The Total Force Concept, Involuntary Administrative Separation, and Constitutional Due Process: Are Reservists On Active Duty Still Second Class Citizens?

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A recent case decided by the U.S. Court of Federal Claims in 1999 exposes the Achilles Heel of the Army's involuntary administrative separation[1] procedures for Reservists on active duty. This case demonstrates a substantial disparity among the military services, where the Army fails to provide the same constitutional due process protections presently afforded other active Reservists. In this new era of the Total Force Concept, where the Reserves and the National Guard are assuming increased active duty roles worldwide, this failure to extend similar due process protections to all service members creates a serious legal inequity.

This article recommends that the Army, as the largest military service, promptly address this due process shortfall by providing the active Reservist equal status under the Constitution within the involuntary administrative separation process. This remedy, neither drastic nor intrusive, simply incorporates the procedural protections already extended to active Reservists by the Air Force, Navy, and Marine Corps.

Major Victor Gonzalez, an Active Guard Reserve (AGR)[2] officer, was part of the Army's full-time mainstay to organize, administer, recruit, instruct, and train the Reserve Component (RC), both U.S. Army Reserve and Army National Guard.[3] After an exhaustive challenge to his involuntary separation from the active duty Army, the U.S. Court of Federal Claims reinstated Major Gonzalez to the AGR on 2 March 1999. The court also awarded Major Gonzalez $123,823.21 in back pay and allowances, and set aside his general discharge imposed on 23 August 1995.[4] Moreover, under the "related case" rules of the Federal Claims Court, the Army presumably deferred to the *Gonzalez* opinion and promptly settled two other administrative discharge cases in April 1999, upgrading both soldiers' discharges to an honorable characterization.[5] On 29 September 1999, the U.S. Court of Federal Claims awarded attorney fees to Major Gonzalez, after finding that the Army's position throughout the underlying dispute was not substantially justified.[6]

Involuntary Discharge of Major Gonzalez

In October 1993, Major Gonzalez tested positive for cocaine use during a drug urinalysis test.[7] On 4 February 1994, court-martial charges were preferred against Major Gonzalez under Article 112a[8] of the Uniform Code of Military Justice (UCMJ). A pretrial investigation was conducted in March 1994, under Article 32, UCMJ.[9] On 31 March 1994, the Article 32 investigating officer (IO) concluded that probable cause existed to believe that Major Gonzalez violated Article 112a and that the case should be referred to court-martial. The IO stated: "[h]owever, in my opinion, there are several questions of fact which may make successful prosecution difficult at court-martial."[10] The IO therefore recommended that some consideration be given to administrative disposition of the case under *Army Regulation (AR) 635-100, Officer Personnel*.[11]

1. Separation, in the context of Reservists, encompasses both release from active duty without discharge (and subsequent transfer to either an Army National Guard or United States Army Reserve component not on active duty) and discharge (the complete severance from all military status). U.S. DEP'T OF ARMY, REG. 635-10, PROCESSING PERSONNEL FOR SEPARATION, glossary (1 July 1984).

2. Active Guard Reserve is defined as:

> Army National Guard of the United States and U.S. Army Reserve personnel serving on active duty under section 12301, title 10, United States Code and Army National Guard personnel serving on full-time National Guard duty under section 502(f), title 32,United States Code. These personnel are on full-time National Guard duty or [active duty (AD)] (other than for training on AD in the Active Army) for 180 days or more for the purpose of organizing, administering, recruiting, instructing, or training the Reserve Components and are paid from National Guard Personnel, Army, appropriations or Reserve Personnel Army, appropriations.

U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES, glossary (21 July 1995) [hereinafter AR 600-8-24].

3. 10 U.S.C. § 12301 (2000); 32 U.S.C. § 502(f) (2000). The Air Force AGR and Navy Training and Administration of the Reserves (TAR) programs fulfill a similar function.

4. Gonzalez v. United States, 44 Fed. Cl. 764 (1999). On 26 January 1999, the court issued final judgment and stipulation of damages. *Id.* The Army did not appeal this decision.

5. Howerton v. United States, No. 97-850C (Fed. Cl. Apr. 19, 1999); Viernes v United States, No. 98-308C (Fed. Cl. Apr. 19, 1999). The author served as plaintiffs' counsel in *Gonzalez*, *Howerton*, and *Viernes*.

