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Articles:

Annual Accumulative Index (Volumes 67-70):

THE JUSTICES AND THE GENERALS: THE SUPREME COURT AND JUDICIAL REVIEW OF MILITARY ACTIVITIES*

Colonel Darrell L. Peck**

I. INTRODUCTION

> *Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.*[1]

A more forceful expression of the need for judicial restraint than that posited by Justice Jackson in the *Orloff* case is difficult to imagine. While the underlying concept can hardly be disputed, the comparison is extreme. Military intervention in judicial matters in the United States is so unthinkable it is difficult to believe the Supreme Court seriously intended to put judicial interference with military matters in the same category.

Apparently many of the lower courts did not believe Justice Jackson's intimations in *Orloff*, for in the ensuing twenty-two years litigation involving the armed forces has proliferated markedly. Legal proceedings involving the military have always tended to grow during and immediately following a war,[2] and the

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[1]Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (emphasis added).

[2]*See, e.g.*, statistical analysis of "open" cases handled by the Litigation Division of the Office of The Judge Advocate General of the Army, September 25, 1974. This analysis of cases litigated by that Division on behalf of the Department of the Army reveals the volume of cases in that office increased and decreased along with American military involvement in Vietnam. Study on file in the Department of Developments, Doctrine & Literature, The Judge Advocate General's School, US Army, Charlottesville, Virginia.

protracted[3] and increasingly unpopular hostilities in Vietnam have undoubtedly contributed heavily to the recent surge. Nor can the effect of an uninterrupted quarter century of military conscription[4] be ignored. But another important consideration has been the sympathetic reception of many of these cases by the federal courts. Without an appreciable chance of success, so large a number of suits never would have been initiated.

Not that there has been any notable consistency among the decisions: in the space of ten days, for example, the same circuit court of appeals which refused to apply constitutional due process principles to a military administrative discharge hearing[5] had no hesitation about using the due process clause as a basis for establishing continuing judicial supervision over the details of military orders, weaponry, and training.[6] It is the very lack of any widely recognized principles governing judicial review of military actions which encourages so much litigation involving so many diverse issues.

Although there are a few areas in which there is general agreement, for the most part the great variety of opinions among the federal district courts, and even among the circuit courts of appeals, makes it possible to find support for almost any proposition one may wish to assert with regard to judicial review of military actions. The only hope for escape from this quagmire of conflicting decisions lies in the Supreme Court. Although that Court has by no means decided all the issues involved, nor necessarily given the clearest guidance in those it has decided, careful analysis of the precedents that are available should provide a basis on which to construct a comprehensive and consistent set of principles to guide the lower courts as to their appropriate role when called upon to review activities of the military.

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[3]Measuring only the eight years from the entry of U.S. ground combat units in 1965 to the withdrawal of American forces in 1973, the Vietnam War was the longest in which the United States has engaged. In addition, American advisors and other military personnel performing more limited roles were committed in Vietnam both before and after that eight-year period.

[4]Conscription was in effect continuously from enactment of the Selective Service Act of 1948, Act of June 24, 1948, ch. 625, 62 Stat. 604 (now Military Selective Service Act, 50 U.S.C. App. § 451-73 (1970)), until July 1, 1973, 50 U.S.C. App. § 467(c)(Supp. II, 1972). However, in the six-month period before induction authority expired, virtually the only men drafted were members of the reserve components who had failed to meet their reserve obligations. Army Times, July 17, 1974, at 23, col. 1.

[5]Crowe v. Clifford, 455 F.2d 945 (6th Cir. 1972). *But cf.* Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

[6]Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972), *rev'd sub nom.* Gilligan v. Morgan, 413 U.S. 1 (1973).

It might be argued that there is little need to worry about clarifying the law in this area now because, with the end of the draft and the withdrawal of all United States military personnel from Vietnam, the huge surge of military-related litigation is rapidly subsiding. The underlying problem remains, however, and will endure as long as the law is so unsettled. And not only is there a steady flow of litigation against the armed forces even in peacetime; but it would be overly optimistic, unfortunately, to believe that the international situation will remain permanently quiescent, precluding another surge of military-related litigation. Actually this may be the best time to address the problem, when the issues are still fresh but no longer quite so heated, when strong emotions and political considerations are less likely to hinder a dispassionate and reasoned solution.

At the outset of this analysis, we should divide military actions that the civil courts may be called upon to review into at least two major categories. First, there are the court-martial cases, those in which the petitioner has been, is being, or expects to be tried by court-martial and asks the civil court to set aside, prevent or otherwise intervene in that action. Then there are the other cases, arising from the day-to-day activities by which the military carries out its designated responsibilities. For convenience these will be referred to as administrative activities. By far the largest subcategory of cases asking civil court intervention in these military administrative activities involves personnel actions—matters such as enlistment, induction, activation of members of the Reserve, pay, promotion, assignment, discharge, and retirement. A commander's control over military installations is another fertile source of litigation, and usually involves challenges to either military activities with an expected environmental impact or the commander's regulation of political or commercial activities by others on military property. Cases involving purely military activities, such as preparation for and conduct of combat operations, are relatively rare.

Although one might expect a fairly clear dichotomy between cases involving civil court review of courts-martial and those involving administrative activities of the military, that is not always the case. In the first place, a question arising from an administrative action may also constitute a crucial legal issue in a court-martial.[7] But even when the facts do not require it, decisions

[7]Perhaps the most obvious example arises from the fact that court-martial jurisdiction normally depends on the accused person having first been properly inducted or enlisted into the service. *See* Billings v. Truesdell, 321 U.S. 542 (1944); *In re* Grimley, 137 U.S. 147 (1890).

of the courts, and especially of the Supreme Court, have so inextricably interwoven the two categories that it is difficult to ignore one in any study of the other.

While the proper role of the civil courts in reviewing courts-martial actions is still not entirely clear, there is even more confusion and uncertainty about judicial intervention in the administrative activities of the military. The following discussion, therefore, will focus primarily on the proper role of the civil courts in reviewing military administrative actions.[8] Major developments in the Supreme Court's guidance for civil court review of courts-martial cannot be ignored entirely, however, because those developments so frequently have an impact on judicial review of other military activities.

In spite of the almost infinite variety of possible military administrative actions—indeed, because of it—there is a real need for a single set of principles, if at all possible, which can be used to determine the reviewability of any of them which may be challenged. That will be the ultimate goal of this analysis.

II. A "DOCTRINE OF NONREVIEWABILITY" IS BORN AND PROSPERS

Historically, there has been a great reluctance on the part of civil courts to review activities of the military. This has sometimes been referred to as a "doctrine of nonreviewability."[9] The term is often a great convenience and will be used here, but with full recognition of the fact that referring to this judicial restraint as a doctrine is a serious exaggeration of its definiteness, clarity, and scope. Unfortunately, however, the courts have not been overly precise themselves in explaining their forbearance. This has contributed heavily to the lack of understanding of the role of civil courts in reviewing military activities. To fully appreciate the current state

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[8]Administrative actions by government agencies other than the military departments themselves, such as the Selective Service System or the Veterans' Administration, are not within the scope of this article even though they often have a close military connection. Neither will there be any treatment of the courts' jurisdiction, exhaustion of administrative remedies, ripeness, standing, and similar issues ancillary to the fundamental question of reviewability.

[9]*E.g.*, Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483 (1969); Comment, *God, the Army, and Judicial Review: The In-Service Conscientious Objector*, 56 CALIF. L. REV. 379 (1968) [hereinafter cited as *God, the Army, and Judicial Review*].

The term "nonreviewability doctrine" is used interchangeably, *e.g.*, Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L. J. 539, 580 (1974).

of the law, a careful examination of the origin and development of this so-called doctrine of nonreviewability is necessary.

In a sense, at least, it is possible to trace the doctrine from the landmark case of *Dynes v. Hoover*[10] in 1858 to its reputed demise in *Harmon v. Brucker*[11] in 1958. There is a certain attraction in attributing to the doctrine a life span of an even century; however, this ignores the fact that neither its birth nor its death is quite so clear.

As will be seen later, the doctrine of nonreviewability was languishing even before *Harmon v. Brucker*. On the other hand, even that case did not necessarily declare it dead. As to the origin of the doctrine of nonreviewability, although *Dynes v. Hoover* is geneologically indispensable, there are still older traces. For the purposes of this analysis, *Decatur v. Paulding*[12] is a more appropriate beginning since it dealt with an administrative determination rather than a court-martial, the subject of *Dynes v. Hoover*.

A. AN EARLY DOCTRINE OF NONREVIEWABILITY

Decided in 1840, *Decatur v. Paulding* confirmed the existence of some sort of doctrine of nonreviewability at least that far back, but it was not a concept limited to the military. Although the case involved a determination by the Secretary of the Navy as to the applicability of a federal pension statute to the widow of a deceased member of the Navy, there was no indication of any special significance in the fact that a military department was involved; the Court's opinion extended to the entire branch of the Government.

> The interference of the courts with the performance of the ordinary duties of the executive department of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.[13]

The "ordinary duties" in question involved the interpretation of a statute and resolution of Congress. The Court acknowledged it would not be bound by the interpretation of the head of an executive department if it were "a case in which they [the courts] have jurisdiction, and in which it is their duty to interpret the Act of Congress, in order to ascertain the rights of the parties in the cause

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[10] 61 U.S. (20 How.) 65 (1858).
[11] 355 U.S. 579 (1958).
[12] 39 U.S. (14 Pet.) 497 (1840).
[13] *Id.* at 516.

before them."[14] The Court went on, however, to find it did not have jurisdiction to review the Secretary of the Navy's interpretation of the statute and resolution because "the law authorized him to exercise judgment and discretion."[15] Actually, although he was to exercise discretion in awarding pensions, the statute did not confer on the Secretary any special authority to interpret it, and the restriction on judicial review was entirely self-imposed. Later cases indicated that the Court would presume it had no power to review executive actions unless review were specifically authorized by the statute in question.[16]

Only two years after *Decatur*, the Court again refused to review the interpretation given a statute by a military department. *United States v. Eliason*[17] involved a suit by the Government against an Army disbursing officer who claimed that an Army regulation, implementing an act of Congress, was based on an erroneous interpretation of that statute. The circuit court agreed with his contention, but the Supreme Court indicated the courts had no business even examining the issue. It held the Secretary's regulations "binding upon all within the sphere of his legal and constitutional authority."[18]

The case carried at least a hint of recognition that special problems could arise from judicial intervention in internal military affairs.

> Such regulations cannot be questioned or defined, because they may be thought unwise or mistaken. . . . [I]ts consequences, if tolerated, would be a complete disorganization of both the army and navy.[19]

Yet similar language was being used in cases applying substantially the same principle to other departments of the executive branch.[20] Thus, although *Decatur* and *Eliason* reflected a doctrine of nonreviewability, it was definitely not a doctrine peculiar to the military. It was really no more than a manifestation of the extreme conservatism characteristic of the Court under the leadership of Chief Justice Taney.[21]

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[14] *Id.* at 515.

[15] *Id.* The case relied on the distinction between discretionary and ministerial acts.

[16] *See, e.g.*, Keim v. United States, 177 U.S. 290 (1900).

[17] 41 U.S. (16 Pet.) 291 (1842).

[18] *Id.* at 302.

[19] *Id.*

[20] *See, e.g.*, Keim v. United States, 177 U.S. 290 (1900); Hadden v. Merritt, 115 U.S. 25 (1885); Dorsheimer v. United States, 74 U.S. (7 Wall.) 166 (1868).

[21] *See generally* SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD 1836-64 (1974). Chief Justice Roger Taney had a twenty-eight year tenure on the Court. He authored the opinion in *Decatur v. Paulding*.

In 1902 the Supreme Court introduced a new approach to the question of judicial review of administrative actions of the entire executive branch which significantly altered the early doctrine of nonreviewability. In *American School of Magnetic Healing v. McAnnulty*[22] the Court held it was not bound by an executive department's interpretation of statutes and that it had the power to grant relief if the department had exceeded its statutory authority.

> That the conduct of the post office is part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action . . . of that Department, which is unauthorized by the statute under which [it] assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.
>
> [T]he decisions of the officers of the Department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by Department officers.[23]

Although not expressly overruling *Decatur* and *Eliason*, this holding is clearly incompatible with those cases. *McAnnulty* marked the beginning of a presumption of at least some degree of reviewability of administrative actions of the executive departments[24] and hence the end of the early doctrine of nonreviewability which had foreclosed judicial examination even of questions of statutory interpretation. The full impact of *McAnnulty* was somewhat slow in coming,[25] but the Court's holding nevertheless undermined *Decatur* as a possible basis for any subsequent doctrine of nonreviewability of military activities. Although some vestiges did appear in later cases, *Decatur* was an evolutionary dead end.

B. NONREVIEWABILITY OF COURTS-MARTIAL

Before another significant case involving judicial review of military administrative action was decided, *Dynes v. Hoover*[26] provided an alternate basis for a doctrine of nonreviewability of military activities. In this suit for assault, battery and false imprisonment arising from the execution of a sentence to confinement imposed by a court-martial, the Supreme Court unequivocally

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[22] 187 U.S. 94 (1902).
[23] *Id.* at 108.
[24] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §28.02, at 509-10 (3d ed. 1972).
[25] *See id.; God, the Army, and Judicial Review, supra* note 9, at 421 and n.190.
[26] 61 U.S. (20 How.) 65 (1858).

declared a lack of authority in the civil courts to review the results of courts-martial. The decision was based on the principle of separation of powers, specifically the fact that courts-martial are not part of the federal judiciary under article III of the Constitution, but rather are established pursuant to congressional authority under article I.

> . . . Congress has the power to provide for the punishment of military and naval offenses . . .; and the power to do so is given without any connection between it and the 3d article of the constitution defining the judicial powers of the United States; indeed . . . the two powers are entirely independent of each other.[27]

The Supreme Court's disclaimer of authority to review courts-martial was not absolute, however. The Court made it clear by way of dictum that civil courts would have authority to set aside a court-martial which "has no jurisdiction over the subject matter or the charge,"[28] which "shall inflict a punishment forbidden by the law,"[29] or "when the law for convening them and directing their proceedings of organization and for trial have been disregarded."[30] The latter ground, liberally interpreted, actually could have allowed considerable latitude for civil court review of courts-martial. Subsequent cases, however, indicated that lack of jurisdiction was the only ground for review.

Ex parte Vallandigham[31] made it clear that the civil courts could not review alleged errors of military courts on a writ of certiorari. In *Ex parte Reed*,[32] which recognized habeas corpus as the exclusive means of obtaining civil court review of courts-martial, the Court observed, "Every act of a court beyond its jurisdiction is void"[33] and went on to say that discharge under the writ is appropriate only when the court-martial sentence is "not merely erroneous and voidable, but absolutely void."[34] If the court-martial had jurisdiction over the person and the offense, "its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within its sphere of authority."[35] Similarly,

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[27] *Id.* at 79. In addition to its constitutional basis, the theory that military tribunals constitute a separate system of jurisprudence can be traced to early English precedents. *See id.* at 83.

[28] *Id.* at 81.

[29] *Id.* at 83.

[30] *Id.* at 81.

[31] 68 U.S. (1 Wall.) 243 (1864).

[32] 100 U.S. 13 (1879).

[33] *Id.* at 23.

[34] *Id.*

[35] *Id.*

In re Grimley[36] indicated that "no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction."[37] In *Johnson v. Sayre*,[38] frequently cited in later decisions applying the doctrine of nonreviewability to military administrative actions, the Court said:

> The court martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of habeas corpus or otherwise.[39]

Other cases made it clear that such errors as a sentence beyond the authority of the court-martial to adjudge[40] or trial by a court-martial composed of ineligible members[41] would be considered jurisdictional, allowing the civil courts to grant relief. Thus, by the beginning of the twentieth century, a doctrine of nonreviewability of courts-martial had been fully developed and firmly established.

As was initially the case with regard to administrative activities, the restriction on federal court review of criminal convictions was not unique to the military. The Supreme Court also limited habeas corpus review of criminal convictions in the civilian courts to the question of jurisdiction.[42] Thus, although both categories of military actions were generally exempt from judicial review, there was really no special doctrine of nonreviewability applicable to the military. Military-related cases were treated in substantially the same manner as were similar cases in the civilian sphere.

C. NONREVIEWABILITY OF MILITARY ADMINISTRATIVE ACTIONS

By an interesting coincidence, the Court had no sooner finished the series of cases defining the nonreviewability of courts-martial when it decided the *McAnnulty* case,[43] thereby opening the door to greater judicial review of administrative activities of the executive branch. Within the next two decades the Court was presented with three cases which required it to decide which of the two opposing approaches it would follow with regard to review of military ad-

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[36]137 U.S. 147 (1890).

[37]*Id.* at 150.

[38]158 U.S. 109 (1895).

[39]*Id.* at 118.

[40]Carter v. Roberts, 177 U.S. 496 (1900); *Ex parte* Mason, 105 U.S. 696 (1882).

[41]McClaughry v. Deming, 186 U.S. 49 (1902).

[42]Harlan v. McGourin, 218 U.S. 442 (1910); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[43]American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). See text accompanying notes 22-25 *supra*.

ministrative activities. In its own way, the Court managed to follow both.

1. Reaves v. Ainsworth[44]

Because it was the first decision based so clearly on special considerations peculiar to the military, and because it appeared to exempt the military from the already developing trend toward greater judicial review of administrative activities of the executive departments, *Reaves v. Ainsworth* is generally considered the seminal case with regard to the nonreviewability of military administrative actions. The case raised a classic due process issue. Lieutenant Reaves was discharged from the Army pursuant to an act of Congress after failing an examination necessary for promotion. He claimed a physical disability for which a provison in the statute would have allowed him to retire in the next higher grade instead of being discharged. He had appeared before a physical disability evaluation board which found him physically competent to perform duty in spite of clear indications to the contrary.[45] All evidence considered by the board had been taken in secret, and Reaves had not been allowed to confront or cross-examine witnesses nor even to examine the evidence. The board also had refused to hear witnesses requested by Reaves. His petition for relief was based specifically on a claim of denial of due process.

Far from asserting its power to review, as might have been expected after *McAnnulty,* the Court managed to extend its precedents relating to the nonreviewability of courts-martial into the administrative area by equating the physical disability evaluation board to a "military tribunal" in the same category as a court-martial.

> Besides, what is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.[46]

The Court relied entirely on precedents involving courts-martial for the latter statement. There was, however, one very important difference from the approach the Court had used in refusing to review court-martial cases. To verify that the board was in fact "acting within the scope of its lawful powers," the Court first examined the statute under which Reaves had been discharged and

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[44]219 U.S. 296 (1911).

[45]An earlier physical disability evaluation board, in fact, had found Reaves incapacitated by an illness "contracted in the line of duty." *Id.* at 299.

[46]*Id.* at 304.

determined that the action complained of was not inconsistent with any of its provisions. This was itself a significant measure of judicial review, completely consistent with the *McAnnulty* decision in which the Court had asserted its authority to review administrative actions of a civilian department of the executive branch for compliance with an applicable statute. This aspect of the *Reaves* case seems to have gone largely unnoticed, probably because of the many strong statements against judicial review throughout the Court's opinion.

Apparently not particularly satisfied with its military tribunal analogy, the Court went on to find further support for its decision by invoking what appears to be a presumption against reviewability in the absence of specific statutory authorization for review.

> If it had been the intention of Congress to give an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion, and carry them over the head of the President to the courts . . . such intention would have been explicitly declared.[47]

This language is reminiscent of the old presumption of nonreviewability reflected in the *Decatur* line of cases[48] which supposedly had been laid to rest by *McAnnulty*. The presumption of nonreviewability the Court raises here is much more limited, however; it appears to apply primarily to review of the factual basis for the military's action.

In addition to these two bases for denying judicial authority to entertain Reaves' claim, the Court expressed dismay at the thought of the courts involving themselves in the internal administration of the Army.

> This [review within the executive branch] is the only relief from the errors or injustices that may be done by the board which is provided. The courts have no power to review. The courts are not the only instrumentalities of Government. They cannot command or regulate the Army. To be promoted or to be retired may be the right of an officer, . . . but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the Army.[49]

Although this language reflects substantially the same reluctance to intervene in the affairs of the executive branch as had been reflected in many earlier cases, it is more significant here because it is so strongly based on special considerations peculiar to the military. It singles out the military from the remainder of the ex-

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[47] *Id.* at 306.

[48] Decatur v. Paulding, 39 U.S. 497 (1840). See text accompanying notes 13-21 *supra*.

[49] 219 U.S. at 306.

ecutive branch and, in effect, gives to it a "doctrine of nonreviewability" of its own. This unique doctrine of unreviewability did not necessarily reflect a more restrictive policy, since there were many actions by other executive departments which the Court still would not review,[50] but it was a policy enunciated in terminology specifically addressed to the military.

Combining as it does these three different, though not entirely distinct, explanations of its reluctance to review activities of the military, *Reaves v. Ainsworth* is the embodiment of the doctrine of nonreviewability of military actions if such a doctrine ever existed. Its blurring of different bases of nonreviewability, though all traceable back to one variant or another of the principle of separation of powers, is also typical of the imprecision of such a doctrine.

2. The Post-World War I Mandamus Cases

The next cases to reach the Supreme Court requesting review of military administrative actions involved petitions for mandamus to set aside orders removing officers from active service following World War I.[51] Army Colonels French and Creary had been involuntarily separated under section 24b of the Army Reorganization Act of 1920.[52] This Act provided for preliminary classification of all officers as to whether they should be retained on active duty or separated with those selected for separation entitled to a hearing before a court of inquiry. Each case would eventually go before a final classification board whose decision was "final and not subject to further revision except upon the order of the President."[53] Still another board, called the Honest and Faithful Board, then determined whether officers to be separated would be retired or discharged. No provision of the Act granted officers concerned the right to participate in a hearing before either of the latter two boards.

Following his classification as an officer to be separated, each of the colonels availed himself of the opportunity to have a court of inquiry and, as the statute required, received a full copy of the records on which the action was based and an opportunity to present testimony on his own behalf. In each case the court of inquiry recommended separation. The final classification board made a similar determination and, in Creary's case, the Honest and

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[50] *See, e.g.*, Hallowell v. Commons, 239 U.S. 506 (1916) (decision by Secretary of Interior as to heirs of deceased Indian).

[51] United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922).

[52] Act of June 4, 1920, ch. 227, 41 Stat. 759.

[53] *Id.*

Faithful Board also determined that he should be discharged rather than retired, thereby depriving him of entitlement to retired pay. Thus, in addition to the somewhat tenuous procedural error alleged by French, that the President had not acted personally in his case, as he contended the statute required, Creary was also able to argue that he had been denied due process by an adverse board determination made without a hearing or an opportunity to present evidence on his own behalf before that board. In the end, however, he fared no better than French.

Since both colonels had been separated pursuant to the recommendation of "military tribunals," precedents involving courts-martial again were cited as authority for the courts' lack of jurisdiction to review them.

> Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that, under such conditions, decisions by military tribunals, constituted by Act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise.[54]

As in the *Reaves* case, however, the Court made sure the boards had acted "within the scope of the power with which they are invested by law" by first examining the statute upon which the action was based and determining that it had been complied with.

In dealing with Creary's due process argument, the Court more thoroughly detailed its authority to review administrative actions by the military.

> The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (art. 1, §8) is as plenary and specific as that given for the organization and conduct of civil affairs; military tribunals are as necessary to secure subordination and discipline in the Army as courts are to maintain law and order in civil life; and the experience of our government for now more than a century and a quarter, and of the English government for a century more, proves that a much more expeditious procedure is necessary in military than is thought tolerable in civil affairs. It is difficult to imagine any process of government more distinctly administrative in its nature and less adapted to be dealt with by the process of civil courts than the classification and reduction in number of the officers of the Army, provided for in §24b. In its nature it belongs to the executive, and not to the judicial, branch of the government.[55]

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[54]259 U.S. at 335-36.

[55]259 U.S. at 343 (citations omitted).

3. A Closer Look

By 1922, then, it appeared fairly well established that the military had the benefit of its own judicially created doctrine of nonreviewability which had been extended from its courts-martial to its administrative activities. Since this was something of a high point for the doctrine, a more detailed assessment is warranted to determine its exact parameters.

There were substantial similarities in the three cases by which the Supreme Court forged the doctrine of nonreviewability of military administrative activities. Each case involved a challenge by an officer to a procedural aspect of his removal from active duty pursuant to a statute. In *French* and *Creary* the statute was fairly specific as to the basic procedures of the military boards it required, and those procedures had been followed. In *Reaves* the statute was less specific and the procedures had been established by implementing regulations. Again the procedures, such as they were, had been followed. In all three cases the Court equated military boards to courts-martial and refused to review the adequacy of the procedures, saying whatever procedures are established for military personnel are constitutional due process for them.[56]

On its face the equation of military boards to courts-martial seems remarkably inapt. There is a great dissimilarity between the two kinds of cases, not only in their very nature but in the legal and practical considerations involved and in the underlying reasons for and against judicial review. It also results in an artificial and unwarranted distinction between those administrative actions which involve a "military tribunal" and those which do not. In large measure, the military tribunal analogy was probably a makeweight, a convenient means for the Court to come up with precedents to support its decisions. Unfortunately, this preference for precedents over logic only confused the issue since it undoubtedly led the Court to use less clear language than it might otherwise have employed.

Nevertheless, closer perusal of the three cases indicates that perhaps there is something to the analogy, even though it is not readily apparent. In each case, the "military tribunal" in question had been acting under authority of an act of Congress. To the extent that Congress had prescribed procedures, they had been followed; the Court expressly noted that the boards had acted

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[56] United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 344 (1922); United States *ex rel.* French v. Weeks, 259 U.S. 326, 335 (1922); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

within the scope of their authority.[57] Having made that determination, the only way the Court could have granted the relief sought would have been to find *additional* requirements, not imposed by the applicable statutes. Where would those requirements have come from? The only logical source was the due process clause of the fifth amendment, and the Court refused to find that the Constitution superimposed any procedural requirements on those Congress had prescribed. Thus the famous quote: "To those in the military or naval service of the United States military law is due process,"[58] or as somewhat more explicitly put:

> As a colonel in the Army, the relator was subject to military law, and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense.[59]

Taken in this light, the "military tribunal" cases did not indicate that the courts were entirely precluded from reviewing military administrative activities. On the contrary, review to determine whether the action was consistent with statutory authority would be required as the first step. Once the courts had determined the military action to be permissible under applicable statutes, however, they were not to find a constitutional requirement for any additional safeguards. It was the same basic position the Court had taken earlier with regard to review of courts-martial: as with courts-martial once their jurisdiction was established, so with military boards once their statutory authority was established, *civil courts may not review for compliance with procedural requirements originating in the due process clause.* Thus, the analogy between the two types of actions possessed some validity after all.

Because all three of the nonreviewability cases involved boards authorized by statute, they provide no express precedent for extending the same limitations to review of administrative actions not involving statutory boards. Perhaps the best indication that the same restrictions would apply to such actions comes from the Court's strongly expressed reluctance to interfere with the internal administration of the military. There was no indication that this reluctance was limited to situations in which there had been a military board.

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[57]United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 343-44 (1922) ("the boards which acted on his case did not exceed the powers conferred upon them . . . under the terms of the act of Congress"); United States *ex rel.* French v. Weeks, 259 U.S. 326, 335 (1922) ("action by them [military boards] within the scope of the power with which they are invested by law"); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911) ("military tribunal acting within the scope of its lawful powers").

[58]Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

[59]United States *ex rel.* French v. Weeks, 259 U.S. 326, 335 (1922).

In addition to the bases of the doctrine of nonreviewability common to *Reaves, French,* and *Creary,* the Court in *Reaves* also invoked an apparent presumption against judicial review in the absence of a specific statutory provision for it. This did not reflect a return to the broad presumption of *Decatur v. Paulding* and its progeny.[60] What the Court actually refused to review in the absence of specific statutory authorization were "the elements, physical and mental, of his qualifications for promotion . . .",[61] in other words, the factual basis for the action. From this it may be concluded that the doctrine of nonreviewability enunciated in *Reaves v. Ainsworth* included the proposition that *civil courts may not review the factual basis for military administrative actions.* This conclusion was entirely consistent with the Court's contemporary decisions regarding other executive departments, holding their factual determinations incident to statutory authority to be conclusive.[62]

In summary, then, the doctrine of nonreviewability of military administrative activities consisted of two important propositions: one limiting review of the factual basis for the action; the other, precluding review of procedural due process. Only the latter restriction reflected a greater degree of judicial restraint than existed with regard to most other executive actions. But the doctrine by no means foreclosed judicial review altogether. It was also clear that *civil courts could review military actions for compliance with statutory authority.*

D. REVIEW OF MILITARY ACTIONS IN THE COURT OF CLAIMS

Although not of direct concern to the development of the doctrine of nonreviewability, another line of cases indicates a limitation on the doctrine not readily apparent from the cases already discussed. At the same time the Supreme Court was disclaiming the authority of civil courts to review administrative activities of the military in other types of cases, the jurisdiction of the Court of Claims to decide suits for money judgments against the United States was unquestioned, even though in deciding such cases that court might be required to review exactly the same kind of military activities.[63]

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[60]See note 15 and accompanying text *supra.*

[61]219 U.S. at 306.

[62]*See, e.g.,* Bates & Guild v. Payne, 194 U.S. 106, 109 (1904) (refusal by Postmaster General to classify a publication as a "periodical" entitled to second-class rates).

[63]*See, e.g.,* Brown v. United States, 113 U.S. 568 (1885) (retirement); United States v. Henry, 84 U.S. (17 Wall.) 405 (1873) (refusal to commission sergeant as lieutenant).

Rogers v. United States,[64] exemplifies the difference in approach particularly well because of its close similarity to the *French*[65] and *Creary*[66] cases. Major Rogers was retired under section 24b of the Army Reorganization Act of 1920,[67] the same statute involved in *French* and *Creary*. When preliminarily selected for retirement, Rogers received the same type of hearing before a court of inquiry, but before his civilian counsel had completed presentation of his case the president of the court of inquiry suggested that counsel rest his case. After twice more trying to proceed and twice more being interrupted by increasingly forceful "suggestions" that he rest the case, counsel finally rested. The reason for the president's impatience was that the court of inquiry had already heard enough to induce it to decide in Rogers' favor, and in fact it did so, recommending that he be retained on active duty. But when the case went to the final classification board, of course, Rogers' additional evidence was not part of the record since it had never been presented, and that board placed him in the category to be separated. He was subsequently retired. He sued in the Court of Claims for the difference between his retired pay and what he would have received on active duty, claiming his retirement was void because he had improperly been denied the opportunity to present his evidence. The Court of Claims ruled against him on the facts, finding that the president's "suggestion" did not constitute a military order and that Rogers had not been prevented from submitting his evidence.[68]

Although the Supreme Court upheld the decision of the Court of Claims against Major Rogers, there was no question whatsoever as to its authority to review the military administrative proceedings which had led to Rogers' retirement. The case was decided on the merits after a full review of the facts. Thus, it appears that Colonels French and Creary could have avoided the nonreviewability problem altogether and had their cases decided on the merits if they had sued in the Court of Claims for their active duty pay instead of seeking mandamus.

From a strictly logical point of view, there may seem to be a certain inconsistency in the Court saying it did not have authority to review the retirement of Colonel French while there was no question as to its authority to review the retirement of Major Rogers un-

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[64]270 U.S. 154 (1926).

[65]United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922). See text accompanying notes 51-55 *supra*.

[66]United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922). See text accompanying notes 51-55 *supra*.

[67]Act of June 4, 1920, ch. 227, 41 Stat. 759.

[68]Rogers v. United States, 59 Ct. Cl. 464 (1925).

der the identical statute and following precisely the same procedures and determinations. There are important distinctions, however.

Most important, of course, is the fact that the jurisdiction of the Court of Claims to adjudicate "All claims . . . founded upon the Constitution of the United States or any law of Congress,[or]upon any regulation of an Executive Department"[69] was expressly granted by Congress. Even before the *McAnnulty* case[70] the Court had recognized that it could not ignore a specific statutory provision for judicial review.[71]

There was also an important practical distinction between the relief available from the Court of Claims and that which other federal courts could grant. Until 1972 the Court of Claims was limited to awarding money judgments but could not grant other relief.[72] Thus, if Major Rogers had been successful in his suit, he would have received a judgment for the difference between active duty pay and retired pay only for that period of time which had already elapsed between his involuntary retirement and the date of his suit.[73] This judgment would not have restored him to active duty, nor would it have forced the Army to do so.[74] Such a limited form of relief, not involving *direct* judicial interference in internal

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[69]Act of March 3, 1911, ch. 231,§ 145, 36 Stat. 1136 (now 28 U.S.C. § 1491 (Supp. II, 1972)).

[70]American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). See text accompanying notes 22-23 *supra.*

[71]*See, e.g.*, Keim v. United States, 177 U.S. 290 (1900). This was, in fact, a case originating in the Court of Claims. The Supreme Court held an Interior Department employee's dismissal for inefficiency to be nonreviewable because no statute expressly conferred authority on the courts to review.

[72]*See* United States v. Jones, 131 U.S. 1 (1889); United States v. Alire, 73 U.S. (6 Wall.) 573 (1867).

In 1972 Congress authorized the Court of Claims to issue orders directing restoration to office or position, placement in a particular status, and correction of records. *See* 28 U.S.C. § 1491 (Supp. II, 1972).

Until 1964, U.S. district courts were precluded from entertaining monetary claims for "compensation for official services of officers or employees of the United States," including financial benefits of military service. 28 U.S.C. § 1346(d), *deleted by* 78 Stat. 699 (1964). This meant the Court of Claims had exclusive jurisdiction over monetary claims of this kind. Therefore, until that time no single court could provide both monetary and other relief.

[73]If the Army failed to take any corrective action he also could have brought new suits periodically, each time recovering additional pay lost since his last successful suit.

[74]For an excellent analysis of the relationship of Court of Claims judgments to military status prior to the statutory changes in 1964 and 1972, see Meador, *Judicial Determinations of Military Status*, 72 YALE L.J. 1293 (1963).

military affairs, must have been more acceptable to a Court reluctant to "command or regulate the Army."[75]

Although the recent expansion of its authority has somewhat increased the potential of the Court of Claims to intervene in military affairs, it is still limited to correcting past errors in individual cases. This is in obvious contrast to the sweeping powers of the federal district courts to affect actions *in futuro* and on a far broader scale. Even aside from the clear intent of Congress to allow the Court of Claims to review whatever issues are necessary to its limited determinations, therefore, the need for judicial restraint by that court is usually not as great as for other federal courts.

III. THE DOCTRINE FALLS ON HARD TIMES

By 1922 the exemption of military actions from judicial review seemed firmly entrenched in American jurisprudence, and there appeared to be ample justification for saying there really was a "doctrine of nonreviewability." The nonreviewability of courts-martial, asserted so strongly in *Dynes v. Hoover*,[76] had been reaffirmed repeatedly. The protective pronouncements of *Reaves v. Ainsworth*[77] had established the nonreviewability of military administrative activities, and had been buttressed by the *French* and *Creary*[78] cases. Soon after these auspicious beginnings, however, the doctrine fell on hard times. First, there was a lapse of more than thirty years before the Supreme Court again expressed any special reservations about judicial review of military administrative actions, despite several opportunities to do so. That drought had not even ended before the nonreviewability of courts-martial received a serious setback. And within another few years, the only recently revitalized doctrine of nonreviewability of military administrative activities was dealt what was generally seen as a damaging, even fatal, blow.

A. THE LEAN YEARS

Only a year after *French* and *Creary* there was a third post-World War I mandamus case, *Denby v. Berry*.[79] This case has received little attention but is extremely important to an accurate understanding of the early doctrine of nonreviewability of military administrative activities.

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[75]Reaves v. Ainsworth, 219 U.S. 296, 306 (1911).

[76]61 U.S. (20 How.) 65 (1858). See notes 26-30 and accompanying text *supra*.

[77]219 U.S. 296 (1911). See notes 44-49 and accompanying text *supra*.

[78]See notes 50-54 and accompanying text *supra*.

[79]263 U.S. 29 (1923).

Berry's complaint was that he had been illegally released from active service in the Navy without a hearing before a retiring board which he contended was required by statute. A naval board of medical survey had found that he had incurred a permanent disability in line of duty and had recommended that he be sent before a retiring board, but this had not been done. Thus, for the first time since *Dynes v. Hoover,* the Court was faced with a case which could not be decided on the basis of its lack of authority to review the action of a military tribunal. The action complained of was contrary to the recommendation of the only "tribunal" which had acted in the case, and the Navy's refusal to convene another type of tribunal was the very denial of due process alleged.

Nevertheless, one might expect that some of the other concerns expressed in the *Reaves, French,* and *Creary* cases would have provided a sufficient basis for the Court to disclaim authority to review Berry's complaint. In fact, the Solicitor General took the position that, in light of those three cases, together with *Dynes v. Hoover* and *Decatur v. Paulding,*[80] Berry's discharge was absolutely nonreviewable; he argued that the Court was without jurisdiction. The Court disposed of that argument without discussion, simply stating that it had jurisdiction because "[t]he case involves the construction of the general statutes of the United States . . ." and citing the statutory provision giving it jurisdiction in such cases.[81]

Although the logic of the opinion is very sound, this summary rejection of the government's argument in favor of nonreviewability is nevertheless surprising, coming as it did only a year after *French* and *Creary*. Obviously the Court was correct that it had jurisdiction within the technical meaning of that term, but it likewise had jurisdiction, in that sense, in all the nonreviewability cases cited by the Solicitor General. Nevertheless, its opinions in both *French* and *Creary* had expressly held there was a lack of jurisdiction in the lower court; that was the very basis of those decisions.[82] And the statement in *Reaves* that the "courts have no power to review"[83] certainly gave the same impression. The Court appears to have been engaging in a bit of semantics in the *Berry* case to avoid a more comprehensive discussion of the issue. Having no convenient

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[80]39 U.S. (14 Pet.) 497 (1840). See notes 13-16 and accompanying text *supra*.

[81]263 U.S. at 31.

[82]The Court used the identical language in both cases, saying "[the lower court] did not have jurisdiction to order the writ of mandamus . . . ." United States *ex rel.* Creary v. Weeks, 259 U.S. 336, 344 (1922); United States *ex rel.* French v. Weeks, 259 U.S. 326, 336 (1922).

[83]219 U.S. at 306.

way of invoking the military tribunal analogy of the *Reaves* case as a basis of nonreviewability, nor wishing to resurrect the only recently interred principle of *Decatur v. Paulding* barring any judicial review of executive actions in the absence of express statutory authorization, the Court undoubtedly would have had to come up with a different rationale for nonreviewability if it had agreed to dispose of the case on that theory. Apparently it was unwilling to do so.

After avoiding that issue, the Court went on to deny Berry's petition for mandamus anyhow. After a very careful review of the statutes and regulations involved led it to the conclusion that referral of his case to a retiring board had not been mandatory, the Court said: "The right [to retirement] is one dependent by statute on the judgment of the President and not on that of the courts."[84]

In spite of its rejection of the concept of absolute nonreviewability, *Berry* actually followed the same pattern as *Reaves, French,* and *Creary*: the Court reviewed the statutory basis for the action, concluded the action had been within the statutory authorization, and declined to intervene. As in *Reaves,* the Court expressly declined to review the factual basis for the action taken or to substitute its judgment for that of the executive branch. Thus, that aspect of the doctrine of nonreviewability was actually confirmed. The fact that the Court in *Berry* affirmatively asserted its authority to construe federal statutes affecting the military really did no violence to its earlier holdings in the three nonreviewability cases since the Court had in fact construed similar statutes in each of them. Probably the principal significance of the *Berry* case was its express affirmation of the Court's authority to interpret such statutes, thereby correcting the possible impression that the earlier cases stood for the absolute nonreviewability of military administrative activities. The case also demonstrated that nonreviewability is a concept distinct from lack of jurisdiction.

Like one born out of season, *Patterson v. Lamb,*[85] another case arising in the aftermath of World War I, reached the Supreme Court one world war late. Lamb had received a "discharge from draft," rather than an honorable discharge, in November 1918 because the war ended on the same day he reported for military service pursuant to the order of his local draft board. Although there was nothing derogatory about the discharge he had received, Lamb discovered many years later that it did not qualify him for the usual benefits of an honorable discharge. After unsuccessfully seeking

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[84]263 U.S. at 38.
[85]329 U.S. 539 (1947).

administrative relief, he sued in federal district court for a declaratory judgment and a mandatory injunction to force the Army to issue him an honorable discharge certificate. The only statute involved was a very general provision requiring certificates of discharge but not even mentioning that there might be different kinds.[56] Army regulations established the various types of discharge certificates, and the conditions under which each would be given.

The Supreme Court carefully considered these regulations and concluded that Lamb's "discharge from draft" had been authorized. The Court acknowledged the question of the authority of civil courts to entertain such a suit and expressly avoided the issue.

> Whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers, is a question that we need not here determine . . . . For we are satisfied that the War Department was within its powers in granting a discharge from draft . . . .[57]

In many respects, the *Lamb* case is similar to *Denby v. Berry*. In neither case was there action by a military tribunal to provide a convenient vehicle for invoking the court-martial precedents. In both these cases the Court's concern focused on whether the military had authority under applicable statutes and implementing regulations to do what it did. More significantly, perhaps, in neither case did the Court acknowledge the existence of any doctrine of nonreviewability of military administrative activities.

Billings v. Truesdell,[58] although not involving the usual question of reviewability of military activities, is worthy of mention here because it is representative of a class of cases indicating another area in which there has never been any reluctance on the part of the civil courts to intervene. Billings was ordered to report for induction during World War II and did so, but he refused to take the oath of induction. Nevertheless, he was told he was in the Army and ordered to submit to fingerprinting. He refused and court-martial charges were brought against him for disobedience. He sued for a writ of habeas corpus, claiming he was not subject to military jurisdiction. The Supreme Court agreed with him, basing its decision on section 11 of the Selective Training and Service Act of 1940, which provided that "no person shall be tried by any military or

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[56] *See id.* at 542. There was also the general provision authorizing the President to prescribe "regulations for the government of the Army." Act of March 1, 1875, ch. 115, 18 Stat. 337 (now 10 U.S.C. § 3061 (1970)).

[57] 329 U.S. at 542.

[58] 321 U.S. 542 (1944).

naval court martial in any case arising under this Act unless such person has been *actually inducted* for the training and service described under this Act . . . ."[89] The Court found that taking the oath was the crucial step which constituted induction. Therefore Billings had never been inducted, and the statute specifically precluded his trial by court-martial.

There was no discussion of the propriety of the civil courts' entertaining Billings' suit, nor was there any need for it. The only real difference from the *Dynes v. Hoover* line of cases involving review of courts-martial was that here habeas corpus was sought before, rather than after, a court-martial.[90] This distinction had little impact on the basic concept of nonreviewability, since *Billings* merely permitted a judicial challenge to the attempted exercise of military authority over a civilian.[91] Thus the Court was not intervening in an internal military matter. Nevertheless, the decision was significant in that it sanctioned habeas corpus as a method of contesting military status without the necessity of having first to undergo a court-martial, thereby opening the floodgates for a variety of new categories of litigation against the military departments.[92]

The lean years for the doctrine of nonreviewability of military administrative actions continued into the next decade. In 1951 the Supreme Court decided *Robertson v. Chambers*[93] on its merits, again without discussing any reviewability problem. Captain Chambers had been found ineligible for disability retirement pay and had been separated following a hearing before an Army retiring board. The board had considered certain Veterans' Administration medical reports over Chambers' objection. When his case came before the Army Disability Review Board, Chambers petitioned the district court for mandamus to require that Board to remove the Veterans' Administration reports from the record of proceedings of the retiring board. The Supreme Court carefully examined the statutes creating the two boards and concluded both of them were authorized to consider the records in question.

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[89]54 Stat. 885, 894 (emphasis added).

[90]*See also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946).

[91]There have been numerous cases in which such a challenge has been successful, *e.g.*, Grisham v. Hagan, 361 U.S. 278 (1960) (civilian employee overseas); Reid v. Covert, 354 U.S. 1 (1956) (civilian dependent overseas); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (former soldier after discharge); Eagles v. United States *ex rel.* Samuels, 329 U.S. 304 (1946) (person actually inducted following improper classification procedures by draft board). Each of the first three cases held unconstitutional some portion of the statute conferring court-martial jurisdiction, Uniform Code of Military Justice arts. 2 and 3, 10 U.S.C. § 802-03 (1970).

[92]See text accompanying notes 261-69 *infra*.

[93]341 U.S. 37 (1951).

Although the Court ordered Chambers' suit dismissed, the case continued an unbroken succession of decisions on the merits in suits involving military administrative actions, each one raising some question of statutory interpretation. Not since the *Creary* case nearly thirty years before had the Supreme Court acknowledged the existence of anything resembling a doctrine of nonreviewability of military administrative activities. The *Chambers* case also involved the action of "military tribunals," thereby providing the Court an opportunity to invoke the court-martial analogy it had last used in *Creary*. Apparently the Court had finally abandoned this strained analogy.

B. EFFECT OF THE ADMINISTRATIVE PROCEDURE ACT

During these years of difficulty for the doctrine of nonreviewability Congress enacted the Administrative Procedure Act of 1946,[94] an Act which had the potential to modify the reviewability question legislatively. Section 10 of the Act specifically addressed the question of judicial review, providing in section 10(c) that "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review,"[95] and defining the scope of review in considerable detail in section 10(e).[96] Because the Court had always recognized the appropriateness of judicial review when expressly authorized by Congress, if these provisions applied to actions by the military authorities, they would seem to remove any doubts as to the authority for judicial review.

The first question, of course, is whether the Act was intended to apply to the military departments at all. Section 2(a) specifically excluded from the operation of the Act "courts martial and military commissions"[97] and "military or naval authority exercised in the field in time of war or in occupied territory."[98] The legislative

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[94]Act of June 11, 1946, ch. 324, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 6362, 7562 (1970).

[95]Act of June 11, 1946, ch. 324, § 10(c), 60 Stat. 243, *as amended*, 5 U.S.C. § 706(1) (1970).

[96]Act of June 11, 1946, ch. 324, § 10(e), 60 Stat. 243-44, *as amended*, 5 U.S.C. § 706(2) (1970).

[97]Act of June 11, 1946, ch. 324, §2(a)(2), 60 Stat. 237, *as amended*, 5 U.S.C. §551(1)(F) (1970).

[98]Act of June 11, 1946, ch. 324, § 2(a)(3), 60 Stat. 327, *as amended*, 5 U.S.C. § 551(1)(G) (1970).

history, however, indicates that this was to be the full extent of the military's exemption: "Thus, certain war and defense functions are exempted, but not the War and Navy Departments in the performance of other functions."[99]

Although the Supreme Court has not addressed the issue directly, it has become widely accepted that the Act does apply to the military.[100]

Even so, the introductory clause of section 10 prevents the Act from being of much assistance in resolving the question of reviewability of military actions. It provides that, to the extent that "agency action is by law committed to agency discretion,"[101] section 10 does not apply. Because the law which determines what is committed to agency discretion includes the common law as well as statutes, the Act does not prescribe any new and uniform path for the courts to follow.

> The result is that the pre-Act law on this point continues. And the courts remain free, except to the extent that other statutes are controlling, to continue to determine on practical grounds in particular cases to what extent action should or should not be unreviewable . . . .[102]

And so Congress did not provide a solution in the Administrative Procedure Act, and the search to find one must once again be focused on the Supreme Court.

C. A SETBACK FOR NONREVIEWABILITY OF COURTS-MARTIAL

As already observed, by the 1950's it was clear that the Court had abandoned its earlier analogy between courts-martial and military administrative activities. Perhaps it was just as well for the military that the two lines of cases had grown apart. While the doctrine of nonreviewability of military administrative activities was only suffering from neglect, the nonreviewability of courts-martial was soon threatened more directly. The scope of review of civilian

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[99]S. REP. NO. 752, 79th Cong., 1st Sess. 5 (1945).

