Mar 1947, 61 Stat. 32, as amended, 50 U.S.C. App. 326 (1952)).

m. United Nations: Up to 1000 personnel of the armed forces may be detailed by the President to duty with the United Nations as observers, guards, or in any non-combatant capacity. (Sec. 5, Act of 10 Oct 1949, 63 Stat. 735, 22 U.S.C. 287d–1(a) (1) (1952); as to dual compensation, see par. m, App. IV, *infra.*)

APPENDIX II

Statutory Exceptions to the 1894 Act

a. The statutes paraphrased in subparagraphs a, b, c, d, e, f, g, h, j, l, and m, Appendix I, *supra,* are also statutory exceptions to the 1894 Act.

b. Aeronautics Committee: A retired officer of the Army or Navy may be employed by the National Advisory Committee for Aeronautics. (Sec. 1, Act of 18 Apr 1940, 54 Stat. 134, as amended, 50 U.S.C. 156 (1952); as to dual compensation, see par a, App. V, *infra.*)

c. Bureau of Budget: Retired officers of the armed forces may be appointed as Director and as Assistant Director of the Bureau of the Budget. (Act of 17 Feb 1922, 42 Stat. 373, as amended, 5 U.S.C. 64 (1952); as to dual compensation, see par. b, App. IV, *infra.*)

d. Central Intelligence Agency: Fifteen retired commissioned or warrant officers of the armed services may be employed by the Central Intelligence Agency. (Sec. 6, Act of 20 Jun 1949, 63 Stat. 211, as amended, 50 U.S.C. 403(f) (1952); as to dual compensation, see par. b, App. V, *infra;* the number "fifteen" is exclusive of officers retired for physical disability; to them the 1894 Act is not applicable (JAGA 1952/4481, 15 May 1952).)[276]

e. District of Columbia Board: Any person in receipt of retired pay from the United States may be a member of the Examining and Licensing Board in the District of Columbia. (Act of 14 Jul 1956, Pub. Law 704, 84th Cong.;[276] as to dual compensation, see par. e, App. IV, *infra.*)

f. Federal Civil Defense Administration: With the approval of the President, not to exceed twenty-five retired personnel of the armed services may be employed in a civilian capacity, on a full

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[276] With respect to paragraphs *d, e,* and *h,* there is a substantial doubt in the opinion of the author whether these three statutes are so worded as to permit the holding of dual offices. The literal language of the statutes provides for the receipt of dual compensation only. As advanced previously, the holding of the civil position must be determined to be without legal objection before the matter of receipt of compensation may be considered. In deference, however, to the legislative history of the 1948 Act (i, *infra*) (*see* 2 U.S. Code Cong. and Admin. News, 80th Cong., 2d Sess., 1948, pp. 1480, 1481) and to an opinion of The Judge Advocate General of the Army with respect to the Act of 4 Jun 1935, 49 Stat. 320, 10 U.S.C. 1178a (1952), no longer in effect (*see* JAGA 1954/9840, 9 Dec 1954) the three statutes are here included.

or part-time basis without loss or reduction of or prejudice to their retired status. They remain subject to dual compensation restrictions, however (Sec. 401, Act of 12 Jan 1951, 64 Stat. 1254, as amended, 50 U.S.C. App. 2253 (Supp. IV)).

g. Mutual Security Program: Any retired officer of the armed forces may hold an office or appointment in connection with the Mutual Security Program. (Sec. 532, Act of 26 Aug 1954, 68 Stat. 859, 22 U.S.C. 1792 (Supp. V); as to dual compensation, see par. d, App. V, *infra*.)

h. Referee in Bankruptcy: Any retired member of the armed forces, whether commissioned or enlisted, whether Regular or Reserve, may be appointed a part-time referee in bankruptcy (Act of 1 Jul 1898, 30 Stat. 555, as amended, 11 U.S.C. 63 (1952)).[276]

i. Remount Service: Retired Army officers may be employed by the Department of Agriculture in connection with the Remount Service (Act of 21 Apr 1948, 62 Stat. 197, 7 U.S.C. 438 (1952)).

j. Reserves and Foreign Employment: Subject to the approval of the Secretary concerned, a Reserve (not on active duty) may accept civil employment with any foreign government or any concern wholly or partly controlled by a foreign government. (10 U.S.C. 1032 (Supp. IV); as to dual compensation, see par. i, App. IV, *infra*.)

k. Reserve and National Guard: Any Reserve or member of the National Guard, when not on active duty or when on active duty for training, may accept any position under the United States or the District of Columbia. (Subsec. 29(c), Act of 10 Aug 1956, 70A Stat. 632; see also Subsec. 29(d), *id.*)

l. Rivers and Harbors: Retired officers of the armed forces may be employed by the Chief of Engineers in connection with the improvements of rivers and harbors of the United States (Sec.

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[276] With respect to paragraphs *d*, *e*, and *h*, there is a substantial doubt in the opinion of the author whether these three statues are so worded as to permit the holding of dual offices. The literal language of the statutes provides for the receipt of dual compensation only. As advanced previously, the holding of the civil position must be determined to be without legal objection before the matter of receipt of compensation may be considered. In deference, however, to the legislative history of the 1948 Act (i, *infra*) (*see* 2 U.S. Code Cong. and Admin. News, 80th Cong., 2d Sess., 1948, pp. 1480, 1481) and to an opinion of The Judge Advocate General of the Army with respect to the Act of 4 Jun 1935, 49 Stat. 320, 10 U.S.C. 1178a (1952), no longer in effect (*see* JAGA 1954/9840, 9 Dec 1954) the three statutes are here included.

7, Act of 3 Jun 1896, 29 Stat. 235, as amended, 5 U.S.C. 63 (1952)).

m. Soldiers' Home: Retired military personnel may accept duty at the United States Soldiers' Home. (Sec. 301, Act of 10 Jul 1952, 66 Stat. 520, 5 U.S.C. 59b (1952); as to dual compensation, see par. k, App. IV, *infra.*)

n. Territories: May a member of the armed forces in a retired status accept and hold an office or position under the government of the Territory of Alaska? Unfortunately statutes conflict here, and a definitive opinion may not be expressed. Section 1860, Revised Statutes, as amended (48 U.S.C. 1460) excepts retired officers and enlisted men of the armed forces from its provisions ("No person belonging to the Army, Navy, Marine Corps, or Coast Guard shall be elected to or hold any civil office or appointment in any Territory. . . ."). A specific statute dealing with the Territory of Alaska expressly prohibits, however, a person holding a commission or appointment under the United States from being a member of the legislature or holding any office under the government of the Territory (Sec. 11, Act of 24 Aug 1912, 37 Stat. 516, 48 U.S.C. 83 (1952)). Thus, to the extent that retired military personnel hold an office within the meaning of the act last cited, that act is in conflict with the exception to Section 1860, *supra.* Although the latter statute in point of time (Sec. 11, Act of 24 Aug 1912, *supra*) would appear to prevail, a glaring instance of the need for legislative revision is here presented. With respect to the Territory of Hawaii, however, a retired member of the armed forces may hold any civil office thereunder, assuming territorial funds as distinguished from Federal funds are involved,[277] except that if his retired status equates to an office, he may not be a member of the territorial legislature. (See Act of 30 Apr 1900, 31 Stat. 145, 48 U.S.C. 589 (1952).)

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[277] *See* 6 Bul. JAG 114.

APPENDIX III

Additional Dual Office Prohibitions

a. Foreign Service: An officer of the Regular Navy, other than a retired officer, may not accept an appointment in the Foreign Service of the Government (10 U.S.C. 6405).

b. Receiver: A person holding a military office or employment under the United States shall not at the same time be appointed a receiver in any case in any court of the United States (Act of 25 Jun 1948, 62 Stat. 926, 28 U.S.C. 958 (1952)).

c. Referee in Bankruptcy: An individual shall not be eligible to appointment as a full-time referee in bankruptcy if he holds an office of profit or emolument under the laws of the United States (Act of 1 Jul 1898, 30 Stat. 555, as amended, 11 U.S.C. 63 (Supp. IV)).

d. Territories: Active duty personnel belonging to the Army, Navy, Marine Corps, or Coast Guard shall not be elected to or hold any civil office or appointment in any Territory. (Rev. Stat. § 1860, as amended, 48 U.S.C. 1460 (1952); for an exception with respect to Coast Guard officers in Alaska, however, see par. a. App. I, *supra.*) In addition to Section 1860, *supra,* other statutes prohibit a person holding a commission or appointment under the United States from being a member of the legislature or holding any office under the government of the Territory of Alaska. (See Sec. 11, Act of 24 Aug 1912, 37 Stat. 516, 48 U.S.C. 83 (1952).) A person holding an office in or under or by authority of the Government of the United States is not eligible to election to the legislature of the Territory of Hawaii. (See Act of 30 Apr 1900, 31 Stat. 145 U.S.C. 589 (1952).)

e. U. S. Commissioner: A person holding a military office or employment under the United States shall not at the same time hold the office of United States Commissioner. (Sec. 1, Act of 25 Jun 1948, 62 Stat. 915, as amended, 28 U.S.C. 631 (Supp. IV); for an exception with respect to Coast Guard officers in Alaska, see par. a, App. I, *supra.*)

f. Virgin Islands: No Federal employee may be a member of the legislature of the Virgin Islands (Sec. 6, Act of 22 Jul 1954, 68 Stat. 499, 48 U.S.C. 1572 (Supp. IV)).

APPENDIX IV

Statutory Exceptions to Dual Compensation Acts

a. Atomic Energy Commission: Any officer appointed as the Director of the Division of Military Application or as the Chairman of the Military Liaison Committee may receive his military pay and allowances or retired pay, as appropriate, and in addition a sum equal to the difference between the civil compensation provided for the position and his military pay (Sec, 28, Act of 1 Aug 1946, 60 Stat. 756, as amended, 42 U.S.C. 2038 (Supp. IV)).

b. Bureau of Budget: A retired officer of the armed forces, if appointed as Director or Assistant Director of the Bureau of the Budget, may be paid the difference between the pay prescribed for that office and his retired pay, as well as his retired pay (Act of 17 Feb 1922, 42 Stat. 373, as amended, 5 U.S.C. 64 (1952)).

c. Census Bureau: Enlisted men and officers of the armed services may be compensated for the enumeration of personnel of the armed forces. The rates are fixed by the Director of Census (Act of 13 Jun 1929, 46 Stat. 21, as amended, 13 U.S.C. 203 (1952)).

d. Central Intelligence Agency: If a commissioned officer is appointed as Director, or Deputy Director, of the Central Intelligence Agency, he may receive his military pay and allowance (active or retired) and the amount by which the compensation established for that position exceeds the amount of his annual military pay and allowances (Sec. 102, Act of 26 Jul 1947, 61 Stat. 498, as amended, 50 U.S.C. 403 (b) (Supp. IV)).

e. District of Columbia Board: A retired person appointed as a member of the Examining and Licensing Board in the District of Columbia may receive an honorarium from the District as well as his retired pay (Sec. 1, Act of 14 Jul 1956, Pub. Law 704, 84th Cong).

f. Federal Maritime Board: Any officer of the armed forces detailed to the Federal Maritime Board may receive such compensation as, when added to his pay and allowances as an officer in the armed forces, will make his aggregate compensation equal to the pay and allowances he would receive if he were the incumbent of an office or position in such board which, in the opinion of the Board involves the performance of work similar in importance to that performed by him while detailed to the

Board (Secs. 201 and 905e, Act of 29 Jun 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1111(f) (1952)).

g. Latin America: Officers and enlisted men of the Army detailed to assist certain Latin American Governments may, while so detailed, accept from Governments to which detailed such compensation and emoluments as the Secretary of the Army may approve, in addition to their military pay and allowances (Act of 19 May 1926, 44 Stat. 565, as amended, 10 U.S.C. 712 (Supp. IV)).

h. Panama Canal: The active duty pay of military personnel employed to operate the Panama Canal and to administer the Canal Zone shall be deducted from the salary or compensation paid by the Canal Zone. Retired warant officers and retired enlisted men may receive compensation from both sources, however. (Act of 24 Aug 1912, 37 Stat. 560, 2 C.Z.C. 81, 82, see also 27 Comp. Gen. 439 (1948) regardless of the fact that they are subsequently advanced on the retired list to a commissioned grade. 36 Comp. 503 (1957).)

i. Reserve and Foreign Employment: Subject to the approval of the Secretary concerned, a Reserve, not on active duty, may accept compensation from a foreign government or from a concern wholly or partly controlled by a foreign government with which he is employed (10 U.S.C. 1032 (Supp. IV)).

j. Reserve and National Guard: Any Reserve or member of the National Guard may accept any civilian position under the United States or the District of Columbia and receive the pay incident to that employment in addition to pay and allowances as a Reserve or member of the National Guard, when not on active duty or when on active duty for training (Subsec. 29(c), Act of 10 Aug 1956, 70A Stat. 632; [278] see also Sec. 2, Act of 1 Aug 1941, 59 Stat. 584, as amended, 5 U.S.C. 61a–1 (1952); Act of 1 Aug 1941, 55 Stat. 616, as amended, 5 U.S.C. 61a (1952); 10 U.S.C. 1033 (Supp. IV)).

k. Soldiers' Home: Retired military personnel on duty at the United States Soldiers' Home are exempted from the Economy Act (Sec. 301, Act of 10 Jul 1952, 66 Stat. 520, 5 U.S.C. 59b (1952)).