6. *Gonzalez*, 44 Fed. Cl. at 770. The Army did not appeal this decision either.

7. *Id.* at 765.

Nonetheless, in April 1994, the convening authority referred the case to trial by general court-martial. On 10 June 1994, the military trial judge found that the charges preferred against Major Gonzalez were defective because a civilian employee, not subject to the UCMJ as required, inadvertently swore to the charges.[12] The judge subsequently dismissed the case "in light of judicial economy and the government's failure to timely correct the preferral deficiencies."[13]

After the court-martial charges were dismissed, the commander of Fort Buchanan, Puerto Rico, took non-punitive administrative action against Major Gonzalez. On 19 September 1994, Major Gonzalez received a memorandum of reprimand (MOR) for the unlawful use of cocaine.[14] The commander did not initiate elimination proceedings under *AR 635-100*, chapter 5, where Major Gonzalez, as a "non-probationary officer," would have been entitled to a formal hearing before a board of inquiry to "show cause" why he should be retained.[15] Although the commander's decision appeared beneficial to Major Gonzalez, the decision actually deprived him of effective due process to contest the drug use charge, and limited him to a cursory right of rebuttal under the MOR procedures.[16]

The MOR procedures permitted Major Gonzalez seven days to submit a written statement to rebut the drug use allegation. In his rebuttal statement, Major Gonzalez asserted his innocence and challenged the drug testing procedures, the credibility of the test results, and the chain of custody of the urine sample. After the rebuttal was submitted, the commander prepared an endorsement for the approving authority, wherein the commander recommended that the MOR be permanently filed in Major Gonzalez's official military personnel file (OMPF). In the endorsement, the commander responded to the issues raised by Major Gonzalez's rebuttal, but the endorsement added derogatory information not mentioned in the MOR. Major Gonzalez was not aware of this additional information, and its potential significance to the approving authority's filing decision, until Major Gonzalez received a response to a Privacy Act request made in 1995. By that time, however, the approving authority had already permanently filed the MOR in Major Gonzalez's OMPF.[17]

On 20 April 1995, a Department of the Army Suitability Evaluation Board (DASEB) denied Major Gonzalez's written appeal to remove the MOR from his OMPF.[18] On 10 July 1995, a Department of the Army Active Duty Board (DAADB) determined that Major Gonzalez would be involuntarily separated from active duty with a general discharge due to the MOR.[19] On 15 August 1995, his appeal of the DAADB decision to the Army Board for Correction of Military Records

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8. UCMJ art. 112a (2000) provides:

> Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court martial may direct.

Id. The substances listed under Article 122(a), subsection (b), include cocaine. *Id.*

9. *Gonzalez*, 44 Fed. Cl. at 765.

10. Administrative Record at 142, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (Investigating Officer's Report, Department of Defense Form 457, item 22 (Oct. 17, 1997)) [hereinafter Administrative Record].

11. U.S. DEP'T OF ARMY, REG. 635-100, OFFICER PERSONNEL, ch. 5 (officer separation for misconduct) (1 June 1989) [hereinafter AR 635-100], *superseded by* AR 600-8-24, *supra* note 2.

12. Plaintiff's Cross-Motion for Judgment on the Administrative Record at app. 36-7, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (transcript of Article 39a).

13. *Id.*

14. Administrative Record, *supra* note 10, at 63-64.

15. *See generally* AR 635-100, *supra* note 11. AR 600-8-24 incorporates similar provisions whereby non-probationary Regular Army (RA) and Reserve Component (RC) officers receive a formal separation board of inquiry with right to counsel, confrontation of witnesses, and cross-examination of witnesses. AR 600-8-24, *supra* note 2, ch. 4. Non-probationary officers are RA officers with more than five years active commissioned service, RC officers with more than three years commissioned service, and warrant officers with more than three years service since original appointment in their present component. *Id.*, glossary.

16. *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, ch. 3 (19 Dec. 1986) (detailing MOR rebuttal procedures) [hereinafter AR 600-37].

17. Gonzalez v. United States, 44 Fed. Cl. 764, at 766. (1999). *See generally* AR 600-37, *supra* note 16, at para. 3.4b(1)(c). Arguably, the addition of derogatory information in presenting the MOR, absent an opportunity for rebuttal, violated AR 600-37.