[100]*See, e.g.*, Carter v. Seamans, 411 F.2d 767, 776 (5th Cir. 1969) (dictum), *cert. denied*, 397 U.S. 941 (1970); Etheridge v. Schlesinger, 362 F. Supp. 198, 200 (E.D. Va. 1973); Garmon v. Walker, 358 F. Supp. 206, 208 (W.D.N.C. 1973); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 81-82 (1958); Lunding, *Judicial Review of Military Administrative Discharges*, 83 YALE L.J. 33, 42 (1973). But see Suter, *Judicial Review of Military Administrative Decisions*, 6 HOUSTON L. REV. 55, 57-60 (1968).

[101]Act of June 11, 1946, ch. 324, § 10(2), 60 Stat. 243, *as amended*, 5 U.S.C. § 701(a)(2) (1970).

[102]K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.05, at 515 (3d ed. 1973).

court convictions in federal habeas corpus actions had already been vastly expanded[103] and extended to state court convictions.[104] Following this lead, the courts of appeals in six circuits had indicated by 1949 that civil courts considering habeas corpus petitions resulting from courts-martial should determine whether there had been any violation of due process in the proceedings.[105] Then, however, with its 1950 decision in *Hiatt v. Brown*,[106] the Supreme Court appeared to put an end to such a notion. In specifically disapproving the action of a lower court which had set aside a court-martial conviction on the grounds of denial of due process, the Court said:

> We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain the respondent's conviction, the adequacy of the pretrial investigation, and the competence of the law member and defense counsel.[107]

This could be interpreted as meaning only that the *scope* of the lower court's due process review was too broad. The Court went on, however, to make it clear that no due process review at all was appropriate.

> It is well settled that "by habeas corpus the civil courts exercise no supervisory or corrective power over the proceedings of a court martial . . . . The single inquiry, the test, is jurisdiction." In this case the court martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decisions.[108]

With such clear affirmation, it seemed that the rule of *Dynes v. Hoover*[109] would mark its centenary as strong as ever. This was not

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[103]Review had been limited to the question of the trial court's jurisdiction, much as was the case with courts-martial under the rule of Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). The Supreme Court first expanded the term jurisdiction to include basic due process rights, Johnson v. Zerbst, 304 U.S. 458 (1938), then abandoned the fiction that review was limited to the issue of jurisdiction, Waley v. Johnston, 316 U.S. 101 (1942).

[104]*See* House v. Mayo, 324 U.S. 42 (1945).

[105]*See, e.g.*, Montalvo v. Hiatt, 174 F.2d 645(5th Cir.), *cert. denied*, 338 U.S. 874 (1949); Smith v. Hiatt, 170 F.2d 61 (3d Cir. 1948), *rev'd*, Humphrey v. Smith, 336 U.S. 695 (1949); Benjamin v. Hunter, 169 F.2d 513 (10th Cir. 1948); Wrublewski v. McInerney, 166 F.2d 243 (9th Cir. 1948); United States *ex rel.* Weintraub v. Swenson, 165 F.2d 756 (2d Cir. 1948); Schita v. King, 133 F.2d 283 (8th Cir. 1943).

[106]339 U.S. 103 (1950); *accord*, Humphrey v. Smith, 336 U.S. 695 (1949).

[107]339 U.S. at 110.

[108]*Id.* at 111 (citation omitted).

[109]61 U.S. (20 How.) 65 (1858). See notes 26-30 and accompanying text *supra*.

to be, however, for *Hiatt v. Brown* marked the final appearance of the doctrine of nonreviewability of courts-martial in its traditional form.

The beginning of the end came less than nine months later in *Whelchel v. McDonald*.[110] Although holding that Whelchel had not been denied due process and specifically restating the principle that jurisdiction is "the only issue before the Court in habeas corpus proceedings,"[111] the Court indicated that denial of due process could be jurisdictional, thereby opening the way for review by the civil courts.

> We put to one side the due process issue which respondent presses, where we think it plain from the law governing court martial procedure that there must be afforded the defendant at some point of time an opportunity to tender the issue of insanity. *It is only a denial of that opportunity which goes to the question of jurisdiction.* That opportunity was afforded here. Any error that may be committed in evaluating the evidence tendered is beyond the reach of review by the civil courts.[112]

The Court's recognition that failure to provide a defendant the opportunity to litigate the issue of insanity would be a jurisdictional defect could only be based on acceptance of the very theory the Court had rejected in *Hiatt v. Brown*, namely that civil courts considering habeas corpus petitions arising from court-martial convictions could determine whether there had been a violation of due process in the proceedings. The Court's statement that review was still limited solely to the question of jurisdiction, taken together with the dictum that denial of a fundamental due process right "goes to the question of jurisdiction," indicated such an expansion of the concept of jurisdiction as to seriously erode the old doctrine of nonreviewability of courts-martial. It was, in fact, the very same approach the Court had adopted a dozen years before in reviewing habeas corpus challenges to civil court convictions.[113]

The break with the old doctrine of nonreviewability of courts-martial came in *Burns v. Wilson*[114] in 1953. Burns had unsuccessfully sought habeas corpus following his conviction in a court-martial in which he claimed he had been denied due process and other basic constitutional rights. The district court had dismissed his petition after nothing more than a determination that the court-martial had jurisdiction[115] in the strict sense of *Dynes v.*

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[110]340 U.S. 122 (1950).
[111]Id. at 126.
[112]*Id.* at 124 (emphasis added).
[113]*See* Johnson v. Zerbst, 304 U.S. 458 (1938).
[114]346 U.S. 137 (1953).
[115]Burns v. Lovett, 104 F. Supp. 312 (D.D.C. 1952).

Hoover. The court of appeals affirmed, but only after full consideration on the merits, including a detailed review of the evidence.[116] The Supreme Court said, in effect, that they were both wrong.

Although eventually ruling against Burns, the Court made it clear that basic principles of due process applied to protect servicemen from "crude injustices"[117] and to insure "rudimentary fairness."[118] Although not invoking the old rubric that review was limited to the question of jurisdiction, the Court was still unwilling to apply the broad standard of review which already had long been applicable in considering habeas corpus petitions from persons convicted by civilian courts.[119] Instead, the Court said:

> [W]hen a military decision has dealt fully and fairly with an allegation raised in that application [for habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.
>
> . . . . It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these [constitutional] claims.[120]

Thus, although departing considerably from the strict doctrine of nonreviewability which had prevailed through *Hiatt v. Brown*, the Court seemed willing to retain at least some vestiges of the old doctrine.[121] The restriction which was retained, limiting civil court review of courts-martial to a determination of whether the military had fully and fairly considered the issues, appears to be directed primarily at review of the facts on which the constitutional challenge is based, not on the substantive constitutional question itself.[122]

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[116]Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952).

[117]346 U.S. at 142.

[118]*Id.*

[119]This was the standard the Court of Appeals had used, relying on decisions of the Supreme Court in cases involving civilian prisoners. *See* Burns v. Lovett, 202 F.2d 335, 339 (D.C. Cir. 1952).

[120]346 U.S. at 142, 144.

[121]Precisely how much remains of the original doctrine is not clear because *Burns v. Wilson* left so many unsettled questions regarding civil court review of due process issues in courts-martial. *See* Katz & Nelson, *The Need for Clarification in Military Habeas Corpus*, 27 OHIO ST. L. J. 193 (1966). In Parker v. Levy, 417 U.S. 733 (1974), the Court indicated that certain issues raised on appeal should first be considered by the lower courts "to the extent that [they] are open on federal habeas corpus review of court-martial convictions under *Burns v. Wilson* . . .," thus apparently reaffirming its holding in *Burns* without clarifying it.

[122]The distinction between substantive constitutional questions and factual

D. A SIGN OF LIFE

The very same term in which the Supreme Court decided *Burns v. Wilson,* limiting the doctrine of nonreviewability of courts-martial, also marked the end of the Court's thirty-year silence about the doctrine's applicability to other military activities. The case was *Orloff v. Willoughby.*[123]

Orloff, a psychiatrist educated at government expense, had been inducted under the Doctors' Draft Act[124] but was not commissioned an officer, as the Act contemplated, because he refused to answer questions concerning his affiliation with the Communist Party. He brought a habeas corpus action, claiming the Army had to commission him or discharge him. The Court carefully examined the Act, concluded that the Army's action was permissible under its provisions, and then declined to interfere with the executive discretion inherent in the commissioning of officers.

> Congress has authorized the President alone to appoint Army officers . . . .
>
> It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.[125]

In addition to the question of Orloff's entitlement to a commission, there was also an issue as to the type of duty to which he could lawfully be assigned if he were retained in the service. The Army, which had previously contended that a person inducted under the Doctors' Draft Act need not be assigned to any particular type of duties, largely mooted this issue by assigning Orloff to medical duties before the case reached the Supreme Court. The basic question remaining was whether those particular duties were, as the Army contended, or were not, as Orloff contended, those of a doctor. Because the nature of the duties a doctor should perform is largely a matter of discretion, Orloff was in effect asking the Court to find an

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issues in the circumstances giving rise to them was very clearly made in Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967). There the substantive constitutional question was whether the defendant in a court-martial had a right to be represented by lawyer counsel. The facts underlying that question were undisputed. The fact that the military courts had given full and fair consideration to the issue did not preclude a civil court determination as to the existence of the basic constitutional right. *See also* Wallis v. O'Kier, 491 F.2d 1323 (10th Cir.), *cert. denied,* 419 U.S. 901 (1974).

[123]345 U.S. 83 (1953).

[124]Act of Sept. 9, 1950, ch. 939, 64 Stat. 826.

[125]345 U.S. at 90.

abuse of discretion by the Army. In disclaiming its authority to resolve such a question, the Court used language reminiscent of *Reaves v. Ainsworth*.[126]

> [We] are convinced that it is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner . . . .[T]here must be a wide latitude allowed to those in command . . . .
>
> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But *judges are not given the task of running the Army*. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. *The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters*. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this court has assumed to revise duty orders as to one lawfully in the service.[127]

The italicized portions of this opinion have been frequently quoted.[128] While that language may well have "imparted new vigor and stature to the nonreviewability principle,"[129] the entire passage provides a more accurate understanding of the Court's attitude. Careful analysis of the case gives rise to still further reservations. The Court actually decided the question of Orloff's entitlement to a commission on its merits. It also indicated that, had the Army adhered to its earlier contention that a person inducted under the Doctors' Draft Act need not be assigned to medical duties, the Court would have decided that issue against the Army. Both these issues involved questions of the Army's authority under the statute to take the action Orloff was challenging, and the Court showed no hesitation about deciding them.

There were only two issues the Court indicated it was unwilling to review: the factual basis for denying Orloff a commission and the appropriateness of certain duties for a military doctor. Both

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[126]219 U.S. 296 (1911). See notes 44-50 and accompanying text *supra*.

[127]345 U.S. at 93-94 (emphasis added).

[128]*E.g.*, Rolles v. Civil Service Commission, 512 F.2d 1319, 1330 (D.C. Cir. 1975); Carlson v. Schlesinger, 511 F.2d 1327, 1332 (D.C. Cir. 1975); Covington v. Anderson, 487 F.2d 660, 665 (9th Cir. 1973); U.S. DEP'T OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK para. 1.8*a*, at 1)8 (1973); *God, the Army, and Judicial Review*, *supra* note 9, at 379.

[129]*God, the Army, and Judicial Review*, *supra* note 9, at 429.

were highly discretionary executive decisions involving the "handling of men."[130] The underlying legal question in both instances was whether the military authorities had abused their discretion, and the Court declined to consider that issue.

Although the Court's attitude toward judicial review of executive activities had grown increasingly liberal over the years, the restraint in reviewing military actions demonstrated in *Orloff* was by no means unique in comparison with that shown in contemporary cases involving other departments of the executive branch.[131] Nevertheless, the Court used very strong language in *Orloff*, and there is no question that the case breathed new life into the decrepit doctrine of nonreviewability of military administrative activities. Any positive attention given the doctrine after thirty years of neglect could not help but have that effect. It was also the first case which did not rely on precedents involving civil court review of courts-martial in the course of indicating that some military administrative activities are not reviewable.

There is a danger, however, of reading more into selected portions of the Court's language than the opinion as a whole will support. The Court's careful analysis of the statute under which Orloff was inducted clearly reaffirmed the principle which had been becoming increasingly apparent with every case involving military administrative actions, at least since *Denby v. Berry*:[132] any doctrine of nonreviewability that did exist was limited to situations where the military was "acting within the scope of its lawful powers."[133] Civil court review of the statutory basis for the action was not limited by any doctrine.

E. THE REPUTED DEMISE OF NONREVIEWABILITY

The "new vigor and stature"[134] of the doctrine of nonreviewability of military administrative actions imparted by the *Orloff* case was relatively short-lived. Just as *Burns v. Wilson*[135] a few years earlier had marked a serious setback for the doctrine as applied to

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[130]345 U.S. at 93.

[131]*See, e.g.*, National City Bank v. Republic of China, 348 U.S. 356 (1955) (foreign policy); United States v. Binghampton Construction Co., 347 U.S. 171 (1954) (determination of minimum wage rates); Ludecke v. Watkins, 335 U. S. 160 (1948) (determination that enemy alien was dangerous). *See also* Chicago & S. Air Lines, Inc. v. Waterman, 333 U.S. 103 (1948) (denial of foreign air route by CAB).

[132]263 U.S. 29 (1923). See notes 79-84 and accompanying text *supra*.

[133]Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

[134]*God, the Army, and Judicial Review*, *supra* note 9, at 429.

[135]346 U.S. 137 (1953). See notes 114-22 and accompanying text *supra*.

courts-martial, *Harmon v. Brucker*[136] appeared to deliver a damaging blow to the doctrine as applied to other military activities.

Harmon had been inducted into the Army and served satisfactorily until, on the basis of certain preinduction activities, he was declared a security risk and given a less than honorable discharge.[137] After exhausting his administrative remedies, he brought suit to force the Army to give him an honorable discharge. The effect of the *Orloff* case in revitalizing the doctrine of nonreviewability of military administrative actions was apparent in the decisions of the lower courts. The district court granted summary judgment for the Army, referring to the military as "a specialized community, of necessity governed by a discipline uniquely adapted to its own needs."[138] The court of appeals affirmed,[139] relying heavily on *Orloff* and *Reaves v. Ainsworth*.[140]

The Supreme Court reversed in a short per curiam opinion remarkable for its simplicity. Completely avoiding Harmon's claim of denial of due process, the Court concluded that the statute authorizing the Secretary of the Army to issue discharges required that such discharges be based solely on the soldier's record in the Army. Thus, by considering Harmon's preinduction activities, the Secretary had exceeded the limits of his statutory authority. The Court described the role of the civil courts under such circumstances.

> Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. The District Court had not only jurisdiction but also power to construe the statutes involved to determine whether the [Secretary of the Army] did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and . . . judicial relief from the illegality would be available.[141]

This decision has been proclaimed as one in which the Court "broke sharply with tradition,"[142] finally breaking "the long line of

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[136]355 U.S. 579 (1958).

[137]An undesirable discharge was originally given, but during the course of the litigation it was changed to a general discharge (which is "under honorable conditions" but still a step below an honorable discharge) in an unsuccessful attempt to moot the case. Harmon v. Brucker, 243 F.2d 613, 616 (D.C. Cir. 1957).

[138]Harmon v. Brucker, 137 F. Supp. 475, 477 (1956). Although *Orloff* was not cited, the language quoted is a close paraphrase of what the Supreme Court said in that case. See text accompanying note 117 *supra*.

[139]Harmon v. Brucker, 243 F.2d 613 (D.C. Cir. 1957).

[140]219 U.S. 296 (1911). See notes 43-49 and accompanying text *supra*.

[141]355 U.S. at 581-82.

[142]*God, the Army, and Judicial Review*, *supra* note 9, at 431. *See also* Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND L.

cases stretching all the way back to *Reaves v. Ainsworth*."[143] This greatly exaggerates the significance of *Harmon*. Actually the *Harmon* decision only reiterated what the Court had said more than half a century earlier in the *McAnnulty* case,[144] and a principle it had applied to the military at least since *Denby v. Berry*.[145] Even in the *Reaves, French*, and *Creary* cases the Court had used language limiting nonreviewability to situations in which the military was acting within the scope of its statutory authority,[146] and in each of the later cases the Court had carefully examined the statutory basis for the action of the military before declining to intervene.[147] If the decision had gone against Harmon, even though the Court had used the identical language, the case would have been little different from and no more significant than *Denby v. Berry*.

As in the *Berry* case, the Court's opinion in *Harmon* placed no particular significance on the fact that a military department was involved. The rationale of the case, quoted above, is the same as is generally applicable to other officials of the executive branch. Thus, the military's special status with regard to judicial review, so strongly reiterated in *Orloff* only five years before *Harmon*, was completely ignored. The Court also strained somewhat to find the statutory limitation on the Secretary of the Army's authority to issue discharges, thereby indicating a willingness, not present in earlier cases, to intervene to prevent an injustice by the military. It was more because of this apparent change of attitude than because of any discernible change in the law that *Harmon* cast doubt on the continued viability of the doctrine of nonreviewability.

F. COMPLIANCE WITH REGULATIONS

Even before *Harmon v. Brucker* the Supreme Court had embarked upon a series of decisions which was to have a significant impact on the scope of judicial review of administrative actions of the executive department. *United States ex rel. Accardi v. Shaugnessy*[148] is generally considered the first of this line of cases.

J. 539, 575 (1974), which describes *Harmon v. Brucker* as the "first substantial break in the nonreviewability doctrine . . . ."

[143] *God, the Army, and Judicial Review, supra* note 9, at 433.

[144] American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). See text accompanying note 23 *supra*.

[145] 263 U.S. 29 (1923).

[146] *See* note 57 *supra*.

[147] *See* Orloff v. Willoughby, 345 U.S. 83 (1953); Robertson v. Chambers, 341 U.S. 37 (1951); Patterson v. Lamb, 329 U.S. 539 (1947); Denby v. Berry, 263 U.S. 29 (1923).

[148] 347 U.S. 260 (1954).

There the Court sustained Accardi's challenge to his deportation as an undesirable alien on the ground that the Attorney General had failed to abide by his own regulations establishing procedures for a hearing and review. The case was really not particularly significant at the time since the Court had ruled substantially the same way at least twice before, saying ". . . one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law."[149]

In 1957, however, the Court relied on *Accardi* as the controlling precedent for its decision in *Service v. Dulles*.[150] There the Secretary of State had departed from his own procedural regulations by dismissing Service from his position despite a favorable finding by a Department Loyalty Board. The Court overturned the dismissal.

> While it is of course true that . . . the Secretary was not obligated to impose upon himself these more vigorous substantive and procedural standards, neither was he prohibited from doing so, . . . and having done so he could not, so long as the regulations remained unchanged, proceed without regard to them.[151]

In *Vitarelli v. Seaton*[152] two years later, the Court reiterated the requirement that the head of an executive department comply with self-imposed procedural standards in dismissing an employee.

None of these cases involved a military department and it is theoretically possible to argue, on the basis of earlier precedents[153] and the fact that the Court has often shown a special reluctance to intervene in military affairs, that the civil courts still should not review military administrative activities for compliance with internal regulations. Such an argument would be extremely unrealistic, however. The lower courts have certainly not adopted that theory,[154] and the Supreme Court has given ample indication that the military must follow its own regulations the same as any other executive department.

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[149]Bridges v. Wixon, 326 U.S. 135, 153 (1945); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923).

[150]354 U.S. 363 (1957).

[151]*Id.* at 388.

[152]359 U.S. 535 (1959).

[153]Denby v. Berry, 263 U.S. 29, 38 (1923) (dictum) (Secretary of Navy not bound by own regulations); United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1871) (Secretary of Army not bound by own regulations).

[154]*See, e.g.*, Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971); Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970); Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Ingalls v. Zuckert, 309 F.2d 659 (D.C. Cir. 1962).

In the *Harmon* case, for example, the Court referred to the fact that applicable Army regulations specifically required that the type of discharge be determined by the character of the period of service for which it was given.[155] Rather than relying directly on the fact that the Secretary of the Army had violated his own regulations, however, the Court used the regulations as an authoritative interpretation of the underlying statute and then based its holding on the fact that the Secretary had violated the statute. It is not clear why the Court did not utilize the theory it had relied on in the *Service* case only a few months earlier. One possible basis for not deciding *Harmon* on that theory may have been that the regulation there was not a procedural one as in *Accardi, Service* and, later, *Vitarelli.* The Court did not make such a distinction, however, and it is not persuasive. It is extremely unlikely the Court would accept the proposition that the military must afford an individual all the procedural protections provided for in its regulations, but is then free to prejudice him even more directly by ignoring a substantive protection in those same regulations. Surely, it should not matter whether the regulation is procedural or substantive, as long as it is intended to protect the individual.[156]

In *Williams v. Zuckert*[157] the Supreme Court did indicate that "the principles enunciated by this Court in Vitarelli v Seaton"[158] would apply to the military departments, at least in proceedings against their own civilian employees. It should be recognized, however, that these are Civil Service employees, and personnel actions affecting them are generally governed by the same statutes and regulations applicable to most other employees of the federal government. Cases involving civilian employees of the military departments are generally decided on the same basis as those involving employees of the other departments of the executive branch. And, as will be seen later, the Court has taken a substantially more liberal attitude toward review of military actions adversely affecting civilians than in the case of those affecting only military personnel.

Another indication that the *Service* rule would be applied to the military came in *Bell v. United States,*[159] a suit for back pay by

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[155]Harmon v. Brucker, 355 U.S. 579, 583 (1958).

[156]*See* Nixon v. Secretary of the Navy, 422 F.2d 934 (2d Cir. 1970). *But see* Grosso v. Resor, 439 F.2d 233, 236 n.8 (2d Cir. 1971).

[157]371 U.S. 531, *vacated,* 372 U.S. 765 (1963). The Court first dismissed the writ of certiorari, holding the facts did not adequately present the issue. This holding was vacated after additional affidavits were considered. There was never any question about the applicability of the *Vitarelli* rule to the case.

[158]371 U.S. at 532 (citation omitted).

[159]366 U.S. 393 (1961).

Korean War "turncoats," American soldiers who had been captured by the enemy but who had refused repatriation after the armistice. Although there was a statutory entitlement to military pay for military members who were in active service, not absent from their posts of duty, nor otherwise ineligible, the Army simply refused to pay them without bothering to make any determination which would have established their ineligibility. Citing the *Service* and *Vitarelli* cases, the Court said, "The Army cannot rely upon something that never happened, upon an administrative determination that was never made . . . ."[160]

This is not a particularly clear precedent, because the Court apparently did not even know whether there were any Army regulations providing for such determinations. It is therefore difficult to argue the Court was actually saying the Army had to follow its own regulations. Nevertheless, the case clearly carries that implication. Considered with *Williams v. Zuckert*, it leaves little room for doubt that the *Service* rule applies to the military.

As a practical matter, there should be little danger of unwarranted intrusion in military matters by the courts' enforcement of the military's own regulations because, hopefully at least, the military will have considered its own requirements in preparing the regulations. It is safe to conclude, therefore, that compliance with regulations establishing safeguards for the protection of individuals should be considered an appropriate area for judicial review of military administrative actions.

This proposition should not be extended to every regulation from which the individual derives any possible benefit, however. In the first place, the benefit obviously must be one *required* by the regulation, since the regulation would not be violated by denial of something left to official discretion. An allegation of abuse of discretion would be appropriate in such a case, but not one of failure to follow the regulation. Thus, the courts have properly rejected service members' attempts to compel the military to process them under regulations authorizing, but not requiring, the discharge of certain undesirables.[161] The regulation must also be one intended *primarily* for the protection of the individual, rather than "to promote the efficient functioning of the military establishment."[162] Thus, a service member's challenge to an unwelcome transfer on the ground that it violates a regulation providing, as an economy

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[160] *Id.* at 413.

[161] Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972); Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972).

[162] Cortright v. Resor, 447 F.2d 245, 251 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

measure, that all nonessential transfers were to be avoided also fails to allege a sufficient basis for review.[163]

G. ACTIONS AGAINST CIVILIANS

This account of the decline of the doctrine of nonreviewability would not be complete without mention of a further limitation reflected in two cases involving civilian employees of corporations which had contracts with the armed forces. In *Greene v. McElroy*,[164] decided in 1959, the Secretary of the Navy's determination to deny access to classified security information led to the dismissal of aeronautical engineer Greene by the government contractor which employed him and to his inability to obtain any similar employment. Although Greene had received various hearings, he was never furnished all the evidence considered nor given an opportunity to confront or cross-examine the many witnesses whose "confidential" statements were considered.
challenge to the Secretary's action. Avoiding the issue of whether traditional constitutional safeguards could ever be dispensed with in such proceedings, the Court said the Department of Defense could not do so in the absence of specific authority from the President or Congress. Although the holding was ultimately based on this lack of authority, the opinion left little doubt that the civil courts were free to review military administrative actions of the kind at issue for compliance with standards of due process imposed by the fifth amendment.

The military fared somewhat better in *Cafeteria Workers Local 473 v. McElroy*[165] two years later. There the commander of the Naval Gun Factory withdrew the identification badge required for access to the installation of a short order cook in a cafeteria operated by a concessionaire. The ground was "that she had failed to meet the security requirements of the installation."[166] No hearing was held and no further explanation was provided. Mrs. Brawner, the cook, was offered employment at another restaurant operated by her employer but refused it and brought suit in an unsuccessful attempt to force return of her identification badge.

The Court saw the case as presenting two basic questions, one of the commander's authority to control access to a military installation, the other whether the summary denial of access to the site of

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[163] *Id.*
[164] 360 U.S. 474 (1959).
[165] 367 U.S. 886 (1961).
[166] *Id.* at 888.

employment violated due process. The military did well on the first issue as the Court strongly endorsed the traditional authority of a commander over his installation. The military also prevailed on the due process issue, but not because of any reluctance on the part of the Court to review, nor because the military was considered to have any special exemption from the ordinary requirements of due process. The Court balanced the competing interests and found those of Mrs. Brawner were outweighed, primarily because she was neither stigmatized nor denied continued employment elsewhere.

Together, the *Greene* and *Cafeteria Workers* cases confirmed both the applicability of the due process clause to military activities affecting members of the civilian community and the readiness of the courts to enforce it. It is important to note that the Court carefully reviewed the facts in each of these cases and made its own determination as to whether there had been a violation of due process. This was a significantly greater degree of review than the Court had authorized for due process issues in court-martial cases. There the civil courts were precluded from reevaluating the evidence; they were limited to determining whether the military had given the issues full and fair consideration.[167]

H. SUMMARY

From the foregoing examination of Supreme Court cases decided between 1923 and 1963, it is not difficult to understand how one might have concluded that the doctrine of nonreviewability of military administrative activities was dead. Except for *Orloff v. Willoughby*,[168] no case decided during this period asserted the existence of any such doctrine, and most of them indicated a willingness on the part of the Court to review military-related cases. Before the doctrine is formally interred, however, perhaps it would be wise to determine whether it is in fact dead.

To begin with, it is important to recall the true scope of the doctrine of nonreviewability supported by the triology of cases[169] decided by the Court before 1923. There was really no absolute and monolithic "doctrine" in the first place. It is a gross oversimplification, therefore, to conclude that the doctrine, and everything that term encompasses, is either dead or alive. As previously indicated, the cases indicated there were two distinct restrictions on judicial review:

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[167] *See* Burns v. Wilson, 346 U.S. 137 (1953).

[168] 345 U.S. 83 (1953). See notes 123-33 and accompanying text *supra*.

[169] United States *ex rel.* Creary v. Weeks, 259 U.S. 336 (1922); United States *ex rel.* French v. Weeks, 259 U.S. 326 (1922); Reaves v. Ainsworth, 219 U.S. 296 (1911).

(a) Civil courts may not review the factual basis for military actions.
(b) Civil courts may not review military actions for compliance with procedural requirements originating in the due process clause.

On the other hand, those same cases also made it clear that civil courts could review challenged military activities for compliance with statutory authority.

Harmon v. Brucker,[170] the reputed instrument of the demise of the doctrine of nonreviewability, really did no more than reaffirm the latter proposition. But it had already been confirmed in a number of other cases.[171] Only a failure to appreciate that the original doctrine never did preclude judicial review of the statutory authority for military activities could lead to the conclusion that *Harmon,* or any of these cases, was fatal to the doctrine.

Nevertheless, there was little doubt that one of the two restraints of the original doctrine was, if not already dead, very close to it. That was the restriction on judicial review for compliance with constitutional due process. Perhaps the most serious threat to that restraint was reflected in *Burns v. Wilson,*[172] the case which weakened the doctrine of nonreviewability of courts-martial by sanctioning at least a limited civil court review of constitutional considerations. Since many of the underlying reasons for judicial restraint are substantially the same in court-martial cases as in cases involving other military activities, it is difficult to see how the Court could conclude that the Constitution requires "rudimentary fairness"[173] for military personnel in one situation but not in the other. The *Greene* and *Cafeteria Workers* cases,[174] which sanctioned full judicial review of due process challenges to military administrative actions adversely affecting civilians, were also an indication that the military could no longer ignore fundamental due process considerations.

Yet, as of 1963 the Court had not specifically held that military administrative actions, consistent with statutory authority and affecting only military personnel, were subject to any additional procedural requirements arising from the Constitution.

Beard v. Stahr[175] was probably the closest the Court had come,

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[170]355 U.S. 579 (1958). See notes 136-37 and accompanying text *supra.*
[171]Orloff v. Willoughby, 345 U.S. 83 (1953); Robertson v. Chambers, 341 U.S. 37 (1951); Patterson v. Lamb, 329 U.S. 539 (1947); Denby v. Berry, 263 U.S. 29 (1923).
[172]346 U.S. 137 (1953).
[173]346 U.S. at 142.
[174]See text accompanying notes 164-67 *supra.*
[175]370 U.S. 41 (1962).

but that case can hardly be said to have settled the matter. Lieutenant Colonel Beard had been recommended for elimination from the Army for conduct unbecoming an officer following a hearing before a board of inquiry and further consideration by a board of review, both provided for by statute.[176] He then sued to enjoin the Secretary of the Army from carrying out the recommendation, claiming the procedures had not afforded him due process. Averting what could have been an interesting due process opinion, inasmuch as the case involved a discharge with a serious stigma, the Court, in a short per curiam opinion, directed dismissal of the complaint. The opinion held the suit to be premature because the Secretary had not yet exercised his discretion by approving or disapproving the recommendation of the board. But then the Court added: "If appellant is removed, the Court is satisfied that adequate procedures for seeking redress will be open to him."[177] Unfortunately, the Court did not indicate what procedures it was referring to, but there was at least an implication that Beard would be allowed access to the civil courts later, if necessary, and obtain review of the Army's procedures for compliance with constitutional due process requirements.

In spite of the absence of a more specific holding, it is probably safe to assume that by this time the era of judicial determinations that due process challenges were nonreviewable because "To those in the military . . . military law is due process"[178] had long since passed into history. It was almost inconceivable that the Court would again refuse to review military administrative activities affecting any substantial rights for compliance with constitutional requirements for "rudimentary fairness."[179] The proposition of the old doctrine of nonreviewability which had foreclosed such review was clearly no longer viable.

The other proposition of the old doctrine—the restriction against judicial reexamination of the factual basis of the military action—still survived, however, and had been strongly reaffirmed in the *Orloff* case. Even *Burns v. Wilson,* which so significantly weakened the concept of nonreviewability in other respects, provided indirect support for this proposition; the Court had indicated there that there should be no reexamination of the evidence by the civil courts on constitutional issues which had already been considered by the military.

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[176]Now 10 U.S.C. §§ 3792, 3793, 3795 (1970).
[177]370 U.S. at 42.
[178]Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).
[179]Burns v. Wilson, 346 U.S. 137, 142 (1953).

On the other side of the ledger, the number of challenges which had been specifically recognized as within the permissible scope of judicial review had been enlarged from one, compliance with statutory authority, to include two others, compliance with regulations intended primarily for the protection of the individual and, to some extent still not clearly defined, compliance with constitutional due process.

On balance, the old doctrine of nonreviewability had certainly lost ground. It was clear by this time that there was no blanket immunity from judicial review for military activities. The cases indicated that reviewability depended primarily on the basis of the legal challenge to the military action, and this in turn depended on the nature of the legal wrong the military was alleged to have committed.

But there were other factors to be considered as well. Certain of the cases decided during this period, for example, indicated that the type of military action challenged and who was affected by it could also be important. The *Orloff* case held that the civil courts should not interfere in highly discretionary military personnel actions, such as assignments, transfers, and similar matters involving the "handling of men."[180] Other cases indicated there would be a broader judicial review of military actions adversely affecting the rights of civilians than of those affecting only military personnel.[181]

Although these are certainly factors that cannot be ignored, it appears that they will generally be secondary to the basis of the legal challenge. Surely, *Orloff* does not stand for the proposition that the courts may not review routine military personnel actions regardless of the basis of the challenge. In fact, the Court indicated it would have ruled against the Army had it failed to assign Orloff to medical duties of some sort as the Doctors' Draft Act required. It follows that review for compliance with statutory authority is appropriate even when such a highly discretionary function as the "handling of men" is the action challenged. There is no reason to believe it would be otherwise if the challenge were based on failure to comply with due process or with regulations for the protection of the individual.

Similarly, examination of the cases involving military actions which adversely affected civilians indicates that each of them rais-

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[180]Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

[181]*See* Williams v. Zuckert, 371 U.S. 531, *vacated*, 372 U.S. 765 (1963) (civilian employee of military department); Green v. McElroy, 370 U.S. 41 (1962) (employee of government contractor); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (employee of concessionaire on military installation).

ed one of the three legal challenges already specifically recognized as reviewable. The purpose of review in each of those cases was to determine whether there had been a violation of due process, statutory authority, or regulations for the protection of the individual. There was no indication that allegations based on other grounds, such as abuse of discretion, would be reviewed by the courts even in cases involving civilians.

By 1963, then, the Court's decisions on judicial review of military administrative actions indicated that:

> *1. Civil courts may not reexamine the factual basis for military actions.*
> *2. Civil courts may review military actions challenged for violation of—*
> *a. statutory authority*
> *b. regulations intended primarily for the protection of the individual*
> *c. due process*

Unfortunately, these relatively simple propositions were not widely recognized at the time. In the general overreaction to *Harmon v. Brucker* and the resultant proclamation of the demise of the doctrine of nonreviewability of military administrative activities, there was little effort to determine objectively what, if anything, was really left of the old doctrine. Perhaps that was to be expected since the sweeping bar to judicial review of military actions which had been generally accepted through the first half of this century had been just as much an exaggeration. The pendulum had swung from one extreme to the other. Actually, the doctrine of nonreviewability, if such a hyperbolic term could still be used, had been refined and clarified to a very significant degree, especially in the decade between 1953 and 1963. It was really no more than a limitation on the courts' substituting their judgment for that of the military authorities by reexamining the factual basis of the military's actions.

IV. REVIEWABILITY IN THE SEVENTIES

Following the relatively large number of cases in the late 1950's and early 1960's, the next several years saw a dearth of Supreme Court decisions involving review of military administrative actions. There were a few cases involving courts-martial, but none which seriously altered the basic parameters of civil court review established by *Burns v. Wilson* two decades earlier. *O'Callahan v.*

Parker[182] is worthy of note, however, because it so significantly expanded the number of courts-martial reviewed in the civil courts. After analyzing the fifth amendment provision excepting "cases arising in the land or naval forces, or in the militia, *when in actual service* in time of war or public danger"[183] from the requirement for indictment by a grand jury, the Court concluded that the Constitution precluded court-martial jurisdiction over offenses which are not "service-connected."[184] Even though later decisions limited the holding somewhat,[185] *O'Callahan* opened a whole new aspect of courts-martial to civil court review. The holding had no direct implications for the reviewability of other military actions, but the Court's imaginative reliance on constitutional grounds foreshadowed a different approach to reviewing military cases than had previously prevailed. Subsequent cases involving judicial review of military activities increasingly involved constitutional considerations other than procedural due process, and the closely related areas of compliance with statutory authority and regulations, which had been the chief concern of the earlier cases. The new decade also saw a sharp upswing in the number of Supreme Court cases involving challenges to military activities as the impact of the Vietnam War made itself felt.

A. REVIEW OF STATUTORY AND REGULATORY AUTHORITY

Although routine cases simply calling on the Court to interpret statutes under which the military operated by no means ceased to occur,[186] even the statutory review cases began to take on constitutional dimensions in the seventies.

In *Frontiero v. United States*[187] there was a direct constitutional challenge to statutes prescribing the compensation and benefits of military service. The statutes in question provided that spouses of male members of the uniformed services were automatically con-

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[182]395 U.S. 258 (1969).

[183]U.S. CONST. amend. V (emphasis added).

[184]The Court indicated an offense committed within the United States in peacetime is not service-connected if committed outside a military post, while neither the accused nor the victim is on duty, and involves no flouting of military authority, security, or property. *See* 395 U.S. at 273-74.

[185]*See, e.g.*, Gosa v. Mayden, 413 U.S. 665 (1973); Relford v. Commandant, 401 U.S. 355 (1971).

[186]*E.g.*, Cass v. United States, 417 U.S. 72 (1974) (interpreting 10 U.S.C. § 687(a) (1970)).

[187]411 U.S. 677 (1973).

sidered dependents for purposes of obtaining a higher quarters allowance[188] and eligibility for medical benefits,[189] but spouses of female members would be recognized as dependents only upon an affirmative showing that they were dependent for over half their support. When Lieutenant Frontiero's application for dependent status for her student husband was denied by the Air Force, she sued, unsuccessfully, in district court for an injunction against enforcement of the statutes and for an order directing dependent's benefits for her husband. On appeal, the Supreme Court held the challenged statutes unconstitutional.

> By according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.[190]

Although there had never been any doubt as to judicial power to determine the constitutionality of statutes on which military activities were based, this was the first Supreme Court case declaring unconstitutional a statute in the military administrative, as opposed to the criminal, area. It was also the first decision in which the Court specifically relied on a violation of the due process clause as a basis for overturning a military administrative action primarily affecting military personnel. Although the fact that it involves a constitutional infirmity in the underlying statutes rather than in the military action itself may somewhat diminish its value as a precedent, *Frontiero* nevertheless confirms what had been apparent more than a decade earlier; that is, that the civil courts may review military administrative activities for compliance with constitutional due process. For, if the Court was willing to hold these statutes unconstitutional as violating due process, it is difficult to imagine that there would be any compunction about holding the same provisions unconstitutional if contained in military regulations. And if the Court would overturn those provisions, why not any other military regulations establishing procedures which violate due process?

The Court's willingness to review due process challenges by no means indicates it has lost its reluctance to intervene in administrative activities of the military. In fact, an attempt to extend

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[188] 37 U.S.C. § 1072 (1970).

[189] 10 U.S.C. § 401 (1970).

[190] 411 U.S. at 690. Although there were three separate opinions for the eight justices who held the statutes unconstitutional, seven of them expressly agreed on this basis for the holding. The main point of disagreement among the seven was whether sex was a "suspect" classification.

the principle of *Frontiero* into a more sensitive area than financial compensation proved unsuccessful in *Schlesinger v. Ballard*.[191] There Navy Lieutenant Ballard challenged a statute[192] which required discharge of a male officer following his second failure to be selected for promotion. The corresponding statute applicable to female officers did not require discharge under those circumstances until the officer had completed thirteen years of service.[193] The Court found a legitimate basis for the distinction in the Navy's requirement to maintain a steadier flow of promotions for male officers because they could "look forward to higher levels of command."[194] In rejecting Ballard's due process challenge, the Court concluded:

> This Court has recognized that "it is the primary business of armies and navies to fight or to be ready to fight should the occasion arise." The responsibility for determining how best our armed forces shall attend to that business rests with Congress and with the President.[195]

Nevertheless, the case was decided on the merits, not on the question of reviewability. It could hardly have been otherwise since the suit challenged the constitutionality of a statute.

Negre v. Larsen[196] also involved constitutional challenges to a statute, and to an Army regulation as well. The Court struck down challenges, based primarily on the religion clause of the first amendment, to the validity of certain aspects of the provisions allowing avoidance of military service on the basis of conscientious objection to participation in war. The case is representative of the flood of conscientious objector cases which hit the courts as popular opposition to the Vietnam War mounted, calling on the courts to review adverse administrative determinations by the military as well as by draft boards.[197]

The Army had promulgated a regulation[198] providing for dis-

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[191]419 U.S. 498 (1975).

[192]10 U.S.C. § 6382 (1970).

[193]10 U.S.C. § 6401(a) (1970).

[194]419 U.S. at 510.

[195]*Id.* (citations omitted).

[196]*Consolidated sub nom.* Gillette v. United States, 401 U.S. 437 (1971).

[197]There are two distinct categories of these conscientious objector cases, those in which a service member seeks a discharge from the military under departmental regulations and those in which a registrant challenges the action of the Selective Service System under section 6(j) of the Military Selective Service Act, 50 U.S.C. App. § 456(j) (1970). *Negre* was a case of the former type, *Gillette* the latter. Cases of the latter type are not within the scope of this article. See note 7 *supra*.

[198]Army Reg. No. 635-20 (May 1, 1967) (now Army Reg. No. 600-43 (June 12, 1974)), based on U.S. Dep't of Defense Directive No. 1300.6 (Aug. 21, 1962), 32 C.F.R. § 75.1-.11 (1973).

charge of a service member upon his application if he had conscientious objections to any form of participation in war.[199] The type of conscientious objection recognized under the regulation was substantially the same as that provided by section 6(j) of the Selective Service Act of 1967,[200] except that the objections had to have become "fixed" subsequent to the member's entry into the service.

Several weeks after he had been inducted, and shortly after receiving orders to Vietnam, Negre applied for discharge as a conscientious objector. He acknowledged that his scruples did not extend to wars in general but only to "unjust" wars such as the one in Vietnam. The Army denied his application and he unsuccessfully sought release through habeas corpus.

Before the Supreme Court, the case was consolidated with that of a pre-induction conscientious objector raising the same first amendment challenges to the statutory provisions as Negre was making to the Army regulation. After disposing of the constitutional challenges, the Court upheld the denial of each petitioner's application for conscientious objector status, saying there was a "basis in fact" for the denial in each case.[201]

Somewhat narrower than the substantial evidence test generally used by federal courts reviewing administrative proceedings,[202] the basis in fact test had been incorporated into the Selective Service Act in 1967 to fix the standard for judicial review of pre-induction conscientious objector cases.[203] In 1968 the Second Circuit had applied the test to an *in-service* conscientious objector case in which the Navy denied an application for discharge without making its own determination of the merits.

> [T]he federal courts have traditionally afforded the military the broadest possible discretion in military matters and questions which touch on the national defense. But it would be a gross fiction to assume, on the record before us, that Hammond was denied a discharge because of military

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[199]There is also provision for assignment to nomcombatant duties of service members with conscientious objections to participating in war as a combatant but not to other aspects of military service. Army Reg. No. 600-43, paras. 1-3*a*(2) and 3-1*b* (June 12, 1974).

[200]50 U.S.C. App. § 456(j) (1964), *as amended* (Supp. III, 1967).

[201]401 U.S. at 463.

[202]*See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01, at 114, and § 29.07, at 149-50 (1958).

[203]*See* 50 U.S.C. App. § 460(b)(3) (1970). The courts had begun using the basis in fact test years earlier in spite of statutory language which then appeared to preclude judicial review. *See, e.g.*, Estep v. United States, 327 U.S. 114 (1946).

The test is also referred to as the "any basis in fact" test or the "no basis in fact" test, depending on whether the reference is in connection with sustaining or overturning the action under review.

> necessity or the requirements of the Navy . . . . The Navy, by its own regulation, chose to defer to [the selective service system's] decision; that decision should be subject to judicial review on a petition for habeas corpus in the same manner as other status classifications of the selective service system.[204]

The court's reasoning was certainly logical, but the special facts which justified the decision were subsequently ignored. Before long every circuit accepted the basis in fact test as the standard of judicial review of in-service conscientious objector cases.[205] It is not surprising, therefore, that the Supreme Court referred to that test in *Negre*, especially since the case was consolidated with a pre-induction case.

The fact that the Court referred to the basis in fact test in reviewing a military administrative action would be of great significance if there were any indication it had been done deliberately. It would indicate approval of at least some degree of judicial review of the factual basis of military actions, something the Court had never before condoned and which it had specifically and repeatedly decried.[206] But there really was never any question about either the facts or the sufficiency of the evidence in the *Negre* case. The reference to the basis in fact test was entirely superfluous. The outcome was determined once the constitutional challenge to the regulation was resolved. Nor did the Court's opinion indicate any awareness of a potential question of the reviewability of military administrative actions. The case of the in-service conscientious objector was completely subsumed into that of the pre-induction objector and was decided as if it arose directly under the statute rather than under an Army regulation. Therefore, it would be unwarranted to interpret *Negre* as a clear signal that judicial review of the factual basis for military administrative actions is now appropriate. Nevertheless, new law is sometimes made by such inadvertence, and the case throws the first shadow of doubt on the

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[204]Hammond v. Lenfest, 398 F.2d 705, 715-16 (2d Cir. 1968). This case has been described as making "a significant breach in the old nonreviewability doctrine." Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 485 (1969).

[205]*See, e.g.*, Armstrong v. Laird, 456 F.2d 521 (1st Cir. 1972); Dix v. Resor, 449 F.2d 317 (2d Cir. 1971); Kaye v. Laird, 442 F.2d 440 (3d Cir. 1971); Cohen v. Laird, 439 F.2d 886 (4th Cir. 1971); DeWalt v. Commanding Officer, 476 F.2d 440 (5th Cir. 1973); Grubb v. Birdsong, 452 F.2d 516 (6th Cir. 1971); U.S. *ex rel.* Oberlund v. Laird, 473 F.2d 1286 (7th Cir. 1973); Packard v. Rollins, 422 F.2d 525 (8th Cir. 1970); Ward v. Volpe, 484 F.2d 1230 (9th Cir. 1973); Polsky v. Wetherhill, 455 F.2d 960 (10th Cir. 1972); Dietrich v. Tarleton, 473 F.2d 177 (D.C. Cir. 1972).

[206]*See* Orloff v. Willoughby, 345 U.S. 83 (1953); Denby v. Berry, 263 U.S. 29 (1923); Reaves v. Ainsworth, 219 U.S. 296 (1911). *Cf.* Burns v. Wilson, 346 U.S. 137 (1953).

one proposition of the doctrine of nonreviewability of military administrative activities which had survived undiminished in the Court's eyes until this time.

B. THE FIRST AMENDMENT

The early 1970's also saw a number of challenges to military activities alleging infringement of first amendment rights. The military collided with the first amendment most directly in *Flower v. United States*,[207] and the Court was sufficiently aroused that it went to the procedural extreme of deciding against the Government without even allowing an opportunity for briefs or arguments. Flower, a civilian, had been convicted under a statute making it an offense to reenter a military post after having been ordered not to do so by the officer in charge.[208] Both the conduct for which he had been barred from the post in the first place and that for which he was convicted involved distribution of anti-war leaflets. The Court noted that the street where Flower had been handing out his leaflets was a main traffic artery, completely open to the public, and concluded that the military commander, having chosen not to exclude the general public, had abandoned any special interest in distribution of leaflets there: "The First Amendment protects petitioner from the application of [the statute] under conditions like those in this case."[209]

The inevitable corollaries of this holding are that the first amendmend also protects the right to distribute leaflets in such an area, the military commander may not unlawfully interfere with that right, and the civil courts may grant relief if he does. Because *Flower* was an appeal from a criminal conviction, it may be argued that it should not be considered as bearing directly on the reviewability of military activities. However, there is no question that the Court would have decided the first amendment issue if it had been presented in a suit directly challenging the validity of the post commander's debarment order.[210] In fact, even the dissenting justices suggested that a direct judicial challenge to the commander's debarment order was the appropriate way to obtain review.[211]

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[207] 407 U.S. 197 (1972).