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[278] A retired *de jure* member of a reserve component of the armed forces is exempted from the dual compensation provisions of Section 212 of the Economy Act. *Tanner* v. *U.S.*, 129 Ct. Cl. 792 (1954); 36 Comp. Gen. 808 (1957).

l. State Department: Members of the armed forces assigned or detailed to duty with the State Department for certain purposes may be paid the traveling expenses authorized for officers of the Foreign Service of the United States (10 U.S.C. 713 (Supp. IV)).

m. United Nations: Armed forces personnel detailed to the United Nations may accept, upon authorization from the President, extraordinary expenses and perquisites in addition to their normal military pay and allowances (Sec. 5, Act of 10 Oct 1949, 63 Stat. 735, 22 U.S.C. 287d–1(a) (1) (1952)).

APPENDIX V

Additional Dual Compensation Restrictions

a. Aeronautics Committee: A retired officer of the Army or Navy employed by the National Advisory Committee for Aeronautics may receive civilian compensation while so serving, but not his retired pay (Sec. 1, Act of 18 Apr 1940, 54 Stat. 134, as amended, 50 U.S.C. 156 (1952)).

b. Central Intelligence Agency: Any retired commissioned or warrant officer (not to exceed 15 in number) employed by the Central Intelligence Agency may receive either his retired pay or the compensation of his position with the Agency, whichever he may elect (Sec. 6, Act of 20 Jun 1949, 63 Stat. 211, as amended, 50 U.S.C. 403f (1952)).

c. Defense Advisory Committees: Persons holding offices under the United States who may be appointed by the Secretary of Defense, the Director of the Office of Defense Mobilization, the Director of the Central Intelligence Agency, and the National Security Council to serve on advisory committees and as part-time advisors may receive no additional compensation for their services. (Sec. 8, Act of 3 Sep 1954, 68 Stat. 1228, 5 U.S.C. 171j (Supp. IV); see also 10 U.S.C. 173 (Supp. IV); as to advisory committees established by the Secretaries of the military departments, the same result obtains, see 10 U.S.C. 174(b) (Supp. IV).)

d. Mutual Security Program: Retired officers holding offices or positions in connection with the Mutual Security Program remain subject to the Economy Act (Sec 532, Act of 26 Aug 1954, 68 Stat. 859, 22 U.S.C. 1792 (Supp. IV); *accord* 35 Comp. Gen. 308 (1955)).

e. National Science Board: Persons holding other offices in the executive branch of the Government who serve as members of the divisional committees and special commissions of the National Science Board shall not receive remuneration for their services during any period for which they receive compensation for their services in such other offices (Act of 10 May 1950, 64 Stat. 154, 42 U.S.C. 1873(e) (1952)).

LEGAL ASPECTS OF NONAPPROPRIATED FUND ACTIVITIES*

BY LT. COL. PAUL J. KOVAR**

Anyone connected with the Armed Forces for any period of time is at least superficially acquainted with the "nonappropriated fund activity." The post exchange, post welfare fund, officers' and NCOs' clubs, special service funds and the like are familiar activities on a military reservation. However, whenever dealings of a legal nature with nonappropriated fund activities become necessary, the seemingly commonplace image of these activities blurs considerably. What is their derivation? What is their liability to the Federal Government, for Federal taxes, to state governments, to employees, to third persons? What is the nature of the liability of Army personnel to such activities? For what purposes may nonappropriated funds be expended? This paper will attempt to answer these questions, so far as possible, or at least point out the basic premises necessary to an informed legal conclusion.

A word of caution—as will be developed, nonappropriated fund activities are creatures of regulations. Therefore, a lawyer with a problem relating to such an activity would be well advised to initially read Army Regulations 230–5 through 230–117 providing in detail for the administration and supervision of nonappropriated fund activities at Army installations and activities. The principal regulation setting forth the general policies to be applied in the administration of nonappropriated funds is Army Regulations 230–5.

I. HISTORY

Nonappropriated funds as we know them today did not exist at the time of the Revolutionary War when our Armed Forces first came into existence. However, the necessity for some type of establishment to fulfill the needs of the members of our newly formed Army in regard to their recreation, welfare and morale

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was recognized by the founding fathers of our country. Recognition and in fact authorization of an organization was contained in the American Articles of War of 1775[1] which provided for sutlers whose mission was to provide for the individual personal needs of service personnel. Although sutlers were not established as a component part of the Army, Congress placed upon commanding officers the responsibility of seeing that the needs of the troops were satisfied and that their rights were protected.[2] This responsibility has been carried over and today is specifically set out in Army Regulations.[3]

The sutlers, itinerant merchants who provided many of the services of the present day post exchange, could be considered as legalized camp followers, possessing concessions from the Army which authorized them to sell liquor, subsistance necessities, and other incidentals to soldiers in the field. Since the Rules and Articles of War of 1806[4] provided in Article 60, Section I that:

> "All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

it is apparent that numerous orders and regulations were promulgated both by the War Department and commanding officers in addition to those contained in the Rules and Articles of War. The principal rule contained in the Articles of War pertaining to sutlers was one applying to hours of operation. It forbad such establishments from being open or making sales during hours of religious services or between nine in the evening and reveille the following morning.[5]

Article 41 of The General Regulations for the Army of 1821, which were approved by Congress,[6] contained specific regulations concerning sutlers. These regulations in general provided that each post or regiment was authorized the services of one sutler. He was authorized to sell on credit and allowed to appear at the pay table where, when the indebtedness was acknowledged, the

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[1] Arts. XXXII, LXIV, LXV, and LXVI, Rules and Arts. of War 1775, App. IX, Winthrop, Military Law and Precedents 953 (2d ed., 1920 reprint).

[2] *Ibid.*

[3] Pars. 47, 48, AR 210–10, 8 Jun 1954, as changed.

[4] Act of 10 Apr 1806, 2 Stat. 359.

[5] Sec. VIII, Art. 1, Rules and Arts. of War 1776, Military Laws of the United States 1776–1863, p. 67.

[6] Act of 2 Mar 1821, 3 Stat. 615.

paymaster was authorized to deduct the amount from the soldier's pay and turn this amount over directly to the sutler. For these and other privileges the sutler was assessed a monthly charge of not less than 10¢ nor more than 15¢ per man based upon the average number of officers and enlisted men assigned to the unit during the period.

The funds secured as a result of this assessment plus any fines collected from sutlers for violation of regulations constituted the basis "of what shall be called the *post fund.*"[7] This fund was administered by a "council of administration" the treasurer of which, where possible, was the paymaster. He was required to open an account in favor of the post fund which account was subject to inspection by the post or regimental commander. Expenditures were made only upon the approval of the council and the commanding officer. The regulations authorized these funds to be expended for immediate or temporary relief to indigent widows and orphans of officers or soldiers, immediate or temporary relief to deranged or "decayed" officers, or to infirm or disabled soldiers, discharged under circumstances which did not entitle them to a pension. Financial assistance for the post school was authorized as well as the purchase of books and periodicals for a library, one section of which was to be adapted to the wants of the enlisted men. The post band could also be maintained from this fund.

These regulations also established certain procedures for administration of the post fund. These included such things as who constituted the council, when it was to meet, the recording and approval of its proceedings. Provisions were also made that when a unit was transferred an equitable portion of the post fund would be transferred to the departing unit. The commanding officer of the unit would receive the funds which were to be used for the benefit of the personnel of the unit. The commanding officer thus became the custodian of the funds.

The War Department, by presentment, and Congress, by adoption of the Regulations for the Army of 1821, recognized the needs of Army personnel and provided for these needs by establishing certain funds and activities which are known today as nonappropriated fund activities. The origin of three of our present day activities, unit, welfare, and library funds, can be traced back to this short but complete regulation of 1821.

Consolidated Officers' and Non-Commissioned Officers' Messes

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[7] Art. 41, Army Regulations of 1821.

were authorized and encouraged in 1835[8] and 1841.[9] These differed from the present day Officers' and Non-Commissioned Officers' Messes[10] in that they were principally considered as eating establishments. The nucleus having been authorized, it was only a matter of time before they should become the focal point of social activities as well as eating establishments. As a social organization, extending equal membership either to all officers or noncommissioned officers on the post, they were authorized limited support from appropriated funds in the form of the use of public buildings when, in the determination of the post commander, such buildings were not required for official purposes.[11]

The War Department, realizing the importance of nonappropriated fund activities, extended their operation by establishing company funds in 1835.[12] These were created, if not directly, at least indirectly, from appropriated funds. The principal source of revenue for these company funds came from savings which accrued from the economical use of rations issued for use in the company.[13] The control of this fund, which was for the exclusive benefit of the enlisted personnel, was placed in the company commander subject to inspection by the post or regimental commander.[14] In addition to this local inspection, a quarterly report of funds received, expended and on hand was required to be furnished to The Adjutant General.[15]

Although minor amendments in the regulations were made as to administration and the purposes for which these nonappropriated funds could be expended, there was no change in the provision allowing the post or regimental sutler to have a lien on a soldier's pay. However, in 1847, Congress abrogated any and all parts of regulations which gave sutlers a lien on soldiers' pay or which allowed sutlers to appear at the pay table. This legislation provided that the only rights sutlers should have were those provided for in the Rules and Articles of War,[16] these rights being those provided for in the Rules and Articles of War of 1806.

For the next twenty years Congress vacillated on the right of sutlers to have a lien on the pay of soldiers and to be able to go to

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[8] Art. IX, Army Regulations of 1835.
[9] Par. 94, Army Regulations of 1841.
[10] AR 230–60, 26 Jul 1956, as changed.
[11] Gen. Order No. 54, 22 Mar 1909.
[12] Par. 31, Army Regulations of 1835.
[13] *Ibid.*
[14] *Id.* pars. 31, 32.
[15] *Id.* par. 15.
[16] Sec. 11, Act of 3 Mar 1847, 9 Stat. 185.

the pay table to enforce such a lien by receiving at least a portion of the soliders' pay.[17]

In 1862 Congress enacted a bill providing for the appointment of sutlers in the Volunteer Service and setting out duties of sutlers and authorizing the sutler a lien on pay of soldiers for merchandise purchased.[18] The apparent purpose of this act was to continue the service of sutlers to the Army and to establish guide lines for the regulation of these activities by the War Department. Since congressional sanction had been given to these activities, it was only proper that authority should be given for the collection of at least a limited amount of money owed the sutler by the soldiers.[19]

The Judge Advocate General of the Army expressed the view that the application of that portion of the act authorizing a lien on the soldiers' pay was not applicable to the pay of regular soldiers since the Act of 19 March 1862 applied to volunteer soldiers and officers.[20]

Sutlers in many instances were not the most ethical retail merchandisers. They were not adverse to loaning money to soldiers at usurious rates of interest and occasionally indulged in dishonest and corrupt practices. Such activities on the part of sutlers caused Congress, in 1866, to abolish the office of sutler effective 1 July 1867.[21] This act further provided that the subsistence department was authorized and required to furnish such articles as from time to time were designated by the inspectors general and that these items would be sold at cost.