18. *Gonzalez*, 44 Fed. Cl. at 766; Supplement to Administrative Record at 17-20, Gonzalez v. United States, No. 97-526C (1998) (Fed. Cl. July 1, 1998) [hereinafter Administrative Record Supplement].

19. Administrative Record, *supra* note 10, at 272.

(ABCMR) was denied.[20] On 23 August 1995, Major Gonzalez was involuntarily released from active duty with a service characterization of Under Honorable Conditions (General).[21] His Department of Defense Form 214[22] stated "failure to meet minimum standard of retention," and Major Gonzalez was transferred to the Individual Ready Reserve.[23] Because the Army Reserve did not convene a Reserve board of inquiry under *AR 135-175*,[24] Major Gonzalez remained in limbo without the ability to earn points towards a reserve retirement. He had accrued seventeen years of total military service, including twelve years of active duty. The single MOR, the factual basis of which Major Gonzalez strongly disputed, provided adequate justification to separate him from active Army service, without regard for the due process protections assured by the use of a board of inquiry.

Involuntary Separation of Reserve Officers

Regular Army (RA) officers may demand an adversarial board of inquiry, with a right to consult counsel, prior to involuntary separation under *AR 600-8-24*, chapter 4. These same officers are also afforded an appellate board of review.[25] If the general officer show cause convening authority (GOSCA), Army Personnel Command (PERSCOM), or such other officials as the Secretary of the Army designates, initiates separation pursuant to *AR 600-8-24*, chapter 4, non-probationary RC officers may demand a board of inquiry just like RA officers.[26] Reserve officers may also be separated without a board of inquiry, however, because the GOSCA has discretion in initiating such separations. If elimination is initiated under the provisions of *AR 600-8-24*, chapter 2, an RC officer's separation may be effected without a board of inquiry through the actions of a Department of the Army Active Duty Board (DAADB).[27]

The Army Personnel Command conducts periodic screening of the records of AGR officers to determine if a basis exists for referring the officer to a DAADB for involuntary release from active duty. The GOSCA may also field-initiate their own DAADB referral for reserve officers within their command. Even if the GOSCA withdraws his field-initiated DAADB referral, PERSCOM—and other authorized entities—may still initiate a DAADB referral.[28] The GOSCA has no authority to terminate a DAADB referral from PERSCOM or other authorized initiators. After officers are referred to a DAADB for release, the DAADB renders a final decision on behalf of the Secretary of the Army.[29] There is nothing to prevent the DAADB from proceeding with summary action on behalf of the Secretary of the Army, even in cases where a GOSCA-initiated board of inquiry is pending.[30]

Officers referred to a DAADB are not permitted an adversarial hearing, with due process limited to submitting a written statement replying to the referral recommendation.[31] After reviewing the file and the officer's rebuttal, if any, the DAADB may release an officer from active duty for a variety of adverse reasons, including misconduct, moral or professional dereliction, and substandard duty performance.[32] Although a board of

20. Administrative Record Supplement, *supra* note 18, at 2-7.

21. Administrative Record, *supra* note 10, at 1; Plaintiff's Proposed Additional Facts at para. 4, Gonzalez v. United States, No. 97-526C (1998) (Fed. Cl. July 1, 1998)

22. U.S. Dep't of Defense, DD Form 214, Certificate of Release or Discharge From Active Duty (Nov. 1988). *See generally* U.S. DEP'T OF ARMY, REG. 635-5, SEPARATION DOCUMENTS, para. 1.4 (15 Aug. 1979).

23. Administrative Record, *supra* note 10, at 1.

24. U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS, para. 2.17e (28 Feb. 1987) [hereinafter AR 135-175]. The Commander, Army Reserve Personnel Center, could have initiated separation proceedings against Major Gonzalez, but declined to do so.

25. AR 600-8-24, *supra* note 2, para. 4.17.

26. *Id.* para. 4.18a.

27. *Id.* para. 2.31.

28. Paragraph 2.31(c) provides:

> Local commanders; CDR, PERSCOM; Chief, Army Reserve (CAR); CDR, ARPERCEN; Director, Army National Guard (DARNG); TJAG, or the DACH may recommend that an RC officer be considered by a DAADB to determine if the officer's manner of performance, degree of efficiency, or misconduct constitutes consideration for involuntary separation.

Id.

29. *Id.* para. 2.31a.

30. *See id.* para. 2.31.

31. *Id.* para. 2.31j, tbl. 2-14.