[208] 18 U.S.C. § 1382 (1970).

[209] 407 U.S. at 199.

[210] *Cf.* Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970).

[211] 407 U.S. at 201

The broadest first amendment challenge to military activities was made in *Laird v. Tatum*,[212] a class action to preclude Army surveillance of civilian political activity by possible "dissidents." As it turned out, the challenge was too broad. The petitioners alleged that the mere existence of the surveillance activity had a "chilling effect" on the exercise of first amendment rights. They also claimed the scope of the surveillance was broader than necessary. The Court reviewed the statutory authority of the President to use the military to quell insurrections[213] and concluded the Army had to be able to collect information on potential disorders in order to carry out its responsibility to combat them. However, the failure of the petitioners' challenge was based principally on the lack of a justiciable controversy and of standing to sue, both due to the vague and subjective nature of the alleged constitutional violation.

Although the decision in this particular case was in favor of the military, the Court's opinion left no room for doubt that it was only the lack of more specific injury which forestalled judicial intervention.

> [I]t is not the role of the judiciary [to monitor such activities], *absent actual present or immediately threatened injury* resulting from unlawful governmental action.[214]

The Court continued with a strongly worded admonition against concluding that judicial review of military intrusion into the civilian sector was precluded.

> The concern of the Executive and Legislative Branches in response to disclosure of the Army's surveillance activities . . . reflects traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions . . . explain our traditional insistence on limitations on military operations in peacetime. Indeed, *when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury*; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.[215]

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[212] 408 U.S. 1 (1972).
[213] 10 U.S.C. § 331 (1970).
[214] 408 U.S. at 15 (emphasis added).
[215] *Id.* at 15-16 (emphasis added).

Although the *Tatum* case dealt only with a first amendment challenge, and an unsuccessful one at that, the foregoing statement implies that the Constitution itself prohibits "military intrusion into the civilian sector" and leaves little doubt that constitutional challenges to military activities adversely affecting civilians are reviewable by the courts, subject of course to the usual requirements of jurisdiction, standing, and justiciability.

C. SEPARATION OF POWERS

A somewhat similar challenge to the legality of military activities was decided in *Gilligan v. Morgan*,[216] a suit brought by students at Kent State University following the disorders in May 1970 during which several persons were killed or wounded by members of the Ohio National Guard. The principal substantive issue to reach the Supreme Court concerned the request, granted by the court of appeals, for the civil courts to resolve the question of whether there was "a pattern of training, weaponry and orders"[217] requiring the unnecessary use of fatal force in quelling disorders.

The Court observed that the National Guard is a reserve component of the armed forces of the United States, in addition to being the state militia, and that the training, weaponry, and orders of the Guard are determined primarily by Congress and the President. Citing the constitutional authority of Congress to "provide for organizing, arming and disciplining, the Militia"[218] and of the President as "Commander in Chief of the Army and Navy,"[219] the Court adopted the opinion of the dissenting judge below:

> I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard . . . *clearly precludes any form of judicial regulation of the same matters* . . . .
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> . . . .
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> *Any such relief*, whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, would necessarily draw the courts into a nonjudiciable political question, over which we have no jurisdiction.[220]

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[216] 413 U.S. 1 (1973).

[217] *Id.* at 4.

[218] U.S. CONST art. I, § 8, cl. 16.

[219] U.S. CONST art. II, § 2, cl. 1.

[220] Morgan v. Rhodes, 456 F.2d 608, 619 (6th Cir. 1972), *as quoted in* Gilligan v. Morgan, 413 U.S. 1, 8-9 (1973) (emphasis the Court's).

The Court also expressed serious concern over both judicial involvement in technical military matters and judicial interference in the realm of responsibility of the other branches of government.

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions are [*sic*] appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.[221]

The language in both the above quoted passages, though certainly more sophisticated, is reminiscent of that used in *Reaves v. Ainsworth*[222] some sixty years before and reflects continued recognition that the principle of separation of powers, the basis of the old doctrine of nonreviewability, still requires judicial restraint in reviewing military activities. The activities in this case were so clearly within the realm of technical military competence that, had the Court decided they were an appropriate subject for judicial review, it is difficult to imagine anything that would not be.

The ultimate disposition of the case was very similar to that of *Laird v. Tatum*, the Army surveillance case. Noting the lack of injury to petitioners and the absence of any specific, imminent threat of unlawful action, the Court expressed doubt as to petitioners' standing and finally concluded there was no justiciable controversy. Again as in the *Tatum* case, however, the Court left no doubt as to judicial authority to review military actions in appropriate cases.

> [I]t should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief.[223]

Thus, in spite of its recognition of the need for judicial restraint arising from the principle of separation of powers, the Court made

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[221] 413 U.S. at 10-11.
[222] 219 U.S. 296 (1911). See text accompanying note 49 *supra*.
[223] 413 U.S. at 11-12.

it clear that military activities are subject to judicial review in appropriate cases. Understandably, the Court indicated less concern about intervention when it is a matter of preventing or redressing specific injuries to known individuals, especially civilians, than when faced with a more general challenge calling for more sweeping judicial involvement.

D. THE SPECIALIZED SOCIETY

Through the years, as has been seen, there has been a recurring relationship between Supreme Court decisions concerning civil court review of courts-martial and those involving other military activities. Perhaps it is only fitting, then, that the Court's last two military-related decisions of the 1973-1974 term should arise from courts-martial, yet have significant implications for the reviewability of military administrative activities. Both cases involved important first amendment issues, and these were decided in a manner reflecting a markedly different attitude toward the first amendment rights of servicemen than the Court had demonstrated toward civilians only a short time before.[224]

The first case was *Parker v. Levy*.[225] Captain Levy was an Army doctor who was convicted by a general court-martial for, among other offenses, making "[i]ntemperate, defamatory, provoking, and disloyal statements to . . . enlisted personnel"[226] and for making statements "with design to promote disloyalty and disaffection among the troops."[227] These charges were under Articles 133 and 134, respectively, of the Uniform Code of Military Justice,[228] proscribing "conduct unbecoming an officer" and conduct "to the prejudice of good order and discipline in the armed forces." The charges grew out of Levy's outspoken opposition to the Vietnam War, including statements that he would refuse to go to Vietnam if so ordered and opinions expressed to black enlisted men that they should refuse to go there or to fight.

After unsuccessfully exhausting his appeals within the military system,[229] Levy sought habeas corpus, challenging his conviction on a number of grounds, including the unconstitutional vagueness

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[224] *See* Flower v. United States, 407 U.S. 197 (1972).

[225] 417 U.S. 733 (1974).

[226] *Id.* at 740 n.6.

[227] *Id.* at 738 n.5.

[228] 10 U.S.C. §§ 933, 934 (1970).

[229] *See* United States v. Levy, 39 C.M.R. 672 (ACMR 1968), *petition for review denied*, 18 U.S.C.M.A. 627 (1969).

of Articles 133 and 134. He prevailed on that issue before the court of appeals[230] but the Supreme Court reversed.

While all the details of the decision concerning Articles 133 and 134 are not important here, certain aspects of the Court's opinion appear to have a significant bearing on the scope of judicial review of administrative activities of the military. The Court, quoting liberally from a heterogenous mixture of precedents involving the military, reasserted more strongly than ever the specialized nature of the military community and its need for a different application of traditional legal principles.

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Toth v. Quarles.* In *In re Grimley,* the Court observed: "An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby,* and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . . " *Burns v. Wilson.*[231]

The legal significance of the "specialized society" is apparent from the language used by the Court in addressing the first amendment issue.

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require [*sic*] a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Doctrines of First Amendment overbreadth . . . are not exempt from the operation of these principles.[232]

Considering the preferred position usually afforded first amendment rights, it seems safe to conclude that other constitutional rights could be similarly affected by the peculiar needs of the specialized military society.

The *Levy* case also sheds a little more light on the Court's attitude toward civil court review of courts-martial. Levy had raised

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[230]Parker v. Levy, 478 F.2d 772 (3d Cir. 1973).
[231]417 U.S. at 743-44 (citations omitted).
[232]*Id.* at 758.

several other challenges to his conviction in addition to the constitutional attack on the statutes. Noting that each of those defenses was recognized under the military legal system and had already been considered by the court-martial, the Court agreed with the statement of the court of appeals: "[T]hese factual determinations adverse to appellant . . . are not of constitutional significance and resultedly, are beyond our scope of review."[233]

The Court went on to express its belief that new issues raised by Levy should first be addressed by the lower court "to the extent that they are open on federal habeas corpus review of court-martial convictions under *Burns v. Wilson*."[234] Thus, it appears the Court reaffirmed the twenty-one year old proposition that civil court review of factual questions involved in due process challenges to courts-martial should be limited to determining whether the issues had been fully and fairly considered by the military courts.

Secretary of the Navy v. Avrech,[235] with many similarities to *Levy* was decided less than three weeks later. Private First Class Avrech was a marine serving in Vietnam when he prepared an anti-war statement and attempted to have it mimeographed for distribution among his peers. He was convicted by a special court-martial for violating Article 134 and received a relatively minor sentence. Later, after his discharge, Avrech sued in district court to have the conviction declared invalid and expunged from his records, claiming Article 134 was unconstitutionally vague and overbroad. The court of appeals declared the Article unconstitutional, but the Supreme Court reversed in per curiam opinion, relying on *Levy*.

Although not directly concerned with the question of reviewability, the *Levy* and *Avrech* cases reaffirm the need for greater judicial restraint in reviewing internal military activities than purely civilian disputes. Perhaps more importantly, those cases declare that even basic constitutional principles apply differently in a military context. This latter proposition indicates that perhaps there is a spark of truth in the old maxim of *Reaves v. Ainsworth*: "To those in the military or naval service of the United States the military law is due process."[236] And *Levy* and *Avrech* make it clear that the difference in the application of constitutional rights is not limited to the due process clause.

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[233] *Id.* at 761.

[234] *Id.* at 762. For a discussion of Burns v. Wilson, 346 U.S. 137 (1953), see text accompanying notes 114-22 *supra*.

[235] 418 U.S. 676 (1974).

[236] 219 U.S. 296, 304 (1911).

E. SUMMARY

Comparing developments of the first half of the seventies with the state of the law as it had developed through the early sixties, one can note relatively little change in the Supreme Court's position with regard to judicial review of military activities in spite of a significant increase in the number of military-related decisions.[237] Certainly, there has been some further clarification and development, but almost entirely in a direction consistent with trends apparent a decade earlier.

Perhaps the most significant development is the possible opening of the door to judicial review of the factual basis for military administrative actions, at least vaguely discernible in the *Negre* case.[238] Prior to that decision this was the one area in which the Supreme Court had never deviated from the doctrine of nonreviewability. As already observed, however, the Court's use of the "basis of fact" language in connection with review of the military determination in *Negre* appears to have been less than deliberate. It is therefore not a clear indication as to what the Court would do if the issue were squarely presented. But deliberate or not, *Negre* does raise the first question at the Supreme Court level as to the continued nonreviewability of the factual basis for military administrative actions.

And what effect have the decisions of the seventies had with regard to those challenges to military activities which the courts already had authority to review? Over the years, the Court had come to recognize military administrative activities as subject to judicial review for violation of fundamental due process, statutory authority, or regulations establishing protections for the individual. The seventies have seen no change in the courts' authority with regard to the last two. If there is any difference at all here, it is that the Supreme Court has shown a greater willingness to consider constitutional challenges to the statutes[239] and regulations[240] themselves.

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[237]The increase in the number of military-related cases has been much more dramatic in the lower federal courts. Far more significant has been the major relaxation, at times the outright abandonment, of earlier judicial restraint by some of those courts in their review of military activities. As is frequently the case, the Supreme Court has been much more cautious about moving away from its traditional position.

[238]See text accompanying notes 196-206 *supra*.

[239]*See, e.g.*, Frontiero v. United States, 411 U.S. 677 (1973); Flower v. United States, 407 U.S. 197 (1972).

[240]*See* Negre v. Larsen, *consolidated sub nom.* Gillette v. United States, 401 U.S.

There has been further clarification as to the appropriateness of judicial review for compliance with fundamental due process and other constitutional requirements. It had been clear by the early 1960's that some measure of due process review of military administrative actions would be permissible.[241] The *Frontiero* case[242] further strengthened this conclusion. In addition, other military-related cases decided in the seventies make it clear that the civil courts may review *any* constitutional challenge to administrative activities of the military, not just those involving due process.[243]

The sixties had seen the development of a growing tendency toward a distinction between military and civilian petitioners. The dichotomy has received even more conscious recognition in the seventies. But it is now seen more as a substantive difference in the application of the petitioners' constitutional rights than as a difference in the Court's policy with regard to reviewability. It would be difficult to find a clearer demonstration of the distinction the Court makes between civilian and military petitioners than to compare the *Flower* case with the *Levy* and *Avrech* cases. Flower was a civilian, and his conviction for reentering a miltiary post to distribute anti-war leaflets after being ordered not to was reversed as violative of the first amendment. But the Court would not undo the conviction of Private First Class Avrech for preparing a similar leaflet and attempting to have it mimeographed for distribution to his fellow marines. Nor would it disturb the conviction of Captain Levy for expressing his anti-war sentiments to other service personnel.

To summarize the law governing judicial review of military administrative activities as extracted from decisions of the Supreme Court through the mid-seventies, there is no longer a single area of inquiry which can be said to be unequivocally exempt from judicial review. The nonreviewability of the factual basis for military actions, repeatedly recognized by the Court in earlier decisions, and the last surviving proposition of the old doctrine of nonreviewability, has finally been brought into question. It may be that at

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437 (1971). Because the *Negre* case was so completely subsumed into a case involving a constitutional challenge to a statute, however, its significance as a precedent involving judicial review of military regulations is considerably diminished.

[241] *See* Beard v. Stahr, 370 U.S. 41 (1962); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Greene v. McElroy, 360 U.S. 474 (1959). *Cf.* Burns v. Wilson, 346 U.S. 137 (1953). See text accompanying notes 172-79 *supra*.

[242] See text accompanying notes 187-90 *supra*.

[243] *See, e.g.*, Flower v. United States, 407 U.S. 197 (1972) (free speech); Negre v. Larsen, *consolidated sub nom.* Gillette v. United States, 401 U.S. 437 (1971) (freedom of religion).

least certain types of military actions are now subject to judicial review to determine whether they have a basis in fact. Conversely, it has been even more firmly established that civil courts may review military administrative actions challenged for violation of the Constitution, statutes, or regulations primarily for the protection of the individual.

V. THE FUTURE OF REVIEWABILITY

As indicated at the outset, the purpose of examining the Supreme Court's decisions has been to arrive at a basis on which to construct a comprehensive and consistent set of prinicples to guide the federal courts as to their appropriate role when called upon to review administrative activities of the military. It is apparent that the Court itself has not made a conscious effort to formulate such principles, nor do its decisions address every aspect of the problem. Yet, there has been a very consistent pattern in the Court's own treatment of the issue over the years. The principles of judicial review of military activities have evolved in basically the same manner and direction as the principles pertaining to review of executive activities in the civilian sector. One distinctive feature, though, has been an unmistakable conservatism stemming from the Court's recognition of certain important differences between the civilian and military communities.

Looking at the Court's military-related decisions with the benefit of historical perspective and an awareness of general trends in the development of judicial review, it should be possible to fill in the remaining gaps in a manner both logical and consistent with the Court's past decisions and so arrive at a principled approach for the resolution of questions of reviewability in the future. Before proceeding further, however, the concept of nonreviewability must be reexamined to determine whether it still has any validity at all. For if it does not, there is little need to worry about its role as an obstacle to reviewability in the future.

A. ANOTHER LOOK AT NONREVIEWABILITY

Taken at face value, the term "nonreviewable" would appear to mean, quite simply, not subject to judicial review. This implies that "courts have no power to review."[244] But, with the exception of occasional statutory attempts to cut off review,[245] not relevant here, nonreviewability has been from the beginning a limitation the

[244] Reaves v. Ainsworth, 219 U.S. 296, 306 (1911).

[245] *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 28.04 (3d ed. 1972).

judiciary has imposed upon itself. This is not to say it does not have a sound basis in law. It is a logical outgrowth of the constitutional principle of separation of powers; and the concept of the nonreviewability of activities of the military, and indeed of the entire executive branch of government, was clearly founded on that principle. But the *McAnnulty* case[246] should have made it obvious that there could be no absolute bar to judicial review. Even *Reaves v. Ainsworth,* the embodiment of the original doctrine of nonreviewability of military administrative activities, involved a judicial determination that the military was "acting within the scope of its lawful powers"[247] before the Court declined further review. Thus, there has been some measure of judicial review at least since the beginning of this century. Yet the Court's early military-related decisions definitely gave the impression that there was some sort of blanket exemption from judicial review for most, if not all, military activities.

Over the years the Court's reluctance to review the activities of the military departments has gradually diminished, or at least has been more clearly defined, so that nonreviewability has taken on a meaning far different than it appeared to have early in the century. While the courts still decline to decide challenges to military activities they describe as nonreviewable, closer analysis reveals that it is not the military action per se that is nonreviewable but rather the particular challenge to it. It is difficult to imagine any military activity that is itself entirely beyond judicial review, given sufficiently cogent circumstances. In spite of its well-founded reluctance to interfere in such matters as the commitment of troops to combat, it is inconceivable that the Court would deny judicial review of a non frivolous allegation that women were being assigned to combat roles in violation of a clear statutory prohibition or that only blacks were being sent into combat in an official policy of genocide.

Probably no military action, then, should be described as absolutely nonreviewable, and the Court has said as much.[248] The concept of nonreviewability is certainly not dead, however; judicial review is appropriate only if the challenge is based on appropriate legal grounds and the circumstances are sufficiently cogent. But nonreviewability, as currently understood, is clearly not a blanket exemption of certain activities from judicial scrutiny as it was once thought to be. It is much more flexible than that and leaves the courts a large measure of discretion.

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[246]See note 70 *supra.*

[247]219 U.S. at 304.

[248]See text accompanying note 215 *supra.*

The principle of separation of powers which nonreviewability was intended to preserve has also found another vehicle in the more recent concept of nonjusticiability. Whether this is really something distinct from nonreviewability is largely a matter of semantics. Nonjusticiability bears a strong resemblance to nonreviewability in many respects. Unfortunately, it is no more precise; the Court is fond of quoting itself to the effect that "Justiciability is itself a concept of uncertain meaning and scope."[249] The truth of that assertion is demonstrated by the Court's broad definition of nonjusticiability as a term encompassing "the inappropriateness of the subject matter for judicial consideration."[250] Its application is clearly warranted when the parties seek adjudication of a political question,[251] that is, one which calls on the court to enter the domain of one of the coordinate branches of government.[252] This is when the relationship between nonjusticiability and the principle of separation of powers comes most clearly into play: "The nonjusticiability of a political question is primarily a function of the separation of powers."[253]

As has been seen, two recent military-related cases were decided on the basis of nonjusticiability, *Laird v. Tatum* and *Gilligan v. Morgan*. From these cases it is clear that nonjusticiability, like nonreviewability as currently understood, does not result from the mere fact that it is an activity of the military that is being challenged. Yet, the fact that the Constitution confers regulation and command of the military on the Congress and the President, respectively, is a crucial factor in making the question a political one and therefore nonjusticiable.

This is also the primary basis for the nonreviewability of military activities and, if nonjusticiability does in fact encompass the entire range of "inappropriateness of the subject matter for judicial consideration," it is practically synonymous with nonreviewability. The cases decided by the Court indicate there are some differences, however. To be nonjusticiable, the challenge usually must be very broad or vague, and must not arise from a specific injury or from any specific unlawful conduct. Thus, the very breadth of the complaint makes it difficult for a court to provide relief without intrusion into discretionary functions more properly within the realm of the President or Congress. Nonjusticiability, then, is probably somewhat less inclusive a concept

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[249]Flast v. Cohen, 392 U.S. 83, 95 (1968).
[250]Baker v. Carr, 369 U.S. 186, 198 (1962).
[251]*See* Flast v. Cohen, 392 U.S. 83, 95 (1968).
[252]*See* Baker v. Carr, 369 U.S. 186, 217 (1962).
[253]*Id.* at 210.

than nonreviewability since the latter may preclude review even of very specific injuries. Yet nonjusticiability is really not distinct from nonreviewability. Perhaps nonjusticiability is best described as one manifestation of nonreviewability.

In discussing these concepts in terms of their application to the armed forces, it is important to keep in mind that the existence of limitations on judicial review of military activities does not necessarily mean that the military departments hold a preferred position vis-a-vis other departments of the executive branch. Nonreviewability has never been limited to the military, nor has nonjusticiability. It is difficult, however, to draw any exact parallel between the reviewability of military activities and those of other departments of the executive branch. In the first place few of the civilian departments are anywhere near as large or generate anywhere near as much litigation as the military. More importantly, there are such wide variations in the nature of executive activities, both civilian and military, which may be challenged in court that it is impossible to generalize. As the cases already examined indicate, the Court is more reluctant to review some activities than others; this is true whether the executive department involved is military or civilian. Thus, while some military activities are among the most litigated, others are among those least subject to judicial review. The same is true of the activities of some of the civilian departments. The Court is just as willing to review a due process challenge to a deportation decision by the State Department as to an administrative discharge by the Army. Conversely, the Court is no less hesitant about becoming embroiled in foreign policy decisions than in questions primarily related to the readiness of the military. Yet, given sufficiently persuasive circumstances even the latter activities are not entirely beyond judicial review.

It is probably safe to conclude that the military is not in a unique category with regard to judicial review, at least not in the sense that the legal principles by which courts should determine questions of reviewability are any different for the military than for other executive departments. But the military does have many special characteristics and requirements. As a result, when the principles are applied, many military activities may in fact be treated with a greater degree of restraint than similar activities of civilian agencies. As already observed, however, there is such a wide variety of executive activities, civilian and military, that meaningful comparisons are difficult. It would be more productive to turn to an examination of the principles by which the courts should determine whether a particular case is reviewable.

B. A PRINCIPLED APPROACH TO REVIEWABILITY

Evolution of the old and rigidly interpreted doctrine of nonreviewability into the much more flexible concept of today carries with it the familiar complication which accompanies almost every such liberalization of the law. As rules become more subjective to provide for greater justice in individual cases, they also tend to lose their cohesion. Eventually the outcome of any given case becomes so uncertain and unpredictable that it appears there are no rules at all. Looking over the myriad of cases involving challenges to military administrative actions, there is little doubt that the liberalization of once strictly applied rules has called the very existence of those rules into question.

Yet, the courts are deciding questions of reviewability every day. They must be basing their decisions on considerations very similar to those the Supreme Court has used. But as in the Supreme Court decisions, those considerations are rarely elaborated very clearly or in any detail. The Fifth Circuit's opinion in *Mindes v. Seaman*[254] is a significant exception; while not wholly comprehensive, it is probably the most deliberate judicial examination of the subject to date. After reviewing many of the prior cases, the court stated:

> From this broad ranging, but certainly not exhaustive, view of the case law, we have distilled the primary conclusion that a court should not review internal military affairs in the absence of . . . an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations . . . . The second conclusion, and the more difficult to articulate, is that not all such allegations are reviewable.
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> A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be weighed . . . .[255]

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[254] 453 F.2d 197 (5th Cir. 1971).

[255] *Id.* at 201. There is a certain ambiguity in the court's language. At the end of the first paragraph quoted, the court indicates that the enumerated challenges are not necessarily reviewable. Yet the next paragraph refers to examining the *substance* of the allegation. If this were intended to refer to the *merits* of the allegation, a court following this procedure would find itself deciding the merits of the case without having determined whether judicial review is appropriate in the first place. The author therefore interprets the second step as part of the process of determining reviewability.

The opinion went on to list four factors which will be examined later.

The court thus suggests a two-step approach to reviewability: a trial court should first determine the threshhold question of whether any of certain potentially reviewable legal challenges has been adequately alleged; if so, the court then uses an ad hoc balancing test to determine whether and to what extent it will review that challenge. To determine the practicality of such an approach and its consistency with opinions of the Supreme Court, a closer look at each of the steps is necessary.

1. The Nature of the Legal Challenge

As has been seen from the earlier examination of the Supreme Court's decisions, military administrative actions may be subject to judicial review when challenged for violation of the Constitution, statutory authority, or regulations intended primarily for the protection of the individual. It is more than coincidence, of course, that the court of appeals in *Mindes* concluded that military actions may be reviewed only upon a sufficient allegation of one of these same grounds. But the court omitted two other common challenges evident from the Supreme Court cases: lack of military jurisdiction and abuse of discretion. Although there are valid reasons why each of these might be excluded from the enumeration, for the sake of completeness all five challenges must be examined here.

a. Lack of Jurisdiction

It is appropriate to consider the jurisdictional challenge first because it has always been recognized as reviewable, even from the inception of the old doctrine of nonreviewability.[256] Perhaps the *Mindes* court excluded lack of jurisdiction from its enumeration of potentially reviewable challenges on the theory that it does not involve review of "*internal* military affairs."[257] Whatever the reason, it is not altogether inappropriate to separate it from the other challenges because lack of jurisdiction is in a class by itself.

To begin with, lack of jurisdiction will frequently be the result of some other legal error on the part of government officials; for example, it could result from a violation of constitutional due process, of a statutory provision, or of selective service regulations by the petitioner's draft board. Yet, if the basic legal issue raised is lack of jurisdiction, all of the circumstances giving rise to the allegation

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[256] *See, e.g.*, Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858).

[257] 453 F.2d at 201 (emphasis added).

are reviewable ipso facto, regardless of whether the error giving rise to the lack of jurisdiction would itself be reviewable under a balancing test or any other standard the particular court may follow. Thus, the jurisdictional challenge is so fundamental that any other legal issues involved are subsumed.

Although there have been cases involving the attempted exercise of military criminal jurisdiction over persons who unquestionably were civilians,[258] in the vast majority of cases which have reached the courts, and indeed in all of those involving military administrative activities, the allegation of lack of military jurisdiction over the petitioner has arisen from a dispute as to the petitioner's military status.[259] It does not necessarily involve any specific administrative action on the part of the military, except perhaps a refusal to issue a discharge certificate or otherwise acknowledge that the petitioner is free to go his own way. Yet the effect on the individual is very real because, if he fails to submit to military authority, he may well provoke a court-martial or other adverse action. Fortunately, military jurisdiction may be challenged without the necessity of placing oneself in such jeopardy.[260]

There have been many cases, and an especially large number during the Vietnam era, in which a person with apparent military status has used habeas corpus to challenge military jurisdiction over him. Although there have been a few cases in which this challenge has been based on a claim that the petitioner had been effectively discharged from the service,[261] or at least that he should have been,[262] the vast majority of jurisdictional challenges has been related to the acquisition of military status.

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[258] *E.g.*, Grisham v. Hagan, 361 U.S. 278 (1960); Reid v. Covert, 354 U.S. 1 (1956); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). Each of the first three cases held unconstitutional some portion of the statutes conferring court-martial jurisdiction, Uniform Code of Military Justice arts. 2 and 3, 10 U.S.C. § 802-03 (1970).

[259] *I.e.*, is petitioner a civilian or a member of the armed forces? If the latter, is he on active duty, and thereby fully subject to military jurisdiction, or in a reserve status subject only to limited jurisdiction? This is referred to as jurisdiction over the person.

Another jurisdictional challenge, based on jurisdiction over the offense, is also raised frequently, primarily as a result of O'Callahan v. Parker, 395 U.S. 258 (1969) See text accompanying note 182 *supra*. This is limited to criminal cases, however.

[260] *See, e.g.*, Billings v. Truesdell, 321 U.S. 542 (1944), and cases cited note 90 *supra*.

[261] *E.g.*, Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948). *Cf.* United States v. Scott, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960) (discharge as defense to court-martial).

[262] *E.g.*, McFarlene v. DeYoung, 431 F.2d 1197 (9th Cir. 1970). Since a service member does not lose his military status until he is discharged, Emma v.

Most of these cases have involved an allegation that the petitioner never acquired the requisite military status because he was not validly inducted,[263] enlisted,[264] or ordered to active duty from reserve status[265] in the first place. There is ample precedent from the Supreme Court that the question of military jurisdiction raised by challenges of this nature is fully reviewable.[266]

Other jurisdictional challenges related to the acquisition of military status are somewhat less simple, in that military status is initially acquired; then later, but due to some condition or infirmity relating back to the time of acquisition, that status is avoided. For many years the only cases in this category to reach the civil courts were those involving the enlistment or voluntary induction of minors without parental consent when such consent was required by statute.[267] In the last few years, however, there has been a flood of cases based on another theory related to the acquisition of military status. In these cases a service member attempts to avoid his enlistment because of a misrepresentation which induced the enlistment or some failure of the military to fulfill an essential condition of the enlistment contract. Although none of these cases has been decided on its merits by the Supreme Court,[268] the theory has

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Armstrong, 473 F.2d 656, 658 (1st Cir. 1973), mandamus would seem to be a more appropriate remedy than habeas corpus in these cases.

[263] *See, e.g.*, Billings v. Truesdell, 321 U.S. 542 (1944); Cox v. Wedemeyer, 192 F.2d 920 (9th Cir. 1951); Andre v. Resor, 313 F. Supp. 957 (N.D. Cal. 1970). *Cf.* United States v. Ornelas, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952) (lack of valid induction as defense to court-martial).

[264] *See, e.g.*, Hoskins v. Pell, 239 F. 279 (5th Cir. 1917). *Cf.* United States v. Blanton, 7 U.S.C.M.A. 664, 23 C.M.R. 128 (1957) (void enlistment as defense to court-martial). The same principle is applicable to voluntary extensions of enlistments. *See, e.g.*, Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972).

[265] *See, e.g.*, Smith v. Resor, 406 F.2d 141 (2d Cir. 1969); Horn v. Musick, 347 F. Supp. 1307 (S.D. Ohio 1971). Perhaps because a reservist has military status, though of a different kind, even when not on active duty, some courts consider mandamus more appropriate than habeas corpus in these cases. *See, e.g.*, United States *ex rel.* Sledjeski v. Commanding Officer, 478 F.2d 1147 (2d Cir. 1973).

[266] See notes 88-91 and accompanying text *supra*.

[267] *See In re* Morrissey, 137 U.S. 157 (1890); *In re* Miller, 114 F. 838 (5th Cir. 1902); United States *ex rel.* Lazarus v. Brown, 242 F. 983 (E.D. Pa. 1917). *Cf.* United States v. Overton, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958) (avoidance of minority enlistment as defense to court-martial).

Most other irregularities in the process of acquiring military status are considered to render it voidable only at the option of the military authorities. *See In re* Grimley, 137 U.S. 147 (1890).

[268] One habeas corpus case involving an allegation of breach of an enlistment contract reached the Supreme Court but was decided on the procedural technicality that no one who had custody over the petitioner was within the territorial jurisdiction of the district court where the petition was filed. Schlanger v. Seamans, 401 U.S. 487 (1971). *But cf.* Strait v. Laird, 406 U.S. 341 (1972).

found general acceptance in the lower courts.[269] It has a solid basis in longstanding pronouncements of the Court that the formation of enlistment contracts is generally governed by the principles of ordinary contract law.[270]

Whatever the basis of the petitioner's denial of military status, it raises the same ultimate issue of lack of jurisdiction and justifies the comprehensive review of that issue by the courts.

b. Violation of the Constitution

Constitutional challenges undoubtedly present the courts with some of the most complex problems of reviewability. Although constitutional issues are generally complex, the situation has been aggravated in the case of the military by the fact that constitutional development there has lagged significantly behind that applicable to society at large. With its decisions in the 1970's, however, it appears the Court has finally removed any doubt that it will entertain the full range of constitutional challenges to military administrative activities. As the *Levy* case demonstrates, some accommodation to the special characteristics and requirements of the military may still be made on the merits of the case, so the ultimate disposition of a particular case may not be the same as in a purely civilian case. But at least there is no longer any restriction on the nature of the constitutional challenges which are eligible for review.

Perhaps one of the most serious complications resulting from the Court's liberalized policy with regard to reviewing constitutional challenges to military activities is that almost any legal challenge can be converted into a constitutional one by imaginative pleading. The due process clause is particularly susceptible to such use and could easily be invoked in a case where the military's delict is more specifically violation of a regulation,[271] or even an abuse of discretion.[272] As will be seen later, however, it is not necessarily an advantage to allege one of the other potentially reviewable challenges as a violation of the Constitution. The device is obviously most useful when no other reviewable challenge is available. It is important that the courts distinguish between bona fide constitutional challenges and those which are specious.

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[269] *See, e.g.*, Shelton v. Brunson, 465 F.2d 144 (5th Cir. 1972); Gausmann v. Laird, 422 F.2d 394 (9th Cir. 1969). The same principle is applied to voluntary extensions of enlistments. *See, e.g.*, Peavy v. Warner, 493 F.2d 748 (5th Cir. 1974).

[270] *See In re* Grimley, 137 U.S. 147 (1890). *Cf. In re* Morrissey, 137 U.S. 157 (1890).

[271] *See, e.g.*, Townley v. Resor, 323 F. Supp. 567, 568 (N.D. Cal. 1970).

[272] *See, e.g.*, Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971).

c. Violation of Statutory Authority

After lack of military jurisdiction, violation of statutory authority was the next earliest recognized basis for judicial review of military administrative activities. There are actually two variations of this challenge. Most cases are of an ultra vires nature, arising from some action taken in excess of requisite statutory authority.[273] Less frequently, there is a direct violation of a statutory provision.[274] There is no practical difference between the two so far as the reviewability of the challenge.

In a sense, an allegation of violation of statutory authority is closely related to a jurisdictional challenge. In fact, early non-reviewability cases, those which relied on the military tribunal analogy, apparently equated the jurisdiction of a court-martial to the statutory authority for a military board.[275] In the ensuing years, however, a fairly clear distinction between the two has evolved. In connection with military administrative activities, lack of military jurisdiction has become practically synonymous with lack of military status on the part of the intended subject of the action. Other situations in which the military acts beyond its authority are generally considered to fall into the category of violation of statutory authority.[276]

Because the basic question it raises is one of statutory interpretation, an area most familiar to the courts, an allegation of violation of statutory authority probably presents the simplest issue of non-reviewability for the courts to decide.

d. Violation of Regulation

An allegation that the military has not followed its own regulations raises a somewhat more complex issue of reviewability. For one thing, interpretation of such regulations may sometimes require the court to venture into unfamiliar waters. More importantly, however, not every violation of a regulation opens the door to judicial review. Although it is probably not necessary that the regulation be a procedural one, it must be one intended primarily for the protection of individuals in the position of the person challenging it,[277] and it must make application of the protection to that class of persons mandatory.[278] In addition, of course, the

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[273] *See, e.g.*, Harmon v. Brucker, 355 U.S. 579 (1958).
[274] *See, e.g.*, Bell v. United States, 366 U.S. 393 (1961).
[275] See notes 46 and 54 and accompanying text *supra*.
[276] *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959).
[277] See text accompanying notes 154-60 *supra*.
[278] *Id.*

petitioner must have been prejudiced by failure to follow the regulation.[279] He has been prejudiced only if there is substantial doubt that the ultimate result would have been the same had the regulation not been violated.[280] Because all these requirements must be met, an allegation of failure to follow regulations may have to undergo considerable scrutiny to satisfy the first requisite in the process of establishing reviewability.

e. Abuse of Discretion

An insufficient factual basis for the action taken by the military may be alleged in any number of ways, as being arbitrary, capricious, or an abuse of discretion, or having no basis in fact, to name the most frequent. Although some technical distinctions might be made, for the most part these challenges are so overlapping and interrelated they can safely be treated as a single category so far as this discussion of their reviewability is concerned. For convenience, the entire category will be referred to as involving an abuse of discretion.

In at least three of the Supreme Court cases in which the military has prevailed on the issue of nonreviewability, the opinions have revealed a strong aversion to judicial review of the factual basis of the military's action.[281] In only one case has there been even the slightest indication of the Court's willingness to permit such review, and that appears to have been inadvertent.[282] It is therefore not surprising that this was not one of the challenges enumerated as reviewable in *Mindes*.

The different character of the issues raised by an allegation of abuse of discretion is apparent when compared with the other challenges previously discussed. Allegations that the military is without jurisdiction, or has violated the Constitution, a statute, or even its own regulations usually involve fairly clear questions of legal interpretation, issues the courts are particularly well qualified to address. Allegations going to the factual basis of the action taken by a military official call on the court to second-guess that official in what may well be his area of expertise and one totally unfamiliar to the court.

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[279] *See* Peavy v. Warner, 493 F.2d 748, 750 (5th Cir. 1974).

[280] *See* Denton v. Secretary of the Air Force, 483 F.2d 21, 28 (9th Cir. 1973).

[281] Orloff v. Willoughby, 345 U.S. 83 (1953); Denby v. Berry, 263 U.S. 29 (1923); Reaves v. Ainsworth, 219 U.S. 296 (1911). *Cf.* Perker v. Levy, 417 U.S. 733, 761 (1974); Burns v. Wilson, 346 U.S. 137, 142 (1953). Also see note 122 and accompanying text *supra*.

[282] Negre v. Larsen, *consolidated sub nom.* Gillette v. United States, 401 U.S. 437 (1971). See notes 196-206 and accompanying text *supra*.

This difference may create the impression that problems of reviewability could be greatly simplified by approaching each case from the viewpoint of whether it involves a question of law or a question of fact, the former being reviewable, the latter not. Unfortunately, there is no such simple solution. Even aside from the complications of that most ambiguous middle ground, mixed questions of law and fact, such an approach ignores the fact that whether an official has acted arbitrarily or abused his discretion is itself a question of law.[283] Neither are lawsuits born in a vacuum; almost every case involves disputed questions of fact, even cases raising very clear and important questions of law. There is no way a trial court could be required to decide the one without being allowed to decide the other. The problem is complicated even further in the case of military administrative activities because so few of them involve formal proceedings; there usually are no findings of fact for the trial court to accept, even were it inclined to do so. Finally, even questions of law are not necessarily reviewable; challenges clearly raising important constitutional questions are sometimes not reviewable.[284] Therefore, reviewability cannot be made to depend on whether a particular question is one of law or one of fact.

Nevertheless, it is apparent from the cases that there is much greater judicial restraint in reviewing allegations of abuse of discretion by a military official than there is in the case of any of the other four legal challenges. If the Supreme Court decisions which have been examined are still valid, in fact, it is difficult to avoid the conclusion that the factual basis of a military action is completely nonreviewable. Many lower federal courts do review the factual basis, however.[285]

Undoubtedly, there are many circumstances when the courts should not interfere with the discretion of military officials and the factual basis for their actions should not be subject to judicial review. On the other hand, there are circumstances when judicial review of an alleged abuse of discretion imposes a relatively minor burden on the military in relation to the adverse consequences to an individual prejudiced by what may have been arbitrary action. To preclude judicial review altogether when abuse of discretion is alleged would be to extend to the military greater deference than is necessary to safeguard its legitimate interests. There must therefore be some discrimination among challenges of this type. It

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[283] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 29.01, at 525 (3d ed. 1972).

[284] *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972).

[285] *See, e.g.*, Hutcheson v. Hoffman, 439 F.2d 821 (5th Cir. 1971); Beaty v. Kenan, 420 F.2d 55 (9th Cir. 1969); United States *ex rel.* Goldstein v. McNamara, 270 F. Supp. 892 (E.D. Pa. 1967). Each of these cases used the basis in fact test.

is for this reason that abuse of discretion is included here as a potentially reviewable challenge, notwithstanding the Supreme Court precedents to the contrary. Certainly there must be a greater degree of judicial restraint in reviewing allegations of abuse of discretion than in the case of any of the other challenges, but, in the two-step approach to determining reviewability, abuse of discretion should not be eliminated at the first step. Rather, the legitimate interests of the military should be protected in the second step, the balancing process.

2. The Role of Balancing

Under the *Mindes* formula, a balancing test would be the second step in the process of determining the reviewability of military actions. There are certain difficulties inherent in any balancing test, since the very subjectivity which allows the flexibility necessary to provide a just result in different cases also diminishes the predictability of the law and increases the influence of the personal attitudes of individual judges. However, this weakness should pose no greater problem in military-related cases than in other cases where the balancing test is already widely and successfully used.

The balancing test proposed by *Mindes* does differ from the usual balancing test, though; it is not a test to resolve the merits of the case but only to determine whether and to what extent the court will consider the merits. The interests to be weighed, therefore, will not necessarily be the same ones normally considered, nor will they necessarily be considered in the same way. For example, the particular circumstances of each individual case are of vital importance and would weigh heavily in a balancing test to decide the merits. But in determining reviewability, broader and more general considerations will usually be the major factors.

Because the balancing test to determine reviewability is a much more limited test, it calls for restraint on the part of the court to confine its inquiry to the reviewability issue without involving itself in the merits of the case. In some instances this may be difficult to do, particularly when the substantive issue is one which must be resolved by balancing, too. Nevertheless, it is important, if there is to be a principled approach to reviewability, that the question be resolved in a preliminary step separate and distinct from the merits of the case.

Use of a balancing test, although not a simple process, is probably the best means available to decide the reviewability of a particular legal challenge when there is truly a question as to its reviewability. It may be, however, that the *Mindes* case overstates the need for balancing if it requires this as a necessary second step

no matter which potentially reviewable legal challenge is identified in the first step. On the basis of both precedent and logic, it appears that the first step will very often be sufficient to determine reviewability and that the balancing process will not be necessary at all.

Lack of jurisdiction, for example, is always reviewable. There is no need to resort to balancing because there is no conceivable circumstance under which a court would be justified in refusing to review such a challenge. If the court considers the urgency of the circumstances sufficiently grave, it may interpret the Constitution or some statute to supply the necessary jurisdiction, or even find it inherent, but it cannot refuse to consider the issue. The jurisdictional challenge has always been an exception to the doctrine of nonreviewability, and there is no precedent whatsoever to indicate that its reviewability may be diminished by subjecting it to a balancing test.

The situation is much the same in the case of a challenge based on a violation of statutory authority. The Supreme Court has never indicated that a balancing test is appropriate in determining the reviewability of a military action challenged on that ground. It has, in fact, invariably reviewed such challenges to determine the substance of the allegations. Even aside from the weight of precedent, the use of balancing would be difficult to justify. If Congress has seen fit to impose certain requirements on the military or to withhold the necessary authorization for certain actions, the courts should not substitute their judgment, even if they believe other interests should have been weighed in making the decision. It is the responsibility of Congress to do the appropriate balancing when it drafts and enacts the statute.

It also appears unnecessary to resort to a balancing test to determine the reviewability of a challenge based on failure of the military to follow its own regulations. The reasons are much the same as in the case of violation of statute. Since this type challenge has been recognized, the Supreme Court has never indicated that a balancing test is necessary and has invariably decided the merits of such cases. The military authorities write the regulations in the first place, and they certainly consider the needs of the service in doing so. In addition, military regulations can readily be changed to adjust to new requirements. There is therefore little need for the courts to protect the military from itself, and no balancing is necessary in these cases, at least not in determining reviewability.

The role of balancing in determining the reviewability of constitutional challenges to military activity is more complex. For one thing, there are two different categories of such challenges. Most of

the challenges the Supreme Court has found reviewable have involved an allegation that a statute on which the military action is based is unconstitutional.[286] There is no quesiton that challenges of this type are reviewable without the need for a preliminary balancing test.

A constitutional challenge may also be directed against the military activity itself,[287] rather than against an underlying statute. Challenges of this type are not always reviewable,[288] and the balancing test can play an important role in determining whether and to what extent they should be reviewed. The range of possible constitutional challenges is so broad there must be some means of sorting them out to protect both the military and the courts from an undue burden, while at the same time providing judicial review in deserving cases. A balancing test appears to be the only practical means of accomplishing this.

When the legal challenge to a military activity is based on an allegation of abuse of discretion, there is no guidance available from the Supreme Court as to the role of balancing in determining reviewability, because each time such an allegation has been considered it has been found nonreviewable. As previously observed, however, although a very high degree of judicial restraint is appropriate, these challenges should not be completely beyond judicial review. A balancing test appears to be the best means of reconciling the needs of the military with the individual's interest in fair treatment.

From this examination of the role of balancing in determining the reviewability of each of the five potentially reviewable challenges to military activities, it is apparent that the need for this second step is much more limited than one might conclude from the *Mindes* case. This is not necessarily because a balancing test is inherently unsuitable for determining the reviewability of each of these challenges. But since it is so difficult to hypothesize a situation in which a challenge based on lack of jurisdiction, violation of a statute or regulation, or the unconstitutionality of a statute could

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[286] *See, e.g.*, Frontiero v. United States, 411 U.S. 677 (1973).

[287] The promulgation of a regulation should be considered a military action in this sense. Thus, the reviewability of a constitutional challenge to a military regulation would be subject to a preliminary balancing test, unlike a similar challenge to a statute. Although there is a definite analogy between constitutional challenges directed at statutes and those directed at regulations, the latter should not be subject to judicial review to the same extent as the former. The procedures for most military actions are institutionalized by provisions in regulations. If all regulations were reviewable without a preliminary balancing test, the courts would in effect be reviewing nearly every military action.

[288] *See, e.g.*, Laird v. Tatum, 408 U.S. 1 (1972).

ever be found nonreviewable, the outcome of the balancing process is so inevitable in those cases as to make it superfluous to go through the formality; the task of determining the reviewability of military administrative activities is greatly simplified by dispensing with it. In cases involving one of the other challenges, however, where there is often a real question about reviewability, the balancing process is a very important step and the only reasonable means available for reconciling the conflicting interests involved. That process must now be examined more closely.

3. The Balancing Process

Since it has been determined that resort to a balancing test to determine the reviewability of military administrative activities is really necessary only in the case of two types of legal challenges, violation of the Constitution (other than by a statute) and abuse of discretion, the next logical question is whether the same balancing test is appropriate for both types.

There are obvious and substantial differences between the two. A constitutional challenge seems so much more serious that one might expect a more receptive attitude on the part of the courts, and therefore a less stringent balancing test than in the case of an abuse of discretion. However, in view of the fact that so many grievances can be alleged in constitutional terms, there will be vast differences in gravity even among the various constitutional challenges. The court in *Mindes* recognized this:

> Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in courts-martial situations which raise issues of personal liberty.[286]

Any balancing test used to determine the reviewability of constitutional challenges will have to be sufficiently flexible to encompass the full gamut of alleged constitutional violations. If it does that, it is not unreasonable to expect that it will also be sufficiently flexible to be applied to allegations of abuse of discretion.

To be complete, the balancing test should also incorporate all the considerations identified in the earlier examination of the decisions of the Supreme Court as having a bearing on the reviewability of military administrative actions. These include the civilian or military status of the person making the challenge, the nature of the military action challenged, and the nature of the relief sought. There undoubtedly are many other considerations which

[286] Mindes v. Seaman, 453 F.2d 197, 201 (5th Cir. 1971).

must be included as well. An attempt will be made to identify these as the balancing process is examined in greater detail.

Mindes mentioned four factors to be weighed in the second step of the process of determining the reviewability of military actions:

> (1) The nature and strength of the plaintiff's challenge to the military determination. . . .
>
> (2) The potential injury to the plaintiff if review is refused.
>
> (3) The type and degree of anticipated interference with the military function. . . .
>
> (4) The extent to which the exercise of military expertise or discretion is involved. . . .[290]

These criteria provide an excellent beginning for the effort to identify specific factors to be considered in the balancing process.

a. The Individual's Interest

It is readily apparent that the first two factors mentioned in *Mindes* reflect the individual's interest. For the most part, they are the same basic factors considered in any situation in which a balancing test is appropriate; that is, they are not necessarily different because the interests against which they are to be weighed may be peculiar to a military society.