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[17] Sec. 5, Act of 12 Jun 1858, 11 Stat. 336, which was the appropriation act for fiscal year 1859, authorized sutlers to have a lien on a part of the soldiers' pay or to appear at the pay table to receive the soldiers' pay from the pay master. By Section 3, Chapter 4, Act of 24 Dec 1861, 12 Stat. 331, providing for allotment certificates among the volunteers, Congress repealed the provisions of the Act of 12 Jun 1858.

[18] Act of Mar 1862, 12 Stat. 371.

[19] By this Act, the Inspectors-General of the Army were to constitute a board to prepare a list or schedule of authorized items that sutlers could sell. The prices for these items were established by a board consisting of certain officers of the organization to which the sutler was appointed. There was to be only one sutler allowed per regiment and he was not allowed to sublet the operation. In return for these services, the sutler was entitled to a lien of 1/18 of one month's pay for items purchased by a soldier.

[20] Dig. Op. JAG 1865, p. 337.

[21] Sec. 25, Act of 28 Jul 1866, 14 Stat. 336.

By Joint Resolution of 30 March 1867[22] Congress conferred authority upon ". . . the commanding general of the army . . . to permit a trading establishment to be maintained . . ." after 1 July 1867 at military posts "on the frontier" (west of the 100th meridian[23] and east of the eastern boundary of California) not in the vicinity of any city or town when, based upon his judgment, such establishment was required for the accommodation of immigrants, freighters, and other citizens. It was further provided that where the commissary department in complying with the Act of 28 July 1866[24] was capable of furnishing necessary stores, the post trader was prohibited from selling to the soldiers.

Although Congress abolished the purveyor of items for the health, welfare, recreation and morale of the troops, it provided that the Government was to assume a certain portion of these functions. Where such activities were foreign to the operations of the commissary service they were to be performed by local merchants except in those remote areas where the Army was authorized to appoint post traders,[25] who, under certain restrictions, could supply the needs of the service man.

In 1870 Congress repealed the Joint Resolution of 30 March 1867[26] and enacted specific legislation authorizing the establishment of post traders under certain restrictions[27] which were published by the War Department.[28]

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[22] 15 Stat. 29.

[23] This is a north-south line running through the center of what is now the states of North and South Dakota, Nebraska, eastern Kansas, the panhandle of Oklahoma, and the center of Texas.

[24] 14 Stat. 332.

[25] By General Order No. 58, 24 May 1867, sutlers were retained as post traders west of the 100th meridian and authorized to sell to soldiers since the Commissary General reported that Congress had not appropriated funds for the purchase of items for sales to soldiers.

[26] 15 Stat. 29.

[27] Sec. 22, Act of 15 Jul 1870, 16 Stat. 320.

[28] Upon being selected as a post trader, the individual was furnished a letter of appointment which indicated the post to which he was assigned. His activities were governed and controlled by a council of administration in accordance with general policies established by the War Department. These directives provided that no tax or burden would be imposed; that post traders would not be allowed the privilege of the pay table; that they would have an exclusive franchise and could erect buildings at their own expense in areas designated by the post commander; that in establishing the prices at which items were to be sold, the council should take into consideration cost of the item, plus freight and the fact that the post trader did not have a lien on the soldiers' pay and therefore lacked the financial security previously enjoyed by the sutlers. Cirs., Adjutant General's Office, 7 Jun 1871, 25 Mar 1872.

Six years later the Secretary of War was authorized by Congress[29] to appoint a post trader at all military posts regardless of location. Since the appointment of post traders was a discretionary act on the part of the Secretary of War, all military posts did not receive the services of a post trader.[30]

However, to supply the troops at moderate prices, with such articles as were necessary for their use, entertainment and comfort, commanders were authorized to establish canteens at posts where there were no post traders.[31] The following year this privilege was extended to all posts.[32] The authorization for establishing canteens also permitted the post commander to make available certain government buildings to house the canteen and its activities which included facilities for gymnastic exercises, billiards and other proper games. An officer "in charge of canteen" assisted by a "canteen council" was to manage the affairs of the canteen. The original purchase was to be either on credit or from funds secured by assessment levied upon the company funds of the several companies the personnel of which would be benefited by the establishment of a canteen. Profits resulting from the operation of the canteen were to be equitably distributed to the participating companies. When a company was transferred from the post, it was to receive a proportionate share of the total assets of the canteen. Conversely when a new unit was assigned to a post, the unit was assessed on the basis of personnel an amount of money which would entitle the organization to own a proportionate share of the canteen assets.

To promote and encourage the expansion of canteens and to assist them in increasing their sales, the War Department prohibited company fund activities from selling any item sold by the canteen.[33] Curtailment of competition increased the volume of business resulting in increased profits for the canteen. From these profits, canteens were authorized to expend funds for the purchase of sporting equipment[34] and any items that would contribute to the "rational enjoyment and contentment of the soldiers."[35]

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[29] Sec. 3, Act of 24 Jul 1876, 19 Stat. 100.

[30] Winthrop, Dig. Op. JAG 1880, p. 383.

[31] Gen. Order No. 10, 1 Feb 1889.

[32] Gen. Order No. 51, 18 May 1890.

[33] Cir. No. 1, Adjutant General's Office, 9 Feb 1891.

[34] Cir. No. 7, Adjutant General's Office, 10 Jun 1890.

[35] Cir. No. 1, Adjutant General's Office, 9 Feb 1891.

In the course of time, the canteen was redesignated the post exchange without any material change in mission or operation.[36]

By 1893 the post exchange had, as far as the serviceman was concerned, supplanted the need for the services of the post trader. Also because of the development of the frontier the need for the post trader to accommodate and supply the immigrants, freighters and other travelers had become almost nonexistent. Because of these changed conditions, Congress prohibited the Secretary of War from making further appointments of post traders to include the filling of vacancies.[37]

With the decrease in the number of post traders, more and more post commanders established post exchanges. To insure that such activities were available to all military personnel and to provide for uniformity of operation and control, the War Department, under special regulations, established post exchanges at all military posts.[38] With the publication of General Order Number 46, 1895, the post exchange, which is a vital part of every military establishment, was born. This activity was to combine the features of a reading and recreation room, a corporate store, and a restaurant, its primary purpose being to supply the troops at reasonable prices with the articles of ordinary use, wear and consumption, not supplied by the Government, and to afford them a means of rational recreation and amusement.

Like the canteen, the exchanges were authorized the use of government buildings, were managed by an "officer in charge" and a council whose operation and reports were approved by the post commander. A first class exchange was expected to consist of a well-stocked general store; a well-kept lunch counter; a canteen where beer and light wine could be sold; a reading and recreation room, supplied with books, periodicals and other reading matter, billiard and pool tables, bowling alleys and facilities for other indoor games, apparatus for outdoor sports and a well equipped gymnasium.

The post exchange and post and company funds continued with slight modification to carry out their missions of providing for the recreation, welfare and morale of the soldiers until after World War I. In June 1920 the Army Motion Picture Service was established to supplant the Civilian Community Motion Picture Bureau

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[36] Gen. Order No. 11, 8 Feb 1892.

[37] C. 51, Act of 28 Jan 1893, 27 Stat. 426.

[38] Gen. Order No. 46, 25 Jul 1895.

that had been organized during World War I.[39] The Army Library Service became a separate operation in July 1921 taking over from the American Library Association that had been organized during World War I to supplement the existing library facilities of the Army.[40]

Based upon lessons learned during World War I, the War Department during the expansion of the Army in 1940 and 1941 took affirmative steps to improve the morale of the troops and to insure adequate recreation and welfare facilities. In 1941 a Morale Branch was established in the War Department to assist the Chief of Staff to properly provide for the "recreation and welfare and all other morale matters not specifically charged to other War Department agencies."[41]

Separate and independent exchanges in which units had a vested interest compensable upon departure from the post were reorganized into a central organization known as the Army Exchange Service which was a separate agency within the Morale Branch of the War Department.[42] This operation was later reorganized to form a centralized operation of Army exchanges[43] which is currently in operation.[44]

Thus, the history of nonappropriated fund activities is one of need and necessity growing with the Army and changing according to the times, needs and desires of the personnel served. Nonappropriated fund activities are flexible organizations which today have the same mission of providing for the recreation, health, welfare and morale of members of the Army and their dependents as did the original post funds authorized by Congress.

II. LEGAL STATUS OF NONAPPROPRIATED FUND ACTIVITIES

After the abolishment of sutlers[45] and post traders,[46] the War Department established the canteen,[47] then post exchanges[48] and

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[39] *The Army Almanac* 75 (1950).
[40] *Ibid.*
[41] Gen. Order No. 2, 14 Apr 1941.
[42] War Dept. Cir. No. 124, 28 June 1941; Tentative AR 210-65, 1 Jul 1941.
[43] War Dept. Mem. No. 210-65, 12 Mar 1946.
[44] AR 60-10/AFR 147-7, 26 Apr 1957, as changed.
[45] Sec. 25, Act of 28 Jul 1866, 14 Stat. 336.
[46] C. 51, Act of 28 Jan 1893, 27 Stat. 426.
[47] War Dept. Gen. Order No. 10, 1 Feb 1889.
[48] War Dept. Gen. Order No. 11, 8 Feb 1892.

other nonappropriated fund activities. This authorization directed the establishment of a post exchange on posts where there were no post traders and authorized commanders of other installations, at their discretion, to establish such an activity within their commands. Current Army Regulations authorizing nonappropriated fund activities continue to specify which military commanders may establish these activities.[49]

Since there is no specific statutory authority for the establishment or existence of nonappropriated fund activities, as we know them today, their establishment and existence is based on departmental regulations commonly known as Army Regulations. To fully understand the status of nonappropriated fund activities it is necessary to determine what force and effect these regulations possess.

Between 1779 and 1870 Congress under its authority to make rules and regulations for the Army[50] approved or adopted some of the Army Regulations presented by the War Department.[51] At other times the Secretary of War was directed to prepare and submit a code of general regulations for the approval of Congress.[52] The preparation of such a set of regulations was time consuming and since the Army was a living, operating establishment, changing in its needs and requirements from day to day, the time lag encountered in securing congressional approval and publication required other means of dissemination of orders and regulations. To this end the President under his constitutional authority as Commander in Chief of the Army[53] through his Secretary issued interim orders and directives. Congress, in 1875, recognizing their inability to make or approve all regulations for the operation of the Army authorized the President "to make and publish regulations for the government of the Army in accordance with existing laws."[54] At a later date Congress authorized the Secretary of a Department to "prescribe regulations, not inconsistent with law, for the government of his department . . . ."[55]

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[49] Par. 6*a*, AR 230–5, 18 Jul 1956.

[50] U.S. Const., Art. I, § 8, Cl. 14.

[51] Liber, Remarks on the Army Regulations and Executive Regulations in General 61–84 (War Dept. Doc. No. 63, 1898); M.L. 1949 § 309, note; Sec. 14, Act of 2 Mar 1821, 3 Stat. 616.

[52] Sec. 37, Act of 28 Jul 1866, 14 Stat. 337; Sec. 20, Act of 15 Jul 1870, 16 Stat. 319.

[53] U.S. Const., Art. II § 2, Cl. 1.

[54] C. 115, Act of 1 Mar 1875, 18 Stat. 337.

[55] Rev. Stat. § 161, 5 U.S.C. 22 (1952), M.L. 1949 § 888.

There can be no question as to the force and effect of Army Regulations which have been approved by Congress. These, like any other congressional enactment, are the law of the land and as such are binding not only on the military but all others who would operate within the sphere of such legislation. Nonappropriated fund activities, with the exception of the post fund, were not in existence nor were they included in the Army Regulations approved by Congress prior to 1870. Therefore the status of regulations promulgated originally by the Secretary of War and later by the Secretary of the Army must be determined.

Thirty-three years before Congress authorized the President to make rules and regulations for the government of the Army, the Supreme Court was called upon to decide a case, the solution to which involved an interpretation of the effect of Army Regulations.