32. *Id.* para. 2.31q.

inquiry is not required, a DAADB determination is required before non-probationary officers can be released from active Army service. Probationary AGR officers, however, may be released without even a DAADB determination.[33] There is generally no entitlement to separation pay for AGR officers, regardless of probationary status.[34]

Although the RC officer may demand a board of inquiry if the GOSCA or other authorized officials initiate separation proceedings pursuant to *AR 600-8-24*, chapter 4, there is nothing preventing these officials from later proceeding with a DAADB referral, thereby denying the RC officer access to an adversarial hearing. Among the services, only Army regulations permit this expedient method to involuntarily separate RC officers from active duty, without the requirement for a board of inquiry and regardless of whether a liberty interest is implicated.[35]

Gonzalez v. United States

In July 1997, as an appeal of the ABCMR denial, Major Gonzalez filed a complaint in the U.S. Court of Federal Claims seeking reinstatement to active duty.[36] On 1 July 1998, the Court of Federal Claims granted summary judgment in favor of Major Gonzalez.[37] In a bench opinion issued swiftly after oral arguments were presented, the court concluded that the Army's summary DAADB procedure violated Major Gonzalez's constitutional liberty interest because it permitted—without a hearing—an administrative separation with a stigmatizing general characterization of service.[38] It is perhaps noteworthy that Judge Margolis stated on the record that he would publish the decision if the Army appealed his decision.[39]

The *Gonzalez* court was the first to interpret the Army discharge case of *Holley v. United States*,[40] which held that a constitutional due process right to a pre-termination board of inquiry does not exist unless there is "some allegation or finding" that the stigmatizing information was false.[41] The Army argued that, although Major Gonzalez claimed his innocence to stigmatizing charges, no right to a hearing existed amid the substantial evidence confirming that Major Gonzalez wrongfully used cocaine. Specifically, the Army asserted that the positive urinalysis test provided sufficient evidence to separate Major Gonzalez without a hearing.[42] The court disagreed, and ruled that an adversarial hearing requirement was triggered under *Codd v. Velger*.[43] Several courts have interpreted *Codd* as requiring a plenary and adversarial, pre-deprivation hearing when some factual dispute has been alleged, including application of rules, polices or law to the particular facts.[44] While Lieutenant Holley essentially sought a hearing only to plead clemency after admitting guilt, Major Gonzalez steadfastly disputed the stigmatizing charges that led to his separation.[45]

The *Gonzalez* court rejected the Army's argument that, because its own regulations did not entitle Major Gonzales to a show cause hearing, such action was a discretionary, internal military personnel decision, not subject to review.[46] The court deferred to its decision in *Casey v. United States*,[47] which held that, even where Army regulations did not grant a right to a board of inquiry, a soldier still had an independent due process right to a board where he raised a material factual question concerning alleged alcohol abuse.[48] The *Casey* decision was consistent with the standards articulated in *Codd v. Velger*.[49] Moreover, Army publications acknowledged that, once a liberty interest was established, administrative due process was governed under constitutional standards formulated indepen-

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33. *Id.* para. 2.29. Active Guard Reserve personnel initially are activated under a limited contract term of four to six years. During that period, the AGR soldier may apply for extended active duty. Probationary AGR soldiers are those serving a one-year probationary period *after* approval of their extended active duty. Under this paragraph, extended active status may be revoked and the officer may be issued an honorable or general characterization of service. *Id.*

34. *Id.* para. 2.31r. *But see* para. 2.31s. The DAADB may also be employed for officer release during a commonly termed Reduction in Force, where officers are considered for separation, not for stigmatizing reasons such as substandard performance or misconduct, but based upon the needs of the service. These Reservists are authorized separation pay. *Id.*

35. *See id.* para. 2.31. It is well established that a stigmatizing administrative discharge will adversely and permanently impact a former service member's civilian employment opportunities and veterans' benefits. *See* Casey v. United States, 9 Cl. Ct. 234 (1985).

36. United States v. Gonzalez, 44 Fed. Cl. 764, 766 (1999).

37. Transcript of June 30, 1998 Bench Opinion Granting Summary Judgment at 47, *cited in Gonzalez*, 44 Fed. Cl. at 766 [hereinafter Bench Opinion].