One exception occurs, however, in connection with the first factor, the nature and strength of the plaintiff's challenge, or more precisely, of the right asserted. There is one consideration here which is peculiar to military-related cases. That is the status of the person asserting the right. It has been recognized that the Supreme Court is often more reluctant to review a challenge asserted by a member of the military than a similar challenge by a civilian. And in the *Levy* case the Court indicated that even the first amendment right of free speech was affected by an individual's status as a member of the armed forces.[291] Therefore, whether the plaintiff is civilian or military will have an important bearing on the weight of his asserted right in the balancing process.

Other than that, the considerations affecting the nature and strength of the right asserted are the usual ones. These include the source or basis of the right, the degree to which it is traditionally recognized as being important, fundamental, or taking precedence, and how clearly the right is genuinely at issue under the particular circumstances. For example, an allegation indicating a real interference with the right of free speech would weigh heavily under these considerations since its source is in the Constitution and it is

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[290] *Id.*

[291] Parker v. Levy, 417 U.S. 733 (1974).

not only recognized as fundamental but as having a preferred position.[292] An equally real abuse of discretion, on the other hand, would rank substantially lower on the scale of values since neither its source nor its traditional importance is comparable. This is where the balancing process can discriminate between important constitutional challenges and those based on abuse of discretion, thereby maintaining its validity for both.

The second factor to be considered in connection with the individual's interest is the nature of the injury threatened or suffered. Obviously, a trifling infringement, even of a very important right, will be given less weight than a serious interference. The specificity of the injury is also an important consideration. Lack of specific injury to specific persons has been a major factor in the nonjusticiability cases involving the military.[293]

b. The Military's Interest

The last two factors suggested by the *Mindes* case to be weighed in the balancing process reflect the interest of the military. These, of course, are much more peculiar to military-related cases than the factors reflecting the individual's interest, and they warrant close examination.

Although *Mindes* referred to the extent of military expertise *or* discretion involved, as if the two were interchangeable, these two factors are really quite distinct. The fact that a decision is within the discretion of the military, and therefore of the executive branch of government, brings into play the principle of separation of powers, the major basis of the entire concept of nonreviewability. Because of its strong constitutional foundation, this should be the most important single factor weighed by the court in the balancing process. The principal consideration bearing on this factor is the degree to which the determinations involved in the action challenged are properly the prerogative of the Congress under its authority to make rules for the government and regulation of the armed forces,[294] or of the President as their commander-in-chief,[295] or of appropriate military officials acting within the authority lawfully delegated to them by the President or Congress.

The degree of military expertise involved in the action challenged, while not unimportant, does not rise to the same significance in the court's consideration as the degree of military discretion involved. It raises a practical problem for the court,

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[292] *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 n.4. (1938).

[293] *See* Gilligan v. Morgan, 413 U.S. 1 (1973); Laird v. Tatum, 408 U.S. 1 (1972).

[294] U.S. CONST. art. I, § 8, cl. 14.

[295] U.S. CONST. art. II, § 2, para. 1.

rather than a constitutional one: the greater the degree of military expertise involved, the less the likelihood of the court adequately understanding the ramifications of the problem and being able to arrive at an informed and practical solution. Whereas interference with military discretion may be an excess of judicial authority, interference with military expertise cannot be more than an excess of judicial competence.

The other factor mentioned by *Mindes* as bearing on the interest of the military is the type and degree of interference with the military function. This is closely related to both the discretion and expertise involved, yet it is something more. The court elaborated somewhat on this factor:

> Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impair the military in the performance of vital duties, it militates strongly against relief.[296]

Among the considerations bearing on this factor is the nature of the military action challenged. Obviously there is a more direct and greater degree of interference in the court's reviewing the imminent shipment of a soldier to a combat zone than in reviewing the character of the discharge given a soldier separated from the service. The type of relief sought would also have a bearing, an injunction or restraining order usually involving the greatest degree of interference. The specificity of the possible relief would also be important; there should be much greater judicial restraint when the court is called upon to take some broad and sweeping action than when it is asked to grant specific and limited relief.

Another aspect which should not be ignored in considering the degree of interference with the military function is the fact that a major increase in administrative burden may itself constitute a serious interference. If the courts demonstrate a readiness to intervene in routine administrative matters, they run the risk of inundating not only the armed forces but themselves in the flood of litigation which could ensue.[297] The very quantity of potential applications for relief involving administrative actions of the type challenged is itself an important consideration.[298]

Although not mentioned in *Mindes*, there is still another factor bearing on the interest of the military which must be considered in

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[296] Mindes v. Seaman, 453 F.2d 197, 201 (1971).

[297] They also ignore the Supreme Court's admonition in Orloff v. Willoughby, 345 U.S. 83, 93 (1953).

[298] *See* United States *ex rel.* Schonbrun v. Commanding Officer, 403 F.2d 371, 375 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969) (potential flood of *unmeritorious* applications for relief militates against review).

the balancing process: the special requirements of military society. These requirements have been recognized by the Supreme Court repeatedly.[299] Although closely related to all three of the previous factors, this is something separate and distinct from all of them.

The military's need for discipline and obedience is undoubtedly its major difference from civilian society; few men will follow an order which causes them to confront injury and death so directly unless the habit of obedience has been thoroughly instilled. Thus, there is a special need to restrict activities which foster disobedience, open disrespect for authority, or otherwise undermine discipline.

Another special requirement stems from the fact that members of the armed forces may not unilaterally terminate their service. Because the military must often send people where they would rather not go and require them to do what they would rather not do, there is a certain involuntary quality about military service even when conscription is not in effect. If members of the service were permitted to resign whenever they chose, the effectiveness of the military would be destroyed.[300] By the same token, the armed forces have a strong interest in discouraging their members from quitting in a less direct manner by deliberately seeking separation through the administrative elimination process by which the services rid themselves of ineffective personnel. It is these concerns which give the military such an interest in the character of the discharge received by members who do not complete their term of service satisfactorily. If such persons would routinely receive the same honorable discharge as those who did complete their service, there would be no deterrent against resigning in this indirect manner. Even under the current system where discharges of a lesser character are common, a large number of personnel deliberately seek separation by administrative elimination.[301]

The military has many other special requirements. They arise from its need to preserve military secrets and protect national security, its possession of unique equipment vital to the national

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[299] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) and cases cited therein.

[300] This would be true even if there were an unlimited quantity of new recruits available. Aside from the high costs involved in training new personnel, orderly personnel planning and management would be completely disrupted.

[301] This observation is based on the author's personal experience over almost twenty years of military service as an Army judge advocate and on the reports of many other military personnel during that time. The Department of the Army's cognizance of this problem is reflected in its advice to enlisted personnel to avoid "[t]he 'Barracks Experts' [who] will try to tell you it's easy to get your discharge changed . . ." once you have escaped the Army. U.S. DEP'T OF ARMY, PAMPHLET NO. 635-2, MONEY IN THE BANK . . . AN HONORABLE DISCHARGE 4 (30 June 1967).

defense and all manner of weapons unthinkably dangerous in the hands of criminals, the relative availability to its own personnel of lethal weapons, and the different nature of living conditions, whether in a barracks, aboard ship, or in a combat zone. An all-inclusive enumeration of the needs of the specialized society is not possible, but the courts should be alert to recognize their presence and weigh them in the balancing process to determine the reviewability of the military action challenged.

C. SUMMARY AND CONCLUSIONS

Although it is clear from this analysis that there is no magic formula which the courts may invoke to spare themselves difficult decisions as to the reviewability of military administrative activities, it is equally clear that the courts could take a much more principled approach than they generally have.

Much of the present confusion undoubtedly arises from the fact that the old doctrine of nonreviewability was neither adequately elaborated nor understood in the first place. There was a tendency to construe it as a declaration that military administrative activities as such were absolutely exempt from judicial review. Such an interpretation was so completely lacking in flexibility that, when the Supreme Court finally made it clear that military administrative activities are sometimes reviewable, there seemed to be no way the old doctrine could continue to stand: if such activities were no longer nonreviewable, they had to be reviewable. A few federal courts subsequently abandoned all restraint. Others, apparently convinced that restraint was still necessary in at least some cases, were hard pressed to explain why they sometimes found military activities were reviewable and sometimes found they were not. It seemed to depend as much on visceral reaction as on any reasoned legal theory.

But in reality, from the time that activities of the executive departments in general were recognized as reviewable, the Supreme Court never held military activities to be completely beyond judicial review. With remarkable consistency, its decisions have indicated that certain challenges to military activities are not reviewable but that others are. And, to the extent it is necessary to an adequate determination of the validity of one of these reviewable challenges, the military activity is subject to judicial review. Such was the import of *Reaves v. Ainsworth*,[302] the case establishing the doctrine of nonreviewability of military administrative activities in the first place, and the Court has never

[302] 219 U.S. 296 (1911).

contradicted that position. There has been, over the years, some expansion, or at least clarificaiton, of the categories of challenges which are reviewable, but the basic concept has not changed.

The Court's decisions have established four general categories of legal challenges to military administrative actions as reviewable:

(1) *lack of jurisdiction over the person*—This is the basis for the many habeas corpus cases brought by persons with apparent military status. It may result from:

(a) a failure to acquire military status due to some defect in the enlistment, induction, or order to active duty which renders it void;

(b) an avoidance of military status which has been acquired but which was subject to some condition or infirmity in the acquisition process; or

(c) termination of military status by an effective discharge or other separation from military service.

(2) *violation of statutory authority*—This may be either:

(a) an action ultra vires when the requisite statutory authority is exceeded or is altogether lacking; or

(b) a direct violation by doing what the statute prohibits or failing to do what it requires.

(3) *violation of its own regulation*—The regulation must be one intended primarily for the protection of individuals in the position of the person challenging it and one which makes that protection mandatory.

(4) *violation of the Constitution*—This may occur when the military action:

(a) is based on an unconstitutional statute; or

(b) is itself unconstitutional.

Review of a fifth type of challenge to military administrative actions was clearly barred by the doctrine of nonreviewability and, in fact, has not yet been specifically recognized by the Supreme Court as reviewable. In the interest of justice, however, it should sometimes be reviewable, though always with the utmost judicial restraint:

(5) *abuse of discretion*—This encompasses allegations that the military action is arbitrary and capricious, has no basis in fact, and all other challenges going to the factual basis of the action.

Of these five categories of challenges, the Court's decisions indicate that the first three, and the largest subcategory of the fourth, are always reviewable: lack of jurisdiction, violation of statutory authority, violation of certain regulations, and violations of the Constitution when the challenge is directed at an unconstitutional

statute on which the military action is based. To determine the reviewability of the other challenges, unconstitutionality of the military action itself and abuse of discretion, a second step is necessary: a balancing process.

There are six major factors to be weighed in this balancing process, the first two reflecting the interests of the individual, the last four the interests of the military:

(1) *the nature and strength of the right asserted*—This may be affected by the status of the individual as a member of the military as well as by the more usual considerations such as the source of the right and its traditional importance.

(2) *the nature of the injury threatened or suffered*—The seriousness of the injury is the major consideration here, but its specificity may also have a bearing.

(3) *the degree of military discretion involved*—This is an extremely important factor since it reflects the principle of separation of powers. The courts must be cautious not to usurp the prerogatives of the President or Congress or of the officials to whom they have delegated their authority.

(4) *the degree of military expertise involved*—Technical competence is the consideration here. The courts must recognize the limitations on their ability adequately to comprehend all aspects of the issues at stake and to arrive at an informed solution.

(5) *the degree of interference with the military function*—This depends on such considerations as the nature of the military action challenged, the nature of the relief sought, the specificity of the possible relief, and even the quantity of military actions of the kind challenged.

(6) *the special requirements of the military community*—The many ways in which this "specialized society"[303] differs from civilian society give rise to a number of special requirements. Foremost among the many considerations here are the military's need for a unique kind of discipline and obedience, and the fact that military members may not unilaterally terminate their service.

This procedure—first determining whether one of the five reviewable challenges has been raised, then, for the two challenges for which it is necessary, proceeding through the balancing process—provides a principled approach for determining the reviewability of challenges to military administrative activities. Obviously, it is also improtant to such an approach that the question of reviewability be decided, very consciously, separate from and prior to the merits of the case. And it is absolutely imperative

[303]Parker v. Levy, 417 U.S. 733, 743 (1974).

that the court avoid the error of deciding the reviewability of the military activity itself, rather than the reviewability of the particular challenge to it. If the same military action is the subject of several challenges in the same suit, each challenge must be identified, isolated, and its reviewability determined separately by the process outlined above. This approach also does much to eliminate the problem of determining the appropriate scope of review, since that is largely a matter of deciding which issues, and therefore which challenges, the court will review in the case before it.

Another question that remains is what standard of review a court should use if it determines that it will review a particular challenge based on an allegation of abuse of discretion. As already observed, this is an area which calls for the utmost judicial restraint, all the more so because of Supreme Court precedents against review of the factual basis for military actions. The Court's reference to the "basis in fact" test in the *Negre* case,[304] though apparently not deliberate, provides at least some justification for the application of that standard, and it is already widely used by the lower federal courts. In addition, since it is the most limited standard of review available, it best comports with the need for judicial restraint indicated in other decisions of the Court.

One problem with the basis in fact test is the difficulty the courts seem to have in genuinely adhering to it; there is a decided tendency to require a *reasonable* basis rather than *any* basis in fact.[305] This greatly increases the likelihood of the court substituting its judgment for that of the agency or official primarily responsible, exactly what the Supreme Court has indicated must not be done in reviewing military administrative activities. The courts must therefore be scrupulous in adhering to the letter and spirit of the basis in fact test once they determine the factual basis of a military action should be reviewed.

It is submitted that, if the courts would consistently follow a principled approach in determining the reviewability of challenges to military administrative activities, the increased degree of predictability would itself have a salutary effect on the entire subject area. Being more certain of the probable result, individuals would tend to raise fewer unreviewable challenges and therefore have fewer unsuccessful suits; the military authorities could be expected to reduce their reliance on the technical defense of nonreviewability and to move more swiftly to remedy those procedures of theirs which tend to provide a basis for successful

[304] Negre v. Larsen, *consolidated sub nom.* Gillette v. United States, 401 U.S. 437 (1971).

[305] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.07, at 149-52 (1958).

suits. The courts would experience an overall decline in the volume of litigation in this area. And all parties involved could concentrate their energies and resources on resolving the substantive questions involved rather than struggling with amorphous issues of reviewability.

ILLEGAL LAW ENFORCEMENT: AIDING CIVIL AUTHORITIES IN VIOLATION OF THE POSSE COMITATUS ACT*

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Here, then is one of the paramount principles for which the Revolutionary War was fought; soldiers, needed and honored in war for the valor and strength that turns back the nation's enemies, are never to be used against their civilian countrymen, no matter how expedient their utilization might seem.[1]

I. INTRODUCTION

The Posse Comitatus Act provides ample reason for military commanders to prohibit their subordinates from performing civil law enforcement missions:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.[2]

At the same time the press has been questioning whether commanders diligently comply with the dictates of the Act,[3] the courts have been issuing warnings to the military establishment. In 1972

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[1]Engdahl, *Soldiers, Riots, and Revolution: The Law of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 28 (1971) [hereinafter cited as Engdahl].

[2]18 U.S.C. § 1385 (1970).

[3]*See, e.g.*, Washington Post, Feb. 4, 1972, at C1, col. 3; Daily Progress (Charlottesville, Va.), Oct. 10, 1974, at A9, col. 1.

the United States Supreme Court, in dicta, clearly indicated its aversion to "any military intrusion into civilian affairs."[4] In a more recent case, the United States Court of Appeals for the Fourth Circuit ruled that only a technicality precluded it from finding a violation of the Act and excluding evidence gathered for civilian authorities by Marines.[5] Notwithstanding its holding, the court admonished the military for its participation in civilian law enforcement and issued the following warning:

> We reserve, however, the possibility that such [an exclusionary] rule may be called for should repeated cases involving military enforcement of civilian law demonstrate the need for the special sanction of a judicial deterrent.[6]

Questions of unlawful military involvement in civilian law enforcement arise in two general contexts. The first concerns military participation at the behest of the President, and the second concerns military aid to local civilian authorities in the performance of their ordinary law enforcement functions without Presidential approval or other lawful authority. The former has been the more topical in the past, and the President's authority in this area has been subject to considerable scrutiny and comment.[7] In some areas the President clearly has authority to use military forces for civil law enforcement by virtue of express statutory authority,[8] which constitute express exceptions to the prohibition of the Posse

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[4]Laird v. Tatum, 408 U.S. 1 (1972) (involving a claim of unlawful surveillance of civilian political activity by the U.S. Army). In a 5 to 4 decision the Court held that a justiciable controversy did not exist because the plaintiffs had failed to show specific harm or threat of harm. The last paragraph of the majority opinion contains a clarion warning to the military about involvement in internal affairs of the United States:

> Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history, or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied

408 U.S. at 15. The Court has recognized the Posse Comitatus Act as a limitation on the use of military forces for execution of civil law. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 644-46 (1952).

[5]United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[6]*Id.* at 373.

[7]*See* Faust, *The President's Use of Troops to Enforce Federal Law*, 7 CLEV.-MAR. L. REV. 362 (1958); Poe, *The Use of Federal Troops to Suppress Domestic Violence*, 54 A.B.A.J. 108 (1968); Wiener, *Martial Law Today*, 49 MIL. L. REV. 89 (1970); Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy*, 1966 DUKE L.J. 413; Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130 (1973).

[8]10 U.S.C. §§ 331-33 (1970).

Comitatus Act. Although it is generally agreed that the Act applies to the President,[9] that opinion is not universally accepted.[10]

More importantly, however, it is in the second context that questions concerning the application of the Posse Comitatus Act are surfacing with increased frequency. This article will focus on the aid given local law enforcement authorities where such assistance is provided without the approval or knowledge of the President. Among the continuing questions which this article will address are whether commanders below the departmental level have any authority to aid in civil law enforcement; what guidance the military departments have given subordinate commanders; whether commanders are properly exercising whatever authority they possess; and what the potential consequences for abuses of authority are.

The Act, passed in 1878, was characterized by a federal circuit judge in 1948 as "this obscure and all-but-forgotten statute."[11] In the only significant published discussion of the Act, Major H. W. C. Furman observed that since its passage the Act had "seldom been construed by the courts or Attorney General."[12] The relative obscurity enjoyed by the Posse Comitatus Act during the past hundred years has now been lost and the courts are now being required to determine the Act's applicability. In the last five years, the U.S. Courts of Appeals for the Fourth[13] and Ninth[14] Circuits have decided cases with significant Posse Comitatus issues, and the Act has recently been used successfully by defense attorneys in at least three of the so-called "Wounded Knee Indian uprising" prosecutions.[15] Also, for the first time, the Act is being cited in reported state court decisions.[16] Commanders who, unwittingly or otherwise, continue to test the patience of the federal courts are surely on a collision course with the Posse Comitatus Act.

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[9]*See* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See generally* authorities cited in note 7 *supra*.

[10]*See* Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 98 (1960); Pollitt, *A Dissenting View, the Executive Enforcement of Judicial Decrees*, 45 A.B.A.J. 600, 606 (1959).

[11]Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

[12]Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960) [hereinafter cited as Furman].

[13]United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[14]United States v. Cotton, 471 F.2d 744 (9th Cir. 1973).

[15]United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808(8th Cir. 1975); United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975).

[16]Hubert v. Oklahoma, 504 P.2d 1245 (Okla. Crim. App. 1972); Burns v. Texas, 473 S.W.2d 19 (Tex. Crim. App. 1973).

II. BACKGROUND OF THE ACT

An historical review of the opposition to military involvement in civil law enforcement in this country and a description of the specific incidents leading to passage of the Act help put current issues into clearer perspective.[17] Strong opposition to military encroachment into civil affairs has surfaced from time to time since colonial days. Eighteenth century colonists were distraught over the British practice of requisitioning their property for use as quarters for British soldiers.[18] General Gage, the British military commander in North America and Governor of the Province of Massachusetts, recognized this sensitivity and desired to make the quartering of his troops in private homes as light a burden as possible.[19] To reduce military-civilian confrontation, he also directed that his subordinates avoid using their troops to aid civil authorities as much as possible.

But conflict was inevitable and it erupted in Boston in 1770 in a bloody and ugly incident known since as the "Boston Massacre."[20] Smaller incidents in Boston had finally culminated in this confrontation between disorderly citizens and armed soldiers in which five Bostonians were killed and others were wounded. The troop commander and all but two of his men were acquitted of any wrongdoing.

Boston continued to be the focal point for dissident and protest activities highlighted by the Boston Tea Party in 1773.[21] British soldiers were used to suppress this and similar disorders, and in 1774 the so-called "Administration of Justice Act" was passed by Parliament. Although it provided that the use of excessive force in suppressing disorders was punishable, it also permitted the removal of the trials of law enforcement officials including soldiers to other colonies or to England. The net effect was to make the trial of any offender very difficult.[22]

The Declaration of Independence specifically enumerated the colonists' objections to military interference with their lives. It criticized the King and English Parliament "for quartering large bodies of armed troops among us," and "for protecting them by a mock trial, from Punishment for any Murders which they should

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[17] For a comprehensive development of military involvement in civil disorders *see* Engdahl, *supra* note 1.

[18] *See* 3 G. BANCROFT, HISTORY OF THE UNITED STATES 105, 451 (1916) [hereinafter cited as BANCROFT].

[19] *See* F. WIENER, CIVILIANS UNDER MILITARY JUSTICE 79-80 (1967).

[20] *See* 3 BANCROFT, *supra* note 18, at 368-78.

[21] *Id.* at 443-58.

[22] *See* Engdahl, *supra* note 1, at 26.

commit on the Inhabitants of these States." It further criticized the King for having "affected to render the Military independent of and superior to the Civil Power."

Throughout the Constitutional Convention convened in 1787, one of the major problems confronting the delegates was how to handle their fear of a standing army. For example, in the session on August 18, 1787, there was considerable controversy over whether there should be a standing army at all or whether it would be preferable to be dependent solely upon the state militias. Under the latter proposal the federal government was to provide some coordination and regulation of the militias in order to have a uniformly disciplined and trained force.[23] General Pinckney of South Carolina argued for a national armed force but proposed that the Constitution provide for very specific regulation of this force by including in it prohibitions against quartering troops in private homes and maintaining a peacetime force except by legislative approval. He also wanted to include a statement that the military would always be subordinate to civil authority.[24] Although these specific measures were not included in the final draft of the Constitution, the records of the debates indicate that the drafters were quite concerned about insuring absolute civilian control over the military. Therefore, they did include affirmative safeguards to prevent the military from accruing too much power.[25] The legislative branch was given the authority to raise a standing army[26] and to control the state militias when "in the service of the United States."[27] Another significant legislative control over the military was the provision for frequent review of military appropriations. This control was established by specifying that funds could be appropriated for not longer than two years;[28] and that although the President was designated Commander in Chief,[29] the power to declare war was reserved to the legislative branch.[30]

The issue of the proper role for a national military force was raised in the states during the ratification process. Convention delegate Luther Martin, reporting to the Maryland legislature in November 1787 commented that ". . . when a government wishes

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[23] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1786, at 329-33 (rev. ed. 1937) [hereinafter cited as FARRAND]; G. HUNT & J. SCOTT, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 217 (1920).

[24] 2 FARRAND, *supra* note 23, at 334-35.

[25] *See* 2 G. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 527-31 (1897).

[26] U.S. CONST. art. I, § 8, cl. 12.

[27] *Id.*, cl. 16.

[28] *Id.*, cl. 12.

[29] U.S. CONST. art. II, § 2.

[30] U.S. CONST. art. I, § 8, cl. 11.

to deprive its citizens of freedom, and reduce them to slavery, it generally makes use of a standing army for that purpose."[31] Several states were quite concerned about the roles a standing army might fulfill, a concern that is reflected in those portions of the Bill of Rights dealing with the necessity of a state militia and the right of the people to keep arms[32] and with the restrictions on quartering soldiers in private homes.[33]

The Judiciary Act of 1789 contained this country's first posse comitatus legislation. In specifying the duties of federal marshals, the Act provided, in part, that ". . . he shall have the power to command all necessary assistance in the execution of his duty. . . ."[34] The Act did not specify that the marshal could call upon military forces to act as his posse, but three years later such a provision was included in an act which authorized the use of militia in various circumstances, for instance to assist the marshal's posse in executing civil law.[35] This provision gave rise to the practice of using military personnel, both militia and regular, to act as assistants to civil law enforcement officials.

The Act of 1792, however, authorized the use of militia, not regulars, making an intentional distinction between the two components based on the constitutional provision which allows the use of militia in executing the law.[36] Unfortunately the passage of time eroded this distinction and regulars were called upon to serve in the marshal's posse.[37] It is significant to note that when military personnel were called out to serve in a posse, they were considered to be performing the duty of all adult citizens to respond to the marshal's call.[38] In 1854 the Attorney General, citing the Lord Mansfield Doctrine of 1789, opined that persons serving in a posse comitatus were performing a citizen's duty regardless of their individual status, whether civilian, militia or regular.[38] In essence the

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[31] 3 FARRAND, *supra* note 23, at 209.

[32] U.S. CONST. amend. II.

[33] U.S. CONST. amend. III.

[34] Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 87.

[35] Act of May 2, 1792, ch. 28, § 9, 1 Stat. 265.

[36] U.S. CONST art. I, § 8, cl. 15.

[37] 16 OP ATTY GEN 162-64 (1878). Discussing the Act of 1789, the Attorney General stated: "It has been the practice of the Government since its organization (so far as known to me) to permit the *military forces of the United States* to be used in subordination to the marshal." *Id.* at 163 (emphasis added). No distinction is made between regular and militia.

[38] The 1792 Act did, however, provide that the President could call out the militia as a *military force* but only when an internal disorder was so violent that it could not be suppressed by the efforts of the normal law enforcement agency, the marshal and his posse. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264.

[38] 6 OP ATTY GEN 466, 473 (1854).

Mansfield Doctrine posited that soldiers could be called out by the marshal to aid in quelling internal disorder and that in so doing, they were acting as civilians and not as soldiers.[40] This basic philosophy was reiterated in an 1860 Opinion of the Attorney General. That Opinion stated that a military force could be used internally only as though it were a civilian posse and that on "such occasions especially, the military power must be kept in strict subordination to the civil authority, since it is only in aid of the latter that the former can act at all."[41]

With the exigencies of the Civil War, the attitude toward using military force to aid civil authority became even more liberal until gross abuses precipitated a return to the strict prohibition the Founding Fathers had envisioned. The trend toward liberalization began in 1861 when Congress replaced that portion of the 1792 legislation which limited presidential use of military force to situations where order could not be restored by ordinary law enforcement measures. The new act permitted the President to call out militia or regular forces when in his judgement it became impracticable to enforce the law with ordinary measures.[42]

During Reconstruction the once staunchly upheld principle of not using the regular military establishment for internal law enforcement was further eroded. The Reconstruction Act of 1867 implemented the congressional belief that military government rule was necessary in the Southern states.[43] Military districts governed by military commanders were established and during the period from 1866 through 1877 federal troops were used to quell disorders throughout the South so frequently that recounting individual incidents would add little to the historical development of military involvement during that period. As the states were restored to the Union, civil authority gradually acceded to the law enforcement functions.

Despite the Presidential pardons granted to all secessionists in 1868[44] and the restoration of all the Southern states to the Union by mid-1870,[45] embittered feelings remained, generating strife which resulted in the continued use of military forces. One of the better known instances involved suppression of Ku Klux Klan activities

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[40]*See* Engdahl, *supra* note 1, at 45.

[41]9 OP. ATT'Y GEN. 516, 522 (1860).

[42]Act of July 29, 1861, ch. 25, § 8, 12 Stat. 281.

[43]Act of March 2, 1867, ch. 153, 14 Stat. 428.

[44]*See* 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 708 (1898) [hereinafter cited as RICHARDSON].

[45]*See* A. SCHLESINGER, POLITICAL AND SOCIAL HISTORY OF THE UNITED STATES 1829-1925, at 244-47 (1927) [hereinafter cited as SCHLESINGER].

in South Carolina. Under the 1871 Ku Klux Klan Act [46] President Grant, at the Republican governor's request, sent federal troops into the state to apprehend klansmen and later suspended the writ of habeas corpus throughout a large portion of the state.[47]

As the use of troops to enforce civil law was reaching its high water mark in 1876, dissatisfaction with such use of troops was gaining momentum, especially in Congress. Until passage of the Posse Comitatus prohibition in 1878, the improper use of troops became a common method of aiding revenue officers in suppressing illegal production of whiskey; assisting local officials in quelling labor disturbances; and insuring the sanctity of the electoral process in the South by posting guards at polling places.[48] However, Reconstruction politics and the resurgence of the Southern Democrats forced a reexamination of the issue.

With the passage of the General Amnesty Act in 1872, two-party politics reemerged in the Southern states.[49] By 1874, the U.S. House of Representatives was back under Democratic control,[50] and by the end of President Grant's term in 1877 the white Democrats were again in control of all the Southern states except for Florida, South Carolina and Louisiana.[51] The 1876 presidential campaign pitted Samuel J. Tilden, Democrat from New York, against the Republican nominee, Rutherford B. Hayes.[52] That year seven thousand special deputy marshals were sent to watch the polls in the South.[53] In October, two months before the election, the incumbent Republican Governor of South Carolina asked President Grant to send troops to perform law enforcement functions in his state. Grant complied.[54] After the balloting, the troops were ordered to guard the local boards of canvassers in South Carolina, Florida, and Louisiana where the outcomes of the elections were not clear. Tilden had 184 uncontested electoral votes, one short of the majority needed for election. Hayes had 165 and most newspapers in the country had declared Tilden the winner.[55] The electoral votes

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[46] Act of April 20, 1871, ch. 22, § 3, 17 Stat. 13.

[47] 7 RICHARDSON, *supra* note 44, at 132-41.

[48] *See* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130 (1973).

[49] *See* SCHELSINGER, *supra* note 45, at 252.

[50] E. SPARKS THE AMERICAN NATION NATIONAL DEVELOPMENT 1877-1885, at 119, (1907) [hereinafter cited as SPARKS].

[51] 5 W. WILSON A HISTORY OF THE AMERICAN PEOPLE 99 (1902).

[52] *Id.* at 104.

[53] SPARKS, *supra* note 50, at 124.

[54] 7 J. RHODES, HISTORY OF THE UNITED STATES 1850-1877, at 225 (1906) [hereinafter cited as RHODES].

[55] *Id.* at 227-29.

in Florida, South Carolina, Oregon and Louisiana were contested and double votes were submitted, one set certified by the Democratic Party and one by the Republican Party in each of those states. A total of twenty electoral votes, exactly the number Hayes needed for victory,[56] was the subject of dispute. A special commission composed of eight Republicans and seven Democrats was to settle the controversy and as expected, each set of contested votes was awarded to the Republican candidate by an 8 to 7 vote.[57] Hayes was elected President and the Democrats were outraged and generally united in the belief that the use of federal troops was, in part at least, responsible for the loss of the election.[58]

The House of Representatives, with a Democratic majority, demanded that President Grant report on his use of military forces in the South during the election. On January 22, 1877 he complied and in his report stated that troops were used to counter intimidation and that they had not interfered with anyone's voting rights. The tenor of his report was that he provided troops to act as a posse for the marshals in order "to secure the better execution of the laws . . . ."[59] This report was immediately given close attention, and in March during House debates over the Army Appropriations Bill for the fiscal year ending June 30, 1878, the use of troops in the South was severely criticized:[60] "American soldiers policemen! Insult if true . . . ."[61] Charges were made that the Army had become a state constabulary and that the Attorney General had directed that ". . . any marshal . . . may upon his own private judgment, order any officer, even the General of the Army, to obey his command."[62]

However, over the protests of a vocal minority,[63] a majority of the

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[56] 9 E. WILEY & I. RINES, THE UNITED STATES: ITS BEGINNINGS, PROGRESS AND DEVELOPMENT 473-77 (1913).

[57] 7 RHODES, *supra* note 54, at 261-79.

[58] *See* notes 59-63 *infra*.

[59] 7 RICHARDSON, *supra* note 44, at 421.

[60] On March 2, 1877 Representative Atkins, calling for a reduction in the size of the Army, charged that in the preceding session the Congress had been deceived by the War Department and had authorized the enlistment of 2500 additional troops to be used on the frontier, which troops were actually sent into the Southern states. He declared that "the Army as an adjunct of civil government is wholly unnecessary and actually hurtful." 5 CONG. REC. 2112 (1877) (remarks of Mr. Atkins).

[61] *Id.*

[62] 5 CONG. REC. 2117 (1877) (remarks of Mr. Banning). As a part of the reduction in force, Representative Banning also recommended that the Bureau of Military Justice be entirely abolished.

[63] It is not the mere number of troops authorized, it is not merely the cost of the Army; it is the question of the employment of the Army. This is the cause of the deep feeling which prevades the people of this country today . . . . The fact is that a widespread belief exists that the Army of the country has been employed and is still being used for purposes dangerous to the liberties of the country.

5 CONG. REC. 2159 (1877) (remarks of Senator Bayard).

Senate disagreed with the House proposals that the Army be reduced and that it be specifically prohibited from enforcing the law. Consequently the 44th Session adjourned without providing appropriations for the Army for the next fiscal year.

The ardent desire to restrict the Army's role in civil affairs carried over to the next session of Congress and surfaced with greater intensity during debates on the Army Appropriation Bill for the fiscal year ending June 30, 1879. In the House it was argued that the Army had been improperly used to execute local laws, to control striking workers, to collect taxes and to arrest offenders. House members charged that these improper actions had been performed at the behest of United States Attorneys and marshals, internal revenue agents, state governors, sheriffs and other local law enforcement agents. Various Army reports were cited showing that in 1871 four companies helped collect revenue in New York, that from 1871 through 1875 there were more than 441 reported incidents in Kentucky in which soldiers were called out to aid federal and state law enforcement authorities, and that in 1876 at least seventy-one detachments of soldiers aided civil authorities. These reports further indicated that Army commanders were dissatisfied with the law enforcement assignments of their troops.[64] Representative Ellis argued that a request for a large Army was really a request for a "national gendarmerie, . . . a national police force."[65] The House voted to amend the Appropriations Act by including a prohibition against using the Army in a law enforcement role.[66] The Senate's initial reluctance was overcome after it was made clear that the amendment prohibited use of the military in a law enforcement role but that it did not prohibit use of the military for purposes expressly authorized by the Constitution or Congress.[67]

Shortly after the bill's passage the Attorney General, in response to a request from the Secretary of the Treasury, voiced his opinion that the long-standing practice of using troops as a posse comitatus had been disallowed at the direction of Congress and that troops

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[64] 7 CONG. REC. 3579-82 (1878) (remarks of Mr. Kimmel).

[65] *Id.* at 3718 (remarks of Mr. Ellis).

[66] 7 CONG. REC. 3845 (remarks of Mr. Knott); *id.* at 3877. The House vote in favor of the amendment was 130 to 117 with 44 abstentions.

[67] The amendment read:

> From and after passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or both such fine and imprisonment.

7 CONG. REC. 4648 (remarks of Senator Sargent).

were available only when specifically directed by the President.[68] Thus the indiscriminate use of regular forces in civil affairs came to a halt—at least on paper.

III. APPLICABILITY TO THE MILITARY DEPARTMENTS

The preceding review of the circumstances which generated the Posse Comitatus Act should provide a useful reference point for dealing with current problems of military assistance to civilian authorities. This section will determine which personnel, whether in uniform or not, the commander must prohibit from participating in local law enforcement activities. This determination will be divided into the major categories of duty status and branch of service. The first, consideration of the duty status of the individual, may be subdivided into three major subcategories: Regular, Reserve, and National Guard; civilian employees of the military departments will also be considered. The second aspect, consideration of the Act's applicability to the various branches of the armed forces, is necessary because the original Act was attached as a rider to an Army Appropriation Bill and thus did not mention the other existing services. This fact has resulted in some confusion which hopefully has been resolved by recent federal judicial interpretation.

A. DUTY STATUS OF THE INDIVIDUAL

The key to resolving which individuals are covered by the Act can be found in the historical development of military involvement in civil matters. As previously discussed, the great reluctance to create a national standing armed force was followed by a clear differentiation between the roles of the armed forces on the one hand, and the militia on the other. In 1792 Congress authorized the use of *militia,* not regular forces, as a posse comitatus in aid of local law enforcement. This distinction, steadfastly maintained throughout the nation's first hundred years, was ignored and almost forgotten during the turmoil during and after the Civil War. The desire to reinstitute this distinction led to the passage of what is now the Posse Comitatus Act. It was the state militia and not the standing army that was to be the last resort in reestablishing civil order according to the constitutional scheme that the militia's mission was to suppress internal disorder and the standing army's to protect against external enemies.[69] This basic distinction should be

[68] 16 OP. ATT'Y GEN. 162-64 (1878).
[69] 7 CONG. REC. 3581 (1878) (remarks of Mr. Kimmel).

borne in mind when deciding if a person or group is included in the phrase "any part of the Army" as that phrase is used in the Act.

1. Regular Forces

On its face the Act prohibits the use of regular forces. This limitation is the essence of the prohibition—active duty federal forces are not to perform civil law enforcement functions.

2. Reserve Forces

A cursory review may lead to the conclusion that no valid distinction can be made between regular and reserve forces with respect to the Act's application. In the only definitive article published on the Posse Comitatus Act, Major H. W. C. Furman maintains that the prohibition applies only to reservists on "active duty in the service of the United States,"[70] reasoning that the Act only applies to troops on active duty because the original House version of the Appropriation Bill prohibited the "employment of any troops."[71] This approach appears valid if Furman is using "active duty" in its generic sense rather than as a term of art. The generic definition signifies anyone with a reserve affiliation during the time he is performing any official reserve function. Unfortunately Furman does not clearly define his terms and confusion arises because the armed services use "active duty" as a term of art. For example, it is used to describe a reservist's status when he is performing two weeks' annual training,[72] whereas the status of a reservist performing a weekend drill is denominated "inactive duty training."[73] Clearly the Army's position is that the Act applies to reserves as a general rule,[74] but the Army position is not so clear as to reserves performing inactive duty training. It can be inferred from one opinion of The Judge Advocate General of the Army that since these reser-

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[70]Furman, *supra* note 12, at 101.

[71]7 CONG. REC. 3845 (1878) (remarks of Mr. Knott).

[72]*See* 10 U.S.C. § 101(22) (1970).

[73]*See* 10 U.S.C. § 101(31) (1970); 37 U.S.C. § 206 (1970).

[74]*See* DAJA-AL 1972/3999, 12 April 1972 (Reviewing proposed legislation which would authorize members of the Ready Reserve to assist the Bureau of Customs in its programs to prevent the illegal entry of narcotics into the United States. The Opinion states that the proposal, if enacted, would constitute an express exception to the Posse Comitatus Act and thus the Reserves could aid in enforcing the drug laws.); DAJA-AL 1973/4738, 2 Oct. 1973 (Responding to a reserve judge advocate's request for guidance concerning use of Reserves for various community programs. The opinion cites an earlier sixteen page opinion (JAGA 1956/8555, 26 Nov. 1956) on Posse Comitatus Act prohibitions as being applicable to Reserves.); *accord*, Marine Corps Bulletin 3440 (5 April 1973) (Applying the prohibitions of the Act to Reserves. This directive had a self-cancellation date of 31 March 1974 and has not been reissued.).

vists are not on "active duty," the Posse Comitatus Act does not apply to them.[75] It is true that a reservist receiving military instruction on a weekend or week night, although wearing an Army uniform and being paid by the federal government,[76] may not be deemed to be on "active duty." But does this technical definition really exclude him from the prohibitions of the Act? Could he properly leave during that training period in response to a marshal's call for assistance? It is difficult to avoid the conclusion that the Congress which passed the Act would be offended by such a notion. Their purpose was to keep the federal forces out of civil affairs. This purpose would surely be thwarted by allowing a reservist undergoing "inactive training" to fall out (probably in uniform) for duty with the sheriff.

The Posse Comitatus Act, as reenacted in title 18 of the United States Code, is a federal criminal statute, and thus its terms should be strictly construed. But holding that a "reserve inactive training status" removes one from "any part of the Army" seems absurd. "But whatever may be said of the rule of strict construction, it cannot provide a substitute for common sense, precedent, and legislative history."[77]

It is also helpful to consider the definitions of pertinent terms in the United States Code to determine whether reserves may properly be considered "any part of the Army." Since title 18 defines neither "Army" nor "reserve," definitions of those terms must be sought elsewhere. In title 10, "Armed Forces," the Code states in pertinent part that the Army is composed of the Regular Army "and Army Reserve"[78] and that the Army Reserve includes all reserves who are not members of the Army National Guard of the United States.[79] No distinction is made between "inactive duty

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[75]*See* JAGA 1970/3745, 17 April 1970 (responding to requests from reserve unit commanders and advisors for guidance concerning what actions they might take to defend their training centers against attacks by civil dissidents). The inquiry which precipitated this opinion specifically asked if the fact that reserve personnel were on reserve duty training (Unit Training Assembly—an inactive duty status, or Active Duty Training—an active duty status) had any bearing on the situation. The Opinion states that federal troops on active duty, including Reserves, can be used to protect federal property (when local civil authorities cannot or will not); however, Reserves not on active duty cannot regardless of whether or not they are present at the training center. The Opinion then states that the Posse Comitatus Act is not applicable to Army Reservists not on active duty. Thus it can be inferred that the opinion means that the Act is not applicable to Reserves in an inactive duty status who are attending a Unit Training Assembly.

[76]37 U.S.C. § 206 (1970).

[77]United States v. Standard Oil Co., 384 U.S. 224, 225 (1966).

[78]10 U.S.C. § 3062(c) (1970).

[79]10 U.S.C. § 3076 (1970.)

training" and "active duty" leading to the conclusion that no distinction need be made and that reservists undergoing "inactive duty training" are part of the Army.

Further support for this conclusion can be found in the recent federal district court decision, *Jones v. Secretary of Defense.*[80] Members of the 5501 U.S. Army Hospital Reserve Unit had been ordered to participate in a parade honoring the Veterans of Foreign Wars during its national convention. Several members of the unit sought to enjoin the Secretary of Defense and other defendants from requiring their participation in the parade. The record makes clear that while participating in the parade the members would have been in an inactive duty training status. One of the plaintiffs alleged that his participation would result in a loss of wages from his civilian employer. The judge, denying the motion for a temporary restraining order, indicated that he was doing so with the understanding and on the condition that the plaintiffs be given credit for having participated in a reserve training assembly or drill session.

Among the substantive bases for requesting the injunction was the claim that the order to march in the parade was in effect forcing the reservists to act as a posse comitatus. The judge ruled that the Act proscribed law enforcement activities, none of which were contemplated by the defendants' order. While the district judge obviously considered that the Act's limitations applied to the plaintiffs insofar as their status was concerned, he specifically held that he could not find that the reservists were "being banned together to execute the civil or criminal laws of the United States or of a state or county"[81] by marching in a parade. Thus, the case implicitly affirms the view that the Posse Comitatus Act may apply to reserves undergoing inactive duty training.

Significant factors to remember are that a reservist at weekend drill or weeknight training is functioning under the direct control and authority of the federal government, that he is being trained for federal service and that he is being paid by the federal government. The legislators who enacted the Posse Comitatus Act would hardly conclude that these men were not "part of the Army" because technical definitions created by the armed forces to differentiate training categories seem to remove one group of reservists from a military definition of "active duty."

3. National Guard

The "National Guard" designates what has been known

[80] 346 F.Supp. 97 (D. Minn. 1972).
[81] *Id.* 100.

historically as the militia[82] which now may be called upon to perform service for the federal government.[83]

It has generally been held that the Posse Comitatus Act applies to the National Guard only when it performs federal service.[84] However, on its face a recent federal district court decision seems to refute this. *United States v. Jaramillo*[85] arose out of the so-called "Wounded Knee" Indian disorders in 1973 where members of a dissident Indian group forcibly took control of the village of Wounded Knee, held hostages, entered the U.S. Post Office by force, established an armed perimeter and denied federal investigators access to the area. After federal marshals and other law enforcement agents had established roadblocks on the major access roads to the village, the defendant Jaramillo attempted to break through the federal lines in order to join his comrades inside the agents' perimeter. He was apprehended and subsequently indicted for interfering with law enforcement officers in the performance of duties during a civil disorder.[86]

One of the elements of proof of the offense charged was that the law enforcement officers were lawfully engaged in the lawful performance of official duties. The defendant argued that participation of Army and National Guard personnel during the disorder violated the Posse Comitatus Act and that consequently, the civil officers were not lawfully engaged in the performance of their duties. The court agreed that if the Act had been violated, the civil authorities had not acted lawfully and thus the Government could not meet its burden.

The court discussed the involvement of two Regular Army colonels and personnel of the Nebraska and South Dakota National Guards. The colonels, sent to Wounded Knee as Department of Defense observers, exceeded that role as they actively aided the civil authorities in advisory capacities. Nebraska National Guard personnel actively participated in the law enforcement activities by making at least one aerial reconnaissance of the site, while mechanics from the South Dakota National Guard maintained the armored vehicles in the area.

The court, while not indicating whether or not the National Guard had been federalized, determined that the National Guard

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[82] 10 U.S.C. § 311 (1970); "The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16 of the Constitution." Maryland v. United States, 381 U.S. 41, 46 (1965).

[83] *See* 10 U.S.C. §§ 331-33 (1970).

[84] *See* Furman, *supra* note 12, at 101.

[85] 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[86] 18 U.S.C. § 231(a) (3) (1970).

personnel, as well as the Army colonels, were "part of the Army" under the Act. The decision, however, leaves two questions unaddressed; and although the record of the case provides tentative answers to these questions, it is difficult to decide what information the judge utilized in reaching his decision. The first and less difficult question is whether the law enforcement activity at Wounded Knee was carried out at the direction of the President under any specific exception to the Act. The record reveals that no such exception was applicable and that the Act's prohibition against the use of the armed forces clearly applied to the use of the military personnel at Wounded Knee. The second unresolved question is whether the court determined that the National Guard had been federalized at the time of its use for law enforcement purposes or that it was operating in its normal status as a state militia rather than as a federal force.

Despite the court's failure to explicitly address these issues, it did find that the National Guard personnel as well as the active Army colonels were "part of the Army" under the Act, and without making a specific finding that the Act had been violated, it held that the military participation was the primary basis for determining that the prosecution had failed to prove beyond a reasonable doubt that the civilian authorities had acted lawfully. This lapse makes it possible to argue that the court found the Act to be applicable to National Guard personnel whether acting as state militia or as federalized troops.

Such an implication would, however, be at variance with the fact that the Nebraska personnel had been ordered to federal active duty making the Posse Comitatus Act applicable to their utilization. The mechanics from South Dakota were actually federal civilian employees who worked for the South Dakota National Guard as technicians. They were also members of the National Guard but were not participating as federalized Guardsmen and evidently were acting solely as civilian employees of the federal government.[67] The judge in *Jaramillo* correctly concluded that the use of the Nebraska National Guard was improper. Apparently he assumed that the South Dakota personnel were federalized Guardsmen or that as federal employees who worked for the National Guard they were in effect federal troops. Alternatively, he may have felt that clarification of their unique and confusing status would not affect the outcome of the case and might un-

[67] Interviews with officials of the National Guard Bureau, March 6, 1975. These officials' request for anonymity has been honored. The mechanics from the South Dakota National Guard were employed under 32 U.S.C. § 709 (1970).

necessarily detract from the opinion's value as a censure of and warning to federal law enforcement agencies.[88]

4. Civilian Employees

The Army and Navy have long held that the prohibitions of the Posse Comitatus Act do not apply to civilian employees of those Departments. For example, The Judge Advocate General of the Army has opined that civilian guards can perform traffic direction functions outside the gates of a military base on public roads during peak traffic hours when traffic is coming and going from the base, and the local civil authorities will not provide the service.[89] Similarly, The Judge Advocate General of the Navy has held that the Act would not be violated if civilian guards at a Navy installation were deputized by local civil authorities to aid in patrolling a public recreation area used by large numbers of military personnel and their dependents.[90]

There are, however, pitfalls in this area to which commanders should remain alert. The civilian employees who engage in civil law enforcement are often employees who perform law enforcement functions for the military, generally guards and investigators. The Army's position concerning the use of civilian guards appears to be valid, especially where the civil enforcement function is in furtherance of or related to a military need as in the traffic control situation. In a situation similar to the deputization of civilian guards from military bases noted above, it might be preferable to have the guards deal primarily with military personnel and their dependents.