The United States instituted suit for the recovery of approximately two thousand dollars held by one Captain Eliason. He contended that under Army Regulations of 1821, which had been approved by Congress[56] he was entitled to additional compensation for the performance of extra duties. By War Department regulation of 14 March 1835, compensation of this nature was disallowed. The defendant contended that the last regulation or order amounted to no more than an opinion of the Secretary of War and could not repeal the regulations of 1821. The court in passing upon the effect of these regulations said:

> ". . . . The power of the executive to establish rules and regulations for the government of the army, is undoubted. . . . The power to establish implies, necessarily, the power to modify or repeal, or to create anew.
>
> "The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority.
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> "Such regulations cannot be questioned or defied, because they may be thought unwise or mistaken."[57]

In 1845 the Supreme Court again had occasion to speak concerning the effect of Army Regulations which were published to implement congressional action. In this instance the court said:

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[56] Sec. 14, Act of 2 Mar 1821, 3 Stat. 616.

[57] *U.S.* v. *Eliason*, 41 U.S. (16 Pet.) 291, 301–302 (1842).

". . . . The President sanctioned those regulations, and by doing so, delegated his authority, as he had a right to do, to the Secretary at War. The Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law. The Regulations of 1825, then, were as conclusive upon the accounting officer of the treasury, whilst they continued in force, as those of 1836 afterwards were, and as those of 1841 now are. When, then, an officer presents, with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the War Department, in conformity with the provisions of the Army Regulations, allowing double rations, his right to them is established, nor can they be withheld, without doing him a wrong, for which the law gives him a remedy . . . ."[58]

The following year the Court said, "as to the army regulations, this court has too repeatedly said, that they have the force of law . . . ."[59] Almost 100 years after the Supreme Court's first announcement of this principal they again said that "authorized War Department regulations have the force of law."[60]

The United States Court of Appeals, Fifth Circuit, in December 1954 on a habeas corpus proceeding which involved an interpretation of Army Regulations said:

". . . . When not in conflict with any Act of Congress, the power of the executive to establish rules and regulations for the government of the Army has never been doubted. *United States* v. *Eliason*, 16 Pet. 291, 302, 41 U.S. 291, 302, 10 L.Ed. 968. That power is confirmed by the statute vesting in the head of each department authority to prescribe regulations, not inconsistent with law, for the government of his department. 5 U.S.C. § 22, R.S. § 161."[61]

Special regulations establishing post exchanges were promulgated by General Order No. 10, Headquarters of the Army, 25 July 1895. In compliance with these regulations a post exchange was established at Jefferson Barracks, Mo., and in further compliance with these regulations Lieutenant Thomas B. Dugan was detailed as "officer in charge." Also under the provisions of the regulations the post commander approved the recommendation of

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[58] *U.S.* v. *Freeman*, 44 U.S. (3 How.) 556, 566–567 (1845).
[59] *Gratiot* v. *U.S.*, 45 U.S. (4 How.) 80, 117 (1846).
[60] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484 (1942).
[61] *McDonald* v. *Lee*, 217 F.2d 619, 624 (5th Cir. 1954). *See also Updegraff* v. *Talbott*, 221 F.2d 342 (4th Cir. 1955).

the exchange council that beer and light wine be sold at the canteen (a room separate and apart from the rest of the exchange). Because of the sale of beer and light wine, the Collector of Internal Revenue for that district required the "officer in charge" to pay a retail liquor dealers' tax for fiscal year ending 30 June 1866 and 1867.

Being conscientious and having the best interests of the exchange at heart, Lieutenant Dugan made application for a refund of this tax under the provisions of a statute which authorized the Commissioner of Internal Revenue ". . . . upon receipt of satisfactory evidence of the facts, [to] make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected . . . ."[62] The application was approved and properly certified for payment in the amount of $25 for each year. Upon presentment, the Secretary of the Treasury, at the request of the Comptroller, transmitted the claim to the Court of Claims for determination as to the legality of making the refund under the provisions of the cited statute.[63]

For the Court to properly decide the issues involved in the case it was necessary that they first make a determination as to the status of the post exchange. The Court first briefly reviewed the history of all organizations which were similar in nature to the exchange and had preceded it. Further, they discussed at some length the establishment of the exchange as it existed at that time. They pointed out that necessary funds were secured by the exchange council assessing each organization, based upon the number of personnel assigned, a proportionate share of the cost of establishment. The Court went on to say:

> "In the Army the ration or 'allowance for substance' is ordinarily issued to the immediate commanders of organizations, under the requirement of the War Department, as by so doing the commanding officers are thereby enabled to form a mess or common table for all the members of such organizations.
>
> "The funds or capital upon which exchanges are conducted are in a sense supplied by the Government; i.e., by reason of

[62] Rev. Stat. § 3426, as amended, 20 Stat. 349 (1879).
[63] *Dugan* v. *U.S.*, 34 Ct. Cl. 458, 461 (1899).

> uniting the rations due such organizations into one mess or common table, a percentage more or less of such rations is not needed by them for consumption, and such surplus so arising is by authority of the act March 3, 1875 (18 Stat. L., 402; 1 Supp. Rev. Stat., 77), and as provided by paragraph 1269, Army Regulations, 1895, sold to the Commissary Department, if required for reissue, at invoice prices, and if not so required 'may be sold to any person,' thereby creating a fund with which to conduct such exchanges . . . ."[64]

The Court continued by discussing various portions of the regulation that established the exchange, pointing out that they were established by special regulations of the War Department, operated by officers of the Army who receive, handle, and disburse these funds in accordance with regulations. The Court pointed out further that, according to the regulation, when an organization which held membership in an exchange was transferred away from the post it was entitled to receive in cash an amount equal to the unit's proportionate share of the total assets of the exchange. Although the departing unit received its share of the exchange assets based upon the percentage of personnel assigned in relation to the total number of personnel assigned to all units that held membership in the exchange, by reason of contributing financially either for its activation or later to enjoy participation in the activity, the money was not distributed to each departing individual. Instead the money was turned over to the commanding officer of the organization to hold in trust for members of the unit. These funds were for the benefit of the group rather than individuals. A lengthy discussion was devoted to the provisions of the regulations which provided that the profits were for the benefit of the troops.

After pointing out that the exchange was established by the Executive Department of the Government, the Court cited *United States* v. *Eliason, supra,* and went on to say:

> ". . . . we think such exchanges, though conducted without financial liability to the Government, are, in their creation and management, governmental agencies, established for the purpose, as the regulations provide . . . ."[65]

The court concluded that the action of the Commissioner was proper and that the amount of $50 was due and payable to the exchange officer.

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[64] *Id.*, at 463.
[65] *Id.*, at 467.

The status of post exchanges was again in issue in the case of *Woog* v. *United States*[66] which was decided by the Court of Claims in 1913. In this case the administrator of the estate of a disbursing officer of a Navy exchange, which was established in the same manner and operated substantially the same as Army exchanges, was attempting to recover the pay of the deceased which had been witheld. This withholding occurred as a result of the officer's failure to account for certain funds which were the property of the exchange. By administrative action it was determined that the failure to account was occasioned by the negligent action of the officers concerned. The court in discussing the status of the exchange said:

> "From what has been said it will be seen that the post exchange is not a voluntary association, but an institution established by the Government for the convenience of the officers and more particularly for the discipline of the enlisted men. The consent of the officers and men for the establishment and maintenance of an exchange is by no means necessary. The regulations settle that. As shown in Dugan's case, *supra*, the Government acts through its officers under authority of the regulations, and the officer put in charge receives and disburses all the funds, and whatever profit that may accrue is paid to and held by the officer in command of such organization as a company fund. . . ."[67]

By the Act of 9 October 1940[68] Congress authorized the various states to extend their sales, use, and income taxes to persons carrying on business or to transactions occurring in Federal areas and to persons residing thereon. Because of this legislation, the status of all nonappropriated fund activities came under the legal spotlight. With the large numbers of people in service under our expanded military program, the state governments saw a veritable gold mine of revenue pouring forth from service personnel through taxation of post exchanges and officers' and noncommissioned officers' messes.

There being many military reservations in South Carolina, the State Tax Commissioner attempted to impose a license tax on the Army Post Exchange at Fort Jackson, South Carolina, for the privilege of selling beer, tobacco products and other items. The military authorities resisted the imposition of such a tax and brought action to enjoin the State Tax Commission from collect-

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[66] 48 Ct. Cl. 80 (1913).

[67] *Id.*, at 88.

[68] 54 Stat. 1059 (later amended by 4 U.S.C. 105, 106 (1952)).

ing. The parties to the suit stipulated that if the United States should prevail with respect to the post exchange, the relief granted by the court would be applicable to all nonappropriated fund activities of the Army, Navy, and Marine Corps.[69]

During its discussion, the court made reference to a somewhat similar case decided by it in 1937,[70] wherein it held that a post exchange of the Civilian Conservation Corps was a government instrumentality and the Court enjoined the State Tax Commissioner from enforcing the provisions of state tax statute against the United States. The provisions of the state tax law were the same in 1941 as in 1937.

The Court recognized that the post exchange of the Civilian Conservation Corps was authorized by statute,[71] however, it was pointed out that the request for the establishment of these exchanges contained the statement that they be "just like the post exchange the Army possess" and should be "on the same basis as the post exchanges on the Army reservation."[72]

The Court took into consideration and discussed the fact that there had been congressional action concerning Army post exchanges in the form of appropriations for erection and maintenance of buildings for use by the exchange and the fact that certain money, derived from post exchange operations, which remained when military organizations were disbanded was covered into the Treasury of the United States. Concerning these activities the Court said:

> "By the enactment of these statutes from time to time, Congress recognized and validated the functions of the Post Exchanges, and in effect confirmed and approved the regulations promulgated by the Secretary of War."[73]

At the same time the State of South Carolina was attempting to impose a tax on post exchanges, the State of California was levying a tax on gasoline distributors, for gasoline sold to Army post exchanges. Standard Oil Company of California paid the tax under protest and then brought suit to recover the taxes paid.[74]

The refund was demanded under the theory that the "gasoline was sold to the United States Government or a department thereof

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[69] *U.S.* v. *Query*, 37 F. Supp. 972, 973 (E.D.S.C. 1941).
[70] *U.S.* v. *Query*, 21 F. Supp. 784 (E.D.S.C. 1937).
[71] Sec. 4, Act of 28 Jun 1937, 50 Stat. 320.
[72] *Senate Hearings Before the Committee on Education and Labor, on S. 2102*, 75th Cong., 1st Sess., at 48, 49.
[73] *U.S.* v. *Query*, 37 F. Supp. 972, 976 (E.D.S.C. 1941).
[74] *Standard Oil Co.* v. *Johnson*, 19 Cal. 2d 104, 119 P.2d 329 (1941).

for official use"[75] and thus was exempt from tax. Further that the state was "without right or authority to impose a tax on gasoline sold to post exchanges since they are instrumentalities and agencies of the Federal Government."[76]

The Supreme Court of California held that the post exchange was not a government instrumentality and that Standard Oil Company of California was not entitled to a refund of the tax paid. This decision was subsequent to the case of *United States* v. *Query*.[77] However the Court based its decision upon a criminal case of conspiracy to defraud the United States where the property involved was that of the post exchange,[78] a case involving a tax on withdrawal of gasoline for use by a post exchange[79] (both of which held that the exchange was not an instrumentality of the Government) and denial by the United States Supreme Court of a writ of certiorari to hear two cases involving the imposition of taxes on the post exchange.[80]

Standard Oil Company appealed to the Supreme Court of the United States which, in deciding the legal status of post exchanges, used substantially the same reasoning as was used in the *Query* case.

> "From all of this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties intrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error."[81]

At approximately the same time as the Supreme Court was deciding the status of post exchanges, the District Court for the Western District of Kentucky was presented with the same question by the Falls City Brewing Co.[82] seeking a declaratory judgment of the provisions of the Buck Resolution.[83] Considering the

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[75] *Ibid.*
[76] *Ibid.*
[77] 37 F. Supp. 972 (E.D.S.C. 1941).
[78] *Keane* v. *U.S.*, 272 Fed. 577 (4th Cir. 1921).
[79] *Pan American Petroleum Corp.* v. *Alabama*, 67 F.2d 590 (5th Cir. 1933).
[80] *Pan American Petroleum Corp.* v. *Alabama*, 291 U.S. 670 (1934); *Thirty-first Infantry Post Exchange* v. *Posadas*, 283 U.S. 839 (1931).
[81] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942).
[82] *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35 (W.D. Ky. 1941).
[83] Act of 9 Oct 1940, 54 Stat. 1059.

fact that exchanges are an integral part of the Army, provide services and benefits for which appropriated funds would be required were it not for nonappropriated fund activities, and that they are established, maintained, and operated in accordance with regulations of the War Department, the Court determined that exchanges were instrumentalities of the government.[84]

Based upon the decisions discussed above, there can be no question but what at this time the existing post exchanges and officers' and noncommissioned officers' messes are government instrumentalities. The question does remain, however, as to whether the other nonappropriated fund activities, such as unit funds, post welfare funds, special services activities, commandant's welfare funds and such others as may from time to time be authorized, are governmental instrumentalities.