38. *Id.*

39. *Id.* at 37, 51. Moreover, Judge Margolis indicated that, should the Army appeal, his bench opinion would serve as the published opinion. *Id.* The author, plaintiff's counsel at argument, interpreted the judge's repeated remarks as intending to dissuade the Army from a lengthy appeal while encouraging prompt reinstatement to preserve Major Gonzalez's career after a three year hiatus.

40. 124 F.3d 1462 (Fed. Cir. 1997).

41. *Id.* at 1470 (citing Codd v. Velger, 429 U.S. 624, 627 (1977)).

42. Bench Opinion, *supra* note 37, at 45-46.

43. *Id.* (citing *Codd*, 429 U.S. at 627).

dently by the courts, and not by the process provided by Army regulations.[50]

The *Gonzalez* court also rejected the Army's position that Major Gonzalez's separation certificate did not publicize any stigmatizing information. The Court found the separation justification listed on the certificate, "failure to meets standards of retention," combined with the general service characterizaton, was stigmatizing on its face.[51] Moreover, the certificate identified the separation authority as "AR 635-100 [paragraph] 3-49A."[52] This provision stated that a "general" service characterization is normally issued for "misconduct, moral or professional dereliction."[53] Furthermore, the Army sent a formal letter to Major Gonzalez with an attachment stating that his DAADB selection was based upon "misconduct, moral or professional dereliction" resulting from the MOR indicating wrongful use of cocaine.[54]

The *Gonzalez* court next addressed the Army's assertion that Major Gonzalez's Article 32 hearing had satisfied constitutional due process requirements.[55] The court found that pretrial investigations conducted under Article 32 were designed to determine only whether there is probable cause to refer the charges for trial and to recommend an appropriate disposition of the allegations.[56] Therefore, the Article 32, standing alone, did not satisfy constitutional muster.

Major Gonzalez argued that he was entitled to an adversarial hearing pursuant to both the Due Process Clause and Army regulation. As a non-probationary officer, Major Gonzalez submitted the Army had abused its discretion by not affording him a board of inquiry prior to elimination, as provided in *AR 635-100*, paragraph 5.24 (Initiation of Elimination Actions for Non-probationary Officers). The Army, by providing this regulatory scheme prescribing elaborate safeguards through the board of inquiry process, had already established this forum to guarantee non-probationary officers due process in the face of a stigma-

44. *Codd*, 429 U.S. at 627 ("[T]here must be some factual dispute . . . . Nowhere in his pleadings or elsewhere has respondent affirmatively asserted that the report . . . was substantially false."). *See* Cabrol v. Town of Youngsville, 106 F.3d 101, 107 (5th Cir. 1997) (stating that merely invoking the term "false" in plaintiff's brief without more, is insufficient); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996) (stating that where employee went through two full hearings, pleaded confession and avoidance, and where there was no disputed issue of material facts to resolve, constitutional due process claim is too feeble to require hearing); Moore v. Agency for Int'l Dev., 80 F.3d 546, 548 (D.C. Cir. 1996) (stating that the sole purpose of *Codd* hearing is to settle factual disputes between employer and employee); Moreau v. F.E.R.C., 982 F.2d 556, 569 (D.C. Cir. 1993) (stating there must be some factual dispute as to the truth of matters); Woods v. City of Michigan City, 940 F.2d 275, 284-85 (7th Cir. 1991) (stating that where there are no disputed facts, and no disputes about the application of rules, policies or law to particular facts, generally there is no hearing required); Greene v. McGuire, 683 F.2d 32, 34 n.2 (2nd Cir. 1982) (stating there must be some dispute); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 n.5, 448 (2nd Cir. 1980) (stating that the defendant's summary motion defeated where questions of disputed fact are raised; factual disputes must await proper resolution by the trier of fact).

45. Major Gonzalez successfully reinstated his top secret security clearance, based on similar challenges and evidence of good military character provided by strong statements from numerous senior officers. Good military character has long been recognized as a powerful defense in criminal drug prosecutions in the military when rebutting positive drug tests in tandem with chain of custody defects. United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985) (stating character evidence may itself generate reasonable doubt in the fact finder's mind); United States v. Beltz, 20 M.J. 33 (C.M.A. 1985) (stating evidence of good military character can be used in drug prosecutions); United States v. Morsell, 30 M.J. 809 (A.F.C.M.R.1990) (setting aside a drug conviction where defective chain of custody argument supported by good military character defense); United States v. Belz, 21 M.J. 765 (A.F.C.M.R.1985) (setting aside drug-related conviction because judge excluded defense's offer of Officer Effectiveness Reports and affidavits of his superiors attesting to his good military character).