The use of civilian investigators employed by the military to enforce the civil laws contains the greatest potential for violating the Act. For example, the Naval Investigative Service which investigates espionage, sabotage, subversive activities, fraud and major criminal offenses[91] usually has agents assigned to offices

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[88] *Cf.* Maryland v. United States, 381 U.S. 41 (1965), where the United States Supreme Court carefully distinguished between the responsibilities and liabilities of Guardsmen and regular forces in the area of tort claims, holding that the Federal Tort Claims Act is not applicable to the Guard unless it is in federal service. *See also* Annot., 14 L. Ed. 2d 892 (1965).

[89] JAGA 1956/6462, 11 Sept. 1965 (tracing the legislative history of the Posse Comitatus Act). The Opinion concludes that "any part of the Army" was a term of art and at the time of enactment and did not include civilians.

[90] OP. JAGN 1965/5184, 23 July 1965; OP. JAGN 1973/6959, 20 Aug. 1973 (reaffirming the opinion that the Posse Comitatus Act does not bar civilian employees from participating in civilian law enforcement activities). The Opinion concerned possible aid to local authorities by a civilian employee marijuana detection dog handler.

[91] SECNAVINST 5430.13B (12 March 1965).

located in proximity to major Naval and Marine Corps installations. The director or senior agent of a branch office is usually an active duty Navy officer. In a recent opinion The Judge Advocate General of the Navy stated that even though these civilian agents work directly for military officers they are not precluded by the Posse Comitatus Act from assisting civilian law enforcement agencies.[92] Discussing the legislative history of the Act, the Opinion emphasized several instances where the terms "military" and "troops" were used and concluded that the Act applied solely to military personnel. That conclusion was further supported by reference to the widespread practice of civilian localities with concurrent jurisdiction over military installations or with complete jurisdiction subject to the United States' proprietary interest. Such localities often deputize the civilian guards employed by the installation in order to allow them to assist in enforcing local law.

The practice of deputization is not really a valid analogy to the use of civilian investigators employed by the military to enforce civil laws. The Opinion fails to point out that a predominant military purpose usually exists where civil servant guards have been deputized. The procedure is used to allow the guards to perform a law enforcement function on the military reservation that otherwise could not be accomplished. Even if the Opinion has merit technically, it ignores the Act's real purpose of keeping the military out of local civil affairs. The civilian investigators operate under the immediate supervision of military officers who are prohibited by the Act from aiding local authorities. Holding that the civilian subordinates are not also prohibited allows a principal to accomplish things through his agent that he could not otherwise lawfully do himself. It is foolhardy to assume that it is only the sight of the man in military uniform aiding the sheriff that tends to offend the civilian community.

B. APPLICATION TO THE VARIOUS DEPARTMENTS

In its original form the Posse Comitatus legislation prohibited only the Army from aiding civil authorities.[93] In 1956 the Posse Comitatus Act was added to title 18 of the United States Code,[94] and the Air Force was included to reflect earlier legislation separating the Air Force from the Army.[95] Considerable controversy has resulted from the fact that the Department of Navy

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[92] Op. JAGN 1974/6836, 18 Sept. 1974.

[93] See note 67 *supra*.

[94] Act of Aug. 10, 1956, ch. 1041, § 18, 70A Stat. 626.

[95] Act of July 26, 1947, ch. 243, §§ 207(a), 208(a), 305(a), 61 Stat. 502.

(Navy and Marine Corps) has not been specifically included in the Act. There is, however, little doubt that the original proposal was meant to be applicable to all services; it included the phrase "land or naval forces."[96] The enactment of the original Posse Comitatus prohibition as an amendment to an Army Appropriation Bill gives rise to the assumption that "naval" was deleted as inapplicable and inappropriate for inclusion in an act pertaining to one service alone.

The Opinions of The Judge Advocate General of the Navy have shifted from: "[the Act] has no application since that statute does not apply to naval personnel"[97] to "Although . . . not prohibited under the Posse Comitatus Act . . ., the policy of the Navy is to follow the spirit of the statute . . ."[98] and ". . . it is the policy of the Navy and Marine Corps generally to comply with the restriction imposed by the statute."[99]

A 1968 Department of Defense Directive declared that "Although the Navy and Marine Corps are not expressly included within the provisions, the Act is regarded as national policy applicable to all military services of the United States."[100] Although this statement of policy was included in a regulation applicable only to the use of the military during civil disturbances, there is no reason to believe that the policy would not be applicable in all circumstances. Three years later, in a revision of that Directive, almost identical phraseology was used in discussing the Posse Comitatus Act except that no reference was made to the Navy and Marine Corps.[101] That portion of the Directive mentions only the Army and Air Force. The latest revision of this Directive also omits any reference to the Navy and Marine Corps in this regard,[102] arguably signaling a change in the Department's policy.[103] However, the Secretary of the Navy published a regulation which, like the aforementioned 1968 Department of Defense Directive, provided that the Depart-

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[96] That from and after the passage of this act it shall not be lawful to use any part of the land or naval forces of the United States to execute the laws either as a posse comitatus or otherwise, except in such cases as may be expressly authorized by act of Congress.

7 CONG. REC. 3586 (1878) (remarks of Mr. Kimmel).

[97] OP. JAGN 1954/213, 6 April 1954.

[98] OP. JAGN 1965/5184, 23 July 1965.

[99] OP. JAGN 1973/1508, 26 Feb. 1973.

[100] Dep't of Defense Directive No. 3025.1 (June 8, 1968).

[101] Dep't of Defense Directive No. 3025.1 (Aug. 19, 1971).

[102] Dep't of Defense Directive No. 3025.1 (Aug. 19, 1971, *reissued* Dec. 4, 1973).

[103] *See* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130 n.1 (1973).

ment of the Navy will comply with the Posse Comitatus Act as a matter of policy.[104]

This impact of the Act and implementing regulations on naval assistance to civil authorities squarely confronted the court in *United States v. Walden,*[105] a case involving the alleged unlawful sale of firearms. While investigating suspected violations of the Federal Firearms Act,[106] the Treasury Department used three Marine enlisted men as undercover agents to pose as ordinary purchasers and buy weapons from the defendants' retail gun shop. At trial the defendants were convicted primarily on the basis of the marines' testimony. The defendants unsuccessfully attempted to suppress that testimony, claiming that the investigation violated the Posse Comitatus Act and the Navy Instruction[107] which adopted the policy of the Act. The Court of Appeals for the Fourth Circuit upheld the convictions but held that the use of the marines violated the Navy regulation which the court found clearly reflected the congressional intent underlying the Posse Comitatus Act. Furthermore, in holding that the Act itself had not been violated because it does not specifically prohibit the use of Marines and other Naval personnel, the court clearly implied that the spirit of the Act had been violated. The court further indicated that it would not hesitate to fashion an exclusionary rule to suppress such evidence in future cases, but it refused to do so in *Walden* only because it felt that the prohibition against using Marines for civil law enforcement was not well known, this being the first such instance to come to its attention.

The *Walden* trial was held on April 6, 1972, the conviction and fine were announced on June 6, 1972,[108] and the appeal was received by the U.S. Court of Appeals for the Fourth Circuit on July 10, 1973.[109] In the interim, in April 1973, Headquarters Marine Corps issued a directive instructing commanders to insure that all personnel were familiar with the regulations pertaining to requests from civil authorities for assistance.[110] This directive established procedures for referral of such requests to an area coordinator and specifically advised that commanders in the field did not have authority to aid civil law enforcement agencies. Activities

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[104]SECNAVINST 5400.12 (17 Jan. 1969). The latest revision, SECNAVINST 5400.12A (12 Mar. 1975), contains a similar provision.

[105]490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974).

[106]18 U.S.C. §§ 921-28 (1968).

[107]SECNAVINST 5400.12, *supra* note 104.

[108]Brief for Appellee at 2-3, United States v. Walden, 490 F.2d 372(4th Cir. 1974).

[109]Brief for Appellant at cover page, United States v. Walden, 490 F.2d 372 (4th Cir. 1974).

[110]Marine Corps Bulletin 3440 (5 April 1973).

specifically prohibited included search, seizure, and apprehension. This was the only definitive directive issued by any service on aid to law enforcement authorities, but unfortunately it contained a self-cancellation provision dated March 1974 and has not been reissued. On January 18, 1974, eight days after the Court of Appeals rendered the *Walden* decision, the Director of the Marine Corps Judge Advocate Division issued a memorandum to all Marine staff judge advocates strongly emphasizing the necessity for strict compliance with the Posse Comitatus Act and pertinent regulations.[111]

Walden contains a very explicit warning. In part it states "[n]or is there any reason to doubt that the military, now that we have declared the effect of the Instruction, will fail to take steps to provide a mechanism to enforce it."[112] In response to the warning, the Secretary of Navy issued a new directive specifically forbidding Navy and Marine Corps personnel from enforcing or executing local, state or federal civil law in violation of the Posse Comitatus Act.[113] To eliminate all uncertainty about the range of the Act's application, several members of Congress have proposed that the Act be made expressly applicable to all services.[114]

IV. AIDING CIVIL AUTHORITIES EXECUTE THE LAW

As noted earlier, the Act prohibits aid to civil law enforcement authorities *except* where expressly authorized. The President has

[111]Memorandum from Brig. Gen. John R. DeBarr to all Staff Judge Advocates, Jan. 18, 1974, on file at The Judge Advocate Division, Headquarters, U.S. Marine Corps.

[112]490 F.2d at 377.

[113]SECNAVINST 5820.7 (15 May 1974). This Instruction provides in pertinent part:

> Although not expressly applicable to the Navy and Marine Corps, the Posse Comitatus Act (18 U.S.C. § 1385) is regarded as a statement of Federal policy which is closely followed by the Department of the Navy.
>
> Members of the naval service shall not, in their official capacity, enforce or execute local, State or Federal civil laws except in the following cases:
>
> a. when expressly authorized by the Constitution or Act of Congress;
>
> b. when authorized [in civil disturbances]; or
>
> c. when specific approval of the Secretary of the Navy is granted.

An Opinion of The Judge Advocate General of the Navy indicates that the Instruction was promulgated because the Secretary of Navy wanted to insure that violations of the Act were punishable under Article 92, Uniform Code of Military Justice, 10 U.S.C. 892 (1970). OP. JAGN 1974/3363, 7 May 1974.

[114]H.R. 266, 94th Cong., 1st Sess. (1975); H.R. 559, 94th Cong., 1st Sess. (1975). Under these proposals the phrase "Armed Forces of the United States" would be substituted for "Army or the Air Force" in the Act. This change was *discussed and recommended in* Note, *Honored in the Breech: Presidential Authority to Execute the Laws with Military Force, supra* note 7, at 149.

such authority.[115] There are a few exceptions under which the post commander or commander in field may act on his own initiative, but they are for the most part obscure and of very limited application. This section will first consider these exceptions and review the regulatory materials available to guide the commander; the section will then consider specific categories of law enforcement aid given to civil authorities, analyzing the legality of such assistance in light of judicial decisions and administrative opinions. The final part of the section will deal with the so-called "military purpose doctrine" under which aid to civil authorities is incidental to a military requirement.

A. COMMANDERS' AUTHORITY FOR EXECUTING CIVIL LAW

1. Statutory Authority

a. The Uniform Code of Military Justice. This Code,[116] as the statutory basis for the military disciplinary system, can properly be viewed as an exception to the Posse Comitatus Act. Naturally its primary purpose is a military one, but it does have some aspects which in effect aid civil law enforcement. Offenses chargeable under the Code which occur on a military base may also be state criminal offenses if concurrent legislative jurisdiction exists over the base. By enforcing military law under the UCMJ, a commander relieves the civil officials of certain law enforcement duties. In addition, the Code specifically provides that a commander may deliver to civil authorities any member of the armed forces accused of an offense under civil criminal law,[117] insuring that military reservations do not become havens for those who violate criminal laws. However, there is no provision allowing a commander to order his personnel to accept civil process and thus become involved in the determination of private rights. Any commander who did so would in effect be acting as a process server, or agent, for the civil authorities and thus would be violating the Posse Comitatus Act.[118]

A potentially troublesome area under the Code involves the *O'Callahan*[119] doctrine. This doctrine is generally held to stand for the proposition that service personnel cannot be tried under the Code for offenses they commit off base unless the offense is service connected. Many off-base offenses by military personnel may be disposed of in the civilian criminal justice system, but the deter-

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[115] See note 8 *supra*.

[116] 10 U.S.C. § 801-940 (1970).

[117] 10 U.S.C. § 814 (1970).

[118] JAGA 1964/3500, 25 Feb. 1964; JAGA 1960/5073, 25 Nov. 1960.

[119] O'Callahan v. Parker, 395 U.S. 258 (1969).

mination of who will prosecute the offense is usually difficult to make until a thorough investigation has been conducted. Any investigative effort by the military will ultimately aid the civil authorities if they assert jurisdiction and process the case to a conclusion. Thus the commander's dilemma is that any military involvement such as apprehension or detention of the offender or investigation of the case may actually be aiding the civil authorities and consequently a violation of the Act. The Code protects the commander as he fulfills the obligations it imposes upon him. If in fulfilling these obligations he incidentally aids the civil authorities, he has not violated the Act.

If the commander continues active participation in the case after it appears that the civil courts will be the more appropriate forum, then he has run afoul of the Posse Comitatus Act's prohibitions. There is no set formula by which a commander can delineate the prohibited area, but there is sufficient judicial guidance from which a reasoned determination can be made. Recently, the United States Supreme Court, considering whether the principles of *O'Callahan* should be given retroactive effect, opined that *O'Callahan* did not establish a definitive juristictional boundary between civil and military courts.[120] The Court indicated that *O'Callahan* actually established a preference of forum, preferring the civil forum for nonservice-connected crimes based on fifth and sixth amendment guarantees. Thus military investigation of an off-base crime is not improper until it becomes clear that the civil forum is preferable under judicial guidelines which have evolved over the past six years.[121]

b. Aid to the Secret Service. The United States Secret Service is the agency with primary responsibility for protecting the President, the President's immediate family, the President-elect, and the Vice President.[122] In 1968 Congress extended the protective coverage to major presidential and vice presidential candidates[123] and provided that the Secret Service would, upon request, be assisted by federal departments and agencies in the performance of its protective duties.[124] Congress did not specifically mention the Department of Defense; but Mr. William H. Rehnquist, then

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[120] Gosa v. Mayden, 413 U.S. 665 (1973).

[121] Munnecke, *O'Callahan Revisited and Buttoned Up*, 46 JUDGE ADVOCATE J. 11 (1974). This article contains a concise review of federal and military case law and a comprehensive bibliography of pertinent articles, comments and case notes.

[122] 18 U.S.C. § 3056 (1970).

[123] Act of June 6, 1968, Pub. L. No. 90-331, § 1, 82 Stat. 170. This bill was enacted the day after the assassination of Senator Robert Kennedy.

[124] *Id.* at § 2.

Assistant Attorney General, advised the General Counsel of the Army that this legislation was deemed to be an express exception to the Posse Comitatus Act prohibitions.[125] The legislative history of this 1968 enactment clearly indicates that use of military forces in aid of the Secret Service was contemplated. During debate Senator Dirksen stated that he wanted to insure that it was clear that the Secret Service and "each Department" would be in constant liaison and that the personnel and facilities of these departments would be available.[126] Also during the course of the Senate debate Senator Monroney specifically mentioned the use of the military.[127] The Department of Defense promptly promulgated a Directive[128] providing implementing instructions which specify the normal procedures for requesting aid and grant commanders the discretion to respond directly to "urgent requests as circumstances justify."[129]

c. Aid to Territorial Governors. Although seemingly obscure, three statutory exceptions to the Posse Comitatus Act could be significant to commanders of deployed units. In Puerto Rico,[130] the Virgin Islands[131] and Guam[132] the Territorial Governor has the authority to call upon the military forces of the United States which may be in his territory to help suppress rebellion, insurrection, invasion and lawless violence. Those governors may also suspend the writ of habeas corpus and declare martial law, but only until they can communicate with the President. Colonel, then Captain, F. B. Wiener suggested 35 years ago that these provisions were based on the realization that communication facilities between these territorial governors and the President were not always adequate.[133] It is doubtful that these governors require this authority any longer, and before exercising it today they would probably seek presidential guidance.

d. Aid to the Federal Magistrates. Considering the furor surrounding the debates and passage of the Posse Comitatus Act in 1878 it is ironical that legislative authority has existed since 1866 for United States Magistrates to call out federal forces to act as a

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[125]Memorandum Opinion from Assistant Attorney General William H. Rehnquist to Honorable Robert E. Jordan III, General Counsel, Department of the Army, Nov. 12, 1968, copy on file at United States Department of Justice.

[126]114 CONG. REC. 16152 (1968) (remarks of Senator Dirksen).

[127]114 CONG. REC. 16170 (1968) (remarks of Senator Monroney).

[128]Dep't of Defense Directive No. 3025.13 (July 15, 1968).

[129]*Id.* at para. II.C.4.

[130]48 U.S.C. § 771 (1970).

[131]48 U.S.C. § 14055 (1970).

[132]48 U.S.C. 1422 (1970).

[133]F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 57 (1940).

posse comitatus in carrying out magisterial orders relating to civil rights violations. Such commitments of federal troops were exactly what the Act was designed to stop, but Congress evidently overlooked the 1866 statute. The statute as it exists today authorizes U.S. Magistrates to appoint assistants to execute the magistrate's "warrants and other process" issued in situations involving civil rights violations.[134] These assistants have the authority to call on the militia, posse comitatus of the county, or United States land or naval forces for aid in carrying out their duties.

Congress initially enacted this provision in the Civil Rights Acts of 1866 which extended the full rights and obligations of citizenship to the former slaves.[135] This Act contained specific procedures for processing violators, and directed all federal law enforcement authorities to institute affirmative programs to insure compliance. The Act gave specific duties to district attorneys, commissioners (now called magistrates), marshals and deputy marshals and then singled out the marshals and deputy marshals by providing that they would be convicted and fined for failure to comply with the Act. The Act was passed over President Johnson's veto and contained the provision authorizing prosecution of the marshals to remove congressional fears that the marshals, as Presidential appointees, would support the President by refusing to enforce the Act.[136] Evidently the magistrates were given the authority to use troops in order to counterbalance the expected inaction of recalcitrant marshals.

No record can be found of troops ever being called out under this provision. In 1960 a federal district judge in Louisiana asked the Department of the Army if troops could be made available to assist in enforcing a school desegregation order he had issued.[137] The Judge Advocate General of the Army opined that without presidential authority such aid would violate the Posse Comitatus Act. No mention was made of the federal magistrate's authority to call out

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[134] 42 U.S.C. § 1989 (1970).

[135] Act of April 7, 1866, ch. 31, §§ 1-10, 14 Stat. 27. Section 5 provided in pertinent part:

> [A]nd the persons so appointed to execute any warrant or process as aforesaid shall have the authority to summon and call to their aid . . . such portion of the land and naval forces of the United States, . . . as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act.

These same provisions were included in the Civil Rights Voting Act of 1870. Act of May 31, 1870, ch. 114, § 10, 16 Stat. 142.

[136] *See, e.g., In re* Upchurch, 38 F. 25 (C.C.N.C. 1889).

[137] JAGA 1960/5018, 10 Nov. 1960.

troops. Considering the obscurity of this statute, the failure to rely upon it can probably best be characterized as a fortunate oversight by the judge and The Judge Advocate General. The Department of Justice believes that this provision is an anachronism and favors its repeal.[138] Considering this history of nonuse and the Department of Justice's position on this portion of the 1866 Act, it would be advisable to seek Departmental guidance before responding to any request under this statute. The status of the magistrate's authority is further clouded by the fact that the Posse Comitatus Act may have repealed that provision by implication.

2. Regulations

Possibly the most significant indicator of the attitude and philosophy of the Department of Defense is the absolute lack of regulations which provide guidance to the commander. The only guidance available is contained in two directives which specify what is to be done at the departmental level when military aid is requested from the Department of Defense. These directives establish the procedures the Department follows when the President acts or purports to act under congressional and constitutional exceptions to the Posse Comitatus Act to quell civil disturbances or to protect federal property or functions. Thus at best, they provide minimal guidance to a commander faced with a request from the local sheriff.

The first of these directives concerns using military resources in civil disturbances[139] and primarily deals with situations where troops are used pursuant to Executive Order.[140] The Directive mentions only two specific instances in which a commander may act in his discretion. The first concerns emergency situations in which a commander may act to prevent loss of life or wanton destruction of property.[141] This type of aid is not prohibited by the Posse Comitatus Act and will be discussed in detail in a subsequent section. The other situation in which a commander may respond under this Directive involves terrorist activities.[142] The Directive is not clear, but by stating that commanders may accept the judgment of Federal Bureau of Investigation agents *at the scene*, it seems to im-

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[138] Interview with Ms. Mary Lawton, Deputy Assistant Attorney General, Department of Justice, Washington, D.C., Dec. 19, 1974.

[139] Dep't of Defense Directive No. 3025.12 (Aug. 19, 1971, *reissued* Dec. 4, 1973). *See also* note 8 and accompanying text *supra*.

[140] Dep't of Defense Directive No. 3025.12, para. VI.A. (Aug. 19, 1971, *reissued* Dec. 4, 1973).

[141] *Id.* at para. V.C.1.a.

[142] *Id.* at para. VI.H.

ply that commanders at the scene may provide support without approval of the Department of Defense. The Directive does not purport to be based on any exemption from the terms of the Act nor does it explain how such aid can be provided without violating the Posse Comitatus Act. Apparently there is neither an exemption nor a justification. Actually the Department of Defense is ignoring its own 1972 letter of agreement with the Attorney General in which both parties recognized that troops could be used against terrorists only when specifically committed by the President.[143]

The other pertinent Department of Defense Directive concerns giving aid to the District of Columbia for combating crime.[144] It establishes the procedures for providing technical assistance, training and equipment to that city. The Directive recognizes the prohibitions of the Posse Comitatus Act and does not authorize military forces to be used in direct law enforcement roles.

As noted earlier, these are the only Department of Defense Directives that mention the Posse Comitatus Act in any substantive context. They give base commanders no specific guidance to assist in processing, responding to, or reacting to requests from law enforcement agencies. Only the Navy has recognized this deficiency and at the prompting of The Judge Advocate General of the Navy[145] recently issued a directive separate from its civil disburbance regulation.[146]

In a more recent Directive dealing with community relations the Department of Defense has compounded the problem.[147] The Directive makes no mention of, or reference to, the Posse Comitatus Act or any prohibition against aiding law enforcement authorities. In fact, the tenor of this instruction is such that it would lead any reasonable person to believe that assistance to local authorities is not only recommended but required. It directs commanders to "give

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[143] [F]ederal troops are required for any law enforcement activity in connection with this Agreement, the President must first authorize this commitment . . . . [T]he President's decision will be communicated to the Department of Defense as an Executive Order if troops are to be used under Chapter 15 of Title 10, United States Code.

Letter of Agreement on Assistance in Combating Terrorism from Attorney General R.G. Kleindienst to Secretary of Defense Melvin R. Laird (and signed by Mr. Laird), Nov. 10, 1972.

[144] Dep't of Defense Directive No. 5030.46 (Mar. 26, 1971).

[145] In order to ensure that military personnel will be specifically alerted to a general order prohibiting violations of the Posse Comitatus Act, and *because the statute is applicable to additional situations other than those addressed in the civil-disturbances instruction*, it is considered that the order should be promulgated by separate instruction.

OP. JAGN 1974/3363, 7 May 1974 (emphasis added.)

[146] SECNAVINST 5820.7 (15 May 1974). See note 113 and accompanying text *supra*. Actually this directive is of limited use to commanding officers of posts and stations because it fails to explain what types of aid are prohibited.

[147] Dep't of Defense Directive No. 5410.18 (July 3, 1974).

positive emphasis to the importance of good community relations and of compliance with the policy guidance contained in this Directive. . . ."[148] It specifically encourages "Cooperation with Government officials and community leaders."[149] Then in a context of maintaining good taste and dignity it provides that military personnel will not be used for menial tasks or as guards, parking lot attendants or for crowd control.[150] Use of military personnel in the first and last of these three capacities would be illegal and a violation of the Posse Comitatus Act irrespective of the Directive's approach. Finally, in a glossary of terms there is a clear implication that military personnel may be used in a "security cordon,"[151] another violation of the Act.

B. AID TO CIVIL AUTHORITIES

Only in recent years has any judicial consideration been given to the Posse Comitatus Act. Without judicial opinions to refer to, commanders and their judge advocates have relied on the opinions of the Judge Advocates General dealing with this subject. The relatively few judicial and JAG opinions rendered in the last fifteen years will provide the basis for discussing the typical situations in which commanders have come into contact with the prohibitions of the Posse Comitatus Act and illustrate factual patterns which are likely to recur in the future.[152]

1. Investigation

Probably the greatest number of Posse Comitatus Act violations result from misguided, good faith attempts by military investigators to help their civilian counterparts. These attempts are hardly surprising in view of the deficiencies in the Department of Defense Directives discussed above and regulations of the various branches which encourage cooperation without warning the investigators to remain aware of the Act. For example, the Marine Corps Order on military police investigations directs commanders "to ensure that close cooperation is extended to all nearby law en-

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[148] *Id.* at para. VII.A. Consider the effect of phraseology such as:

> The Armed Forces and the Defense Establishment belong to all the American people. Department of Defense support of and participation in events and activities in the civilian domain will reflect that fact. Common ownership of the Defense Establishment dictates that its resources be committed to support of events and activities of common interest and common benefit.

Id. at para. V.B.1.

[149] *Id.* at para. III.B.4.

[150] *Id.* at para. V.B.6.

[151] *Id.* at encl. 1.

[152] For an excellent review of earlier opinions of the Judge Advocates General, *see* Furman, *supra* note 12, at 112-26.

forcement agencies."[153] That statement is not qualified or explained anywhere in the Order or in the noted Instruction.

Civilian authorities have sought investigative assistance for crime prevention, deterrence and detection as well as for the solution of specific crimes. Where a civilian criminal offense is under investigation, military personnel cannot be used to perform general investigative functions such as taking statements from witnesses, regardless of whether the suspect is civilian[154] or military.[155] Likewise, it is improper for military medical personnel to take blood alcohol samples if done solely for civilian authorities[156] and psychiatric examination by a military doctor of a civilian accused, performed at the behest of a federal district judge, constitutes a violation of the Act by the judge and doctor.[157] Allowing civilian authorities to utilize the services of a drug detection dog and his handler is also improper.[158]

In the past four years the civilian use of military personnel in undercover roles has been attacked by defendants in state and federal prosecutions. Predictably, the state courts have not found that the defendants' allegation that a federal criminal statute was violated constitutes a bar or obstacle to the admission of evidence at trial. However, these cases are worth considering because they reveal the nature of the ongoing cooperation between military and civilian authorities.

In a 1971 case the Texas Court of Criminal Appeals upheld the convictions of a marijuana seller based on a "controlled buy" made by a civilian working undercover for the Fort Bliss Criminal In-

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[153]Marine Corps Order 5830.2A (15 Nov. 1970) at 4. Also note that the Secretary of the Navy's directive on Naval Intelligence Investigative Jurisdiction and Responsibilities states in pertinent part:

> Command investigative personnel, military or civilian, shall not be utilized to augment or assist civil law enforcement agencies *on a regular or scheduled* basis, although cooperation not inconsistent with this Instruction shall always be extended.

SECNAVINST 5430.13B (12 Mar. 1965) at 3 (emphasis added). Query: Does this mean that irregular or unscheduled assistance or augmentation is authorized? If so, the Instruction impliedly counsels violation of the Posse Comitatus Act. Again, this directive does not mention the Act or limit or explain the portion cited above.

[154]OP. JAGAF 1966/688, 7 Nov. 1966.

[155]JAGA 1965/4182, 8 June 1965.

[156]OP JAGAF 1964/511, 29 July 1964; DAJA-AL 1973/5259, 5 Dec. 1973.

[157]Letter from Major Jacob Stemberg, U.S.A.F. to Colonel Eugene Sisk, Staff Judge Advocate, Scott Air Force Base, Illinois, Jan. 28, 1963, on file with Opinions of The Judge Advocate General of the Air Force, Washington, D.C.

[158]DAJA-AL 1973/3933, 11 April 1973 (discussing a possible statutory exception (19 U.S.C. § 507) which would authorize aiding the U.S. Treasury Department in conducting customs inspections). Loaning a dog without the handler will be considered in a later section on loaning government equipment and property.

vestigation Detachment (C.I.D.).[159] The undercover agent was a civilian college student who volunteered to help the C.I.D. investigate illicit drug traffic. The defendant was a C.I.D. agent who was selling drugs off post, presumably to military personnel as well as civilians. If the defendant was selling to service members, the military was clearly justified in conducting the investigation for a military purpose,[160] and it is unlikely that the Posse Comitatus Act was violated. It could also be argued that the undercover agent's civilian status precluded any finding of a violation. The court commented on this argument, but based its finding that the Act had not been violated primarily on its conclusion that investigative assistance from the C.I.D. did not constitute "execution of the law" under the Act. In light of this finding, the evidence obtained by the informant was admissible and could not be excluded under a Texas statute which provides that evidence obtained in violation of the laws of the United States is inadmissible in criminal trials. The court reached the right result, but for the wrong reason. The proper analysis would have been that assistance such as that rendered by the informant does constitute execution of the law, but in this case it was specifically authorized by the Uniform Code of Military Justice.

In three recent decisions an Oklahoma Court of Criminal Appeals upheld convictions in cases involving three unrelated incidents of sale or delivery of marijuana or other illicit substances.[161] The civilian defendants all argued unsuccessfully that the evidence against them had been obtained in violation of the Posse Comitatus Act and thus was inadmissible. The cases reveal that military and civilian investigators worked together on a regular basis, with C.I.D. agents from Fort Sill meeting a local city detective at the C.I.D. office or city police station to obtain marked money for use in drug purchases. After the detective had given the military agents the marked money he would accompany them to the civilian suspect's residence and remain outside, while the agents entered the residence and purchased the illicit drugs with the marked money. Upon departing, the C.I.D. agents would immediately give the purchased items to the detective who would apprehend the seller.

The defendants properly argued that this course of conduct

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[159]Burns v. Texas, 473 S.W.2d 19 (Tex. Crim. App. 1973).

[160]United States v. Rose, 19 U.S.C.M.A. 3, 41 C.M.R. 3 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

[161]Hubert v. Oklahoma, 504 P.2d 1245 (Okla. Crim. App. 1972); Hildebrandt v. Oklahoma, 507 P.2d 1323 (Okla. Crim. App. 1973); Lee v. Oklahoma, 513 P.2d 125 (Okla. Crim. App. 1973).

violated the Posse Comitatus Act. Evidently the C.I.D. agents were getting the names of the civilian dealers from military sources and then reporting this information to the city detective. Had the military-civilian cooperation stopped there, no violation would have occurred. It is the active participation in executing civil law—not the exchange of information—that the Act prohibits. The Oklahoma court reasoned that the C.I.D. was investigating the sources from which military personnel obtained drugs and that when their investigation led them outside of their jurisdiction they then were acting as private citizens. The decisions fail to justify that conclusion and the facts simply do not support it. Rather than acting as private citizens, the C.I.D. agents were engaging in their primary military occupation as criminal investigators and were aiding the civilian law enforcement officials in a regular and systematic manner.

A series of state criminal prosecutions in Virginia during 1971 and 1972 revealed a relationship between military and civilian law enforcement agents that was strikingly similar to the Oklahoma practice. While none of the resulting decisions was published, a newspaper article[162] and an appellate brief[163] outline a practice of military superiors permitting Marines to serve as undercover drug investigators for county police.[164] According to the newspaper account, two Marine noncommissioned officers from the base at Quantico worked directly for a county detective during a two-month investigation. Although the base commanding general testified that he had no knowledge of the investigation until after it had been completed, the base security officer not only knew of the investigation, but also authorized the Marines to participate in the probe in response to a request from the civil authorities. His justification for the use of his men was that he thought that they might uncover evidence of Marine involvement in the drug trafficking.[165] The Marine NCO's, sporting beards and long hair, acted as undercover agents in the lengthy investigation of drug traffic in a civilian community twenty miles from the base. There were no military suspects. Using marked money provided by the civilian detective, the Marines made controlled purchases of illicit drugs from persons designated by the detective. As a result of this in-

[162]Washington Post, Feb. 4, 1972, at C1, col. 3.

[163]Appellee's Brief in Response to a Petition for Certiorari, Morris v. Virginia, 411 U.S. 968 (1973).

[164]According to the statements of certain of the Marine investigators involved in these cases, they knew of other military policemen who worked for civilian police in similar capacities. Washington Post, *supra* note 162.

[165]*Id.*

vestigation twenty people were indicted. At the time the article was published five trials had been held, and in all five defense motions to suppress the evidence collected by the Marines had been denied by the Virginia circuit judges hearing the cases.

The one published judicial record of this series of events is the Virginia Attorney General's response to a convicted defendant's petition for certiorari. The defendant, one Morris, had been convicted at trial for illegal possession of heroin and distribution of marijuana. The Virginia Supreme Court refused to hear his appeal in November 1972,[166] and the United States Supreme Court denied his petition for writ of certiorari in May 1972.[167] It is difficult to determine why the petition was denied, but one significant factor is that Morris entered a plea of guilty at the trial level.[168] In his brief in opposition to the petition for certiorari, the Attorney General of Virginia argued that the Posse Comitatus Act had not been violated because the undercover Marines volunteered to help, they were usually in an off-duty status, and their undercover work was not related to their regular duties.[169] Even assuming these averments to be totally correct, they do not justify the assistance in view of the fact that the base security officer not only sanctioned it, but he arranged it at the civil authorities' request. He was clearly acting in his official capacity, and regardless of his well-intended efforts to maintain good relations with his civilian counterparts, he violated the Act. Citing the Texas decision discussed above,[170] the Attorney General further argued that using the Marines as undercover agents did not constitute "executing the law" as that phrase is used in the Posse Comitatus Act. That unfounded assertion was discredited a few months later by the United States Court of Appeals for the Fourth Circuit when, in the strikingly similar case of *United States v. Walden,*[171] it ruled that use of Marines as undercover agents by civil authorities constituted "execution of the law."

In *Walden* the defendants, husband and wife, worked in a department store in Quantico, Virginia, a small town adjacent to the main entrance to a large Marine Corps base. They devised a scheme for selling firearms to individuals ineligible to purchase weapons under the Federal Firearms Act.[172] Their method involved the use of a

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[166]Morris v. Virginia, 213 Va. XCIV (1972).

[167]Morris v. Virginia, 411 U.S. 968 (1973).

[168]Appellee's Brief in Response to a Petition for Certiorari at 3, Morris v. Virginia, 411 U.S. 968 (1973).

[169]*Id.* at 5.

[170]*See* note 159 and accompanying text *supra.*

[171]490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974).

[172]18 U.S.C. §§ 921-23 (1974) which forbids the sale of firearms to, among others, minors or nonresidents.

middleman, an eligible purchaser, who would purchase a weapon and then immediately transfer it to the true, but ineligible, purchaser. In exposing this ruse an investigator from the Firearms Division of the United States Treasury Department used three Marine enlisted men from the nearby base as undercover agents. Posing as ordinary purchasers, these servicemen bought weapons from the Waldens and at the subsequent trial gave testimony which was instrumental in convicting the defendants of the firearms offenses.

At their trial the defendants unsuccessfully attempted to suppress this testimony by claiming that use of the Marines violated the Posse Comitatus Act and military regulations which implemented the Act. The transcript of the proceedings indicates that the Marines were recruited by the Treasury Agent through a staff sergeant who worked in the Provost Marshal's office,[173] that at least two of the Marines used as agents worked for the Provost Marshal,[174] and that one of them (who was not on active duty at the time of trial) had extensive experience as an undercover agent.[175] Despite this evidence and the absence of military suspects, the Government argued that the Act had not been violated because the investigation was "related directly to the maintenance of order and security"[176] on the base and that such undercover assistance to civilian authorities does not constitute "execution of the law."[177]

In affirming the conviction on appeal, the Circuit Court of Appeals for the Fourth Circuit held that the use of military undercover agents violated pertinent military regulations,[178] but not the letter of the Act because it does not specifically mention Marine Corps personnel. The clear implication of the court that the spirit of the Act had been violated is buttressed by its warning that evidence obtained by military authorities in violation of the spirit of the Act would be subject to exclusion at trial.[179]

Finding a violation of the regulation sufficient to determine that the military assistance was illegal, the court was relieved of the obligation of deciding whether the use of military personnel in civil law enforcement violates the Constitution. It then gave an indica-

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[173]Consolidated Appendix for Briefs of Appellants and Appellee at 51 and 54, United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974).

[174]*Id.* at 48.

[175]*Id.* at 49.

[176]Brief for Appellee at 2 and A.5, United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974).

[177]*Id.* at 7 and 11.

[178]SECNAVINST 5400.12 (17 Jan. 1969).

[179]See notes 107-12 and accompanying text *supra.*

tion of potential constitutional restrictions on the use of the military in civil law enforcement:

> Nonetheless, our interpretation of the scope and importance of the letter and spirit of the Posse Comitatus Act and the Navy regulation as standards governing primary behavior is influenced by the traditional American insistence on exclusion of the military from civilian law enforcement, which some have suggested is lodged in the Constitution.[180]

2. Surveillance

In order to quell civilian trafficking in illicit goods, civilian law enforcement agents often request other forms of military assistance. Military commanders of aviation units can expect to be confronted with requests that their units assist in border surveillance to help locate, track and apprehend individuals flying illegal drugs across the border in private aircraft. When the Treasury Department requested aerial assistance of this sort The Judge Advocate General of the Army opined that in the absence of an appropriate Presidential directive such conduct was prohibited by the Posse Comitatus Act.[181] Similar use of Army aircraft for spotting illegal liquor stills would violate the Act.[182] In April 1973, the Commanding General of Fort Sill, Oklahoma, ordered aerial reconnaissance of a nearby Indian reservation after receiving reports of possible dissentious activities by the American Indian Movement. Aerial photographs were made and delivered to the Federal Bureau of Investigation. An Opinion of The Judge Advocate General of the Army held this action to constitute a violation of the Act.[183] Similarly, the use of military personnel to conduct aerial reconnaissance over the village of Wounded Knee, South Dakota in February 1973 was one of the reasons a federal judge found that civil law enforcement officers could not prove that they had acted lawfully in their suppression of dissident Indian activities.[184]

3. Pursuit

Most requests for military assistance in the pursuit of criminals

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[180] 490 F.2d at 376; see notes 25, 28-30, 32, 33 and accompanying text *supra*.

[181] DAJA-AL 1972/3401, 7 Jan. 1972.

[182] DAJA-AL 1972/4991, 18 Oct. 1972 (prepared for use in responding to the Chief of Police of Macon, Georgia who was seeking to have military assistance available to him on an as-required basis). The Opinion declared that historically the Army had strictly construed and adhered to the Posse Comitatus Act.

[183] DAJA-AL 1973/4441, 9 Aug. 1973. This Opinion was later revised when it was learned that the General's action was prompted primarily because it was suspected that disruptive activities were being planned against the military installation. DAJA-AL 1973/5129, 21 Dec. 1973.

[184] *See* notes 85-88 and accompanying text *supra*.

involve requests for the use of military aircraft. The Judge Advocates General of the Army,[185] Navy[186] and Air Force[187] have all determined that such assistance clearly violates the Act.

The Air Force Opinion, rendered in 1967 relied on the reasoning of the first significant judicial interpretation of the Posse Comitatus Act, *Wrynn v. United States*.[188] In *Wrynn*, a county sheriff and town police chief were conducting a search for two prisoners who had escaped from the county penal farm. Late in the afternoon when one prisoner had been recaptured and the search had focused on a wooded area, the sheriff called a nearby Air Force base and requested that personnel be provided to help search the woods. As armed airmen moved into the wooded area, the base offered to dispatch a helicopter to provide aerial surveillance. The offer was accepted, and the helicopter flew search patterns as directed by hand signals from the police on the ground. Later the helicopter landed and took aboard two civilian police officers and a radio. As darkness approached and the helicopter was returning to the base, the pilot, at the request of the police, landed his helicopter on a highway near the sheriff's command post to discharge the civilian passengers. Although vehicular traffic had been blocked off, a stray station wagon drove under the descending aircraft causing an erratic landing. The helicopter swung to the right hitting a small sapling with the tip of a rotor blade and scattered debris which injured a 17-year-old bystander. In the suit seeking recovery for the injured youth's damages under the Federal Tort Claims Act, the judge carefully reviewed the legislative history of the Posse Comitatus Act and determined that the employment of the helicopter and crew in the search was a violation of the Act. Accordingly the crew was not acting within the scope of its employment, and the plaintiff could not recover from the United States. The judge, recognizing that the dictates of the Act cannot be ignored, commented:

> The innocence and harmlessness of the particular use of the Air Force in the present case, the dissimilarity of that use to the uses that occasioned

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[185] DAJA-AL 1972/4991, 18 Oct. 1972 (reaffirming an earlier opinion that use of an Army helicopter to spot and track a fugitive in an automobile would violate the Act). *See* JAGA 1957/1209, 18 Jan. 1957.

[186] OP JAGN 1961/9282, 14 Dec. 1961. In this opinion The Judge Advocate General of the Navy opined that even though the Posse Comitatus Act did not apply to the Navy, it was the Navy's policy to follow the spirit of the statute. Thus it could not provide naval personnel and aircraft to local and state law enforcement agencies for use in locating known or suspected criminals.

[187] OP. JAGAF 1967/143, 5 May 1967.

[188] 200 F. Supp. 457 (E.D.N.Y. 1961).

> the enactment, these considerations are irrelevant to the operation of a statute that is absolute in its operation and explicit in its exceptions.[188]

Despite the opinions of the Judge Advocates General and the language of the court in *Wrynn,* military commanders continue to authorize the use of their aircraft in violation of the Act. On January 8, 1973, New Orleans city police requested that Marine Corps helicopters from a nearby base be made available to aid them in combating a sniper, or snipers, in a highrise motel. Newspaper accounts report that on three separate occasions Marine helicopters were used as firing platforms from which police fired tear gas and heavy caliber rifles.[190] Evidently no Presidential or departmental authority was given for this assistance.

In addition to the more routine types of assistance mentioned above it would not be unusual for a commander of an aviation unit to be asked to provide aircraft for surveillance and pursuit of hijacked aircraft. Since 1972 Department of Defense policy has been that such support can be provided without violating the Act. The Department's position is that military force can be used to protect federal property and functions and that the airways, as part of the public domain, are federal property.[191] The Army Regulation implementing this policy requires that all requests for assistance be forwarded to the National Military Command Center via the Directorate of Military Support.[192] The Air Transportation Security Act of 1974[193] gives the Administrator of the Federal Aviation Administration responsibility for directing all law enforcement activities during the commission of an air offense and provides that "Other Federal departments and agencies shall, upon request by the Administrator, provide such assistance as may be necessary. . . ."[194] In earlier proposals the Department of Justice recommended legislation that would specifically authorize the Army, Navy and Air Force to respond to requests for assistance notwithstanding any statute to the contrary.[195] The Judge Advocate General of th Navy has indicated that such specific statutory authority is required to overcome the prohibitions of the Posse Comitatus Act.[196] Because the recently enacted legislation is

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[188] *Id.* at 465.

[189] N.Y. Times, Jan. 9, 1973, at 1, col. 2; *id.* at 22, col. 4; *id.* at 23, col. 1.

[190] Deputy Secretary of Defense Memorandum, Support of Civil Authorities in Airplane Hijacking Emergencies (June 29, 1972).

[191] Army Reg. No. 500-1, para. 5 (6 Oct. 1972).

[192] Act of Aug. 5, 1974, Pub. L. No. 93-366, 88 Stat. 409.

[193] *Id.* § 316 (1) (2), 88 Stat. 415.

[194] *See* OP JAGN 1973/1748, 1 Mar. 1973.

[195] *Id.*

not more specific, a commander should seek departmental guidance rather than respond directly to any request for surveillance or pursuit aircraft from the Federal Aviation Administration.

4. Confinement

Commanders of military correctional facilities continually receive requests for assistance. In 1973 the Governor of Hawaii requested that the Naval Correctional Center at Pearl Harbor be made available to the state during the renovation of the state's high-security prison. He proposed to house twenty-four inmates there with state guards. The Judge Advocate General of the Navy opined that even though the State would provide guards, such action would violate the Act. He reasoned that since naval personnel had overall supervision of the center and bore the ultimate responsibility for all prisoners' safety, they would be executing the state's penal laws.[197] More recently, a similar request from city officials in Philadelphia was denied for the same reason.[198] For the same reasons, when a warden of a civilian institution asked the Air Force to agree to guard his prison's outer perimeter in case of a mass escape attempt, The Judge Advocate General of the Air Force opined that such an agreement would violate the Act.[199]

5. Apprehension

A recent opinion by the United States Court of Appeals for the Ninth Circuit reveals at least one federal court's recognition of the problems raised by the apprehension of civilians by military personnel.[200] In 1970 two American civilians living in Vietnam were indicted by a federal district court in California for conspiracy to defraud the United States and for theft of government property. While Vietnamese authorities were detaining them on other charges, the State Department arranged for their passports to be revoked. As the Vietnamese dropped the charges against the men, they released them to the custody of U.S. Naval Investigative Service Agents. Both were returned to the United States for trial on military aircraft under protest. Both had to be forced aboard the aircraft and one of them was held to the deck of the aircraft with cargo chains and the other was handcuffed.

On appeal of their convictions, they claimed that the government's conduct violated their constitutional rights and

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[197]Op. JAGN 1973/8056, 1 Oct. 1973.
[198]Op. JAGN 1974/801, 29 Jan. 1974.
[199]Op. JAGAF 1968/177, 31 July 1968.
[200]United States v. Cotton, 471 F.2d 744 (9th Cir. 1973).

thereby deprived the trial court of jurisdiction over them. Among the issues raised was an allegation that the use of military personnel and aircraft to forcibly return them violated the Posse Comitatus Act and that this criminal act required either a dismissal of the charges or a finding of lack of jurisdiction. The court determined that it was only confronted with the narrow issue of whether the district court had the power to proceed to trial. In finding that such power existed, the court cited authority for the principle that even forcible abduction or kidnapping does not serve as a bar to jurisdiction before a proper court and determined that the alleged Posse Comitatus Act violation would not bar jurisdiction. However, the court recognized that the appellants might have remedies for a violation of the Act and that criminal and civil sanctions against the military personnel might be available if raised in a proper forum. While the decision certainly falls short of finding that a violation of the Act occurred, this Court of Appeals' recognition that such violations could exist is significant.