"Instrumentality" in Webster's New International Dictionary, Second Edition, unabridged, Volume II, is defined as "Quality or state of being instrumental; that which is instrumental; means; medium; agency" and "Instrumental" is defined as "acting as an instrument; contributing to promote; helpful, as, he was *instrumental* in concluding the business."

Probably the best and easiest test for determining whether an activity or agency is a government instrumentality was set out in the case of *Unemployment Compensation Commission* v. *Wachovia Bank & Trust Co.*[85] wherein the Court said:

> "As to the Federal Government, it derives its authority wholly from the powers delegated to it by the Constitution. Since every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress are governmental in nature . . . .
>
> "Perhaps it is impossible to formulate a satisfactory definition of the terms 'instrumentalities of government' which would be applicable in all cases. At least it is unwise to undertake to do so. Each case must be determined as it arises. Generally speaking, however, it may be said that any commission, bureau, corporation or other organization, public in nature, created and wholly owned by the Government for the convenient prosecution of its governmental functions, existing at the will of its creator, is an instrumentality of government . . . ."[86]

[84] *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35, 39, 40 (W.D. Ky. 1941).

[85] 215 N.C. 491, 2 S.E. 2d. 592 (1939).

[86] *Id.*, at 495, 2 S.E. 2d 595.

The presence of only one of the above qualities in an organization would not be sufficient to constitute it a governmental instrumentality. Whether all the above qualities are necessary need not be decided since nonappropriated fund activities possess all of the above attributes. They are created by the Government;[87] not operated for a profit;[88] wholly owned by the Government;[89] primarily engaged in performing essential governmental functions;[90] and terminable at the will of the creator.

After a careful analysis of the history, statutes, cases and regulations pertaining to nonappropriated fund activities there is only one conclusion that can be reached and that is that all nonappropriated fund activities, operated within the provisions of Department of Army Regulations are government instrumentalities.

III. LIABILITY

A. *Of Fund Activities to the Federal Government*

Congress, under its constitutional power to make rules and regulations for the government of the Army and to raise money for the support of the Army, appropriates funds to be expended in maintaining the Army. Congress has the power and does on occasion limit the purposes for which these appropriated funds may be expended. Such a limitation may be made applicable to a specific appropriation or may be legislation of a permanent type, such as the following:

> "No money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use by post exchanges of public buildings or public transportation when, in the opinion of the branch, office, or officers of the Army the Secretary of the Army may from time to time designate, not required for other purposes."[91]

In furtherance of the above statutory authorization for the use of government property, the Department of the Army has made

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[87] AR 230–5, 18 Jul 1956, as changed.

[88] *Ibid.*

[89] *Ibid.*; 47 Stat. 1571–1573 (1933); 48 Stat. 1224, 1229 (1934); wherein Congress ordered remaining funds from disbanded organizations and exchanges to be handed over to the Federal Treasury.

[90] AR 230–5, 18 Jul 1956, as changed.

[91] Act of 16 Jul 1892, 27 Stat. 178, as amended, 10 U.S.C. 1335 (1952). This quoted provision, slightly simplified, has been enacted into positive law. 10 U.S.C. 4779(c) (Supp. IV).

known its intent to furnish and maintain from appropriated funds certain kinds of facilities, utilities, supplies and equipment for nonappropriated fund activities.[92] Examples of such items that may be furnished are buildings and necessary facilities and utilities for normal health and sanitation purposes. These services are limited to the extent that they would be furnished to a like building used for general military purposes. In addition to the above facilities, nonappropriated fund activities may secure on a temporary loan basis nonexpendable government property when such property is not required immediately for military use and is in excess to technical service stock requirements. To allow continued use of this property by nonappropriated fund activities where it is excess to the operational requirements of the Army, the Department is not required to consider such property as surplus. Any additional costs involved in transportation or operation of the property will be paid for by the nonappropriated fund activity.[93]

In addition to appropriating funds for the operation of the Army and placing certain restrictions on how they may be expended, Congress has provided that the Secretary of the Army may prescribe rules for the method of accounting for supplies and property of the Army and the fixing of responsibility therefor.[94]

In compliance with and in furtherance of the above law, the Department of the Army has published regulations concerning property accountability, which provide for the accountability for lost, damaged and destroyed property.[95] Although it is the Department of the Army policy "that some individual be responsible at all times for the care and safekeeping"[96] of government property, the regulations provide that in the case of nonappropriated fund activities the "activity rather than the individual who signs for the property"[97] will assume the responsibility. Although the activity does not assume the role of an insurer of government property, it will be held liable for loss or damage to such property caused by the wrongful acts of its officers or employees or the failure of such persons to take necessary and reasonable precautions to safeguard or prevent loss or damage.[98] However, should the activity concerned be able to establish that

[92] AR 210–55, 26 Jul 1956, as changed.
[93] *Id.*, par. 4, as changed.
[94] 10 U.S.C. 4832 (Supp. IV).
[95] AR 735–10, 11 Oct 1955, as changed.
[96] *Id.*, subpar. 2*a*.
[97] *Id.*, subpar. 4*d*.
[98] *Ibid.*

the property became unserviceable by fair wear and tear or that all reasonable and proper precautions were taken to safeguard the property from damage or loss, it may be relieved of liability.[99] Where a nonappropriated fund activity has been required to reimburse the Government for property lost, damaged or destroyed, it may proceed against the individual or individuals who were responsible for such loss. Such individuals may be held pecuniarily liable and collections made in the same manner as if the property involved were that of the activity rather than the Government. Methods of collections from such persons by nonappropriated fund activities will be discussed later.

B. *Of Fund Activities for Federal Taxes*

Taxation of a post exchange by the Federal Government resulted in the Court of Claims being called upon to decide the *Dugan* case, *supra*, wherein it was first determined that post exchanges were instrumentalities of the United States. Having determined this, the Court, in discussing the tax, said:

> "It has never been the policy of the Government to tax its own enterprises or its own manner or method of doing business . . . ."[100]

This statement, as a general principle of law, is as applicable today as it was sixty-four years ago. Nonappropriated fund activities, being instrumentalities of the United States,[101] are, based upon the above mentioned principle of law, entitled to the same immunities as the Federal Government. Therefore, these activities are not liable for Federal taxes except in those cases where the statute specifically makes the tax applicable. The Government, having the power to tax itself and its instrumentalities, has provided that certain Federal taxes are applicable to nonappropriated fund activities.

The Federal Manufacturers' Excise tax[102] is imposed when the manufacturer, producer or importer sells or leases any of the following items: inner tubes, truck chassis and bodies, automobile chassis, automobile, truck and trailer parts and accessories, radio receiving sets, air conditioners, mechanical refrigerators, sporting goods, electric, gas and oil appliances, photographic apparatus and films, business and store machines, electric light bulbs, firearms, shells and cartridges, and matches. This tax, although always

[99] *Ibid.*

[100] *Dugan* v. *U.S.*, 34 Ct. Cl. 458, 468 (1899).

[101] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

[102] Int. Rev. Code of 1954, c. 32, as amended, 26 U.S.C. 4061–4227 (Supp. IV).

applicable to articles sold by the exchange, was not, prior to 1944, applicable to purchases made for the use of nonappropriated fund activities.[103]

By the Act of 25 February 1944[104] the statutory exemption from the tax on sales for the exclusive use of the United States Government was repealed leaving this exemption available only to State and Territorial Governments of the United States and their political subdivisions. Provision was made, however, for the Secretary of the Treasury to authorize certain exemptions from the taxes imposed under the Federal manufacturers' excise tax where he determined that the imposition of the tax would cause a substantial burden of expense which could be avoided, provided the total benefit of such exemption would accrue to the United States.[105] From all available source material, there is no evidence that the Secretary of the Treasury has ever exercised his administrative power to grant such exemptions to purchases made by nonappropriated fund activities.

The Federal Retailers' Excise tax,[106] which supplements the Federal Manufacturers' Excise tax, imposes a tax on jewelry, furs, toilet preparations, and luggage, when sold at retail. In an opinion of The Judge Advocate General of the Army considering this tax, it was said:

> "Sales in Army commissaries and post exchanges are not subject to Federal retailers' excise tax and the Bureau of Internal Revenue has announced that it will make no examination of the records of these agencies. . . ."[107]

A later opinion stated:

> "The Bureau of Internal Revenue has agreed with the War Department that it will not attempt to collect the Federal retailers' excise tax from Army exchanges or commissaries. The agreement does not relate to the Federal manufacturers' excise tax, and exchanges are not exempt therefrom as to merchandise purchased for resale."[108]

By the Revenue Act of 1950, the Federal Retailers' Excise tax was

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[103] SPJGT 012.2, 22 Aug 1942, 1 Bul. JAG 147.
[104] Sec. 307(a), Revenue Act of 1943, 58 Stat. 64.
[105] Sec. 307(c), Revenue Act of 1943, 58 Stat. 66 (now Int. Rev. Code of 1954, § 4293).
[106] Int. Rev. Code of 1954, c. 31, as amended, 26 U.S.C. 4001–4057 (Supp. IV).
[107] SPJGT 1942/5750, 7 Dec 1942, 1 Bul JAG 397.
[108] SPJGT 1943/1000, 8 Feb 1943, 2 Bul. JAG 87.

specifically made applicable to retail sales made by the Government with the addition of the following section:

> "The taxes imposed by this chapter and by section 1651 shall apply with respect to articles sold at retail by the United States, or by any agency or instrumentality of the United States, unless sales by such agency or instrumentality are by statute specifically exempted from such taxes."[109]

Import taxes on petroleum products[110] and excise taxes on tobacco products,[111] playing cards,[112] beer,[113] and liquor,[114] which in effect are manufacturers' excise taxes since they are imposed on the manufacturer, producer or importer when the produce is sold or removed for sale, are paid by nonappropriated fund activities in the form of higher cost which in turn is passed on to the ultimate consumer.

Although all nonappropriated fund activities are government instrumentalities, they have not always received identical treatment from the Bureau of Internal Revenue concerning tax liability, as may be seen from the following opinions of The Judge Advocate General of the Army:

> "The Bureau of Internal Revenue has ruled that officers' clubs and messes are liable for the special taxes imposed by sections 3267 and 3268 of the Internal Revenue Code with respect to the operation of pool tables, billiard tables and bowling alleys, and the use of coin-operated devices. . . ."[115]

and:

> "The Federal taxes imposed by sections 3267 and 3268 of the Internal Revenue Code with respect to the maintenance or use of coin-operated amusement and gaming devices, bowling alleys, billiard and pool tables, do not apply in the case of post exchanges, soldiers' clubs and messes, and organizational day rooms. However, the Bureau of Internal Revenue has ruled that officers' and noncommissioned officers' clubs and messes are liable for such tax. . . ."[116]

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[109] Title VI, Sec. 602, Act of 23 Sep 1950, 64 Stat. 963 (now Int. Rev. Code of 1954, § 4054).

[110] Int. Rev. Code of 1954, § 4521.

[111] Int. Rev. Code of 1954, c. 52, as amended, 26 U.S.C. 5701–5763 (Supp. IV).

[112] Int. Rev. Code of 1954, §§ 4451–4457.

[113] Int. Rev. Code of 1954, §§ 5051–5057, as amended, 70 Stat. 66 (1956).

[114] Int. Rev. Code of 1954, c. 51, as amended, 26 U.S.C. 5001–5693 (Supp. IV).

[115] SPJGT 1944/2584, 24 Feb 1944, 3 Bul. JAG 127.

[116] JAGC 1947/9923, 26 Jan 1948, 7 Bul. JAG 56.