6. Training

Requests from civil law enforcement authorities for training assistance are not unusual. The requests are usually for instruction in the use of specific weapons and for the use of live-firing ranges. So long as the assistance is purely for educational reasons, and not a ruse such as "training" in a wooded area where fugitives are being hunted, it would seem that neither the letter nor the spirit of the Act would be violated. In an article recently written for publication in a law enforcement publication, the author concluded that military personnel could train civilian police without being in violation of the Act.[201] The validity of this conclusion was not challenged in the Department of Army review of the article which did in fact recommend several other changes.[202]

In the absence of any specific departmental guidance concerning general training of civil law enforcement personnel, commanders should be guided by the Department of Defense policy on training police for civil disturbance operations. This policy is that commanders cannot approve such requests at the local level.[203] In the absence of any other guidance all requests for training assistance, except for civil disturbances, probably should be forwarded to the

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[201] Proposed article for publication entitled *The Military as a Source of Equipment Training* by Captain William A. Cherry, USA.

[202] DAJA-AL 1974/4552, 23 July 1974.

[203] Dep't of Defense Directive No. 3025.12 (Aug. 19, 1971, *reissued* Dec. 4, 1973). Paragraph X.C.4 at page 15 provides that requests for civil disturbance training be forwarded to the nearest United States Attorney.

appropriate departmental headquarters. Military training of civil law enforcement agencies does not go unnoticed and receives substantial criticism.[204]

7. The Military Advisor

The cases of *United States v. Jaramillo*,[205] *United States v. Banks*,[206] and *United States v. Red Feather*[207] which provide the most current federal judicial interpretation of the Posse Comitatus Act all arose out of the civil disturbances at Wounded Knee, South Dakota. In March 1973, the Department of Defense sent an Army colonel to South Dakota to observe the disorders instigated by members of the American Indian Movement at Wounded Knee. The colonel's mission was to keep the Department advised of developments in the event the President should order federal troops into the area. As an observer he was not violating the Posse Comitatus Act. Unfortunately the colonel became more involved, and his participation provided the primary basis for a successful defense to the criminal charges lodged against some of the Indian participants. The officer in actuality became an advisor to the civil law enforcement agents, giving advice on rules of engagement, negotiation and placement of equipment. He also obtained another active duty Army colonel to assist with logistical support for the operation.

In *Jaramillo* the court acquitted the two defendants charged with interfering with federal officers lawfully engaged in the lawful performance of their duties as a result of its finding that the prosecution could not prove beyond a reasonable doubt that the civilian law enforcement authorities had acted "lawfully" in light of the participation of military personnel. The decision does not specifically hold that the colonel, acting as an advisor, violated the Posse Comitatus Act, but the case clearly stands for the proposition that conduct of that type is exactly what the Act prohibits. In

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[204] *See* N.Y. Times, Jan. 9, 1973, at 23, col. 3. Mr. Ramsey Clark, former Attorney General, avers that police operate as paramilitary units and that this concept needs to be changed. Police should be viewed as civil servants. The Daily Progress (Charlottesville, Va.), Oct. 10, 1974, § A, at 9. A news service release on the criminal trials resulting from the Wounded Knee incidents of 1973 reports that defense attorneys are raising a "military defense." They are claiming that the civil law enforcement agencies are in effect military units. In support of this allegation they point out that U.S. marshals have been receiving instruction in civil disturbance operations at Fort Gordon, Georgia.

[205] 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[206] United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974).

[207] United States v. Red Feather, 392 F. Supp. 916 (D.S.D., 1975).

Banks the court granted motions for judgment of acquittal as to similar charges on the rationale of *Jaramillo*.

A defense investigator claimed that the colonel not only acted as an advisor but actually controlled the use of all law enforcement weapons and munitions.[208] A later newspaper account reported that the federal district court which heard the *Jaramillo* case subsequently dismissed indictments against nine other persons charged with the same offenses as Jaramillo quoting the prosecutor as saying the cases were dropped "because we didn't think the cases were that strong."[209] His real meaning was that the Posse Comitatus violations made it impossible to obtain convictions.

Lest anyone assume that the decision in *Jaramillo* is a reflection of an anti-military bias, it should be noted that the court actually complimented the civil and military authorities and found their actions "unreservedly reasonable."[210] However, the judge stated that the congressional prohibitions against use of the military were very clear and that he was bound to acquit the defendants in light of the military's conduct.

The judge in *Red Feather* did not agree that the congressional prohibitions were so clear. In the early stages of the case he granted a government motion to restrict the defendants from referring to the military involvement.[211] He concluded that the colonels' advice (as well as the aid given by the vehicle mechanics and pilots) was passive involvement in civil law enforcement and as such did not violate the Posse Comitatus Act. He reasoned that only active involvement such as participation in arrest, search of persons and places, seizure of evidence and pursuit of escaped prisoners violates the Act.

The decisions in *Jaramillo* and *Banks* more accurately reflect the legislative intent behind the Posse Comitatus Act. The Act creates no active/passive distinction. It simply prohibits *all* execution of civil law except where specifically authorized by Congress or the Constitution. Nor does the history of the Act support the argument

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[208] The Daily Progress (Charlottesville, Va.), Oct. 10, 1974, § A, at 9.

[209] Washington Post, Dec. 25, 1974, at A14, col. 1.

[210] 380 F. Supp. at 1381.

[211] On April 1, 1975, the government in *United States v. Geneva Red Feather*, *supra* (a Wounded Knee non-leadership case) filed a motion *in limine* to prohibit the defense from introducing any evidence concerning the Department of Defense involvement at Wounded Knee in 1975. On April 7, 1975, Judge Andrew Bogue ruled that the defense could only introduce evidence of a *direct active* role in the execution of the law at Wounded Knee by military *personnel* such as investigation, search, arrest, pursuit and other like activities. Judge Bogue specifically found that aerial photographic flights, maintenance personnel for loaned equipment, training by military personnel, advice or recommendations by military personnel, and other similar [*sic*] activities were not unlawful under 18 U.S.C. 1385. The court found that such *indirect passive* roles by military personnel were not intended to be within the scope of the Posse Comitatus Act. See also, *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974).

23 United States Attorneys Bulletin No. 13 at 584 (June 27, 1975).

that only active aid is prohibited.[212] Utilizing an active/passive test will only make compliance with the Act more confusing and will surely result in more violations. For example, aerial reconnaissance flights can hardly be characterized as passive in nature. At the very least they constitute active intelligence gathering and often constitute searches. Also, in the context of the Wounded Knee operation, the colonels' advice on logistics and tactics cannot be reasonably characterized passive participation. They in fact actively contributed to the overall command and control of the operation.

8. Civilian Use of Government Equipment/Property

The Judge Advocate General still adheres to the long-standing position that allowing civil authorities to use military equipment or property does not violate the Posse Comitatus Act so long as no military personnel are utilized.[213] Army helicopters can be loaned to civil authorities but pilots or maintenance personnel cannot;[214] and polygraph facilities may not be loaned because providing the military operator would violate the Act.[215] The Air Force will not loan helicopters with Air Force pilots[216] or any other type equipment that requires military operators.[217] A Naval correctional facility can be used by civil authorities only if all Navy supervisory and control personnel are removed.[218]

The Department of Defense policy is that military equipment may be loaned to civil authorities in connection with civil disturbances, but operators "employed in connection with loaned equipment may not be used in a direct law enforcement role."[219] This policy seems to depart from the traditional opinion that personnel will not be used in any capacity whatsoever and is questionable. The pertinent Directive does not explain precisely what is contemplated either through definitions of terms or examples. The Department of Defense has not promulgated guidance concerning

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[212]See notes 48-67 and accompanying text *supra*. *But see* 28 United States Attorneys Bulletin No. 13 (June 27, 1975) which states:

> It appears that Judge Bogue's decision has sufficiently narrowed the scope of the Posse Comitatus Act so as to permit the Department of Defense to continue to lend effective assistance to civilian law enforcement agencies. If, however, on appeal, Judge Bogue's opinion is overturned or broadened to the scope of the opinions of Judges Urbom or Nichol, consideration will be given to recommending corrective legislation.

[213]*See* Furman, *supra* note 12, at 123.

[214]JAGA 1968/3586, 28 Feb. 1968.

[215]JAGA 1964/3491, 5 Feb. 1964.

[216]Op. JAGAF 1967/143, 5 May 1967.

[217]Op. JAGAF 1963/555, 22 Aug. 1963. *See also* note 186 *supra*.

[218]Op. JAGN 1974/801, 29 Jan. 1974.

[219]Dep't of Defense Directive, *supra* note 203, at para. X.

use of equipment by civil authorities in situations other than civil disturbances and in light of the unique status of the civil disturbance guidelines commanders should be extremely wary of extrapolating them to other situations.

The most significant guidance concerning the use of military equipment and personnel to operate it stemmed from the Wounded Knee incident. On March 29, 1973, while Wounded Knee was still being forcibly held by members of the American Indian Movement, a memorandum opinion was prepared at the Department of Justice concerning the possible use of mobile military equipment operated by military personnel. The opinion concluded that:

> If a plan were devised to use mobile equipment of the military, operated by military personnel, at Wounded Knee, it seems clear that this would constitute a law enforcement use covered by the Posse Comitatus Act.[220]

This opinion seemingly anticipated the decision in *Jaramillo.*[221] There the court observed that the Army had furnished large quantitites of materiel and equipment, including ammunition, flares, rifles, protective vests and armored personnel carriers. The judge, after reviewing the history of the Posse Comitatus Act, concluded, "I am confident that the furnishing of this material, *standing alone,* is not a violation of [the Act]."[222] He then determined that the use of the military mechanics to maintain the armored personnel carriers was unlawful.[223]

C. INDIRECT AID: THE "MILITARY PURPOSE DOCTRINE"[224]

Many law enforcement activities performed by military officials benefit the civilian community as well as the military command. This dual purpose "execution of the law" can, and often does, violate the Act. Where the primary purpose of the action is to fulfill a legitimate military requirement, no violation of the Act occurs even though civil law enforcement is incidentally aided. However, where action by military officials is taken primarily in aid of civil authorities, the Act is violated even though the military command

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[220]Memorandum Opinion regarding Authority to Use Mobile Equipment of the Armed Forces and Limited Military Personnel at Wounded Knee, March 29, 1973, on file in the office of Ms. Mary Lawton, Deputy Assistant Attorney General, Department of Justice, Washington, D.C.

[221]380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed,* 510 F.2d 808 (8th Cir. 1975).

[222]380 F. Supp. at 1379 (emphasis added).

[223]*Id.* at 1381.

[224]*See* Furman, *supra* note 12. Note the examples given on pages 112 through 126 of situations where the military acts primarily to fulfill a military requirement.

is aided incidentally. Violations of this type usually occur where a commander is trying to accommodate local officials in order to enhance community relations.

Military commanders must perform certain law enforcement functions. The Uniform Code of Military Justice establishes an entire system of criminal law which the commander must enforce. Furthermore, commanders are responsible for all government property and activities under their control and must take appropriate action to insure their preservation.[225] When the predominant motive for law enforcement activities is to enforce the Uniform Code of Military Justice, to protect military property or activities, or to further some legitimate military interest, the Act is not violated.

The military can investigate loss of household goods in a commercial warehouse due to fire[226] or theft[227] when they are stored under government contract. Even though the investigation may aid civil authorities, the military has a duty to protect the property of its members. Potential claims against the Government require an investigation and the statements taken in conjunction with this or other legitimate military investigations may be given to civil authorities without violating the Act.[228]

Military police may be used as guards for base exchange funds in transit between the exchange and an off-base bank,[229] but they may not escort funds of commercial banks on and off base.[230] Both actions would aid civil law enforcement in deterring or preventing robberies, but only in the case of the exchange funds is the predominant motive to protect government property. Use of military police for general traffic control off-base violates the Act even though many of the vehicles are those of military personnel;[231] however, where civil police are not available, military police may direct traffic in order to preserve the integrity of a military convoy traveling off-base.[232] Military police may be used to guard military property and to maintain discipline among military personnel at off-base

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[225]Internal Security Act of 1950, 50 U.S.C. § 797 (1970); Dep't of Defense Directive No. 5200.8 (Aug. 20, 1954).

[226]JAGA 1968/3468, 23 Feb. 1968.

[227]JAGA 1967/4727, 4 Dec. 1967.

[228]JAGA 1965/4182, 8 June 1965.

[229]Op. JAGN 1971/9839, 9 Nov. 1971.

[230]Op. JAGAF 1965/861, 30 Nov. 1965.

[231]DAJA-AL 1972/4289, 5 June 1972; DAJA-AL 1974/3871, 28 Mar. 1974.

[232]Op. JAGAF 1968/189, 8 Aug. 1968. Even though such action may not violate the Posse Comitatus Act it should always be coordinated with civil authorities.

events such as Olympic games,[233] national rifle matches[234] and large religious services,[235] but they may not perform general traffic and crowd control or surveillance functions at these affairs. Joint military-civilian patrols are permissible as long as military police only exercise control over military personnel who violate military law. They may not exercise control over civilian offenders or military personnel who violate civil law.[236]

As a general rule, information obtained by military personnel in the course of performing military duties may lawfully be reported to civil authorities.[237] Exchanging traffic information such as accident reports[238] and the results of blood alcohol tests[239] are proper where the military obtained the information in the course of a proper military investigation. Possible criminal activity or the location of suspects observed incidentally by military pilots during military flights may be reported[240] and unidentified aircraft observed by military radar may be reported to customs authorities without violating the Act.[241]

D. NONDUTY STATUS CIVIL LAW ENFORCEMENT

Military personnel are all private citizens as well as members of the federal military. The prohibitions of the Posse Comitatus Act do not apply to military personnel who are performing the normal duties of a citizen such as reporting crimes and suspicious activities, making citizens' arrests where allowed by local law and otherwise cooperating with civil police.[242] It is not sufficient for military personnel to be "volunteers,"[243] they must clearly be acting on their own initiative and in a purely unofficial and individual capacity.[244] Commanders must be careful to insure that activities which are in violation of the Act are not being carried on

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[233]JAGA 1959/7312, 23 Oct. 1959.

[234]DAJA-AL 1974/5006, 28 May 1974.

[235]DAJA-AL 1974/3871, 28 Mar. 1974.

[236]JAGA 1968/4361, 6 Sept. 1968; OP JAGAF 1961/295, 12 June 1961.

[237]OP. JAGAF 1966/688, 7 Nov. 1966; DAJA-AL 1974/4802, 20 Aug. 1974.

[238]JAGA 1969/4036, 31 July 1969.

[239]JAGA 1970/5147, 1 Dec. 1970; JAGA 1968/4228, 15 Aug. 1968.

[240]OP JAGN 1961/9282, 14 Dec. 1961.

[241]Letter from John C. Wren, Assistant General Counsel, U.S. Air Force, to Lt. George Hammett, Sept. 11, 1973.

[242]For example, two Marines were recently commended for aiding a policeman at Disneyland who needed help in apprehending a suspected drug offender. Navy Times, Oct. 23, 1974, at 14, col. 3.

[243]United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[244]JAGA 1968/3484, 13 Feb. 1968.

under the labels of "individual" or "unofficial" assistance. Some factors which may signal a violation of the Act include aid given during duty hours, aid prompted or suggested by a military superior or aid given with the knowledge or acquiescence of a military superior. Other considerations include the manner in which the civil authorities contacted the military person, whether that person regularly performs military law enforcement functions, and whether or not the individual's usefulness to civil authorities is related to his military status.

The Department of Defense does not prohibit military personnel from working as civil law enforcement officials while off duty.[245] The Army,[246] Navy[247] and Air Force[248] Judge Advocates General have opined that such off-duty employment does not constitute a violation of the Posse Comitatus Act as long as it is done in an individual and unofficial capacity. The Commandant of the Marine Corps, as a matter of policy, does not allow off-duty Marines to work as law enforcement officers on public police forces.[249]

Military personnel may participate in military sponsored programs designed to prepare them for civilian employment as law enforcement officers such as "Project Transition;" however, their training must be restricted to classroom instruction. Performance of any active law enforcement role such as making arrests or patrolling in squad cars would violate the Act.[250]

E. NON-LAW ENFORCEMENT ACTIVITIES

Law enforcement agencies often perform services other than enforcement of criminal law, services that may be described as public safety functions. In general, military commanders can perform public safety services when requested by local civil authorities if such service is necessary to preserve life or prevent serious injury. Such action will not violate the Posse Comitatus Act.[251]

The most topical example of the type emergency aid which is authorized is explosive ordinance disposal. The Army[252] and

[245]Dep't of Defense Directive No. 5500.7 (Aug. 8, 1967).

[246]DAJA-AL 1974/4334, 10 July 1974; DAJA-AL 1974/3549, 29 Jan. 1974.

[247]Op. JAGN 1973/1878, 5 Mar. 1973.

[248]Op. JAGAF 1971/62, 21 July 1971; Op. JAGAF 1970/174, 17 Nov. 1970.

[249]Marine Corps Order 5330.3A (11 Nov. 1974).

[250]JAGA 1968/4361, 26 July 1968; Op. JAGN 1973/1878, 5 Mar. 1973.

[251]Op. JAGN 1973/8056, 1 Oct. 1973; JAGA 1969/4742, 14 Nov. 1969. The Judge Advocate General opined that medical evacuation by military helicopter of persons injured in automobile accident does not violate the Act. However, if the primary mission of the helicopter is accident investigation or pursuit of an offender then the Posse Comitatus Act is violated.

[252]JAGA 1966/3590, 22 March 1966.

Navy[253] often search[254] for and dispose[255] of explosive devices to preserve public safety, not to execute law. However, military storage of such devices after they are disarmed for safekeeping as evidence would violate the Act.[256]

Military aid is often requested after major disasters such as fires, floods or hurricanes and in such instances the Department of Defense usually issues guidance to subordinate commands. If the President determines that federal disaster relief is required, he may direct federal military forces to provide assistance.[257] In the absence of such guidance a commander should act only in situations of immediate urgency where human life and safety are in jeopardy. The assistance should be as limited in duration as possible and should immediately be reported to superior headquarters. If assistance continues after the immediate crisis has passed or if it involves tasks not directly related to the personal safety of victims, such as protection of property, traffic control or suppression of looting, it will be unlawful.[258]

VI. CONSEQUENCES OF POSSE COMITATUS VIOLATIONS

A. CRIMINAL PROSECUTION

The Posse Comitatus Act provides that "Whoever . . . willfully uses any part of the Army . . . to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."[259] No record can be found of any criminal prosecution under this section. The statute does not specify whether "Whoever" refers to the civil authority who requests the aid, the military commander who provides it, the military personnel who actually perform the assistance requested or all or a combination of these parties. The

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[253] *See* Washington Post, Sept. 25, 1974, at C11, col. 4 (describing services rendered by Navy explosive experts in disarming a bomb in Portsmouth, Virginia).

[254] JAGA 1967/4169, 13 July 1967.

[255] JAGA 1966/3590, 22 Mar. 1966.

[256] JAGA 1970/3513, 18 Feb. 1970.

[257] 42 U.S.C. § 1855 (1970).

[258] OP. JAGAF 1966/461, 10 June 1966; OP. JAGN 1973/8656, 24 Oct. 1973. For a discussion of the commander's assistance to civil authorities in an emergency situation *see* C. POWELL, MILITARY AID TO THE CIVIL POWER 203-07. The author, discussing aid given in San Francisco after the 1906 earthquake, concluded that a commander in such situations can act without permission from higher authority and that troops can be used for law enforcement functions. That later conclusion, valid 50 years ago, is doubtful today in view of the significant improvement in communications which provide contact with the Department of Defense in almost all circumstances.

[259] 18 U.S.C. § 1385 (1970).

legislative history indicates that when Congressman Knott first proposed the Act he clearly intended that the penalty be applicable to the military commander. In debate he stated that he wanted the prohibition to apply "from the Commander-in-Chief down to the lowest officer in the Army who may presume to take upon himself to decide when he shall use the military force in violation of the law of the land."[260] However, nothing in the Act's history indicates that the penalty was intended to apply only to the military commander.

The phraseology of the Act, "Whoever . . . willfully uses . . .," indicates that the penalty is also applicable to the civil authority who requests the aid. The history of the Act supports the conclusion that it was the action of civil officials in requesting and using military aid that Congress sought to stop. In the year before passage of the Act, Congressman Banning was critical of the Attorney General's directive that, "Any marshal of the United States, or deputy or special marshal, may upon his own private judgment, order any officer, even the General of the Army, to obey his command."[261] The following year Congressman Kimmel complained that the Army had been improperly used by governors, sheriffs, local authorities, and United States marshals.[262] Major Furman, in his article on the Posse Comitatus Act, concludes that when a violation occurs both the military commander and civilian authority requesting the aid have "used" the military.[263] The Judge Advocate General of the Air Force has stated that the military commander may be criminally liable for violations of the Act[264] and an informal memorandum opinion of the Department of Justice dealing with the "Wounded Knee" situation concludes that the civil agency requesting aid and the "participating military personnel" are subject to criminal penalties for violating the Act.[265] It is not clear whether the Department meant the military commander, his troops, or both.

The Fourth Circuit's decision in *Walden v. United States*[266] sheds no additional light on which persons are subject to criminal liability for violations of the Act. There, when the court considered the motives of the Marines and the Treasury Department Investigator, it pointed out that the Act "renders the transgressor liable to criminal penalties."[267] The decision does not indicate whether

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[260]7 CONG REC. 3847 (1878) (remarks of Mr. Knott).
[261]5 CONG. REC. 2117 (1877) (remarks of Mr. Banning).
[262]7 CONG. REC. 3581 (1878) (remarks of Mr. Kimmel).
[263]Furman, *supra* note 12, at 98.
[264]OP. JAGAF 1968/177, 31 July 1968.
[265]Department of Justice Memorandum, *supra* note 220, at 2.
[266]490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).
[267]*Id.* at 876.

"Marines" means the commander, his troops, or both. Near the end of the decision the court, in what appears to be a warning, stated that there is no "reason to doubt that the military, now that we have declared the effect of the Instruction, will fail to take steps to provide a mechanism to enforce it."[268] In response to this admonition the Secretary of the Navy published a directive in order that the provisions of the Act could be enforced against Navy and Marine Corps personnel under Article 92 of the Uniform Code of Military Justice.[269] The directive provides that "Members of the naval service shall not . . . enforce, or execute . . . civil law . . .,"[270] extending the criminal penalty to the troops who actually render the assistance.

As can be seen, various interpretations of the Act find the criminal penalties extending to the civilian requester, the military commander and the troops who actually assist. It would seem that the penalties need not be extended to the latter in order to insure compliance with congressional intent. Furthermore, on its face the Act does not seem to extend to the troops who carry out their commander's desires. Nonetheless, this reasoning is mere supposition, and not until there is judicial interpretation of the Act will the matter be resolved. Until that time, a safer course will be to assume the criminal sanctions extend to all who may be involved in a violation.

B. CIVIL LIABILITY

Almost thirty years ago Congress enacted the Federal Tort Claims Act,[271] which was a significant waiver of sovereign immunity. In general this Act allows suit for damages to be brought against the United States for personal injury and property damage caused by the wrongful acts, negligence, or omissions of employees of the federal government acting within the scope of their employment. The circumstances surrounding the tortious conduct must be

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[268] *Id.* at 377.

[269] Op. JAGN 1974/3363, 7 May 1974.

[270] SECNAVINST 5820.7 (15 May 1974).

[271] 28 U.S.C. §§ 1346, 2674 *et seq.* (1970). In general this Act does not bar plaintiffs from recovering damages from the individual government employee tortfeasor. The Act does bar double recovery from the employee and the United States. An exception to this general rule in section 2679 (b)-(e) of title 28 provides that recovery against the United States is the exclusive remedy in the case of accident involving vehicles driven by government drivers. Naturally, when a govermment vehicle operator is not acting within the scope of his employment, (e.g. acting in violation of the Posse Comitatus Act) he is not protected by the Federal Tort Claims Act.

such that the United States, if it were a private person, would be liable under the law of the situs of the incident.

In *Wrynn v. United States*[272] an Air Force helicopter assisting a local sheriff in his search for an escaped prisoner struck a small tree while landing, showering four onlookers with flying debris and injuring them. The father of one of the injured minors brought an action against the United States under the Federal Tort Claims Act for medical expenses and loss of his son's services. The court carefully reviewed the legislative history of the Posse Comitatus Act and concluded that Act was applicable in the case. The court specifically found that the helicopter and its crew had assisted in the execution of civil criminal law and thus had violated the Act. Since the crew was clearly acting illegally, it was not within the scope of its office or employment. It is now well recognized that the United States Government is immune from liability in tort actions arising from incidents involving violations of the Posse Comitatus Act. Even under the latest change to the Federal Tort Claims Act which allows actions to be brought for assault, battery, false imprisonment and false arrest by federal law enforcement officers,[273] the federal employee must be acting within the scope of his employment for a plaintiff to recover under the Act.

Since the federal government will not be liable for torts arising out of acts which violate the Posse Comitatus Act, it is very probable that the injured party will seek redress from the government employee in his private capacity. Generally, a federal employee's best protection is that of immunity from suit based upon conduct arising from his official duties. In a recent case an Army colonel was sued for assault, intentional infliction of emotional distress and malicious prosecution after he stopped and berated a civilian nurse for speeding on post.[274] The colonel claimed that because he was an officer and in the Army Adjutant General's Corps he was immune from suit. The court concluded that there was insufficient evidence to show that he had authority to enforce traffic regulations and accordingly he could be personally liable because he had failed to show that he had acted within the scope of his official duties and was performing discretionary acts. For any individual service member involved in a Posse Comitatus Act violation this case stands for the proposition that he may be subject to personal liability.

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[272]200 F. Supp. 457 (E.D.N.Y. 1961). *See also* notes 188 and 189 and accompanying text *supra*.

[273]Act of March 16, 1974, Pub. L. No. 93-253 § 2, 88 Stat. 50.

[274]Green v. James, 473 F.2d 660 (9th Cir. 1973).

C. EXCLUSION OF EVIDENCE

In *Walden*,[275] the court of appeals recognized that most of the evidence upon which the defendants' convictions were based had been obtained through violations of the Posse Comitatus Act. It then observed that while the Act provided criminal penalties, it did not require that the evidence be excluded. Accordingly, the evidence was not excluded, but the court did consider the development of the exclusionary rule and warned "Should there be evidence of widespread or repeated violations in any future case, or ineffectiveness of enforcement by the military, we will consider ourselves free to consider whether adoption of an exclusionary rule is required as a future deterrent."[276] In *Jaramillo*,[277] even though the court did not apply an exclusionary rule, it showed that violations of the Act drastically decrease the prosecution's chances of success. In that case the accused were charged with interfering with law enforcement officers lawfully performing their duties during a civil disorder. The court held that the prosecution failed to prove the officers were *lawfully* engaged in their duties because they had used military aid in violation of the Posse Comitatus Act. These cases will probably be cited with increasing frequency and success by defendants in any cases where military aid has been given to civil authorities.

VII. CONCLUSION

Ninety-seven years ago on the floor of the House of Representatives the Army was characterized as being "to the United States what a well-disciplined and trained police force is to a city."[278] Congress passed the Posse Comitatus Act in order to remove that police force image and "to put a stop to the practice, which has become fearfully common of military officers of every grade answering the call of every marshal to aid in the enforcement of the laws."[279] Unfortunately, just as a hundred years ago, military commanders are still responding to the marshals, sheriffs and federal agents. Until a few years ago the Act had received no significant consideration by the courts. In 1960 Major Furman correctly observed that after eighty years "there is a paucity of judicial

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[275]United States v. Walden, 490 F.2d 372, 376 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[276]*Id.* at 377.

[277]United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[278]7 CONG. REC. 3552 (1878) (remarks by Mr. Kimmel).

[279]7 CONG. REC. 3849 (1878) (remarks by Mr. Knott).

decisions concerning it."[280] Nonetheless, the phrase "posse comitatus or otherwise" is not so incomprehensible as to excuse the frequent practice of ignoring the Act. The legislative history of the Act clearly shows that the prohibitions were meant to be broad.[281] The excuses voiced over the years for ignoring the Act are rapidly being silenced by the federal courts where at long last this "obscure and all-but-forgotten statute"[282] is receiving close scrutiny. The first significant decision was rendered in 1961 and recognized that the Act forbids every use of the Army or part of it, as a posse or strictly as a military force, in aiding civil authorities with execution of the law, except where *explicit* congressional authority exists.[283] Federal decisions have held that "otherwise" includes using military personnel for pursuit[284] and surveillance.[285] Violations of the Act have also been found where military personnel have given aid as advisors,[286] support personnel[287] and as undercover agents.[288] Another decision clearly implies that apprehension, detention and transportation of offenders in aid of civil authorities are questionable.[289]

The decisions may require the Department of Defense to recognize the prohibitions and sanctions of the Act. It is unfortunate that the courts must force the Department out of its lethargy in an area where it should have been meeting its responsibilities without prompting. At the time of passage there was strong sentiment in the Army, expressed by Generals Ruger and Halleck, that the military establishment should stay out of civil law enforcement.[290] The lessons learned by these officers have long been forgotten.

The Defense Department's indifference toward the Act is made evident by the lack of guidance given to subordinate commanders. While the Act is at least recognized in a Directive on the use of

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[280]Furman, *supra* note 12, at 126.

[281]The military never executes the law. The military puts down opposition to the execution of the law when that opposition is too great for the civil arm to suppress . . . Therefore I say it ought to be unlawful in all cases to talk about calling upon the Army to execute the laws.

7 CONG. REC. 4247 (1878) (remarks of Senator Hill).

[282]Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

[283]Wrynn v. United States, 200 F. Supp. 457 (E.D.N.Y. 1961).

[284]*Id.*

[285]United States v. Jaramillo, 380 F. Supp. 1375, (D. Neb. 1974), *appeal dismissed,* 510 F.2d 808 (8th Cir. 1975).

[286]*Id.*

[287]*Id.*

[288]United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983 (1974).

[289]United States v. Cotton, 471 F.2d 744 (9th Cir. 1973).

[290]7 CONG. REC. 3581-82 (1878) (remarks of Mr. Kimmel).

military personnel and equipment in "civil disorders,"[291] this Directive fails even to recognize that commanders receive many requests from civil law enforcement agencies for aid in situations not involving "civil disorders." Commanders do have very specific departmental guidance concerning their duty to develop and maintain good community relations[292] through a Directive which appears to have been drafted with public relations in mind. Encouraging "cooperation with government officials,"[293] the Directive states that "successful community relations can result only from the consistent exercise of initiative, imagination, and judgment by every individual" and places "principal reliance on Commanders at all levels" to act "within the guidelines provided."[294] The Directive does not mention the Posse Comitatus Act; it does not even imply that there are limitations on providing aid to civil law enforcement authorities; however, it clearly allows military personnel to be used in security cordons off base.[295] The only real restriction it places on the use of military personnel is that they should not perform menial tasks.[296] Considering the overall tenor of the Department's Directives, one may conclude that in its zeal to enhance public relations the Department has completely failed to acknowledge the restraints imposed by the Act. Certainly the Department has a valid interest in maintaining a good community image, but even if indifferent to the Act's prohibitions, it should be concerned with protecting unwary subordinate commanders.

When and if civil and criminal actions are instituted for violations of the Act, they will not be against the Secretary of Defense but against the commander and his troops who assisted the civil authorities. Accordingly, commanders must be aware that the Department of Defense has yet to recognize fully that military involvement in community affairs has strict limitations in the area of law enforcement. Unfortunately there is little to indicate that the Department is prepared to recognize this limitation. Indeed, the actions of its emissaries, the so called "observers" at Wounded Knee in the *Jaramillo* case, indicate that the Act is still being ignored by the Department.

The initial reaction to the *Walden* decision was encouraging. The Marine Corps published a brief, concise directive which recognized

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[291] Dep't of Defense Directive No. 3025.12 (Dec. 4, 1973).
[292] Dep't of Defense Directive No. 5410.18 (July 3, 1974).
[293] *Id.* at para. III.
[294] *Id.* at para. V.A.
[295] *Id.* at encl. 2.
[296] *Id.* at para. V.B.6.

that the Posse Comitatus Act must be followed, gave specific examples of the type activity prohibited and provided commanders with a procedure for resolving any uncertainty.[297] Unfortunately this directive was replaced by an Instruction from the Secretary of the Navy which merely provides that "Members of the naval service shall not . . . enforce or execute . . . civil laws except" as authorized by Congress, as authorized in the civil disturbance directive and as approved by the Secretary of the Navy.[298] Although deficient because it fails to give more specific guidelines, at least the Secretary of the Navy has recognized the existence of the limitations imposed by the Act. The Secretary of Defense should publish an order similar to the short-lived Marine Corps Bulletin. Such a Directive would give the Department a starting point from which future guidelines and policies could evolve.

Regardless of the quantity or quality of directives that may be issued by higher authority, only the commanders at posts and stations throughout the country can insure compliance with the Posse Comitatus Act. They must understand that although each incident, isolated and viewed alone, may do little harm to our constitutional principles, it is the collective effect and the gradual erosion of the democratic principle of non interference by military authority in domestic matters that must be guarded against. Commanders must remember that this tradition did not evolve by accident. It evolved out of the determination to abate governmental abuse of the rights of private citizens. Failure to preserve this tradition and others similar to it, which serve to balance the powers of the central government, will surely weaken the democratic system.

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[297]Marine Corps Bulletin 3440 (5 April 1978) provided:

1. All requests for support of civil authorities received by USMC commanders will be referred to the appropriate naval area coordinator, who will process the request. USMC commanders, except in instances where natural disasters are of such imminent seriousness as to preclude the receipt of timely instructions from the naval area coordinator, must await the appropriate authorization prior to providing USMC resource support to civil authorities. Care should be taken to ensure that the use of Marine Corps resources is not in a law enforcement role.

2. Marine Corps resources may not be used in a law enforcement role without prior approval of CMC (Code AO1F). For the purposes of this bulletin, "Law Enforcement Role" is defined as follows: A law enforcement role or capacity includes but may not be limited to activities of the following nature.

A. Active participation in the investigation of a criminal case

B. The search for suspected criminals or escaped prisoners

C. The search for or seizure of evidence relating to alleged crimes

D. The apprehension or arrest of a suspect

E. Crowd control or the direction of traffic

F. Use of a vehicle or aircraft as a weapons platform or as a carrier for civilian law enforcement officials who are in the process of actively searching for a suspected criminal, evidence related to a crime or an escaped prisoner. However, this definition should not be used to make final determination as to what does or does not constitute law enforcement. In all cases of any doubt concerning the propriety of a request for the use of Marine Corps resources in a possible law enforcement role, commanders, in addition to processing the request via the naval area coordinator, will obtain approval of CMC (Code AO1F) before releasing resources or furnishing assistance.

[298]SECNAVINST 5820.7 (15 May 1974).

Some may respond that these are heady warnings for such innocuous acts of cooperation as occur daily between military and civil police throughout this country. That may be valid criticism, but devotion to the principle of strict noninterference in civil matters will help insure that we are never asked "How do people get to this clandestine Archipelago?"[299]

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[299] A. SOLZHENITSYN, THE GULAG ARCHIPELAGO 1 (1973).

OFFICER SELECTION BOARDS AND DUE PROCESS OF LAW*

Captain John N. Ford, USAR**

I. INTRODUCTION

Self-interest alone should provide adequate motivation for members of the military establishment to examine the statutory and administrative bases of the Army's process of selecting commissioned officers for promotion. Unfortunately, the tremendous number of promotion lists in the Army converts any general analysis of the subject into a Herculean task. For that reason, this article will focus on the compatibility of the selection procedure with the due process clause of the fifth amendment to the Constitution only in the context of selection boards which consider Regular officers for permanent promotion on the Army Promotion List; selection boards which consider Reserve officers for permanent promotion; and boards which consider active duty officers for temporary promotion in the Army of the United States (AUS).[1] Discussion of the formal statutory and regulatory scheme will be followed by an examination of the method of empaneling a selection board and a description of a typical board's proceedings. Finally, the system, as structured and actually administered, will be tested against the due process requirements of the fifth amendment to the Constitution.

Oral interviews with former selection board members provide the basis for much of the information detailing the manner in which the boards conduct their business. Some of the individuals interviewed have given the author permission to quote them on the condition that their identities remain anonymous, a condition which has been honored in the preparation of this article. Formal citation to authority is similarly limited by the fact that the author has been

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*This article is an adaption of a thesis presented to The Judge Advocate General's School, U.S. Army in satisfaction of the writing requirements for the Nonresident Judge Advocate Officer Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of the Department of the Navy, The Judge Advocate General's School, U.S. Army, or any other governmental agency.

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[1]The selection process employed for promoting Chaplains, members of the Women's Army Corps or the Army Medical Department and promotions to ranks above lieutenant colonel are beyond the scope of this article.

denied access to documents in the possession of the Office of the Deputy Chief of Staff for Personnel (ODCSPER) which enumerate the specific criteria for choosing selection board members. Fortunately the hiatus is not complete; general criteria have been conveyed to the author orally by personnel in ODCSPER.

II. THE STATUTORY/REGULATORY SCHEME

The statutory basis for the Army's officer promotion system is the Officer Personnel Act of 1947, as amended.[2] The original purpose of the Act was to resolve the question of how all the Armed Forces would manage their officer personnel in the aftermath of World War II and the anticipated transition from a huge wartime military force to a relatively small peacetime establishment. The first four titles of the Act deal with promotions in the Navy and Marine Corps with only title five concerning Army procedures. For the Army, the Act ushered in a new era, utilizing procedures which were well-known in the Navy—promotion by selection.[3]

By imposing the requirement that an officer be selected by the majority of a board of officers before he could be promoted, Congress sought to greatly strengthen the Army's officer corps.[4] To accomplish the mission of selecting officers for permanent promotion, Congress established two board systems, one for Regular Army officers and the other for Reserve officers. Congress also made provision for officers to be appointed to a temporary grade, but did not establish a selection board for accomplishing this task.

A. PERMANENT PROMOTIONS

1. Regular Officers

Selection boards are to convene at Headquarters, Department of the Army (HQDA)[5] at times prescribed by the Secretary of the Army.[6] Each board must be composed of at least five officers of the

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[2] Act of Aug. 7, 1947, ch. 512, 61 Stat. 795.

[3] In the House Report on the Act the following observations were made:

> The Navy plan is not an innovation for the Navy. It effects certain refinements in the Navy selection system which has been in effect since 1916—over 30 years . . . .
>
> By contrast, the Army promotion system—title V of H.R. 3830—is a new undertaking of major proportions for the Army. For the first time, supported by strong recommendations by General Eisenhower, the Army plans to promote by selection in the lower Army grades. Selection has always been used by the Army for promotion to grades above colonel. In the past, however, seniority alone controlled promotions in the lower grades. This system required only the completion of service as a prerequisite for promotion; it unavoidable placed mediocre officers on a par with the more industrious, more capable officers.

H.R. REP. NO 640, 80th Cong., 1st Sess. 3 (1947).

[4] *Id.*

[5] Army Reg. No. 624-100, para. 16*a* (29 July 1966) [hereinafter cited as AR 624-100].

[6] 10 U.S.C. § 3297(a) (1970); AR 624-100, *supra* note 5, at para. 16*a*.

Regular Army who hold a permanent or temporary grade above lieutenant colonel. Each board member must be senior in regular grade to, and outrank any officer whom the board is considering.[7] However, boards considering officers appointed in a special branch[8] or carried on a list other than the Army Promotion List, will include one or more members of the branch being considered, and such members must have a regular or temporary grade above major.[9] No selection board may serve longer than one year,[10] and no member may serve on two consecutive boards for promotion to the same grade, if the second board considers any officer considered but not recommended for promotion by the first board.[11] Each member of a selection board must swear that he will perform his duties without prejudice or partiality, keeping in mind the "special fitness of officers and the efficiency of the Army."[12] Promotions to the regular grade of captain through major general may be made only upon the recommendation of a promotion board, unless otherwise provided by law, and such recommendation must be made by a majority of the total board membership. Furthermore, a board may not recommend officers as best qualified for promotion unless it also determines them to be fully qualified.[13] To be fully qualified, an officer must be found by a promotion board to be qualified professionally and morally, of demonstrated integrity, and capable of performing the duties expected of an officer of his branch in the next higher grade; whereas the best qualified officers are those fully qualified officers whom the board determines to be the best qualified to meet the needs of the Army.[14]

Any officer who is eligible for consideration for promotion may send a letter to the board, through official channels, calling attention to matters of record in the Department of the Army (DA) concerning himself which he considers important. However, the letter may not contain criticism or reflect upon the character, conduct, or motives of any officer.[15] No candidate for promotion may appear

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[7] 10 U.S.C. § 3297(a) (1970); AR 624-100, *supra* note 5, at para. 16*b*.

[8] 10 U.S.C. § 3064 (1970) defines special branches as being each corps of the Army Medical Service; the Judge Advocate General's Corps; and the Chaplains.

[9] AR 624-100, *supra* note 5, at para. 16*b*(1) & (3).

[10] 10 U.S.C. § 3297(b) (1970).

[11] 10 U.S.C. § 3298(b) (1970); AR 624-100, *supra* note 5, at para. 16*b*.

[12] 10 U.S.C. § 3297(c) (1970). Army Regulations state that the board will receive a letter of instruction (LOI) prescribing the oath board members are to take, reports to be prepared, methods of selection and other pertinent administrative details. AR 624-100, *supra* note 5, at para. 16*c*.

[13] 10 U.S.C. § 3297(d) (1970). *See also* 10 U.S.C. § 3284 (1970) which provides that appointments of commissioned officers in the Regular Army shall be made by the President with the advice and consent of the Senate.

[14] AR 624-100, *supra* note 5, at para. 2*d* & *e*.

[15] 10 U.S.C. § 3297(e) (1970); AR 624-100, *supra* note 5, at para. 16*d*(1) & (3).

before a board on his own behalf, nor may any officer appear before a board on behalf of a candidate, but letters of commendation or appreciation and recommendations for promotion may be forwarded directly to the promotion board.[16]

There are three statutory procedures whereby selections may be made for promotion to the regular grade of captain, major or lieutenant colonel. First, to fill existing or anticipated vacancies, the Secretary may direct the board to consider officers in the specified grade in the order of their seniority on the promotion list concerned; recommend those who are fully qualified for promotion; pass over those not so qualified; and continue this procedure until the number of officers specified by the Secretary is recommended.[17] Second, when an officer must be considered for promotion because of length of service or because he is on a promotion list above an officer who must be considered for that reason, the Secretary may furnish the board a list of officers to be considered for promotion to the grade concerned and direct the board to recommend the officers on that list whom it determines to be fully qualified for promotion.[18] Third, the Secretary may furnish the board with a list of promotion list officers and direct the board to recommend a number specified by the Secretary as best qualified for promotion. However, the number specified by the Secretary must be at least 80 percent of those listed for promotion for the first time.[19] This last method is used to promote officers to the grades major through colonel,[20] the first two methods being utilized to promote officers to the regular grade of captain.[21] In any case, the board is enjoined to base its selection on an impartial consideration of all the candidates, and to consider all factors, including ability, efficiency, seniority, and age. However, promotion boards are prohibited from divulging their reasons for the selection or nonselection of any individual.[22] The actions of promotion boards are administratively final and reconsideration will be granted only in those cases where material error was present in the records of an officer when reviewed by a selection board. This determination will be made by HQDA.[23]

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[16]AR 624-100, *supra* note 5, at para. 16*d*(2).

[17]10 U.S.C. § 3300(a)(1970). *See* 10 U.S.C. § 3296 (1970) which defines "promotion list."

[18]10 U.S.C. § 3300(b) (1970). 10 U.S.C. § 3299 (1970) establishes time-in-service requirements which entitle certain Regular officers to mandatory promotion consideration.

[19]10 U.S.C. § 3300(c) (1970).

[20]AR 624-100, *supra* note 5, at para. 18*a*(1).

[21]*Id.* at para. 18*a*(2).

[22]*Id.* at para. 18.

[23]*Id.* at para. 18*b*.

2. Reserve Officers

The requirements for selection boards which are to consider Reserve officers are similar to those specified for Regular officers. However, some significant differences exist. First, the Secretary may convene Reserve promotion boards or he may delegate this authority.[24] In response to this flexibility, the Secretary has delegated convening authority to various commanders in the United States and overseas.[25] There are two types of boards which these commanders may convene, unit vacancy boards and mandatory selection boards.[26] Unit vacancy boards will normally convene during the months of March, June, September and December on dates announced by HQDA, while mandatory boards will convene annually as announced by HQDA. Also, mandatory boards will have the additional duty of serving as standby advisory boards for cases which must be reconsidered.[27]

Each board is to be composed of at least five members, each of whom is senior in regular or reserve grade to, and outranks any officer to be considered by the board.[28] At least one-half the board members must be Reserve officers,[29] and no more than one Reserve officer from the same Army Reserve Command/General Officer Command (ARCOM/GOCOM) or no more than one Army National Guard of the United States (ARNGUS) officer from the same state may serve on the same board.[30] No board may serve longer than one year and a member may not serve on two consecutive boards for promotion to the same grade, if the second board is to consider any officer considered but not recommended by the first.[31] The general qualifications which a selection board member must possess include a broad range of experience upon which to base sound decisions; selection by each mandatory selection board which has considered him for promotion; credit for the Command and General Staff College or a higher level of military

[24]10 U.S.C. § 3362(a) (1970).

[25]Army Regulations specify the commanders to whom convening authority has been delegated, the types of boards they may convene and the grades to which the boards can recommend officers for promotion. Army Reg. No. 135-155, fig. 3-1 (30 Aug. 1974) [hereinafter cited as AR 135-155].

[26]The regulation also prescribes time-in-grade and time-in-service requirements which, when met, entitle a nonunit Reserve officer to mandatory consideration for promotion. *Id.* at para. 2-7. *See also* 10 U.S.C. § 3366 (1970).

[27]AR 135-155, *supra* note 25, at para. 3-5*a-c*.

[28]10 U.S.C. § 3362(b) (1970).

[29]10 U.S.C. § 3362(b) (1970). Army Regulation No. 135-155 further provides that the officers not be on active duty. Moreover, table 3-1 provides the specific composition for the various types of Reserve promotion boards. AR 135-155, *supra* note 25, at para. 3-8*b*(1).

[30]AR 135-155, *supra* note 25, at para. 3-8*b*(4).

[31]10 U.S.C. § 3362(c) (1970); AR 135-155, *supra* note 25, at para. 3-8*b*(2).

education; and a college degree.[32] Finally, Reserve officers serving on unit vacancy boards must be members of units.[33] Members of Reserve promotion boards must take the same statutory oath as members serving on Regular promotion boards,[34] and the restriction on selecting only those officers who are fully qualified as best qualified also applies.[35] In this regard, an officer is considered to be fully qualified if he is in the zone of consideration; on active duty or participating satisfactorily in Reserve training; qualified physically, morally, and professionally; capable of performing the duties of the next higher grade under mobilization conditions; and educationally qualified.[36] On the other hand, if an officer's records indicate a lack of leadership, command capability, moral principles or professional capabilities commensurate with his grade, the board is to recommend elimination.[37]

A candidate for promotion has the same right to communicate with the board as does a Regular officer. However, a Reserve officer may call attention to any matter of record within the Armed Forces concerning himself[38] and he may send certain information to the board which reflects his civilian educational, professional or vocational accomplishments.[39]

Standby advisory boards will be convened to prevent any injustice to an officer who was eligible for promotion but whose name was inadvertently omitted from the list submitted to the board, or whose records contained a material error when reviewed by the selection board. If his name was omitted, he will be considered, provided he is eligible, such eligibility to be determined by HQDA. An officer may apply for standby advisory determination by forwarding such a request through command channels to the Commander of the Reserve Components Personnel and Administration Center (RCPAC). However, area commanders may disapprove such requests without referring them to RCPAC if

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[32]The requirement that an officer possess a college degree is not mandatory. However, officers who do not have a degree must have an exceptionally broad and varied background of military experience.

[33]AR 135-155, *supra* note 25, at para. 3-8.

[34]10 U.S.C. § 3362(d) (1970). The full text of the required oath is set forth in AR 135-155, *supra* note 25, at para. 3-9*a*(1). It will also be set forth in a letter of instruction (LOI) prepared by HQDA for presentation to the board by the convening authority. The LOI will also state the reports to be furnished, methods of selection and any other required administrative details. *See* AR 135-155, *supra* note 25, at para. 3-9.

[35]10 U.S.C. § 3362(e) (1970).

[36]AR 135-155, *supra* note 25, at para. 3-11*a*.

[37]*Id.* at para. 3-9*b*(3).

[38]10 U.S.C. § 3362(f) (1970); AR 135-155, *supra* note 25, at para. 3-10*a*.

[39]AR 135-155, *supra* note 25, at para. 3-10*a*(1).

either the applicant did not meet minimum educational requirements or the retirement year prior to the retirement year the applicant became entitled to promotion consideration was not a qualifying retention year.[40]

It should be noted that technically there is no such thing as a permanent reserve promotion, because appointments of Reserves in commissioned grades are for an indefinite term and are held during the pleasure of the President.[41] However, the term permanent reserve grade will be used to differentiate between the grade a Reserve officer holds in the Reserves and any other commissioned grade he may hold on a temporary basis while on extended active duty.

B. TEMPORARY PROMOTIONS

Temporary promotions may be tendered under conditions specified by statute.[42] To receive a temporary promotion, an officer must be serving on active duty and he need not vacate any other grade held by him if he is so promoted. Temporary promotions are to be made to a grade that is equal to or higher than the regular or reserve grade held by the officer concerned. Furthermore, the Secretary is required to prescribe regulations which will insure that temporary promotions are made on a fair and equitable basis with selections to be based upon ability and efficiency with regard being given to seniority and age.[43] To implement this requirement, the Secretary has promulgated Army Regulation No. 624-100 which deals with promotions of officers on active duty. The same regulatory requirements that apply to boards which are to recommend Regular officers for permanent promotion apply to boards considering both Regular and Reserve officers for temporary promotion with the following two exceptions. First, there is no minimum grade requirement for board members, and the only grade requirement for temporary board members is that they be senior in permanent grade and temporary rank to the officers being considered. The second exception is that when a board is to consider non-Regular officers, the board must, whenever practicable, include at least one officer of the Reserve components.[44] Temporary

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[40] *Id.* at para. 3-14*a-c*. Also, 10 U.S.C. § 1002 (1970) requires a Reserve officer to earn a number of points, to be specified by the Secretary, for retention in an active status. The implementing regulation is Army Reg. No. 140-10 (12 May 1975).

[41] 10 U.S.C. § 593(b) (1970).

[42] 10 U.S.C. § 3442(a)(b) (1970).

[43] 10 U.S.C. § 3442(c) (1970).

[44] AR 624-100, *supra* note 5, at para. 16*b*(5). This Regulation implements 10 U.S.C. § 266(a) which provides that each board convened for the promotion of Reserves shall include an appropriate number of Reserves.

promotion to grades below lieutenant colonel may be made by the President alone; however, temporary promotions to grades above major are made by the President with the advice and consent of the Senate.[45] Nevertheless, the President may vacate a temporary promotion to a commissioned grade at any time.[46]

III. THE SELECTION PROCESS

A. ESTABLISHMENT OF ZONES OF CONSIDERATION

A selection board which is to recommend officers for temporary promotion will make its recommendations from two zones of consideration. The zones are designated the primary zone and the secondary zone, and the Letter of Instruction (LOI) to the board will specify the number of officers which may be recommended from each.[47] The primary zone will consist of all officers who are otherwise qualified and whose permanent or temporary date of rank in the grade is on or prior to a specified date. The cut-off date is selected so as to provide a sufficient number of officers in the grade concerned to meet the projected requirements of the Army for approximately the next year.

The secondary zone is established in the same manner as the primary zone, but the officers to be considered in this zone will have dates of rank between specified dates which are later than the cut-off date for the primary zone.[48] This zone is not established with the view of satisfying the Army's requirements for a desired number of officers in a specified grade but instead is established to afford younger, more capable officers an opportunity to advance in grade ahead of their contemporaries. Also, the secondary zone can allow officers who are placed in it to advance ahead of those in the primary zone. If a board finds the quality of officers in the secondary zone to be so clearly superior to the quality of officers in the primary zone that a greater number than originally specified should be promoted from the secondary zone, the president of the board will immediately notify the Secretary who will determine if the number to be selected from the secondary zone should be increased. Secondary zone selections are to be based solely on an

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[45]10 U.S.C. § 3447(b) (Supp. III, 1971).

[46]10 U.S.C. § 3447(c) (1970).

[47]Army Regulations provide percentage limitations on the number of officers that may be selected from the secondary zone for promotion to major, lieutenant colonel and colonel. AR 624-100, *supra* note 5, at para. 23*b*.

[48]The Regulation also specifies that officers must have served a stated period of time in the next lower grade before they can be temporarily promoted to major, lieutenant colonel and colonel. *Id.* at para. 23*a*.

evaluation of records at HQDA. Recommendations for promotion of officers in the secondary zone will not be accepted.[49]

There are no zones of consideration for the selection of officers for permanent promotion. Army Regulation No. 624-100 states that consideration for permanent promotion of Regular officers is based on an officer's position on the Regular Army promotion list, permanent date of rank, or service for promotion purposes.[50] In the Reserves, eligibility for consideration for promotion is based primarily upon time-in-grade requirements plus time-in-service requirements for those mandatorily considered.[51]

B. NOTICE OF CONVENING OF THE BOARD

Once the zones of consideration are established, a message will be sent to subordinate commands by the Department of the Army to inform them of the convening of a selection board to consider active duty officers for promotion to a specified grade. This message will later be superseded by a Department of the Army Circular in the 624 series, a six-paragraph document which will contain the name, Social Security number and branch of each officer whose record indicates he should be in the primary zone. The circular will set forth the pertinent dates for the zones of consideration and when and where the board will convene. The message will state that selections "will be made under the appropriate method as prescribed in AR 624-100." Also included will be instructions to commanders regarding possible erroneous omission of officers from the list and requiring the submission of efficiency reports on officers to be considered. Additionally, the circular will contain instructions to officers within the primary zone of consideration. These instructions direct an officer who believes he falls within the primary zone but whose name is not included on the list in the circular to notify his unit personnel officer of the potential error. These instructions also inform individuals of the prohibitions against personal appearance before the board and the right of an officer in the primary zone to communicate with the board on matters concerning himself which are on record in the Department of the Army. Individuals are also informed as to how they can

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[49] *Id.* at para. 24. Paragraph 25 provides that nonselection from a secondary zone will not be counted as a passover.

[50] 10 U.S.C. § 3299 (1970) provides that Regular officers in specified grades must be considered for promotion after a specified number of years of service.

[51] AR 135-155, *supra* note 25, at para. 2-7 prescribes time-in-grade and time-in-service requirements which entitle a nonunit Reserve officer to be considered for promotion. This is termed mandatory consideration for promotion. *See also* 10 U.S.C. § 3366 (1970) (establishing time-in-grade and time-in-service requirements which entitle all Reserve officers to mandatory promotion consideration).

request corrective special review of specific efficiency reports. In a separate paragraph entitled "Communication for promotion selection board," the circular provides that communications which contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to the promotion board.

In the Reserve components, there are two methods of notifying officers of their impending consideration by a selection board. Officers who are to be considered by a mandatory selection board and who are not on active duty will be notified by a letter which is set forth in Army Regulation No. 135-155.[52] Along with the letter, each candidate will be provided with a promotion consideration data sheet which contains current data extracted from his Military Personnel Records Jacket (MPRJ). The officer is required to verify this data and make necessary corrections before the data are furnished to the selection board.[53]

Officers who are to be considered by unit vacancy selection boards should be notified through their units (unless the officer is a member of the Individual Ready Reserve, in which case he will be notified by letter) since it is a vacancy within his unit that he is being nominated to fill.[54]

C. SELECTION OF BOARD MEMBERS

Board members who are to recommend active duty officers for promotion are selected by the Secretary. However, the process by which the Secretary makes his selection involves coordination by the Office of the Deputy Chief of Staff for Personnel and the Military Personnel Center (MILPERCEN). The MILPERCEN will provide ODCSPER with the names and branches of the officers within the zones of consideration. ODCSPER will then determine the respective percentages of combat arms, combat support, and administrative and technical branch officers in the total number to be evaluated. Because it is Department of the Army policy to have the branch composition of the board approximate the branch composition of the officers to be evaluated, officers in the combat arms

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[52]AR 135-155, *supra* note 25, at para. 3-4*a*. The letter is contained in figure 3-1 of the Regulation.

[53]*Id.* at para. 3-4*b*.

[54]When a vacancy occurs in a USAR unit which cannot be filled by the local commander with a qualified officer of the authorized grade from local resources, the names of all unit officers in the next lower grade who meet the requirements set forth in paragraph 2-8*a* of Army Regulation 135-155 will be forwarded to the appropriate selection board convening authority for promotion consideration. *See also* 10 U.S.C. § 3383 (1970).

will be predominant on the board.[55] Once the branch composition of the board is determined by ODCSPER, that office requests a personal qualifications sheet on a certain number of officers who meet the branch qualifications and other qualifications set forth in the letter from the MILPERCEN. Some of the other qualifications are that the officers must be of a specified grade; they must never have been passed over for promotion; they must be graduates of senior service schools; at least one-half of those nominated must be stationed outside the Washington, D.C. area;[56] and that certain of the members possess miscellaneous characteristics, including prescribed ethnic heritage. When these qualification sheets are provided to ODCSPER that office will review them to insure that the qualifications specified are met and that the officers nominated for board membership are not in some way disqualified from sitting. ODCSPER evaluates the personal qualification sheets, recommends nine officers to the Secretary for board duty,[57] and sends the qualification sheets of all eligible officers to the Secretary for his evaluation. Once the Secretary has made his decision, the commanders of the officers selected are notified and requested to release the board member-elect for board duty. When consent to release the board nominees is received, the empaneling process is completed.[58]

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[55]This is due to the fact that there are more combat arms officers on active duty than officers in any other class. The following table shows the breakdown of officers by class of service and rank as of 31 October 1974.

	CPT	*MAJ*	*LTC*
Combat Arms	12,773 (49%)	6,354 (49%)	4,733 (55%)
Combat Support	6,758 (26%)	3,362 (26%)	2,097 (24%)
Admin & Tech	6,557 (25%)	3,260 (25%)	1,811 (21%)
Total	26,048	12,986	8,641

The combat arms are infantry, armor, field artillery and air defense artillery; combat support branches include the chemical, engineer, signal, military police, and intelligence corps; and the administrative and technical services are the ordnance, quartermaster, transportation, adjutant general, finance and judge advocate general's corps. The figures used were provided by the Chief of Information (Office of the Chief of Staff).

[56]At present selection board members are selected from Army units worldwide. However, with the recent cutback on government travel funds, DCSPER is considering revising this policy. Interview with LTC Paul Schwartz, Officer Career Branch, ODCSPER. LTC Schwartz is the coordinator of officer selection boards in ODCSPER.

[57]It is present DA policy to have selection boards composed of nine officers. Because of the branch distribution of officers, the typical board will be composed of four combat arms officers, three combat support officers and two technical or administrative service officers.

[58]Board members for Reserve selection boards will be selected in accordance with AR 135-155, *supra* note 25, at paras. 3-6 & 3-8. *See also* 10 U.S.C. § 3362 (1970).

D. THE RECORDER OF THE BOARD

To assist the board in carrying out its administrative duties, each board is provided with a recorder. The recorder is a commissioned officer of any branch, in the grades 0-3 to 0-5, who is assigned to the DA Secretariat for Selection Boards with a primary duty as a recorder.[59] No regulation deals with the function of a recorder, however, there is a Standard Operating Procedure (SOP)[60] which provides guidance to recorders. In addition DCSPER will on occasion submit oral guidelines. It is the recorder's function to provide the board with the records which are to be evaluated. The recorder is also responsible for making outside contacts for the board, recording the results of the board in accordance with the LOI to the board, and performing any additional functions the board might assign. The recorder has no vote on the board, nor does he participate in discussions concerning the qualifications of any officer being evaluated.

E. BOARD PROCEEDINGS[61]

When the board is convened, each member will be provided a LOI[62] which sets forth the maximum number of officers to be selected from each zone, the method of selection, the reports to be issued by the board, and general guidance as to the factors which should be considered in evaluating each candidate.[63] The board will also receive a short oral briefing as to its duties from the DCSPER. Once these procedures are completed, the president of the board is sworn in by the recorder, the president then administers the oath required of the recorder, and the recorder then swears in the remaining board members. After all members are sworn, the board determines the procedure it will utilize to evaluate the candidates. When the best qualified method is used, most boards will use an ascending numerical rating system running from one to six or ten. Some boards will introduce more gradations

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[59]At present there are four recorders, all of whom are majors.

[60]The author conducted a telephone interview with one of the recorders concerning the SOP. It is this recorder's understanding that the SOP was originally written in the 1960's and that at present no one has the assigned responsibility of insuring that the SOP is kept current. The author was denied access to the SOP to study its contents.

[61]Information in this subsection was obtained through interviews with officers who have served on promotion boards. This subsection is not intended to describe the proceedings of any particular board, but is a composite of the procedures which were utilized by the boards on which these officers served.

[62]The LOI which is provided the members is contained in the DA circular announcing the names of officers selected by the board.

[63]See notes 12 & 34 *supra*.

to the system by permitting the addition of a plus or minus to the numbering system so that a candidate might receive, for example, a "five plus" from a board member.[64] During this stage of the proceedings, the recorder may make suggestions as to the method by which the files are to be evaluated.

The next step in the proceedings is to take a random sample of files and evaluate them. After the board has considered the sample, it totals the scores and segregates the sample scores; then the members discuss the files and the manner in which they were scored. This is merely an educational process for the board members. After the sample has been thoroughly discussed, the board begins its official evaluation by judging all the candidates in one branch and zone as a group and then cross-checking branches and zones. Each board member evaluates each candidate's file[65] whether the member knows the candidate, ever commanded him or served under him. If a member has had such a relationship with a candidate, some boards will have the member annotate his score sheet to indicate the member's personal knowledge of the candidate.

The ex-board members related similar experiences in the thoroughness with which the boards scrutinized the files during the evaluation stage. At first, the members diligently examined almost everything in the file. However, as they became more familiar with the records, the members began to "zero-in" on certain parts of the file or parts of documents in the file. As a result of this "zeroing-in" process,[66] the members estimated that the average length of time spent by a member evaluating each file was between two and ten minutes with most files being evaluated for five minutes or less.

In addition to the "zeroing-in" process, some boards reportedly utilize what is called a "short-pull" procedure in evaluating files.

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[64]Each file is accompanied by a score sheet on which the rater scores the candidate. Also, each rater uses a different color pen or pencil to mark the score sheet.

[65]If the board is considering officers for temporary promotion and has Reserve officers sitting as board members, the Reserve members will evaluate Regular Army candidates' records.

[66]Although not necessarily an item which was "zeroed-in" on, more than one board member mentioned the initial impression created by the photograph or lack thereof in the candidate's efficiency file. If the picture revealed the officer to have a "soldierly bearing" and a neat uniform, he had made a good impression. On the other hand, if the officer appeared to be excessively overweight, had an unkempt appearance or the picture was not of recent vintage, he had made a poor first impression. If the picture was not there, two thoughts were voiced: one that the officer concerned had something to hide, and two that he did not pay attention to detail. In either case, he had made a poor first impression.

This procedure comes into play when a file receives identical scores from a specified number of board members, usually two-thirds. If this occurs, the file is not considered by the remaining members and receives a constructive score from them which is the same as that given by the members who did evaluate the file.

Each board member scores the files individually without discussing his evaluation with the other members. However, if there is an unusual career pattern present in a file, that file may be marked and discussed later. As an aid to the board, the medical files of each candidate are available, and medical personnel are present to interpret the files. As would be expected, an officer's efficiency reports (OER's) are the most important documents evaluated. However, because of the "zeroing-in" process, the narrative portion of the OER's is subjected to close scrutiny to determine a pattern of certain characteristics which are considered by the board members to be the best indicators of the candidate's potential.

In considering the records presented, a board will at times come across something in an OER that seems unusual. In such cases, the board may contact the officer who made the unusual entry. Thus, a board does not necessarily concern itself solely with the written records provided for its inspection. Also, any documents which are received while the board is in session[67] and which would normally be included in an officer's file are made available to the board members.

Once the files are evaluated and the scores totaled, the files are segregated according to score. Those with the highest scores are the officers recommended for promotion. If the total number to be selected is reached in the middle of a stack with the same score, the board will then "fine tune" that stack and one or two stacks on either side of it. "Fine tuning" consists of reevaluating those files in order to reach the required number of officers to be recommended. In this reevaluation, the board members may discuss the merits of various officers to determine what will allow for a distinction among officers who are so similarly qualified. It is at this stage that some arbitrary decisions might possibly have to be made, because often there is not sufficient difference between these "borderline" officers upon which to base an objective decision.

F. THE BOARD'S REPORTS

As mentioned above, the LOI given to the board instructs the board as to what reports it is to render. Generally, a board will be required to submit two reports, the formats of which are set forth in

[67]The average length of time a board is in session is three weeks with some running as short as one week and others lasting for five weeks and more.

the LOI. The first report will consist of an introductory paragraph specified in the letter and the names of all officers recommended for promotion. The second report will consist of another introductory paragraph specified in the LOI and the names of those officers not recommended for promotion. In addition to these reports, a board will occasionally be required to undergo a debriefing during which the board members will relate their experiences and offer suggestions on how board proceedings can be improved. The board's reports are submitted to DCSPER for review after which they are submitted to the Secretary for approval, and where necessary, forwarded to the President for submission to the Senate. When the officers recommended are finally approved, their names are printed in a circular in the 624 series.[68]

IV. RELIEF FROM IMPROPER BOARD ACTION

A. STANDBY ADVISORY BOARDS

Although the regulations governing active duty and Reserve promotions state that selection board action is administratively final,[69] both regulations provide for the convening of standby boards if a material error was present in the records of an officer when reviewed by a selection board.[70] Standby selection boards will not be convened as a matter of course, but will only be convened upon a meritorious request for review of an officer's records.[71] Such a request is possible from several sources but will usually originate from one of three sources: the individual concerned; the individual's commander; or the officer's branch.[72] If the requested review discloses a material error or the erroneous omission of an

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[68]This method of notification of selection and, by omission of a name from the promotion list, nonselection, applies only to active duty officers. Reserve officers will be advised personally by letter of their selection or nonselection. AR 135-155, *supra* note 25, at paras. 4-13 & 4-30.

[69]AR 624-100, *supra* note 5, at para. 18*b*; AR 135-155, *supra* note 25, at para. 4-26.

[70]AR 624-100, *supra* note 5, at para. 18*b*; AR 135-155, *supra* note 25, at para. 3-14*b*. In addition, Reserve standby boards may be convened to prevent "any injustice to a member who was eligible for promotion but whose name was inadvertently omitted."

[71]For Reserves this request will be sent to RCPAC. Active duty requests will be sent to HQDA.

[72]It is self-evident why an officer who has been passed over would be concerned. An individual's commander may request such a review since he possibly recommended the officer for promotion. This would be especially true in cases involving USAR unit vacancy boards. An officer's branch could become involved because each branch maintains an order of merit list on which the officers in that branch are evaluated for duty assignments and schooling. If an officer rates high on this list yet is passed over for promotion, the branch would have an interest since such action could affect future personnel plans for that branch.

officer's name from the consideration list, the standby board will be convened. As pointed out above, regularly scheduled mandatory selection boards will act as standby boards for Reserves. It is also common practice for active duty boards to act as standby boards. Standby board procedures are substantially the same as those for primary boards; however, the standby board will not be required to select any officers for promotion. The board will be given the corrected record of the officer whose record is to be evaluated, and the records of several other officers who were considered by the original board, some of whom were recommended for promotion and others who were not. The standby board will evaluate and score all the files presented. If the reconsidered officer's score is high enough to place him in the group recommended for promotion, he also will be recommended.

B. THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

It is possible that an officer who feels he has been wronged by a selection board has also failed to obtain relief from a standby board. In such a situation the officer has a potential source of relief in the Army Board for Correction of Military Records (ABCMR). The ABCMR implements a provision of title 10 of the United States Code[73] which authorizes the Secretary, acting through a board of civilians in the executive part of Department of the Army[74] to change any military record of the Army when he considers it necessary to correct any error or remove an injustice. The statute also requires that any request for a correction of a record must be made within three years after the claimant discovers the error or injustice. However, this time limit may be waived by the ABCMR if it determines such action to be in the interest of justice. In addition to this statutory restriction on access to the ABCMR, the regulation provides that no application will be considered by the ABCMR until the applicant has exhausted all effective administrative remedies available to him and such legal remedies as the ABCMR determines are practical and available.[75] Also, application to the

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[73]10 U.S.C. § 1552 (1970). The implementing regulation is Army Reg. No. 15-185 (4 June 1974) [hereinafter cited as AR 15-185].

[74]The implementing regulation provides that the ABCMR will be composed of not fewer than three civilian employees or officers of DA, and that it is to be a part of the Office of the Secretary of the Army. *Id.* at para. 3.

[75]AR 15-185, *supra* note 73, at para. 8. Although promotion board decisions are "administratively final," reconsideration may be had before a standby board if HQDA determines there was a material error present when the officer's records were reviewed by the primary board. Therefore, application for reconsideration should be made to HQDA before application is made to the ABCMR. In light of the "exhaus-

ABCMR does not stay any other proceedings which are pending against the applicant.[76] The regulation does, however, grant the ABCMR jurisdiction to review and determine all matters properly before it consistent with existing law.[77]

Army Regulation No. 15-185 requires the ABCMR to consider each application and available military records pertinent to the corrective action requested to determine whether to authorize a hearing, recommend correction of the records without hearing, or deny the application without a hearing. However, the ABCMR need not make this determination if the application is rejected on administrative grounds.[78]

In each case in which the ABCMR determines that a hearing is warranted, it will so notify the applicant informing him of his right of personal appearance, right to counsel, and where and when the hearing will be held. The applicant is required to reply to the notice at least fifteen days prior to the day set for the hearing with the reply indicating the name of counsel, if any; whether the applicant will be present at the hearing; and the names of witnesses he may wish to call on his own behalf. If the applicant desires to present witnesses, he is responsible for notifying them and insuring their presence at the hearing. In preparing his case, the applicant will be assured access to all official records that are necessary for an adequate presentation of his case, consistent with regulations governing privileged or classified material. If pertinent information is classified, the ABCMR must take steps to determine whether declassification is possible. If it is not, a summary of the contents of such classified material must be made available to the applicant in such detail as to allow him to prepare a response. However, the ABCMR is not authorized to furnish copies of official records to the applicant. Any such copies must be obtained by processing an application for them in accordance with Army Regulations.[79]

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tion of administrative remedies" doctrine it would appear that an applicant would have no action in law at this stage of the proceeding.

[76] *Id.* at para. 9. If the applicant has been passed over twice and is facing separation or discharge, it would be appropriate to seek equitable relief in the form of an injunction against such separation or discharge pending the outcome of proceedings before the ABCMR. As to the possibility of success in such an equitable action, *see* Pauls v. Secretary of the Air Force, 457 F.2d 294 (1st Cir. 1972). *But see* Turner v. Callaway, 371 F. Supp. 188 (D.D.C. 1974).

[77] AR 15-185, *supra* note 73, at para. 5. *See also* U.S. DEP'T OF ARMY PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK, para. 3.25*c* for a discussion of the jurisdiction of the ABCMR.

[78] AR 15-185, *supra* note 73, at para. 10*a*. The ABCMR may also deny an application for lack of evidence. Whenever an application is denied without a hearing, written findings, conclusions and recommendations are not required. *Id.* at para. 10*b-c*.

[79] *Id.* at § IV, paras. 11-15.

The hearing will be conducted by the Chairman of the ABCMR in such a manner as to insure a full and fair hearing. The rules of evidence are not applicable to the hearing, but all testimony before the ABCMR is under oath and the entire proceedings are to be recorded verbatim. If the applicant has indicated that he does not desire to appear before the ABCMR, the Board will base its decision on the application for correction, any documentary evidence filed in support of the application, any brief submitted by the applicant, all available pertinent records, and any other evidence before it.[80]

Following the hearing, the ABCMR makes written findings, conclusions and recommendations. In case of a disagreement among members of the Board, a minority report may be submitted on any aspect of the majority report.[81] Under certain circumstances, the ABCMR has the delegated authority to take final action on behalf of the Secretary to promote retroactively applicants who would have been promoted during regular promotion cycles but were inadvertently or improperly excluded from consideration during such cycles.[82] In cases where the ABCMR does not have the authority to take final action on behalf of the Secretary, it will forward the record of the proceeding to him for such action as he determines appropriate, including returning the record to the ABCMR for further consideration.[83] After final action is taken on the application, the application, supporting documents, proceedings of the ABCMR and the Secretary's decision will be filed in the applicant's permanent military record except where such action would nullify any relief granted.[84]

The statute has been interpreted to confer broad powers upon the ABCMR. For instance the Board may correct retirement dates[85] or a record of trial by court-martial,[86] promote officers in the Reserves,[87] and change a discharge or dismissal adjudged by a general court-martial.[88]

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[80] *Id.* at § V, paras. 16-17.

[81] *Id.* at para. 19*a*(3) & *b*.

[82] Such action may be taken if it has been recommended by the Army Staff and is agreed to by the ABCMR. *Id.* at para. 19*e*(1).

[83] *Id.* at para. 20. However, the Secretary may not substitute his judgment for that of the ABCMR when the findings and recommendations of the ABCMR are supported by the record. Hertzog v. United States, 167 Ct. Cl. 377 (1964); Proper v. United States, 139 Ct. Cl. 511 (1957).

[84] AR 15-185, *supra* note 73, at para. 21*e*.

[85] 41 OP. ATT'Y GEN. 94 (1952).

[86] 41 OP. ATT'Y GEN. 49 (1949).

[87] 41 OP. ATT'Y GEN. 71 (1951). *But see* 41 OP. ATT'Y GEN. 10 (1948), which notes the requirement of Senate confirmation of Reserve appointments above the grade of major.

[88] 40 OP. ATT'Y GEN. 504 (1947).

However, in *Biddle v. United States*,[89] the Court of Claims appeared to limit the power of the ABCMR. There the claimant was an ex-WAC officer who, while on active duty had served as a major in an indefinite category from November 1956 until her relief from active duty in October 1959. On 14 May 1959, the Chief of the WAC Career Branch recommended to the Active Duty Board (ADB) established by the Secretary to screen the records of active duty officers with a view toward eliminating those who did not meet the qualifications for remaining on active duty, that Biddle's indefinite service agreement be revoked. However, on 19 May 1959, the ADB rejected this recommendation. On 8 July 1959, the Chief of the Career Branch renewed her recommendation to the ADB, basing the second recommendation on grounds different from those stated earlier. This time the ADB accepted the recommendation and on 16 July 1959 revoked Biddle's indefinite status. She was released from active duty as an officer on 19 October 1959, at which time she enlisted as a private in the Regular Army. Biddle served in an enlisted grade until August 1964, when she was released for retirement as a lieutenant colonel in the Army Reserve. During the first year after her release from active duty as an officer, plaintiff had written two letters to The Adjutant General requesting reinstatement as an active duty major, however, she had not received an answer to either request until the following events had occurred.

On 8 June 1960, the Chief of the WAC Career Branch requested the ADB to reconsider its 19 May 1959 decision, *i.e.*, its first relevant decision regarding Biddle. On 24 June 1960, the ADB issued a third decision in which it recommended "her retention on active duty." The Adjutant General was informed of this decision and advised that the ADB had held, in effect, that Biddle should never have been relieved from active duty. The Adjutant General then responded to Biddle's requests for reinstatement, informing her that such action could not be accomplished unless her records were changed by the ABCMR to show that she had not been released. She was also informed that the DCSPER would support her appeal to the ABCMR. Claimant then initiated proceedings before the ABCMR, but in a decision reached in September 1960, the ABCMR determined that the ADB's second decision was supported by the record and proper, therefore, it denied her application for relief. A second application filed in 1964 was also denied.

Claimant then filed suit in the Court of Claims alleging that the decision of the ABCMR refusing to correct her records was invalid, unauthorized, arbitrary, capricious and unsupported by the evidence. She based these allegations on the contention that the

[89]186 Ct. Cl. 87 (1968).

second ADB decision was invalid since the applicable regulations provided that an officer's records could be screened by the ADB only once annually. Furthermore, since the regulations provided that decisions of the ADB were final, the ABCMR was bound to follow the ADB's first decision and correct her records.

The Court of Claims rejected plaintiff's contention that the second ADB decision was invalid, holding that the regulations were intended to insure that each indefinite category officer's records were screened *at least* annually, but that the Army was not restricted to only one screening per year. The court went on to hold that both the second and third decisions of the ADB were reconsiderations of the first decision, therefore, the third decision was the final decision of the ADB. The court then held that the ABCMR had acted contrary to law by basing its denial of plaintiff's application upon the second ADB decision because the jurisdiction of the ABCMR is discretionary with the Secretary of the Army, and here the Secretary had provided that the decisions of the ADB are final. In such a situation, the court held, the ABCMR was without any authority to alter or review the decisions of the ADB and is bound by them. Consequently, the ABCMR should have accorded finality to the third ADB decision and ordered Biddle's records corrected to show that she had never been relieved from active duty as an officer. The court ordered this correction made and that Biddle be paid as an active duty major for the period between the date she was released from active duty and her retirement date.

Upon analysis, it appears that the court read the statute too narrowly, for the intent behind the statute was to allow the correction boards to consider "any military record" and then determine whether an error had been made or an injustice done which required correction. If the court's interpretation of the act is correct, there would be no prohibition against the Secretary making every personnel decision in the Army final, and thus not subject to review by the ABCMR. Such was surely not the result intended by Congress, particularly in light of the fact that the statute has been amended to allow for payment of claims arising from corrected records and to allow the Secretary to make equitable promotions.[90] Therefore, a proper analysis of the case leads to the conclusion that the court attempted to balance the Army's interest in being allowed to continually evaluate the desirability of allowing a certain category of officers to continue on active duty and the plaintiff's interest in having her records corrected to reflect her status as the ADB had finally determined it to be. In doing so, the court resorted to specious reasoning to support a desired result. However, as

[90] *See* S. REP. NO. 788, 82d Cong., 1st Sess. (1951).

Judge Davis pointed out in a concurring opinion, such an effort would appear to have been unnecessary. In Judge Davis' opinion, the pertinent regulations provided that indefinite category officers would have their records reviewed annually by the ADB at the instance of HQDA. However, commanding officers could recommend relief from active duty at any time they felt elimination to be warranted, and such recommendations would be acted upon immediately. In this case, the record did not show that the second recommendation to the ADB was made by any of Biddle's commanders, but was made solely on the initiative of the WAC Career Branch. For this reason, Judge Davis would hold the second ADB decision to be a nullity and plaintiff's subsequent release from active duty to be contrary to regulations and of no effect.

Notwithstanding the court's contrary reasoning in *Biddle*, the statute on its face appears to grant the Secretary, acting through civilian boards, extraordinary powers in regard to appointment or reappointment of officers,[91] and the legislative history of the act confirms this authority.[92] However, this power is discretionary and not subject to review unless it is exercised in an arbitrary or capricious manner.[93] Moreover, when an action is taken to remove an injustice or correct an error, every essential benefit required to accomplish those ends should be conferred upon the claimant.[94]

In spite of the broad powers discussed above, research has disclosed no case in which a correction board has reversed the judgement of a promotion selection board and an officer in an active status has been promoted by the Secretary acting through the correction board. However, a close case on this point is *Weiss v. United States*.[95]

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[91] 10 U.S.C. § 1552(d) (1970) provides in part "[w]ithout regard to qualifications for . . . appointment or reappointment, the Secretary concerned may reenlist a person . . . appoint or reappoint him to the grade to which payments are under this section relate." This would appear to be one of the situations contemplated by 10 U.S.C. § 3297(d) (1970) in which Regular officers may be promoted other than upon the recommendation of a promotion board. It should be noted that the statutes do not expressly restrict the permanent promotions of Reserve officers or the temporary promotion of active duty officers to those persons recommended by a promotion board. *See* 10 U.S.C. §§ 3362 & 3442 (1970).

[92] In order to receive continuing payments after this 1-year period has expired, the individual must be reappointed or reenlisted in his military or naval status, with its attendant responsibilities and obligations. The Secretary concerned is authorized to make such reenlistments and reappointments without regard to other qualifications.

S. REP. NO. 788, 82d Cong., 1st Sess. 3 (1951).

[93] Jackson v. United States, 297 F.2d 939 (Ct. Cl.), *cert. dismissed*, 372 U.S. 950 (1962).

[94] Caddington v. United States, 178 F. Supp. 604 (Ct. Cl. 1959).

[95] 408 F.2d 416 (Ct. Cl. 1969).

Weiss was a Regular Navy officer with over ten years of active service. During that time his OER's had been above average. However, during the course of an investigation into his conduct during suspected black market currency activities in the Philippines, a one-man Board of Investigation found that Weiss had violated Navy regulations on various occasions and recommended that adverse action be taken against him. When the Investigator's report reached the Commander-in-Chief of the Pacific Fleet (CINCPACFLT), he noted that because the record consisted primarily of unsworn *ex parte* statements there was ample justification to order a reinvestigation. However, the CINCPACFLT felt that justice could be done by issuing a letter of reprimand to Weiss for the only charge which he felt had been proved by competent evidence. The report was endorsed accordingly and The Judge Advocate General of the Navy similarly approved the record. A copy of the full report with its endorsements was not included in Weiss' personnel records, but the letter of reprimand, a poor fitness report resulting from the action and a letter from Weiss' commander requesting that Weiss be transferred were included in his records. Weiss was given an opportunity to counter the poor fitness report, and his lengthy statement in rebuttal was also included in his records. Weiss' subsequent fitness reports were favorable with the exception of one filed five years after the Philippines incident which reported him as hypochondriac or malingerer. Before Weiss could respond to this report, a promotion board met to consider candidates for promotion to commander and this unrejoined report was included in Weiss' records which were presented to the promotion board. The board passed Weiss over and recommended that he be separated from the Navy for unsatisfactory performance,[96] which he subsequently was. Thereafter, Weiss filed an application for relief with the Board for Correction of Naval Records (BCNR) to have the full report of the Philippines incident included in his record and to show that the second poor fitness report should not have been considered by the promotion board. The BCNR recommended that his records be corrected to show that he was not reported unsatisfactory by the promotion board, and that the letter of reprimand and the adverse fitness report relating to the Philippines incident be removed from his record. However, the Under Secretary of the Navy, presumably on advice of The Judge Advocate General of the Navy, refused to follow the recommendation of the BCNR and upheld Weiss' dis-

[96] 10 U.S.C. § 5701 (1970) imposes the additional duty on Navy promotion boards which consider line officers to recommend officers who should be continued on active duty. Those not so recommended are removed.

charge. The case was then taken to the Court of Claims to determine whether this act by the Under Secretary was arbitrary and capricious.

Relying on the fact that the BCNR's recommendation was founded on record evidence, the court held the Under Secretary's refusal to grant relief arbitrary, capricious and subject to reversal.[97] The court also noted that by acting through the JAGN, the Under Secretary had acted in a manner contrary to law. By relying on the advice of a military attorney, the Navy had ignored the statutory provision requiring the Secretary to act through *civilian* boards to correct records.

However, the court did indicate the possibility of judicial intervention in the promotion process:

> Selection Boards have and must have wide discretion in performing their duties. We do not think the courts are or should be in the "promotion business." But the selection procedure must follow the law. The documents which are sent to a Selection Board for its consideration, therefore, must be substantially complete, and must fairly portray the officer's record. If a Service Secretary places before the Board an alleged officer's record filled with prejudicial information and omits documents equally pertinent which might have mitigated the adverse impact of the prejudicial information then the record is not complete, and it is before the Selection Board in a way other than as the statute prescribes.[98]

Likewise, the court appears to have accepted the Navy's characterization of the function of correction boards as being to relieve Congress from handling a large class of private bills[99] and the jurisdiction of such boards as being not limited to a mere review of former administrative action. To accept a more expansive view of the boards' jurisdiction which includes authority to determine de novo, in view of all the equities, whether relief should be granted is an important step. For implicit in the court's decision is the conclusion that a correction board does have the authority to overrule a selection board's decision (on a matter which it is the statutory duty of the selection board to determine) when the board's action constitutes an injustice to the individual concerned because it is based on prejudicial information improperly before the selection board.

Clinton v. United States [100] involved an Air Force captain who

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[97] *See* Hertzog v. United States, 167 Ct. Cl. 377 (1964); Proper v. United States, 137 Ct. Cl. 511 (1957).

[98] 408 F.2d at 419.

[99] This would be strong support for the conclusion stated in an Attorney General's Opinion that correction boards were intended to provide relief in cases where Congress had been granting it, and thus, they are empowered to do whatever Congress could have done. 40 OP. ATT'Y GEN. 504 (1947).

[100] 423 F.2d 1367 (Ct. Cl. 1970).

was considered for promotion to major by boards meeting in three successive fiscal years, 1967, 1968, and 1969. The first two times he was considered, Clinton was passed over. He then learned that his records contained certain derogatory information which should not have been considered by the boards. Clinton then applied to the Air Force Board for Correction of Military Records (AFBCMR) to have his records corrected to delete the derogatory information and any indication that he had been passed over. The AFBCMR granted partial relief by expunging the 1967 passover and the objectionable material from his records. Clinton was then considered by the 1969 selection board at which time he was selected for promotion to major. By some authority, he was put in the position of having been selected by the 1968 board. Clinton then filed a pro se claim with the Court of Claims requesting that he be treated as though he had been selected by the 1967 board and paid the difference between ten months' pay as a captain and ten months' pay as a major. The court stated that Clinton had not alleged anything to show that the AFBCMR had acted arbitrarily or capriciously in regard to his case and the court refused to grant Clinton any relief, holding that selection for promotion is discretionary and it cannot be presumed that the first board which considers an officer will select him. For this reason, the court refused to "postulate" that the promotion discretion would be exercised favorably. Therefore, it refused to award Clinton the back pay he claimed.

As the foregoing discussion indicates, direct relief from a selection board passover in the form of a promotion is generally not obtainable from the ABCMR, although the Secretary, acting through the Board, has the power to make such a promotion. However, indirect relief can be achieved by correction of records, and if the error was so egregious as to constitute an injustice to the officer concerned, the passover may be obviated.

C. JUDICIAL REVIEW

If an officer does not receive satisfaction from the ABCMR, he has one final opportunity to receive the justice to which he feels entitled, and that is resort to the federal courts.[101] However, the field of military promotions is an area into which courts rarely tread, for as the Supreme Court explained in *Orloff v. Willoughby*:[102]

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism

[101] Duhon v. United States, 461 F. 2d 1278 (Ct. Cl. 1972); Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969).

[102] 345 U.S. 83 (1953).

> or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.[103]

Since *Orloff*, courts have continued to pay homage to the nonreviewability doctrine, while occasionally deciding military cases on their merits.[104] In a case involving an Air Force captain who had twice been passed over for promotion to major, the Fifth Circuit explained the reluctance of courts to interfere with military decisions as follows:

> Traditional judicial trepidation over interfering with the military establishment has been strongly manifested in an unwillingness to second guess judgments requiring military expertise, and in a reluctance to substitute court orders for discretionary military decisions. Concern has also been voiced that the courts would be inundated with servicemen's complaints should the doors of reviewability be opened. But the greatest reluctance to accord judicial review has stemmed from the proper concern that such review might stultify the military in the performance of its vital mission. On the other hand, the courts have not entirely refrained from granting review and sometimes subsequent relief.[105]

The court then conducted a survey of cases dealing with review of military decisions by the courts and concluded:

> From this broad ranging, but certainly not exhaustive, view of the case law, we have distilled the primary conclusion that a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures. The second con-

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[103] *Id.* at 93-94. In spite of the foregoing dictum which seems to establish an absolute rule of nonreviewability in matters such as this, the Court went on to decide *Orloff* on its merits and found no violation of statutes or regulations on the part of the Army, notwithstanding a strong dissent on these points. Approximately one year after *Orloff* was decided, Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954) presented essentially the same facts as those in *Orloff*, yet the court ordered the Army to release the plaintiff if it did not commission him. The differing results were caused by an amendment to the Doctors' Draft Law which required doctors to be granted rank commensurate with their education, experience and professional ability.

[104] *See generally* Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 48 MIL. L. REV. 91 at 102-12 (1970).

[105] Mindes v. Seaman, 453 F.2d 197, 199 (5th Cir. 1971).

> clusion, and the more difficult to articulate, is that not all such allegations are reviewable.
>
> A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be weighed (although not necessarily in the order listed).
>
> 1. The nature and strength of the plaintiff's challenge to the military determination....
>
> 2. The potential injury to the plaintiff if review is refused.
>
> 3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.
>
> 4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.[106]

In light of *Mindes*, it would appear that the problem a disappointed officer with a meritorious complaint concerning a denial of procedural due process would have would not be in finding a forum within which to air his complaint, but rather of proving his case.[107]

V. DUE PROCESS

A. DEFINITION

The phrase "due process of law," as that term must be applied to the Army, is found in the fifth amendment to the United States Constitution which states "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ." Thus, before due process can be considered applicable to the promotion process, that process must have the potential to result in the denial of one of these three rights to an individual. Any deprivation of life by the promotion process being a remote possibility, attention should be focused on the possible deprivation of property or liberty.

Arguably no officer has a right to a promotion. While probably a valid statement, such an argument misses the point insofar as due process principles are concerned, for each officer has a statutory

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[106] *Id.* at 201-02. Mindes' petition alleged that he had been denied due process because (i) his separation was based on a factually erroneous OER, (ii) the AFBCMR failed to file findings of fact and conclusions of law, and (iii) the AFBCMR failed to conduct a full, fair and impartial hearing. He also alleged that the Air Force promotion regulation violated due process. The court held that Mindes' allegations were sufficient to withstand a motion to dismiss at the pleading stage. Upon remand, the district court found that Mindes has failed to prove his allegations. This finding was affirmed on appeal. Mindes v. Seaman, 501 F.2d 175 (5th Cir. 1974).

[107] However, as to what, if any, relief a plaintiff could receive, see Section V. *infra*.

right to be considered for permanent promotion upon completion of a specified number of years' service.[108] It goes without saying that when an officer is considered for promotion, whether such consideration is mandatory or discretionary, the proceedings must be held within the scope of statutorily granted authority,[109] and must not be held in a manner which contravenes statutory requirements.[110] Furthermore, Army regulations set forth procedures which govern the promotion process in a general fashion. As long as these regulations are in effect, the Army cannot ignore them to the detriment of an individual without committing an arbitrary and unlawful act. This principle is demonstrated in the Saturday Night Massacre case, *Nader v. Bork*:[111]

> Had no such limitations been issued, the Attorney General would have had the authority to fire Mr. Cox at any time and for any reason. However, he chose to limit his own authority in this regard by promulgating the Watergate Special Prosecutor regulation.... It is settled beyond dispute that under such circumstances an agency regulation has the force and effect of law, and is binding upon the body that issues it....
>
> . . . .
>
> The firing of Archibald Cox. . . was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal.[112]

An officer's expectations and understanding that a selection board will follow the law and the Army's regulations confer property rights upon him which are entitled to due process protections. In *Board of Regents of State Colleges et al. v. Roth*,[113] the Supreme Court gave this view of property which is protected by the due process clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . .
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> Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[114]

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[108]See 10 U.S.C. § 3299 for Regular Army officers and 10 U.S.C. § 3366 (1970) which imposes time-in-grade requirements for Reserves.

[109]Harmon v. Brucker, 355 U.S. 579 (1958).

[110]Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969); Ricker v. United States, 396 F.2d 454 (Ct. Cl. 1968); Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954).

[111]366 F. Supp. 104 (D.D.C. 1973).

[112]*Id.* at 108.

[113]408 U.S. 564 (1972).

[114]*Id.* at 577.

Keeping these considerations in mind, an examination of the legislative history of the Officer Personnel Act of 1947 makes it clear that qualified officers have a "legitimate claim" to a series of promotions throughout the course of their careers. The House Report noted that "In the lower grades, the Army 'selection system,' . . . is in actual effect an elimination system whereby all officers who are qualified will be selected up, with only the unqualified forced out."[115] It went on to state that "So long as temporary officers are needed, both promotion programs [Army and Navy] will function substantially in the same way, with all except the patently unfit Regular officers remaining in service,"[116] and concluded that ". . . provision is made for promotion to the grade of lieutenant colonel without regard to existing vacancies . . . so that every qualified Army officer is, in effect, assured of a career up to and including lieutenant colonel grade. . . ."[117] Clearly, then, in addition to their right to demand that the services follow their own rules, officers have a sufficient interest in promotions, at least to the rank of lieutenant colonel, to demand that the guarantees of due process attach to their contacts with the promotion system.

In addition to these interests, certain results of selection board proceedings can be termed deprivations of an officer's liberty. There can be little doubt that the officer who is passed over is stigmatized as a result of that action. To many, this may signify a character or moral defect; to others, it may be a reflection on competency. In either case, the officer has been stigmatized, and the Supreme Court has ruled that where "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process protections "are essential." For only when "the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."[118] As the foregoing discussion demonstrates, due process considerations do apply to the promotion process. However, there remains the task of defining what is due process.

Nowhere in the Constitution is due process defined. As a result, courts have formulated definitions of due process that vary with the circumstances of the particular case which calls for a definition. As Justice Frankfurter stated in *Griffin v. Illinois*,[119] "'Due

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[115] H.R. REP. NO. 640, 80th Cong., 1st Sess. 3 (1947).

[116] *Id.* at 4.

[117] *Id.* at 7. Other provisions are made for the removal of the "patently unfit" or unqualified officers from active duty which do not involve promotion boards. *See, e.g.*, 10 U.S.C. § 3781 (1970).

[118] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1970) (holding the notice and hearing requirements of procedural due process must be met prior to the posting of a notice that an individual was forbidden from purchasing liquors for one year).

[119] 351 U.S. 12 (1956).

Process' is, perhaps the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society."[120] In an earlier case,[121] he had stated:

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances, expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process.[122]

Due process has also been described as a summarized constitutional guarantee of respect for those personal immunities which are so rooted in our national traditions and conscience as to be considered fundamental, or are implicit in the concept of ordered liberty.[123] With this general concept in mind, the next step is to determine what due process guarantees an individual may expect when he becomes involved in the promotion process. First, it must be remembered that the promotion process is an administrative process which does not require all the formalities of judicial proceedings.[124] Also, the content of due process is not unrelated to time, place and circumstances and varies according to specific factual contexts, the kind of proceeding involved, and the different fields in which adjudicatory powers are exercised.[125] Furthermore, it has been written that the process which is due in an administrative proceeding varies with the nature of the government function and the seriousness of the potential harm to the individual. Therefore, an individual's opportunity to challenge facts on which the Government will act must be proportionate to the injury that he may suffer because of erroneous action, balanced by the government's need for speed, economy, secrecy, or maintenance of an efficient governmental organization.[126] Recent-

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[120] *Id.* at 20-21 (concurring opinion).
[121] Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123 (1951).
[122] *Id.* at 162-63.
[123] *See* Haessig, *The Soldier's Right to Administrative Due Process*, 63 MIL. L. REV. 1, 2 (1974) and the cases cited therein.
[124] 2 AM. JR. 2d *Administrative Law* § 351 (1969).
[125] *Id.*
[126] *See* Note, *Due Process in Undesirable Discharge Proceedings*, 41 U. CHI. L. REV. 164, 170 (1973) and the authorities cited therein.

ly in *Goss v. Lopez*,[127] the Supreme Court set forth bench marks which it would use in determining what process is due public high school students who face possible short-term suspensions from school. There, after first deciding that students have certain interests protected under the due process clause, the Court stated:

> "[M]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." . . . At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.
>
> It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved.[128]

Notwithstanding the foregoing generalities, there appear to be four fixed principles of administrative due process: (1) an agency must act within the limits of its statutory authority;[129] (2) the agency must follow its own regulations;[130] (3) the agency must not act in an arbitrary, capricious or unreasonable manner;[131] and (4) individuals affected by the agency action must be given some kind of notice concerning the action and afforded some opportunity to be heard.[132]

B. ANALYSIS OF BOARD REQUIREMENTS AND PROCEEDINGS

1. Board Composition

The first item to be analyzed is the composition of selection boards. As mentioned earlier,[133] the statutory scheme for permanent promotions of both Regular and Reserve officers is very similar. However, selection boards which are to recommend officers for temporary promotion are strictly creatures of Army Regulations as there is no statutory requirement for such boards. The regulation governing promotions of active duty officers requires essentially the same composition for permanent promotion boards and temporary promotion boards, the prime exception be-

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[127]419 U.S. 565 (1975).