The above discrepancy was rectified to the detriment of all nonappropriated fund activities in 1950 by the enactment of Section 3283 of the Internal Revenue Code which reads as follows:

> "Any tax imposed by this chapter shall apply to any agency or instrumentality of the United States unless such agency or instrumentality is granted by statute a specific exemption from such tax."[117]

The above provision with slight modifications was retained in the Revenue Act of 1954.[118] Now all nonappropriated fund activities are required to pay Federal occupation stamp taxes where they act as a wholesale[119] or retail dealer in beer, a retail dealer in liquor,[120] where they operate any coin-operated amusement device[121] or where they operate any bowling alley, billiard or pool table, unless these latter facilities are maintained exclusively for the use of members of the Armed Forces and no charge is made of the use of these items.[122]

Like all other individuals or organizations who charge admission to any type of entertainment or who hire employees, nonappropriated fund activities are required to collect an admissions tax[123] and to withhold certain amounts from employees' earnings each pay period for credit against the employees' income tax obligations.[124] Although these are not, strictly speaking, obligations of nonappropriated fund activities, their revenue must be used to collect, account and pay over the taxes collected. In the event the activity fails to comply with these provisions of the law it will become liable for either the tax or the penalty imposed for noncompliance.

C. *Of Fund Activities to State Governments*

As an instrumentality of the Federal Government, nonappropriated fund activities are entitled not only to the same exemptions from Federal taxation as all other Federal agencies but are also exempt from the imposition of state taxes to the same extent as the Federal Government. As any general rule has exceptions, so is the case in the field of state taxation. This exception, however, is based primarily upon specific Federal legislation.

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[117] Title VI, Sec. 604, Act of 23 Sep 1950, 64 Stat. 964.
[118] Int. Rev. Code of 1954, §§ 4907, 5144(e).
[119] Int. Rev. Code of 1954, § 5111.
[120] Int. Rev. Code of 1954, § 5121.
[121] Int. Rev. Code of 1954, §§ 4461–4463.
[122] Int. Rev. Code of 1954, §§ 4471, 4473(2).
[123] Int. Rev. Code of 1954, § 4231.
[124] Int. Rev. Code of 1954, §§ 3401–3404, as amended, 69 Stat. 605, 616 (1955).

The first of these exceptions was contained in a 1936 amendment to the Federal Aid Highway Act[125] which provided:

> "That all taxes levied by any State, Territory or the District of Columbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation affected may be located."[126]

This section was later amended by increasing the scope of the section to make it applicable not only to the tax on sales, but also all taxes "with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels . . . ."[127] Thus, gasoline taxes of all the states and territories are collectible from the consumer when gasoline is purchased by individuals from nonappropriated fund activities.

In 1940, Congress authorized the states to extend their income, sales, and use taxes to persons residing on, or carrying on business, or to transactions ocurring in Federal areas.[128] However, such provision was made inoperative with respect to the United States, its instrumentalities and authorized purchasers therefrom who are defined as follows:

> "A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch."[129]

Having extended the power of states to impose taxes on military reservations except on operations of the Federal Government, its instrumentalities and authorized purchasers therefrom, a moral obligation devolved upon the Department of the Army to insure

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[125] Act of 11 Jul 1916, 39 Stat. 355.
[126] Sec. 10(a), Act of 16 Jun 1936, 49 Stat. 1521.
[127] Act of 30 Jul 1947, 61 Stat. 641, 4 U.S.C. 104(a) (1952).
[128] Act of 9 Oct 1940, 54 Stat. 1059 (now 4 U.S.C. 105, 106 (1952)).
[129] Sec. 3(b), Act of 9 Oct 1940, 54 Stat. 1060, as amended, 4 U.S.C. 107(b) (Supp. IV).

that such legislation was not abused or violated by unauthorized persons making purchases from nonappropriated fund activities. To fulfill this obligation, the Department of the Army has promulgated regulations[130] concerning each type of nonappropriated fund activity which contain definitions as to who is to be considered an authorized patron. The activities have the responsibility of enforcing these regulations to insure that only authorized persons are allowed the privileges of such activities.

As was pointed out earlier, some Federal taxes are imposed upon the manufacturer and may be passed on to the ultimate consumer in the form of increased price. Others are imposed upon the seller who in turn must collect the tax from the consumer and remit the collected amount to the Federal Government. Should the retailer fail to collect the tax he is still liable for it since the tax is imposed upon the retailer.

All states and territories of the United States have some form or other of taxation which is applicable to either the manufacturing, processing, transferring or the use of personal property. With all the modifications and variations that are possible with these forms of taxes, the question arises as to whether or not the states are attempting to impose upon an agency or instrumentality of the Federal Government a tax from which it is immune.

When the courts have been called upon to determine whether a tax of this nature is being imposed upon the person selling to the United States or the United States itself, they have looked to the local tax law to determine where the legal incidence of the tax lies. If it is determined that the legal incidence of the tax falls on the United States or its instrumentality, then the Government invokes its immunity and avoids the tax. However, if the legal incidence of the tax is on the individual selling to the United States who through increased price passes the cost of the tax on to the United States, there is no immunity.[131]

Public Law 587 of the 82d Congress authorized the Secretary of the Treasury, under such regulations as the President should promulgate, to enter into agreements for the withholding of state income taxes by the United States or its agencies from Federal employees who are residents of the state where the state law provides for collection of a tax by imposing the duty of withholding upon employers generally.[132]

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[130] AR 60–10, 26 Apr 1957, as changed; AR 230–60, 26 Jul 1956, as changed; AR 230–81/AFR 176–5, 6 Mar 1957; AR 230–10, 18 Jul 1956, as changed.

[131] *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941); *Colorado Nat'l Bank* v. *Bedford*, 310 U.S. 41 (1940).

[132] 66 Stat. 765 (1952).

Based upon the above legislation and Executive Order No. 10407 dated 6 November 1952[133] which implements it, all nonappropriated fund activities are liable for the withholding and paying over to state and territorial governments of taxes withheld from compensation paid employees who are normally residents of the particular state, provided the Secretary of the Treasury has entered into an agreement with the state.

D. *Of Fund Activities to Employees*

When Congress amended the Social Security Act in 1950, it provided specifically that employees of nonappropriated fund activities were to be covered by the Act.[134] On and after 1 January 1951, all employees of nonappropriated fund activities were covered by the Act and the activities were required to withhold a certain percentage of the employees' pay and to contribute a like amount for the benefit of each employee. Prior to the passage of the above Act, the War Department had taken the position that the 1939 amendments to the Social Security Act[135] made officers' and noncommissioned officers' clubs liable for the tax on their employees since such instrumentalities were not wholly owned by the United States.[136]

The most recent Federal legislation affecting the rights of nonappropriated fund activity employees and increasing the liabilities of the activities is the Unemployment Compensation Act for Federal Employees.[137] This act provides unemployment compensation to Federal civilian employees, effective 1 January 1955, for services performed after 1952 in the employ of the United States or any instrumentality thereof which is wholly owned by the United States. In implementation of this legislation the Department of the Army in October of 1955 issued a change to current regulations which provided as follows:

> ". . . . Title XV, Social Security Act, as added by Act of 1 September 1954 (68 Stat. 1130; 42 U.S.C. 1361 *et seq.*), provides unemployment compensation coverage to Federal civilian employees, effective 1 January 1955. Civilian employees of nonappropriated funds defined and authorized by these regulations, and military personnel performing authorized voluntary service during off-duty hours, within the limitations prescribed in *c*

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[133] 17 Fed. Reg. 10132 (1952), 5 U.S.C. 84b (Supp. IV).
[134] Act of 28 Aug 1950, 64 Stat. 492, 42 U.S.C. 410(a)(7)(B)(iv) (1952).
[135] Act of 10 Aug 1939, 53 Stat. 1360.
[136] War Dept. Cir. 86, 8 Aug 1940.
[137] Act of 1 Sep 1954, 68 Stat. 1130, 42 U.S.C. 1361–1370 (Supp. IV).

(2) above, shall be considered as having rendered Federal service within the meaning of the Act entitling them to unemployment benefits."[138]

Based upon the reasons given as to why officers' and noncommissioned officers' clubs were required to deduct and pay social security tax (*supra*), it would appear that the above change in Army Regulations has attempted to extend the scope of the Act or that the previous determination has been reconsidered and that all nonappropriated fund activities are now considered as wholly owned by the Government. This latter view would appear to be the more logical since the members of officers' and noncommissioned officers' clubs or mess do not require any proprietary interest in any of the assets of a particular activity.[139]

Nonappropriated fund activities being Federal instrumentalities, the employees of such activities do not come within the scope of the various state workmen's compensation laws. To provide comparable protection for its employees, nonappropriated fund activities were initially permitted to secure insurance coverage on its employees from private casualty companies.[140] Not only the question of death or disability compensation for this class of employees but also their status as governmental employees was finally and definitely answered by Congress in 1952 when it passed an act clarifying the status of certain civilian employees of nonappropriated fund instrumentalities under the Armed Forces with respect to laws administered by the Civil Service Commission.[141] In essence the Act provided that nonappropriated fund employees shall not be considered as employees of the United States for the purpose of any law administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act. It further provided that such employees would be covered by insurance or otherwise with compensation for death or injury and that such compensation should be comparable to that provided by the laws of the state where employed. This Act further provided "that

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[138] AR 210-50/AFR 176-1, 4 Nov 1953, C 5, 25 Oct 1955 (superseded by AR 230-117, 1 Dec 1955, as changed).

[139] AR 230-5, 18 Jul 1956, as changed.

[140] JAG 248.5, 29 Jan 1930, Dig. Op. JAG 1912-40, p. 942. *See also* SPJGC 331.3, 6 Aug 1942, 1 Bul. JAG 199, which expressed the view that workmen's compensation laws were not applicable nor were the employees covered by the Federal Employees' Compensation Act.

[141] C. 444, Act of 19 Jun 1952, 66 Stat. 138, 5 U.S.C. 150k, 150k-1 (1952). *See also* legislative history, 2 U.S. Code Cong. and Admin. News 82d Cong., 2d Sess., p. 1520 (1952).

the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected."[142]

E. *Of Fund Activities to Others*

Contracts. Since by statute, *supra,* employees of nonappropriated fund activities are not government employees, the terms and conditions of their employment plus any rights they may have must be governed by the terms of their employment contract. These activities being government instrumentalities, the question arises as to the remedies available, not only to an employee or former employee for breach of contract by the activity, but what, if any, remedies a contractor may have against an activity for breach of contract or failure to pay for services rendered under a contract. To the naive and uninitiated the answer appears to be simple: "There's no worry, the activity is part of the Government so they will always have enough money to pay their bills and if not, we'll file a claim. If they breach the contract, we'll sue the Government."

In view of the Supreme Court decision in *Standard Oil Company* v. *Johnson*[143] to the effect that a nonappropriated fund activity is an instrumentality of the Government, such would seem to be the logical conclusion. However, that is not the case.

Between December 1950 and December 1953, four cases were decided concerning the contract liability of nonappropriated fund activities and/or the liability of the United States for such contracts. Two of these cases were decided by District Courts, one by the Court of Appeals for the District of Columbia and one by the Court of Claims.

A review of these cases will show the status of these activities as regards their contracts and may shed some light on what may be expected from the courts in the future should somewhat similar cases arise.

In *Bleuer* v. *United States,*[144] decided on 21 December 1950, in the United States District Court, Eastern District, South Carolina, the suit was based upon an alleged contract of employment. The Board of Governors of the Commissioned Officers' Mess (Open) at the Parris Island Marine Corps Base had authorized the employment of plaintiff as manager for one year starting about 15 November 1946. In April 1947, his employment was terminated and he was paid up to 1 May 1947. Extracts of regula-

[142] *Id.,* 5 U.S.C. 150k (1952).
[143] 316 U.S. 481 (1942).
[144] 117 F. Supp. 509 (E.D.S.C. 1950).

tions introduced into evidence established that civilians paid from appropriated funds could not be employed by "open messes" but civilians could be hired if paid from funds of the "Open Mess"—which this was. In deciding the case against the plaintiff, the Court said:

> "This suit is one against the United States. In case the Plaintiff were given a verdict the judgment would have to be paid from the Treasury of the United States from funds appropriated by the Congress to meet judgments against the United States. . . . If he has any right of action (and this Court expresses no opinion as to whether he has or not) it would be against the organization, or officers or personnel of the Officers' Mess and not against the United States.
>
> "When this exhibit was introduced, and after hearing the Plaintiff's testimony, and it being admitted in open court by the counsel for the respective parties that the Officers' Mess at Parris Island was an 'Open Mess', and not a 'Closed Mess', I felt constrained to dismiss the suit since the Plaintiff failed to show a cause of action against the named Defendant, the United States of America."[145]

In April of the following year, a breach of contract suit was brought against an Army officers' club. Whether the Officers' Club was made defendant rather than the United States because of the opinion in the *Bleuer* case is not known.