[128]*Id.* at 579 (citations omitted).

[129]Harmon v. Brucker, 355 U.S. 579 (1958).

[130]Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Conn v. United States, 376 F.2d 878 (Ct. Cl. 1967) and the cases cited therein. Moreover, the regulations must also comply with notions of fundamental fairness. Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971); Clackum v. United States, 296 F.2d 226 (Ct. Cl. 1960).

[131]Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969).

[132]Goss v. Lopez, 419 U.S. 565 (1975).

[133]See Section III *supra*.

ing that temporary boards which are to consider nonregular officers will, where practicable, include at least one officer of the Reserve components.[134] This provision of the Regulation appears to be inconsistent with the policy of having boards reflect the branch distribution of officers to be evaluated. If it is desirable to have this latter requirement at a time when officers are appointed into the Army as a whole, and do not receive a commission in a specific branch,[135] with the exceptions of the special branches and the WAC,[136] and such a large percentage of active duty officers are Reservists,[137] it seems only logical that it would be desirable to have selection boards reflect the component distribution of officers to be evaluated as well.

The figures contained in the preceding note reveal that Reserve officers comprise approximately 60 percent of the company grade officers on active duty where promotions, as a general rule, are not made by selection boards; however, the Reserves provide only one-half that percentage of the majors and lieutenant colonels on active duty where promotions are made by selection board. While many factors motivate movement from Reserve to Regular components as officers advance in age[138] and grade, some might contend that promotion through selection board tends to increase the proportion of Regular officers on active duty and consequently is a method biased in favor of Regulars and not in compliance with the

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[134] AR 624-100, *supra* note 5, at para. 16*b*(5). It should be noted that the Regulation does not specify that the Reserve officer(s) be on active duty. However, it should be apparent that it is the intent of the Regulation that the Reservist(s) be on active duty since the board is to recommend active duty officers for promotion.

[135] 10 U.S.C. § 3283(b) (1970).

[136] *See* 10 U.S.C. § 3064 (special branches); 10 U.S.C. § 3311 (WAC).

[137] The following table gives a breakdown by grade and component of the male officers on active duty in the Army, excluding ANC and AMSC. The figures are as of 30 November 1974 and were provided by the Chief of Information (Office of the Chief of Staff).

	Regular	Reserve	Nat'l Guard	AUS
2LT	4,486	6,153	2	1
1LT	4,634	5,690	3	1
CPT	12,111	18,565	264	23
MAJ	10,510	5,823	269	14
LTC	9,165	1,314	124	7
COL	4,692	122	51	
BG	224	2	1	
MG	183	1	2	
LTG	30	1		
GEN	12			
GA	1			
total	46,048	37,671	716	46

[138] 10 U.S.C. § 3286 (1970).

statutory requirements that the regulations governing temporary promotions provide for appointments to be made on a "fair and equitable basis,"[139] or that an "appropriate number of Reserves" serve on promotion boards considering Reserve officers for temporary promotion.[140] Moreover, the legislative history of section 266(a) of title 10 bolsters this latter argument:

> This subsection provides that the membership of boards concerned with the...promotion,... of members of the reserve components shall include appropriate Reserve representation. The term 'appropriate numbers' rather than a fixed ratio is used since the same board may be considering both Regular and Reserve personnel. In such case the proportion of Reserve officers on the board should be roughly equal to the proportion of Reserves being considered.[141]

Thus, it would appear that the requirement that promotion boards which are to consider Reserves for temporary promotion have at least one Reserve officer whenever practicable, does not comply with the congressional intent that Reserves be represented on such boards in numbers "roughly equal to the proportion of Reserves being considered."[142]

In light of this disparity between congressional intent and actual practice, the Court of Claims' awareness of the long-held fear of many, including Congress, that Regular and permanent officers would not always deal fairly with temporary and Reserve officers serving on active duty deserves added attention. This awareness, coupled with the observation that statutes seeking to prevent such discrimination have been accorded the fullest force, should put the military services on notice that the Court of Claims may be willing to place the selection board process under closer scrutiny.[143]

The result of placing Reserve officers on temporary promotion boards in numbers approximating the proportion of Reserves being considered would be to comply with the congressional intent that Reserves should have an appropriate voice in determining the treatment of their own members, and would insure that temporary promotions are made on a "fair and equitable basis" by removing the possibility of unchecked bias on such boards in favor of Regular officers.

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[139]10 U.S.C. § 3442(c) (1970).

[140]10 U.S.C. § 266(a) (1970).

[141]S. REP NO. 1795, 82d Cong., 2d Sess. 35 (1952).

[142]One former board member told the author that he was "sure" his board considered Reserves for promotion, but he "doubted" that there were any Reserve members on the board. If the facts should bear out these suspicions, the validity of that board's actions would be in grave doubt. *See* McClaughry v. Deming, 186 U.S. 49 (1902); Ricker v. United States, 396 F.2d 454 (Ct. Cl. 1968).

[143]Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969).

Another source of bias exists in the practice of having every board member evaluate the file of every candidate for promotion whether he knows the candidate or not. This would seem to fly in the face of the requirement that board members perform their duties "without prejudice or partiality."[144] Although an evaluator may make a good faith effort to be completely objective in his evaluation, that member's evaluation will inexorably be colored by his personal knowledge of the candidate. Such a result is not fair to the candidate concerned, other candidates, or in the best interests of the Army. If a judge who is assigned to try a case discovers that one of his former associates is one of the parties, there is little doubt that the judge should recuse himself. Similarly, if a board member discovers that he is to evaluate the file of an officer for whom he was at one time a rater or indorser, or with whom he has served, the member should disqualify himself.

This observation is all the more true in the case of former raters or indorsers who have created the OER's upon which the board will, in large part, base its decision. In such a case the promotion board member who formerly commanded a candidate can exert influence far beyond both typical raters or indorsers who address the board only through written, often duplicative reports, and the other board members who have no personal knowledge of the candidate. Obviously this ability to disproportionately influence the proceedings can have the effect of either promoting candidates who would not otherwise be selected or retarding the advance of those who, but for the intervention of a hostile former rater or indorser, would have been selected. As the Supreme Court stated in *Goldberg v. Kelly*,[145] a case involving the question of what process is due welfare recipients who are threatened with the termination of the benefits they have been receiving, "of course an impartial decision maker is essential. . . . [P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review."[146] Because efficiency reports are a vital ingredient in the selection process, it is difficult to argue that a former rater or indorser does not in part—and consciously—participate in making the determination under review. This consideration becomes even more crucial if the candidate is on the borderline of selection and the board discusses the qualifications of the last candidates in contention for selection.[147]

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[144]10 U.S.C. § 3297(c) (1970); 10 U.S.C. § 3362(d) (1970).

[145]397 U.S. 254 (1970).

[146]*Id.* at 271.

[147]In interviews with ex-board members, one ex-member revealed that he had sat

One final point should be made in regard to active duty selection boards. The regulation states that boards considering officers appointed in a special branch or carried on a promotion list other than the Army Promotion List, will include one or more members of the branch being considered, in accordance with the Code[145] and policies established by the Secretary.[149] For example, title 10 designates the Judge Advocate General's Corps as a special branch.[150] However, not all selection boards which consider JAGC officers have a JAGC officer on the board.[151] It is a basic tenet of administrative law that an agency is bound by its own rules.[152] If an agency does not abide by its rules, any action it takes in violation of those rules is illegal and void.[153] Therefore, if a board is improperly constituted, it is a nullity as are its actions.[154]

To those who would say that the regulation does not require the assignment of JAGC officers to selection boards when JAGC officers are to be considered because the regulation states such officers will be appointed under policies established by the Secretary and his policy does not provide for the appointment of JAGC officers to every board considering JAGC officers for promotion, the answer must be that to accept this reasoning would give the regulation the following meaning: "Every board considering JAGC officers will have one or more JAGC officers as members, except it is Army policy not to include JAGC officers on every board considering JAGC officers for promotion." Such a ludicrous interpretation clearly cannot be sustained. In conclusion, it is submitted that the failure of the Army to follow its own regulations in this regard is a denial of due process.[155]

2. Evidence Presented to the Board

The next aspect of promotion board procedure that is in need of discussion is the evidence upon which the boards base their decisions. The statutes are silent on this point. The Reserve regula-

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on a board in which he evaluated two officers who had been subordinate unit commanders in an organization which he commanded when they served in such positions.

[148]10 U.S.C. § 3297 (1970).

[149]AR 624-100, *supra* note 5, at para. 16*b*(b).

[150]10 U.S.C. §3064 (1970).

[151]*See, e.g.*, U.S. Dep't of Army Circular 624-55 (15 Feb. 1974).

[152]See Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) and the cases cited therein; Weiss v. United States, 408 F.2d 416 (Ct. Cl. 1969).

[153]Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973); Reale v. United States, 188 Ct. Cl. 586 (1969).

[154]Ricker v. United States, 396 F.2d 454 (Ct. Cl. 1968); JAGA 1960/4796, 30 Sep. 1960.

[155]*See* note 130 *supra*.

tion provides that Official Military Personnel Files (OMPF), promotion consideration data folders, or other pertinent files will be reviewed by the selection boards. Also, information which is filed in the OMPF may be made available to the boards, but unsupported or unacted upon derogatory or suitability information will not be provided the board.[156] The active duty regulation specifies that letters of commendation or appreciation and recommendations for promotion may be forwarded to the board for consideration.[157] Efficiency reports may also be considered if they are received by The Adjutant General "10 days or more prior to adjournment of the board."[158] Finally, the regulation provides that officers in the secondary zone will be evaluated solely on records available at HQDA.[159] However, Army regulations state that favorable personnel decisions[160] will be based *inter alia* on review of official personnel files.[161] There are two types of official personnel files discussed by this regulation: the Military Personnel Records Jacket (MPRJ) which is kept by the individual's organization, and the Official Military Personnel File (OMPF) which is maintained by the Military Personnel Center (MILPERCEN).[162] Since only the OMPF contains an officer's OER's,[163] and since promotion boards must consider all factors in their evaluations including "ability and efficiency,"[164] it is only logical to conclude that the OMPF is the file which the Army regulations require be evaluated by promotion boards. Other documents which will be filed in the OMPF include records of courts-martial and courts-martial orders.[165] The purpose of filing these documents in an officer's file if he is acquitted is not clear. However, the prejudicial effect of such records being in an officer's file is readily apparent. Unless the Army can demonstrate some compelling reason for including the record of a court-martial which resulted in acquittal as a part of an officer's permanent record, it would appear that such

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[156]AR 135-155, *supra* note 25, at para. 3-3.

[157]AR 624-100, *supra* note 5, at para. 16*d*(2). However, promotion recommendations submitted on officers in the secondary zone may not be considered. *Id.* at para. 24.

[158]AR 624-100, *supra* note 5, at para. 17. How it will be determined if this requirement has been met is not explained.

[159]AR 624-100, *supra* note 5, at para. 24.

[160]Army Reg. No. 600-37, para. 1-4*c* (16 Oct. 1972) [hereinafter cited as AR 600-37] includes promotions in the definition of favorable personnel actions.

[161]*Id.* at para. 2-1*a*.

[162]Army Reg. No. 640-10, para. 1-26 (26 April 1973) [hereinafter cited as AR 640-10].

[163]*Id.* at Appendix.

[164]*Id.* at para. 18.

[165]*Id.* at Appendix. This regulation also specifies that records of punishment under Article 15, UCMJ will be filed in the permanent section of the OMPF.

action denies an officer due process before a promotion board by unnecessarily invading his constitutionally protected right of privacy.[166] In the context of the promotion process, it is difficult to conceive how placing a highly prejudicial document in consideration which has no relevance to an officer's ability, efficiency or fitness for higher responsibilities would "preserve a significant aspect of discipline or morale." This is not to say that the Army may not keep such records, but only to challenge the propriety of placing them in a file that has such importance for an officer's career.[167]

Another problem presented by the use of the OMPF is the fact that these records are kept at the MILPERCEN in Washington, D.C., and no effort is made by the Army to insure that the records are accurate before they are presented to a promotion board. Instead, the Army relies on the individual to insure that his OMPF is accurate. An individual can insure the accuracy of his records by either examining the records himself or appointing an agent to examine the records for him.[168] To utilize the first method, the officer must be fortunate enough to be in the Washington area on official business, otherwise he will have to bear the inconvenience and expense of a trip to Washington in order to review his records.

Appointing an agent to inspect an officer's records is a method an officer may utilize to insure that certain documents are in his file. However, any agent would have difficulty determining that a document was improperly filed in the record or verifying the contents of documents in the record. The case of *Egan v. United States*[169] presents an extreme example of what can happen when someone other than the individual concerned reviews the files of a person and makes decisions based on those files.

Egan had received a commission in the Army Reserve in 1938. In January, 1941, he was called to extended active duty in the grade of captain. In August 1942, he resigned his Army commission and received a commission as a first lieutenant in the Marine Corps Reserve. Subsequently, he was called to active duty with the

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[165] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Davidson v. Dill, 503 P.2d 157, 161 (Colo. 1972) where the court, quoting from Eddy v. Moore, 487 P.2d 211 (Wash. Ct. App. 1971) stated:

> We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and it is well within the penumbras of the specific guarantees of the Bill of Rights formed by emanations from those guarantees that help give them life and substance.

[167] *See* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) and Davidson v. Dill, 503 P.2d 211 (Colo. 1972) for discussions of the prejudicial effects an arrest record has on a person's future, including possible employment.

[168] AR 640-10, *supra* note 162, at para. 1-15.

[169] 158 F. Supp. 377 (Ct. Cl. 1958).

Marines and while serving in Samoa was hospitalized for bronchitis. While in the hospital, he witnessed another patient in his ward preparing to assault a doctor with a dangerous weapon. Egan disarmed the patient, but during an ensuing investigation, all other witnesses to the attempted assault denied the event had occurred. Hospital doctors then questioned Egan about two injuries for which he had been treated in the Army and had revealed to the admitting physician in the Samoan hospital, but were not listed in his hospital record. The hospital doctors decided that Egan had imagined his injuries as well as the attempted assault. At about this time, Egan learned that his unit had been ordered into combat, and since he had recovered from his bronchitis, he asked to be discharged from the hospital. However, when his request was denied he reacted quite violently to the refusal. In February 1943 he was erroneously diagnosed as insane and spent the next five months in the locked wards of various hospitals. Meanwhile, Egan was given a temporary appointment to captain effective 1 March 1943, conditioned upon his being found physically and mentally fit to perform duty in the higher grade. This temporary promotion was withheld from him on the ground that he was sick in the hospital. However, the only reason for his hospitalization at that time was the erroneous diagnosis of insanity.

During the five months Egan spent in locked wards, he tried in every conceivable way to convince the authorities of his sanity. However, when his attempts failed, his growing sense of frustration and occasional vehement protests only reinforced the opinion that he was insane. Moreover, a Board of Medical Survey reviewed Egan's history in July 1943, and listed as one of its facts that Egan's verified history revealed that he had been discharged from the Army in March 1942 because of a mental illness diagnosed as psychoneurosis, anxiety, neurosis, with schizoid features. However, the verified history referred to was the service and medical history of another John J. Egan who had in fact been discharged from the Army in March 1942 as insane. This piece of misinformation had been transmitted to the Navy by The Adjutant General of the Army.

Subsequently, Egan's records, along with the records of the second Egan, were submitted to the Marine Corps Retiring Board. This Board found Egan unfit for further military service and proposed his release from active duty in October 1943, and his discharge from the Marine Corps Reserve in April 1944. Thereafter, Egan applied to the Naval Retiring Review Board seeking reversal of the Retiring Board's decision. The Review Board denied this application, stating that after review of all records, including those of the second Egan, it could find no reason to reverse the Retiring

Board's decision.

Egan continued to attempt to get the true facts in the case into his records and in March, 1948, the Board for the Correction of Naval Records ordered his records corrected to reflect the true facts. In 1958, the Court of Claims ruled that Egan was entitled to back pay as a captain from March 1943 to March 1948.

At least four military entities reviewed Egan's records and the records of the second Egan in important proceedings where facts were contested, yet did not detect a difference in the service numbers and discharge dates from the Army for the two Egans. The particularly drastic oversight in *Egan* suggests that inaccurate, prejudicial material can often find its way into an officer's official records. The failure of the Army to attempt to verify the files presented to its boards and the impracticalities relying on the individual to insure the accuracy of his OMPF maintained in Washington deprive officers of adequate notice of the information upon which a selection board may base a decision to deprive him of constitutionally protected property interests.[170]

As the Supreme Court has stated:

> [W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.[171]

In such an instance, the notice must be "of such a nature as reasonably to convey the requested information."[172]

To remedy this situation, it is suggested that the Army prepare a summary of each officer's records listing, in chronological order, the documents which are submitted to promotion boards, the dates and subject thereof, to whom addressed and by whom signed. This summary would be updated each time a document is filed in the OMPF, and when an individual is to be considered for promotion, he would be sent a copy of the summary for verification. If mistakes are present in the summary, the individual would so notify the MILPERCEN which would take appropriate action to insure that the officer's records are complete.[173]

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[170]See notes 108-17 and accompanying text *supra*.

[171]Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[172]Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

[173]Systems similar to this are utilized to keep an active duty officer's career history current through use of the officer's record brief. For Reserves, certain information is updated prior to consideration for promotion through use of the promotion consideration data sheet. However, both of these documents deal with information that is in the MPRJ not the OMPF which is the primary source of information for promotion boards. Since these procedures are currently in use, it would not be unreasonable to require the periodic verification of information in the OMPF.

A policy similar to this proposal finds support in a Naval personnel administrative practice noted in *Brenner v. United States*.[174] There the court noted that under Article B-2201 of the *Bureau of Naval Personnel Manual* "adverse material or information is not placed in [an officer's] record without his knowlege."[175] A fuller explanation of the policy is extracted from the *Manual* itself:

> Pursuant to United States Navy Regulations, adverse matter shall not be placed in an officer's record without his knowledge. In all cases it shall be referred to the officer reported on for such official statement as he may choose to make in reply. If the officer reported on desired [*sic*] to make no statement, he shall so state officially in writing. The Chief of Naval Personnel is liberal in his interpretation as to what constitutes adverse matter.[176]

An analogous procedure, merely informing a candidate of the nature of the material on file in his official records would provide sufficient notice for him to inquire further should he discover an unusual or seemingly erroneous document.

Providing officers abstracts of material in their records would not in and of itself impair the records management system by creating more doubts as to the administrative finality of records included in the OMPF. For example, at present, each rated officer must be provided with a copy of his completed officer efficiency report[177] and is entitled to appeal any report which he feels is "administratively incorrect, unjust, substantively inaccurate, or otherwise in violation of [the] regulation."[178] Such appeals may be forwarded within two[179] or five[180] years, depending upon the date of the report. Such a procedure recognizes that even material the rated officer is aware of may stand in need of correction. Forwarding an officer a summary of the documents in his OMPF would at once serve the same purpose as providing him a copy of his OER, call his attention to the absence of any pertinent information, and satisfy the requisites of due process that the Constitution demands.

In concluding the discussion on information presented to promotion boards, it should be noted that Army regulations provide that when unfavorable information in an individual's files causes an unfavorable personnel action or decision, the individual will be informed of the basis of such adverse personnel action, the policies

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[174]202 Ct. Cl. 678 (1973).

[175]*Id.* at 689.

[176]*Id.*, *quoting from* U.S. DEP'T OF NAVY, BUREAU OF NAVAL PERSONNEL MANUAL, Art. B.-2201, para. 4(c).

[177]Army Reg. No. 623-105, para. 2-4*d* (18 Aug. 1975).

[178]*Id.* at para. 8-2*b*.

[179]*Id.* at para. 8-3*a*.

[180]*Id.* at para. 8-3*b*.

and procedures governing such actions and his right of appeal if he feels the decision was based on erroneous information.[181] This provision is in direct conflict with the Army regulation which provides that selection boards will not divulge the reasons for the selection or nonselection of any individual.[182] The current Army practice is to consider the latter provision controlling. Clearly this may result in a promotion passover being made on the basis of unfavorable information which might be erroneous, without letting the individual know that the action was based on unfavorable information and that he has a right to appeal under either regulation.[183] While promotion passovers intuitively appear to be "unfavorable personnel actions," whether they fit the description of this term found in the Army regulations is not so clear. The regulations define a favorable personnel action as "any personnel management or career management decision that enhances the individual's status or position."[184] Clearly a passover is a "career management decision," although unfavorable in nature. While it might be argued that it is merely neutral, not unfavorable, this interpretation conflicts with regulation's classification of "[i]ndications of substandard . . . promotion potential . . ." as "*Unfavorable* information";[185] the requirement of elimination after two passovers;[186] and the common sense interpretation of that term.

However, the Supreme Court has held that when the Government intends to take an action which will have a direct adverse impact on an individual, due process requires that the individual receive notice of the action against him and be afforded an opportunity to be heard in a meaningful way.[187] In light of this requirement, it is clear that the promotion passover provisions deny an individual due process while the "unfavorable personnel action" provisions provide some rudimentary due process protections. Therefore, the provisions which should apply in this situation are the former, otherwise the individual must speculate as to the reason for the unfavorable action and cannot adequately protect his interests. Such an action cannot be said to comply with the concept of fundamental fairness required by the due process clause, or the disclosure requirements set forth in *Goldberg*.[188]

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[181]AR 600-37, *supra* note 160, at para. 2-1*c*.

[182]AR 624-100, *supra* note 5, at para. 18.

[183]*Id.* at para. 18*b*; AR 600-37, *supra* note 160, at para. 2-1*c*.

[184]AR 600-37, *supra* note 160, at para. 1-4*c*.

[185]*Id.* at para. 2-2.

[186]Army Reg. No. 635-120, ch. 11 (14 Jan 1975).

[187]Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[188]See note 171 and accompanying text *supra*. Although the foregoing discussion concerns active duty personnel, the same considerations apply to Reserves.

3. Evaluation Criteria

The next area of examination involves the criteria by which officers will be judged by selection boards. The element of the statute concerning permanent promotions which comes closest to providing criteria is to be found in the oath which is required of selection board members. The oath provides that promotion boards will base their recommendations on "the special fitness of officers and the efficiency of the Army."[189] The statute governing temporary promotions states that promotions "shall be based upon ability and efficiency with regard being given to seniority and age."[190] The regulations do not shed much light on this matter either. Army regulations simply state that active duty promotion boards will base their selections on an impartial consideration of "all factors, including ability, efficiency, seniority, and age."[191] The regulation governing reserve promotions offers more specific guidance than that provided active duty boards. It states that board members will review an officer's evaluation report file when determining his qualifications[192] and that to be found fully qualified an officer must be in the zone of consideration; on active duty or participating satisfactorily in Reserve training; physically, morally and professionally qualified; capable of performing in the next higher grade; and educationally qualified.[193] The board is also instructed to consider the extent to which an officer has taken advantage of available means to improve his professional qualifications.[194] On the negative side, if an officer required a waiver to remain in an active status during his last retirement year due to a failure to acquire the required number of retirement points, he will not be considered to be participating satisfactorily in Reserve training, unless the failure to accrue sufficient retirement points was due to a temporary physical disability.[195]

The letter of instruction which is provided active duty promotion boards states that to be fully qualified, an officer must be professionally and morally qualified, possess demonstrated in-

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However, Reserve records are not kept at the MILPERCEN, but at the Reserve Components Personnel and Administration Center in St. Louis, Missouri.

[189]10 U.S.C. § 3297(c); 10 U.S.C. § 3362(d) (1970). Since temporary promotion boards are not statutory boards, there is no statutory oath for members of such boards.

[190]10 U.S.C. § 3442(c) (1970).

[191]AR 624-100, *supra* note 5, at para. 18. The Regulation also states that boards will not divulge their reasons for the selection or nonselection of any individual.

[192]AR 135-155, *supra* note 25, at para. 3-9*b*(1).

[193]*Id.* at para. 3-11*a*(1)-(5).

[194]*Id.* at para. 3-12*b*.

[195]*Id.* at para 3-12*c*

tegrity, and be capable of performing the duties of "an officer with his qualifications in the next higher grade."[196] The LOI also specifies that an officer's entire record should be examined to determine his potential. For the most part this potential will be determined by his record of performance in his primary and secondary MOS, as well as by his overall duty performance. The letter also states that DA does not prescribe specific qualifications for promotion but attached to the LOI are some general guidelines for the board. These guidelines are set forth in five sections. The first discusses the purpose of the officer promotion system and factors which are to be considered when employing the "total man" concept of review. The second section is dedicated to guidance on how to evaluate efficiency reports and states that the efficiency report is the single most important document in an officer's file. Section 3 details the importance of command and staff time while cautioning members to keep this experience in perspective since the opportunity for command time is more limited than other types of duty. The fourth section addresses the importance of specialization and education in the age of technology and emphasizes the necessity of evaluating the demonstrated ability and indicated potential of the specialized officer. Finally, the fifth section instructs members on how to evaluate derogatory information. Here boards are told that little, if any consideration should be given to records of disciplinary action under Article 15 of the Uniform Code of Military Justice if the offense was minor. The boards are further told that it is not their function to mete out punishment in such cases by denying an officer a promotion. However, promotion may be denied because of a major disciplinary action, relief for cause, demonstrated cowardice, lack of integrity or moral turpitude. All of these sections contain at least two paragraphs which further define the evaluation criteria.

It is readily apparent that the LOI's are the primary source of evaluation criteria. However, it should be noted that these criteria are not quantified or mandatory nor are any of them given precedence over any other with the exception of efficiency reports. It is evident that the importance to be attached to the criteria in the guidelines is left to the discretion of each board member. Moreover, having taken an oath to base their selections on the "special fitness of officers and the efficiency of the Army," board members could well feel free to establish their own criteria as to the qualities an officer should have to enhance the efficiency of the Army. It goes without saying that this would lead to unequal evaluation of of-

[196]How this criterion is to be interpreted and applied is not explained.

ficers based on personal whim, caprice, or philosophy of different board members. Furthermore, this lack of specific or binding criteria could, and probably does, lead to the use of inconsistent standards by the several selection boards.[197] Thus, the lack of quantified or mandatory criteria can lead to two inconsistencies in evaluation: one, internally, among the members of a particular selection board; and two, externally between the evaluation criteria used by various boards to select officers for promotion to the same grade. These possibilities of abuse are heightened by the fact that selection boards do not, as a general rule, discuss the files they are evaluating.[198] Moreover, if the board is a long board, the individual members admittedly have a tendency to become inconsistent in their ratings.

In practice, some boards will discuss at the outset what the future needs of the Army will be and what type of officers the Army will need to fulfill those needs. Then they will discuss what elements in an officer's records should be of primary importance in determining which officers are best qualified to satisfy the future needs of the Army. However, this is simply a preliminary session and does not commit a member to any course of action in his evaluation process. The most difficult part of such a "brainstorming" session is in trying to determine what the future needs of the Army will be. These needs must be perceived through the collective experience of the board members and the perspectives they bring to the board.

In evaluating officers, boards rely primarily on efficiency reports to convey a picture of the officers' capabilities. In doing so, boards utilize the "zeroing in" process discussed above. However, it has been the common experience of board members that the various forms of OER's[199] present a problem in their evaluations and the inflated ratings complicate their endeavors to obtain a true idea of an officer's performance. Therefore, boards tend to place greater emphasis on personality characteristics and the narrative portions of the OER's. Also, some compare ratings for similar duties at various stages of an officer's career. It was stated that these ratings generally are consistent, *i.e.* if an officer had trouble in a particular

[197]This probability is verified by a study conducted at the Army War College in which experimental boards were asked to evaluate the relative value of eleven merit indicators which would show an officer's potential for promotion to colonel. This study found that subjective attitudes toward the relative value of the merit indicators were not uniformly applied throughout the promotion process. *See* Heathcock, et. al., *Military Merit: How to Measure Who Measures Up*, SPECIAL PROJECT REPORT, U.S. ARMY WAR COLLEGE, May 14, 1973 [hereinafter cited as the WAR COLLEGE STUDY].

[198]The only exceptions appear to be the "samples" evaluated at the outset, any particularly unusual files, and the borderline cases.

[199]Some senior officers have five or more different forms in their records.

type of duty early in his career, he usually had trouble in a similar type of duty later in his career. Thus, it is evident that the total man concept is not applied, as a general rule, in evaluating officers. This is particularly so in light of the fact that the average file is evaluated for five minutes or less per board member. Furthermore, if a file contains something which a board member considers an absolute bar to promotion such as an Article 15, that member generally does not evlauate the file beyond that point. Thus, in spite of the admonition in the LOI that little if any weight should be given to an Article 15 if the infraction were minor, if any record contains an Article 15, invariably that officer is not selected.

The role that racial or ethnic bias plays in the selection process is beyond the scope of this paper. However, one board did require the recorder to keep a tally of the number of blacks and Asian-Americans who were recommended to insure that everyone was getting a "fair shake."[200] However, other forms of bias exist which probably do affect promotion board results.

In the War College Study noted earlier, the researchers utilized 32 seven-member boards and three five-member boards as their experimental panels. The seven-member boards were asked to evaluate the last five men selected for promotion to colonel in 1971, and the five with scores immediately below the cut-off point. The five-member boards evaluated these ten files and twenty others which consisted of ten files taken at random from those scores above the cut-off score and ten taken at random from below the cut-off point. All of the files had been "sanitized" to remove any extraneous influences on the evaluators such as names of the individuals, the identity of raters or indorsers, and branch and unit identification. There was almost total agreement between the experimental panels and the actual DA board regarding the randomly selected files. However, there were divergent results concerning the borderline cases. Two of the experimental boards selected only one of the five officers chosen by the DA board. The other experimental board agreed with the DA board on two officers. This led the researchers to conclude:

> The low correlation between the simulated boards and the DA Board for the border line cases could indicate that other factors or different standards were considered by the actual Board. Another factor which could have contributed to this low agreement was the "sanitation" of the personnel records used by the class. Personal knowledge of the individual, influence from knowing the rater or indorser, or unit association could have

[200]It is interesting that only two minority groups were selected for this scrutiny while all others were ignored. Although the Army does not indicate ethnic background in an officer's records, the picture in his file is a useful tool for determining this.

> contributed to the DA Board's final decisions on those 10 individuals who were clustered around the promotion cut-off point.[201]

The foregoing discussion suggests that the failure of the Army to provide its promotion boards with quantified mandatory criteria by which to judge officers presented to them for evaluation leads to unequal treatment of similarly situated individuals which is unreasonable, unnecessary, avoidable, and not in furtherance of a legitimate Army interest; and that this unequal treatment of similarly situated individuals is so unjustifiable as to be contrary to the concept of fundamental fairness and thus constitutes a denial of due process to those affected thereby. The Supreme Court clearly explained this principle in *Bolling v. Sharpe* when it stated:

> But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[202]

4. Communications with the Board

A final aspect of the selection process which deserves consideration is the matter of appearance before or communication with the board by officers who are to be evaluated by the board. The statutes governing permanent promotions do not address the question of personal appearance before selection boards; however, the regulations which cover active duty and Reserve promotion boards specify that no candidate for promotion may appear in person before a promotion board. The active duty regulation further specifies that no one may appear on behalf of a candidate, but the Reserve regulation is silent on this point.[203]

Both statutes dealing with permanent promotions provide that an officer eligible for promotion may write a letter, through official channels, to the board, calling attention to matters of record[204] which he feels are important to his case. However, the letter may not criticize any officer or reflect on his character, conduct or motives.[205] The regulations carry these provisions forward except the Reserve regulation prohibits letters which "contain criticism, or reflect adversely on the character, conduct or motives of any in-

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[201] WAR COLLEGE STUDY, *supra* note 197, at B-8-9.

[202] 347 U.S. 497, 499 (1954).

[203] AR 624-100, *supra* note 5, at para. 16*d* (active duty promotions); AR 135-155, *supra* note 25, at para. 3-10*a* (Reserve promotions).

[204] In the Army for Regulars and in the Armed Forces for Reserves. See 10 U.S.C. § 3297(e) and 3362(f) respectively.

[205] 10 U.S.C. § 3297(e) (1970) (Regulars); 10 U.S.C. § 3362(f) (1970) (Reserves).

dividual being considered" from being submitted to the board.[206] Also, the DA circular which publicizes the convening of promotion boards instructs those eligible for consideration of their right to communicate with the board, as does the letter which is sent to Reserves who are being mandatorily considered for promotion.

When the bill proposing the Officer Personnel Act of 1947 was submitted to Congress, these provisions were contained in the titles dealing with the Navy but not in the title concerning the Army.[207] Despite congressional concern over these limitations, the Congress amended its bill to make the provisions applicable both to the Army and the Navy. In regard to the requirement that a letter be sent through official channels, concern was indicated over the possibility that such a requirement would tend to discourage an officer from writing as frankly and fully as he otherwise might. The Navy responded by writing:

> It is believed that this is adequate as written and that such communications should go through 'official channels.' . . . It assists the officer as well as the Navy in having it go through a commanding officer as the latter will see that it is in proper form and, often as not, provide assistant (sic) to the officer in making as good as (sic) case as possible.[208]

The committee also had doubts about the restrictiveness of the contents of letters the proposed provision would allow eligible officers to write and wondered if an officer should not be granted more leeway in writing a selection board. To these questions the Navy answered:

> This is not considered a severe limitation . . . . It is necessary because a selection board is convened to select officers on the basis of their records. It cannot, and should not, act to reinvestigate or reinquire into a matter covered by a legal board of investigation or a court of inquiry, nor retry a case which has been tried by a legal court. It can consider only those things which are a matter of record. The proceedings and findings of courts and boards containing the original evidence brought out in their proceedings and the statements of the defendants are matters of record in the Navy Department, and can be invited to the attention of the board. In every instance, when an officer is given an unsatisfactory fitness report, the report is submitted to him for such statement as he may desire to make; such statements are also matters of record and are available to the selection board with the officer's fitness reports.[209]

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[206] AR 135-155, *supra* note 25, at para. 3-10*a*(2). This must be a misprint, for the letter which the Regulation prescribes for notifying Reservists of their impending consideration states the statutory requirements concerning letters to the board.

[207] H.R. REP. NO 640, 80th Cong., 1st Sess. 15 (1947).

[208] *Hearings on H.R. 2536 and 2537 Before Subcomm. No. 1 on Personnel of the House Comm. on Armed Services*, 80th Cong., 1st Sess. 2598-99 (1947). The Navy's response was in written form as the questions propounded by the Committee were in the nature of written interrogatories.

[209] *Id.* at 2597. This and the reference in note 205 *supra* are the only two references to communication with the board in the hearings on the bills which ultimately led to

The preceding statement presupposes a completed board or court proceeding or an unsatisfactory OER. But what of the officer who has been wronged through the personal animosity of another officer and the matter is still in an adjudicatory proceeding, or the type of wrong for which the Army does not provide an adequate remedy? Let us take as an example the hypothetical case of Major *A* who receives reassignment orders to another duty station, clears his unit and post, and somehow angers his former commander who unjustifiably withdraws an OER he had prepared in which he had rated *A* as "excellent." The commander prepares another efficiency report on *A* in which he rates him only satisfactory. As a result of the near universal inflation of ratings on OER's, such a report would probably end any chance *A* has of being promoted. In less than a month *A* is to be considered by a promotion board. In this situation, Major *A* is left without an adequate remedy to protect his career. Any relief he could obtain through an application to the ABCMR would in all likelihood occur after the promotion board adjourns. It would be unconscionable to force Major *A* to place the fate of his career in the administrative appellate procedures available to him when he has an opportunity to protect that career in a decision-making body of the first instance by simply relating the facts concerning his OER even though in the process he would be criticizing an officer and reflecting adversely on his motives. When it is recalled that promotion boards do, on occasion, contact rating officers concerning specific OER's they have prepared, such a letter would appear to be entirely appropriate under the circumstances of *A*'s case. Anything less than this would constitute a denial of due process to *A* because due process cannot rely on appellate procedures to protect rights[210] which should be protected by the initial tribunal. This principle is exemplified by *Goldberg v. Kelly*[211] which involved welfare recipients who alleged that their benefits had been or were about to be terminated by the state without notice or a hearing, thus denying them due process. State procedures allowed terminated recipients to file a post-termination appeal during which the recipients could appear personally, present evidence, question witnesses and have the proceeding recorded. If the appeal was denied, the recipients had recourse to the courts. However, if it was sustained, they would receive all payments which had been

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the Officer Personnel Act of 1947. On the weight of these answers, the communication clause was added to the Army provisions of the Act.

[210]The rights to be protected are the officer's good name, reputation and potential future employment either in the Army or as a civilian. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goss v. Lopez, 419 U.S. 565 (1975); Lindsay v. Kissinger, 367 F. Supp. 949 (D.D.C. 1973).

[211]397 U.S. 254 (1970).

erroneously denied them. In determining to what extent, if any, the recipients are entitled to due process protection, the Court held that that would depend on the recipient's interest in avoiding loss outweighing the government's interest in summary decision. The Court then stated that the basic principle of due process is the opportunity to be heard and that such opportunity must be afforded the individual at a meaningful time and in a meaningful manner.[212]

Applying these principles to the case at hand, the restriction on the material an officer can submit to the board in letter form can operate to deny him the right to be heard at a meaningful time and in a meaningful manner.[213] Moreover, to require Major *A* to submit his letter "through official channels" could have a very significant chilling effect on the vigor with which he presents his case. This is not to suggest that promotion boards reconsider board or court actions which have been completed, but only that they have sufficient information before them so that they can evaluate "all factors" which are relevant to an officer's ability or efficiency. By doing this, the Army would be acting in its own best interests and the best interests of the individual at the same time. Moreover, there are no counterbalancing considerations that could limit the extent of due process protection required here. Of course, the weight to be accorded the information in such a letter would remain within the discretion of the board.[214]

5. Appeal of Board Actions

If an officer's records are incomplete or HQDA determines that there was a material error in them when reviewed by a promotion board, the records can be corrected and submitted to a standby board.[215] There is no statutory or regulatory scheme established for active duty standby boards; however, as a matter of practice, primary boards will be assigned the additional duty of acting as a standby board, and they continue to be governed by the same

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[212] *Id.* at 267.

[213] In *Mullane v. Central Hanover Trust Co.* the Court held that due process requires a hearing, preceded by notice, "appropriate to the nature of the case." In the context of promotion boards, the board proceedings should be considered the "hearing." 339 U.S. 306, 313 (1950).

[214] It is suggested that this would be one of the pieces of evidence in an officer's file which it would be all but impossible to quantify as to value.

[215] AR 624-100, *supra* note 5, at para. 18*b* (active duty officers). This Regulation does not specifically mention or provide for standby boards. However, in practice the reconsideration which is provided for will be accomplished by a standby board. AR 135-155, *supra* note 25, at para. 3-14b deals with Reserve standby boards which may also consider an officer if his name was inadvertently omitted from the original consideration list.

statutory and regulatory requirements as primary boards. Reserve standby boards are specifically provided for by a regulation which delineates how application for reconsideration is to be made and minimal standards for denying applications.

The flaw in both these schemes is the lack of standards for determining whether material error was present in the officer's records. This determination is made by DCSPER after a review to insure that all the documents in the applicant's file pertain to him, and that all his OER's, citations, and other records are present in the file. However, this is done internally, without providing the individual concerned with information concerning the material in his file and what was considered by the board. Thus, the internal review at DCSPER suffers from the same shortcomings as does the verification of an officer's records by his agent. While it may be possible to detect obvious errors in such a manner, other less obvious errors may exist which only the officer concerned may detect. Therefore, unless an officer can personally review his records, it is difficult to insure that an adequate determination of material error can be made. Moreover, if a document in an individual's files contains adverse information, the individual has the burden of proving that it is unjust or untrue. However, the individual can only do this through the submission of documentary evidence and does not have the right to appear in person to contest adverse information in his file.[216] This makes it imperative that the individual know of the contents of documents which contain unfavorable information. With the world-wide dispersion of Army personnel, there is only one practicable method of accomplishing this and that is by the Army furnishing such information to the individual.

A second problem is determining what is a material error if an error is found. Since boards do not assign reasons for their actions, a reviewer has no basis for knowing if an error was material. In this situation, the difficulty tends to work to the advantage of the individual with the erroneous record for it is generally determined that any error of substance is a material error, whereas errors of form are not viewed so favorably.

One remaining agency within DA can provide a remedy for errors in the records considered by a selection board, the Army Board for Correction of Military Records (ABCMR). Three aspects of ABCMR proceedings are critical here. First, the regulation provides that no application for correction will be considered until the applicant has exhausted such legal remedies as the ABCMR determines are practical and available to the applicant.[217] The sec-

[216]AR 600-37, *supra* note 159, at para. 5-3.

[217]AR 15-185, *supra* note 73, at para. 8.

ond is the provision that application to the ABCMR does not operate as a stay of any proceedings being taken with respect to the applicant.[218] The first provision can operate to force an individual to seek judicial relief prematurely, *i.e.* before he has exhausted his administrative remedies. This can lead to unnecessary delay and expense to the applicant in light of the doctrine of exhaustion of administrative remedies. Thus, if a premature suit is brought, the court will dismiss for failure to exhaust administrative remedies[219] and the applicant is then forced back into the ABCMR.

However, in the interim, time has been running against the applicant because the application to the ABCMR does not operate as a stay of any proceedings. This fact becomes especially critical if the applicant has been passed over twice and is facing separation from the Army. Thus, an individual who has been passed over twice and is facing separation from the Army will seek relief from the ABCMR but may be required by the ABCMR to seek judicial relief against his pending separation; be denied judicial relief because of his failure to exhaust administrative remedies; reapply to the ABCMR for relief; be separated and then have the ABCMR determine that his records contained an error which would have precluded his separation, yet be denied reinstatement.[220] Accordingly, this ability to divert an applicant from his chosen path to relief can be abused and become a tool of oppression.

The third aspect of the ABCMR in need of examination is that its exclusive situs is Washington. Therefore, although an individual is entitled to personal appearance before the ABCMR[221] whether he can take advantage of such opportunity depends on his duty station and finances. Moreover, no provision requires that an individual be granted leave to appear before the ABCMR. Thus, the same authority who might have wronged an individual has the power to prevent him from seeking to effectively vindicate himself. Such a system can hardly be held to provide fundamental fairness to the individual concerned.

The role of the judiciary in the promotion process, although seemingly eliminated by the strict rule of nonreviewability in *Orloff* would appear to remain a possible route for relief where allegations of a denial of due process are concerned. As the court stated in *Mindes v. Seaman*:

> . . . this phase of Orloff's case raised no questions of deprivation of constitutional rights or action clearly beyond the scope of Army authority.

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[218] *Id.* at para. 9.

[219] *See* note 104 *supra*.

[220] *See* Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Jackson v. United States, 297 F.2d 939 (Ct. Cl. 1962), *cert. dismissed*, 372 U.S. 950 (1962).

[221] AR 15-185, *supra* note 78, at para. 12*b*.

> Thus the last statement of the Court must be read restrictively. The Court could not stay its hand if, for example, it was shown that only blacks were assigned to combat positions while whites were given safe jobs in the sanctuary of rear echelons.[222]

The criteria established in *Mindes* should provide adequate guidance as to when a court should review the procedures by which Army promotions are made and that is all that is being suggested here. Judicial review is a part of our constitutional heritage and the principle was established early in our history that it is for the courts to say what the law is and, ultimately, to pass on the legality of official action.[223]

One final point should be made concerning the possible involvement of the courts in promotion proceedings brought about by the Privacy Act of 1974.[224] The Act provides that any agency, with a few exceptions not pertinent here, which maintains a system of records must allow individuals access to those records which pertain to them, and if the records are not accurate, to request correction of those records. The Act also requires the agency to maintain records which are used in making personnel decisions with such "accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination."[225] If an agency does not comply with any of these requirements, any other provision of the Act, or a rule promulgated thereunder to the detriment of an individual, that individual may bring suit against the agency in federal district court to enforce his rights under the Act. In addition, if the court finds that the agency's refusal to comply with the Act's requirements was intentional or willful, the Government shall be liable to the individual for the actual damages sustained by the individual, but not less than $1,000 plus court costs and reasonable attorney's fees.

Thus, under the Privacy Act, an officer who has requested correction of his records through the ABCMR but has been denied relief, would appear to have the right to apply to a Federal district court for a de novo review of his request and if the plaintiff prevails, the court may order his records corrected "in accordance with his request or in such other way as the court may direct."[226] On its face, the Privacy Act could have a definite impact upon the promotion system through its provisions for judicial correction of military records. The exact extent of this impact will have to be determined as cases which arise under the Act wend their way through the

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[222]453 F.2d 197, 199 (5th Cir. 1971).
[223]Marbury v. Madison, 1 Cranch 137 (1803).
[224]Act of Dec. 31, 1974, Pub. L. No. 93-579, 88 Stat. 1896.
[225]5 U.S.C. § 552a(e)(5).
[226]5 U.S.C. § 552a(g)(2)(A).

judicial system, but it is well to note the potential role this Act gives to the judiciary in the promotion process.

VII. CONCLUSIONS

As the analysis of the different aspects of the promotion process indicates, serious due process deficiencies exist in that process. However, those deficiencies can be corrected within the present framework of the promotion system. The most glaring deficiencies are the lack of mandatory quantitative objective standards by which a board is to judge files presented for evaluation; the failure of the Army to provide servicemen notice of information in the records which will be presented to promotion boards; and the failure of the Army to require boards to assign reasons for the action taken in regard to each officer evaluated. While these and the other deficiencies discussed exist, doubts will continue to recur within the officer corps as to the fairness of the promotion system. In the aftermath of the war in Vietnam and its debilitating effects on the Army and the Army's image, the Army must continually examine its personnel policies to insure that they provide fair and equitable treatment to all individuals while at the same time insuring that the Army is ready to fulfill its primary mission of being prepared to fight. This concept was aptly stated by the Court of Appeals for the District of Columbia in *Robinson v. Resor,*[227] a case involving the dishonorable discharge of an Army warrant officer:

> Substantial fairness, rather than nitpicking compliance with precise regulations must guide the Army's actions. The Army must not be allowed to reach, step by technical step, a result which, viewed in its entirety, constitutes an overreaching leap into the arbitrary and inequitable.
>
> [It is] a time when the Army is attempting to demonstrate its attractiveness as an employer, and to enlist volunteers confident that they will receive fair treatment. . . . The Army could not isolate itself from the accepted standard of justice in the civilian world when it was a conscript force; still less can it—or should it wish to—live by a different standard when it plans to become an all volunteer Army.[228]

[227] 469 F.2d 944 (D.C. Cir. 1972).

[228] *Id.* at 951 (footnotes omitted).

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