However, in disposing of the case, the Court, after determining the Club to be an instrumentality of the Government, said:

> ". . . . The United States has not waived its sovereign immunity, of which its agency partakes, as to contract obligations of the Club.
>
> "Even if the complaint were amended to name the United States as defendant, under Title 28, § 1346, United States Code, the action could not be maintained, because contracts made by the Club are not obligations of the United States, but solely liabilities of the Club. AR 210–60 Sec. IV. 29. Indeed they are not claims against the United States. The plaintiff contracted with notice of the legal status of the Club, its immunity to suit, and the absence of responsibility of the United States.
>
> "The result is that the Club is obligated on its contract but cannot be *sued* for its breach, and the United States is neither liable nor suable thereon."[146]

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[145] *Id.*, at 510.

[146] *Edelstein* v. *South Post Officers' Club*, 118 F. Supp. 40 (E.D. Va. 1951).

In May, 1953, the United States Court of Appeals for the District of Columbia decided a suit by a concessionaire against the Board of Governors of the Naval Gun Factory lunchroom committee for alleged services rendered.[147] The district court had dismissed and plaintiff appealed. The Board contended it was an instrumentality of the Navy Department and thus immune to suit to the same extent as the Navy Department. The plaintiff contended he was suing the Board members only in their representative capacity as custodians of a private fund and not as officers or employees of the Government. The Court, using *Standard Oil Company* v. *Johnson* as a guidepost, determined that there existed a distinct relationship between the Board and the Navy Department sufficient to constitute the Board an arm of the Government performing a governmental function. In concluding, the Court said:

> "We conclude that the individuals comprising the Board were acting for and in behalf of the United States, and not in any private capacity. Therefore, the action is in legal effect against the United States without its consent, for the statute [28 U.S.C. 1346] limits a civil action or claim against the Government in the District Court to $10,000."[148]

In December of 1953 the Court of Claims was called upon to decide whether one Borden could recover salary withheld under terms of a contract of employment with the Post Exchange. Briefly, under the terms of the contract the exchange was authorized to withhold salary of the employee for loss occasioned by the employee's negligence. A loss had occurred and a board of officers appointed by the Army determined that such loss was occasioned by Borden's negligence. This finding was approved and the amount in question was withheld. The plaintiff contended that he was not negligent and his was the issue before the court. However, before the Court could determine the issue, the United States contended that it could not be sued on the contract since it was between the plaintiff and the Exchange Service. Thus the status of exchanges and their contracts was again raised. In reviewing the various cases, the Court agreed that exchanges were instrumentalities of the United States and as such not liable to be sued. The majority of the Court held, however, that in view of the decision of the Supreme Court concerning post exchanges and since Army Regulations provided that exchange contracts were not Government contracts, the United States was in no way a party to the

[147] *Nimro* v. *Davis*, 204 F. 2d 734 (D.C. Cir. 1953).
[148] *Id.*, at 736.

contract and not a proper defendant. Unanimously, the Court agreed that the plaintiff should have a right of action and said:

> "For the Army to contend and to provide by regulation that it is not liable since it did not act in its official capacity would be like a man charged with extra-marital activity pleading that whatever he may have done was done in his individual capacity and not in his capacity as a husband."[149]

The Court of Claims apparently did not consider the *Nimro* case because the dissenting judge argued that the United States was liable under the Tucker Act,[150] his theory being that Congress had waived sovereign immunity in cases arising out of express or implied contracts of the United States and that the contract of the Exchange was at least an implied contract of the Government. Further, exchanges being instrumentalities of the Federal Government, their attempt to avoid liability to suit by regulations was contrary to law and thus the regulation providing that such contracts were solely exchange contracts was void.

Torts. Since nonappropriated fund activities are instrumentalities of the Government, the question arises as to whether under the Federal Tort Claims Act[151] the United States is liable for the tortious acts of employees of such activities.

It has been the view of the Department of the Army in respect to tort claims that the United States is not liable under the Federal Tort Claims Act for the acts or omissions of the employees of nonappropriated fund activities.[152] Briefly, this determination is based partially upon the statement of the United States Supreme Court that "the government assumes none of the financial obligations of the exchange,"[153] and the fact that the services rendered by these activities have, since the formation of our Army, been furnished with few exceptions[154] from sources financed by other than appropriated funds[155] and that Congress intended such activities to be self-supporting.[156] In addition, the Department takes the position that employees of these activities are not government

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[149] *Borden* v. *U.S.*, 126 Ct. Cl. 902, 908 (1953).
[150] 28 U.S.C. 1346 (1952), as amended, 68 Stat. 589 (1954).
[151] 60 Stat. 842 (1946).
[152] JAGL 1952/1906, 2 Feb 1952, 1 Dig. Ops., Claims, § 38.1.
[153] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942).
[154] Appropriation acts for period 1902 to 1915 when Congress appropriated funds for construction, equipping and maintaining post exchanges, libraries and reading rooms.
[155] Sutlers, post traders and revenue producing nonappropriated fund activities.
[156] 10 U.S.C. 4779 (Supp. IV).

employees and therefore an injured person may not avail himself of the remedy provided by the Federal Tort Claims Act.

With a view to compensating individuals who might be injured as a result of the torts of nonappropriated fund activities or their employees, the activities are required to purchase public liability insurance at their own expense. Since these activities are Government instrumentalities, each insurance contract is required to expressly name both the particular nonappropriated fund and the United States as co-insured.[157] In general, this arrangement has worked to the mutual satisfaction of all concerned. However, where there is a disagreement as to the settlement between the claimant and the insurer, any proviso pertaining to arbitration contained in the endorsement to the insurance policy is not binding on the claimant who may, if he desires, bring suit against the insurer. Should the claimant sue the insurer, may the insurer interpose the defense of sovereign immunity? Is a clause in the insurance contract expressly waiving such a defense binding? By such a provision, the nonappropriated fund activity is attempting to waive the Government's immunity from suit. Immunity from suit being a sovereign right, it cannot be waived without the express consent of the sovereign (Congress) and then only to the extent and under the circumstances authorized.[158] Since the Government has not waived its immunity against being sued for the acts of nonappropriated fund activities or their employees, an injured party is precluded from suing the activity which is a Government instrumentality and entitled to all immunities commensurate with such status.[159]

From the above it is obvious that a person injured by the tortious act of an employee of a nonappropriated fund activity finds himself in somewhat the same predicament as the individual trying to recover from the activity on a breach of contract. In meritorious cases both should be able to collect as a matter of fairness. However, the courts have not always agreed with the Department of the Army as to the inapplicability of the Federal Tort Claims Act to nonappropriated fund activities.

In three recent cases involving nonappropriated fund activities the Government has moved for a dismissal based upon the fact that the Federal Tort Claims Act does not apply to acts or omis-

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[157] Par. 14, AR 230–8, 2 Aug 1957.

[158] *Dalehite* v. *U.S.*, 346 U.S. 15 (1953); *U.S.* v. *U.S. Fidelity & Guarantee Co.*, 309 U.S. 506 (1940); *U.S.* v. *Shaw*, 309 U.S. 495 (1940); *Stanley* v. *Schwalby*, 162 U.S. 255 (1896).

[159] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

sions of employees of these activities. In all three cases the court has refused to grant the motion. In one case they held that a civilian employee swimming pool constructed, maintained and operated by the Government and supervised by a commissioned officer who promulgated rules and regulations for the operation of the pool was a government agency.[160] In another, the Court ruled that an enlisted airman whose assigned duty was with the Exchange Services was an employee of the Government and that he was within the scope of his employment since the operation of the post exchange is the business of the armed force and it had a right to supervise and control the duties of servicemen assigned to duty with the exchange.[161] In still a more recent case[162] the Court held that an exchange was a "Federal agency" within the Federal Tort Claims Act, and thus the United States was subject to suit under the Act. The Court went on further to say that even though Congress had provided that exchanges should purchase compensation insurance for its employees, this provision only made it clear that such employees were not covered by the Civil Service Act or the Federal Employees' Compensation Act. On the basis of the above cases, it would appear that nonappropriated fund activities, as separate and distinct entities, have no liability to third parties for torts committed by their employees since suits within the limits of the Federal Tort Claims Act may be filed against the United States.

F. *Of Army Personnel (Civilian and Military) to Nonappropriated Fund Activities as Indebtedness to the Government*

As we have seen, nonappropriated fund activities are liable for government property lost, damaged or destroyed. Also, that the activity may collect from its agents or employees if their acts or omissions were the cause of the activities' liability.[163] The normal procedure for ascertaining whether a particular agent or employer was at fault and should reimburse the nonappropriated fund activity is by means of a board of officers who investigate and make findings of fact and recommendations to the installation commander in accordance with the regulation under which they are appointed.[164]

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[160] *Brewer* v. *U.S.*, 108 F. Supp. 889 (M.D. Ga. 1952).
[161] *Roger* v. *Elrod*, 125 F. Supp. 62 (Alaska 1954).
[162] *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill. 1955).
[163] Par. 4*d*, AR 735–10, 11 Oct 1955.
[164] Par. 22, AR 230–8, 2 Aug 1957; AR 15–6, 25 Jul 1955.

A finding by the board of sufficient negligence on the part of an agent or employee with a recommendation that the individual be held pecuniarily liable does not, even when approved by the convening authority, always mean that the activity will be reimbursed for its losses. Where the loss is covered by insurance, the regulations generally provide that proof of loss will be filed with the insurer.[165] When there is no insurance, a request for voluntary restitution should be initiated. If this is refused, a claim account against the responsible person will be established. This account may be settled or reduced by means of a setoff of any money due the employee from the activity. In the case of civilian employees and volunteer military employees provision for such a method may be included in the contract of hire to cover not only United States Government issue property but also property purchased with funds of the activity. Where military personnel who are not entitled to compensation from the activity are held liable to the activity and refuse to make voluntary restitution or authorize a stoppage of military pay, considerable difficulty and time may be encountered in collecting the indebtedness.

As to military pay of both enlisted personnel and officers, the general rule of law is that there can be no stoppage without statutory authority.[166] In the case of the pay of enlisted personnel, Congress by the Act of 22 May 1928[167] provided, in brief, that a percentage of the pay of enlisted personnel of the Army may be stopped to satisfy an indebtedness to the United States or its instrumentalities where such indebtedness has been administratively determined under regulations prescribed by the Secretary of the Army. In the case of officers, there is presently no existing statutory authority for withholding their pay to offset indebtedness to a nonappropriated fund activity while the officer is on *active duty. However, upon final settlement prior to separation,* there is an exception to the general rule which allows a withholding of pay due an officer for any indebtedness due the United States or its instrumentalities, including nonappropriated fund activities.[168]

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[165] Par. 24, AR 230–8, 2 Aug 1957.

[166] *McCarl* v. *Pence,* 18 F. 2d 809 (D.C. Cir. 1927).

[167] Act of 22 May 1928, 45 Stat. 698, as amended, 10 U.S.C. 875a *(1952), M.L. 1949 § 1521 (superseded by 10 U.S.C. 4837 (Supp.* IV)).

[168] 29 Comp. Gen. 99 (1949); JAGA 1952/4354, 27 May 1952, 2 Dig. Ops., Pay and Allowances, § 101.9; CSJAGC 1949/1890, 9 Mar 1949; JAGC 1948/2825, 25 Mar 1948.

IV. PURPOSES FOR WHICH NONAPPROPRIATED FUNDS MAY PROPERLY BE USED

A. *Use of Nonappropriated Funds in Discharge of Official Obligations of the Government*

By its own directive and orders, the Department of the Army has recognized and acknowledged its responsibility and obligation to provide for and promote "a well-rounded morale, welfare, and recreational program to insure the mental and physical well-being of its personnel."[169] To implement, supervise and provide the necessary activities in the fulfillment of this responsibility, an organization or activity has been established which is known as the "Special Services." In the accomplishment of the mission, such activities as libraries, service clubs, craft shops, sports programs and other forms of recreational and entertainment programs are either directly operated or supervised by Special Services.

Generally speaking, the necessary facilities, qualified civilian employees and essential equipment and supplies necessary for the operation of these activities and operations are provided for from appropriated funds to the extent that these funds are available.[170] Although the funding of such programs is the obligation of the Government, it is understandable that due to budgetary limitations, fluctuation in troop strength, deployment and redeployment of troop strength and the varied programs that may be and are conducted, it is sometimes impossible to carry out as complete and well-rounded a program as is desired or deemed necessary by the installation commander who is responsible for all recreation and welfare activities.[171]

Recognizing the existence of such a situation, the Department of the Army has authorized and directed that, under certain conditions, nonappropriated funds will be used to supplement these programs.[172] Thus, by regulations, nonappropriated funds have been made available to defray certain expenses that would normally be incurred and satisfied by the Federal Government.

Presently, the Government, under the Federal Tort Claims Act, is required to pay the obligations of nonappropriated fund activities apparently with no known provision requiring such activity to reimburse the Government. Since the courts have held that

[169] Par. 4*a*, AR 230–5, 18 Jul 1956.
[170] AR 680–20, 24 Apr 1953; AR 680–40, 16 Oct 1953; AR 680–70, 17 Oct 1952, as changed.
[171] Par. 47c, AR 210–10, 8 Jun 1954.
[172] Par. 4, AR 680–20, 24 Apr 1953.

these activities are instrumentalities of the Government, there is no particular reason for reimbursement unless the theory is adopted that the welfare, recreation, and morale activities of the Army are to be operated without expense to the Government. The adoption of such a theory would amount to a complete reversal of existing policy and adversely affect the efficiency of the Army. However, if it is determined that nonappropriated fund activities, particularly revenue producing activities, should stand the expense of its tort obligations, it would appear that the matter could be accomplished by regulations similar to those presently in existence requiring reimbursement for certain services furnished nonappropriated fund activities.

B. *Repair of Government Buildings*

By the Act of 16 July 1892,[173] as amended, Congress authorized the use of government buildings and transportation by post exchanges when, in the opinion of the Secretary of the Army or his representative, the Government had no present need requirements. By regulation, the Secretary of the Army has extended this policy to all nonappropriated fund activities and included certain facilities, utilities, supplies and equipment. The criteria as to whether the latter items are furnished without reimbursement is whether they are necessary for health, sanitation, and safety. If so, then there is no charge. The normal maintenance of these facilities, since they are government property, rests upon the Government and appropriated funds are normally used.[174] However, due to the nature of the various nonappropriated fund activities, it is understandable that buildings furnished for their use may require certain alterations, modifications, or the installation of particular types of equipment not normally used by the Army before such buildings will be suitable for the use intended. Under these particular circumstances, the nonappropriated fund activities may and generally will be required to pay for such alterations or repairs.

C. *Employment of Various Classes of Military Personnel*

In considering the employment of military personnel by nonappropriated fund activities, there are two principal categories to be considered—those presently serving in the Army or on active duty and former members who are retired. Each of these two major categories must again be broken down into two groups

[173] 27 Stat. 178, 10 U.S.C. 1335 (1952) (superseded by 10 U.S.C. 4779 (Supp. IV)).

[174] AR 210–55, 26 Jul 1956, as changed.

consisting of enlisted personnel and commissioned personnel. Employment must, however, be distinguished from assigned duty. The former connotes payment from the activity for services rendered by the individual in addition to normal pay received as a member of the Army. The latter means that by competent authority the individual's primary military duty is to manage or work for a particular nonappropriated fund activity.

Employment of enlisted personnel on active duty during off-duty hours is not prohibited by statute and is authorized by regulations. Such employment is authorized provided it is voluntary on the part of the individual concerned, is performed during off-duty hours, does not impair the individual's efficiency in assigned military duties, is computed at an hourly rate and does not exceed that received by civilians in the community for performance of similar duties.[175]

In the case of warrant and commissioned officers, the activities are prohibited from paying compensation for services rendered except for reimbursement for personal expenses incurred while officiating at sporting events, instructing or conducting educational, religious or entertainment activities.[176]

This indirect prohibition against the employment of warrant and commissioned officers appears to be based more on policy than on any statutory prohibition. For an officer to accept part-time employment with such an activity on an equal basis with enlisted personnel would be inconsistent with and degrading to the office he holds.

As to the employment of retired enlisted personnel, there is nothing contained in regulations or statutes which would prohibit such employment or would limit the amount of compensation they may receive.

In the case of retired officers a distinction must be made between Reserve officers retired under the provisions of the Army and Air Force Vitalization and Retirement Equalization Act of 1948[177] and Regular Army officers. In the case of Reserve officers who are drawing retired pay, there is no impediment to their employment since after their relief from active duty they are no longer considered as holding an office.[178] Likewise, there is no

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[175] Par. 6c(2), AR 230-5, 18 Jul 1956.

[176] *Id.*, subpar. 6c(3).

[177] 62 Stat. 1087, as amended, 10 U.S.C. 1036 (1952) (superseded by 10 U.S.C. 3966 (Supp. IV)).

[178] Sec. 29, 70A Stat. 632 (1956).

statutory limitation placed upon the amount of compensation they may receive.[179]

Nonappropriated fund activities should be cautious in the employment of Regular Army retired officers, not because the activity is prohibited from employing such personnel but because the individual may, due to his status, be prohibited either from accepting such employment or may jeopardize his retired status or the amount of compensation he is eligible to receive. Two statutes, commonly referred to as the Dual Office Act[180] and the Economy Act,[181] place limitations upon the types of employment and amount of compensation retired officers of the Regular Army may receive. Generally, officers retired for physical disability are expressly excluded from the Dual Office Act.[182] There is an exception in the case of officers retired for physical disability when the injury was not incurred in line of duty. The Economy Act is not applicable where the aggregate of retired and civilian pay is less than $10,000 or where the individual is retired for disabilities incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in line of duty during an enlistment or employment as provided in Veterans Regulations Numbered 1 (a), Part I, Paragraph I.[183]

As to the Dual Office Act, The Judge Advocate General of the Army has ruled that full-time employment by a nonappropriated fund activity amounts to holding office under the Federal Government[184] and therefore, unless eligible under one of the exceptions to the act, a Regular retired officer would be precluded from accepting such employment. However, the Comptroller General has recently ruled to the contrary.[185] Although the act does not specifically provide for punitive action, there is the possibility

[179] *Tanner* v. *U.S.*, 129 Ct. Cl. 792 (1954), judgement entered, 131 Ct. Cl. 804 (1955).

[180] Prohibits appointment to or acceptance of second office under the Federal Government where annual compensation of one amounts to $2,500 or over. *See* Sec. 2, Act of 31 Jul 1894, 28 Stat. 205, as amended, 5 U.S.C. 62 (1952).

[181] Limits amount of retired pay an individual employed by the United States may receive if a commissioned officer. Sec. 212, Act of 30 Jun 1932, 47 Stat. 406, as amended, 5 U.S.C. 59a (Supp. IV).

[182] *Ibid.*

[183] Pensions to veterans and their dependents for disability or death resulting from active military service during Spanish-American War, Boxer Rebellion, Philippine Insurrection, World War I, World War II, and the Korean conflict.

[184] JAGA 1954/9840, 9 Dec 1954; JAGA 1951/7800, 28 Dec. 1951; JAGA 1951/7807, 28 Dec 1951; JAGA 1943/19034, 24 Nov 1943.

[185] 36 Comp. Gen. 309 (1956).

that such employment might operate to vacate the retired officer's commission leaving him only the position of employment with the nonappropriated fund activity and the compensation attached thereto. This is based upon a recent opinion of the Comptroller General wherein he advised that where an individual presently holding an office under the Federal Government is appointed to a second office, the first is vacated and the individual is entitled only to the compensation of the second.[186]

Should a retired Regular Army officer, contemplating employment with a nonappropriated fund activity, be exempt from the provisions of the Dual Office Act, he must consider the provisions of the Economy Act. However, in the majority of cases, if the individual is exempt from the provisions of the Dual Office Act he will also be exempt from the provisions of the Economy Act. In those few cases where the individual does not come within one of the exemptions of the Economy Act he must consider what effect it will have on the amount of compensation he is entitled to. By the Act of 4 August 1955[187] the restrictive effect of the Economy Act was greatly eased since the amount of compensation an employee under the United States Government may receive both from salary and retired pay for or on account of commissioned service was increased from three to ten thousand dollars.

Where a nonappropriated fund activity is considering employing military personnel, either active or retired, and there is a question as to the individual's eligibility as to employment or the amount of compensation he may receive, the custodian of the activity should, through command channels, request an opinion from The Adjutant General as to the individual's eligibility. Such a request should contain all pertinent facts as to dates of service, reason for retirement, including the provisions of law under which the individual retired, disability, if any, and extent, current status of the individual and proposed nature of employment and amount of compensation.

D. *Other Purposes for Which Nonappropriated Funds May Be Expended*

The funds or profits of any nonappropriated fund activity do not become the personal property of any individual, installation, organization or unit nor do any of the above possess a vested right in any of the funds or property maintained by an activity.[188]

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[186] 32 Comp. Gen. 448 (1953).
[187] 69 Stat. 498, 10 U.S.C. 59a (Supp. IV).
[188] Par. 4*d*, AR 230-5, 18 Jul 1956.

The reallocation or distribution is within the power of the Department of the Army[189] and upon dissolution of the activity all residual assets are forwarded to the Department of the Army for disposition.[190] These facts, coupled with the fact that these activities are instrumentalities of the Federal Government, allow but one conclusion and that being that such funds are property of the United States. As such, they may only be expended in accordance with policies established by the Department of the Army.

These activities have been established to provide for a "well-rounded morale, welfare, and recreational program to insure the mental and physical well-being" of military personnel where appropiated funds are insufficient.[191] Thus, where appropriated funds are not available, any expenditure which contributes to the comfort, pleasure, contentment and mental or physical improvement of military personnel, as a group rather than as an individual, would be authorized, provided that Army Regulations do not specifically prohibit the expenditure.[192]

V. SUMMATION

From a review of the preceding material, certain facts and conclusions appear to be obvious.

The morale of the individual soldier and the Army as a whole has been and always will be a vital factor in the effectiveness of the Army in carrying out its mission. Any function or activity that contributes to the comfort, pleasure, contentment, spiritual, mental and physical improvement of military personnel will materially assist in maintaining a higher state of morale and thus a more efficient Army. Occupying a prominent place in the history of our Army have been various organizations and activities such as sutlers, post traders, canteens, unit funds, officers' and noncommissioned officers' messes, post funds, libraries, service clubs, post exchanges, and motion pictures to mention a few. These activities have uniformly had one principal mission and that was to assist the commander in maintaining a high state of morale within his organization.

To aid the commander, Congress has from time to time appropriated certain sums of money to further activities which are calculated to maintain or improve the morale of the Army. This,

[189] *Id.*, subpar. 4*d*(3).
[190] Par. 21, AR 230–10, 18 Jul 1956.
[191] Par. 4*a*, AR 230–5, 18 Jul 1956.
[192] SPJGA 1943/7407, 28 May 1943, SPJGA 1943/7469, 28 May 1943, 2 Bul. JAG 294.

however, has been the exception rather than the rule. In general Congress, by not enacting specific legislation, has given tacit approval for the Army to provide these services by means of nonappropriated fund activities. Thus, the financial burden does not rest directly upon the Government.

Since these activities are performing a function of the Army, the Courts have rightly determined that the activities are instrumentalities of the Government and as such are entitled to all immunities commensurate with such status. Thus, as a separate entity, they are immune from being sued in state or Federal courts except where Congress has legislated specifically to the contrary. They are immune from local, state and Federal taxes, licenses and regulations to the same extent as any other agency of the Federal Government.

Being an adjunct of and established by the Department of the Army, the operations of nonappropriated fund activities are controlled by orders and regulations of the Department of the Army. These regulations may and do provide for the establishment, operation and control of these activities. They also provide for the manner and method of raising and safeguarding funds and the authorized purposes for which these funds may be expended.

[AG 010.6 (17 Apr 58)]

By Order of *Wilber M. Brucker*, Secretary of the Army:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

Official:

HERBERT M. JONES,
Major General, United States Army,
The Adjutant General.

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