46. Bench Opinion, *supra* note 37, at 38, 41-42. *See* Defendant's Opening Brief at 3-5, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

47. 8 Cl. Ct. 234 (1985).

48. *Id.* at 242 n.6.

49. 429 U.S. at 627.

50. U.S. DEP'T OF ARMY, PAM. 27-21, LEGAL SERVICES ADMINISTRATIVE AND CIVIL LAW HANDBOOK, para. 13.3b(3) (1 Sept. 1990) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 536 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)).

51. Bench Opinion, *supra* note 37, at 43-44.

52. Administrative Record, *supra* note 10, at 1.

53. *Cf.* AR 635-100, *supra* note 11, para. 1.6b(1) (stating that an officer's service normally characterized as general or worse by DAADB for officers released for misconduct, moral or professional dereliction); 1.5b (stating that a General Discharge Certificate is issued because of serious misconduct for which punished).

54. Administrative Record, *supra* note 10, at 176.

55. Bench Opinion, *supra* note 37, at 47-48.

56. *See* United States v. Bramel 29 M.J. 958, 964 (A.C.M.R. 1990) (stating that an Article 32 investigation is a preliminary proceeding, not a trial on the merits, and provides a discovery tool for the accused as to the evidence against him) (citing United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959)). *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 discussion (1993) (stating that an Article 32 investigation is limited to issues raised by the charges and necessary to a proper disposition of the case, "not to perfect a case against the accused . . . [and] also serves as a means of discovery").

tizing discharge.[57] Major Gonzalez maintained that *AR 635-100* provided a floor of rights to an officer with a liberty interest at stake.[58] By relying on the board of inquiry process, the Army had effectively employed the "balancing test" to decide what process was due to protect an officer's liberty interest.[59]

Absent a board of inquiry, Major Gonzalez argued that the Army's reliance on Article 32 or other proceedings on an *ad hoc* basis raised substantial equal protection concerns.[60] Because the board of inquiry process provides more rights to an officer than an Article 32 investigation, the latter was an inadequate forum to protect Major Gonzalez's liberty interest. The purpose of the board is to afford the officer a full adversarial hearing to "show cause" why he should not be eliminated from the service.[61] After the military makes an initial decision to eliminate based upon evidence of misconduct, the officer is afforded an opportunity to prepare and present a meaningful case as to why he should be retained. The board's findings and recommendation are binding and set a protective floor, such that the Army cannot overrule the board and impose a less favorable outcome for the officer.[62]

In sum, Major Gonzalez asserted that none of the supposed "ample opportunities" offered him were adequate to safeguard his constitutional rights and liberty interest.[63] The Article 32 proceeding, MOR rebuttal process, DASEB, DAADB, and ABCMR[64] were not entrusted as "super-boards of inquiry" making show cause and retention decisions for the Army.[65] These forums, Major Gonzalez urged, failed to accomplish the exhaustive and thorough evaluation provided by a duly appointed board of inquiry.[66]

The *Gonzalez* court agreed with the rationale offered by Major Gonzalez and, as an illustration, highlighted a flaw in the administrative proceedings leading to his elimination to emphasize the need for an adversarial forum. The court found that the Army had compromised Major Gonzalez's MOR rebuttal rights under *AR 600-37*[67] when his commander improperly used an endorsement to the MOR rebuttal submitted by Major Gonzalez to add derogatory information, *post hoc* and *ex parte*. This served to discredit Major Gonzalez's defenses contained in the MOR rebuttal, and only an adversarial hearing could have cured this flaw in the proceeding.[68] [69]

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57. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 22-23, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

58. *Id.* at 22-25. *See* AR 635-100, *supra* note 11, paras. 5.13-5.29, 5.33-5.48. Similar language is found in the current regulation that provides respondents with the right to counsel, to a hearing, to a personal appearance, to a right to testify and present witnesses, and to cross-examine witnesses. AR 600-8-24, *supra* note 2, at paras. 4.1-4.19. *See also* Casey v. United States, 8 Cl. Ct. 234, 241-43, 242 n.6 (1985) (stating that the soldier had independent constitutional due process right to board where underlying separation code stood for stigmatizing "drug rehab" failure, and where Army had sent stigmatizing letter to soldier listing this reason).

59. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 22, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (citing Mathews v. Eldridge, 424 U.S. 319, 335-36 (1976)).

60. 10 U.S.C. § 10209 (2000) ("Laws applying to both Regular and Reserves shall be administered without discrimination . . . between Regulars and Reserves.").

61. AR 635-100, *supra* note 11, para. 5.13a(3), app. B, *superseded by* AR 600-8-24, *supra* note 2, para. 4.6 (containing similar language).

62. AR 635-100, *supra* note 11, paras. 5.21b, 5.39b(9), 5.23d(3), 5.28b, *superseded by* AR 600-8-24, *supra* note 2, paras. 4.6-4.17. The officer is entitled to not less than three board members senior in rank, who sit as voting members, with one member sitting as the president. AR 635-100, *supra* note 11, para. 5.37a(1), (2)(b), *superseded by* AR 600-24-8, *supra* note 2, para. 4.7. The board president rules on evidentiary and other matters. A legal adviser is present to render advice to the board as to admissibility of evidence, arguments, motions and any other matter. AR 635-100, *supra* note 11, para. 5.14, *superseded by* AR 600-8-24, *supra* note 2, para. 4.10. If the board recommends elimination, the officer is entitled to a board of review, and to submit a legal brief. The board of review furnishes recommendations to the Secretary of the Army after a thorough review of the officer's entire record, whether or not the officer should be retained. The board may decide to retain the officer when the board of inquiry recommended elimination. AR 635-100, *supra* note 11, paras. 5.26-5.27, *superseded by* AR 600-8-24, *supra* note 2, para. 4.17.

63. Defendant's Response to Plaintiff's Cross-Motion for Judgment on the Administrative Record at 7, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998).

64. Instead of ordering a show cause hearing, the ABCMR ignored the broader constitutional concerns raised by Major Gonzalez, and did not examine whether the existing regulatory procedures were adequate. According to standard practice in DAADB cases, the ABCMR narrowly limited its ruling to whether DAADB procedure was properly carried out under the controlling Army regulation, then AR 635-100. Administrative Record Supplement, *supra* note 18, at 5-6 (BCMR finding that DAADB decision to involuntarily separate was proper because procedures under AR 635-100, paragraph 3.49, were followed).

65. Plaintiff's Cross-Motion for Judgment on the Administrative Record at 29-30, Gonzalez v. United States, No. 97-526C (Fed. Cl. July 1, 1998) (citing Dodson v. United States Army, 988 F.2d 1199, 1205-1206 (Fed.Cir. 1993)).

66. *Id.* at 30.

67. AR 600-37, *supra* note 16, at ch. 3..

68. Bench Opinion, *supra* note 37, at 47-48.

69. The ABCMR, in a subsequent administrative proceeding, agreed and set aside the MOR, two non-selections for promotion to lieutenant colonel, and ordered promotion reconsideration. ABCMR Dkt. No. AR1999-029831 (11 July 2000).

Award of Attorney Fees

On 29 September 1999, the *Gonzalez* court awarded attorney fees after finding that the Army's overall position throughout the underlying dispute was not substantially justified.[70] In attorney fee cases, the Court of Federal Claims evaluates whether the government agency's position was reasonable in fact and law.[71] In *Gonzalez*, the court's findings were abundantly clear when it stated: "In short, after considering the entirety of the government's position, this court concludes that this is a case where unjustifiable government actions forced the plaintiff to vindicate his rights through litigation. [The Equal Access to Justice Act] is intended to compensate plaintiffs under just such circumstances."[72] Therefore, the court awarded attorney fees and expenses totaling $16,437.15 to Major Gonzalez.[73]

In an August 1999 article, *the Army Times* reported the impact of *Gonzalez:*

> [S]ources on both the Army Staff and Secretariat said legal officials were surprised by the *Gonzalez* decision, and do not want it to become strong precedent in federal courts . . . . "That's why the Army settled these other two cases [*Howerton* and *Viernes*]," said one senior officer. "They did not want adverse rulings. The whole system of administrative discharge could fold if that happened."[74]

The *Gonzalez* ruling indisputably demonstrated the vulnerability and necessity for reform in the Army's system of administrative separation for RC officers.

Policy Justifications for Reform

In this new era of the Total Force Concept, where Reservists and the National Guard are assuming increasing active duty roles worldwide, the failure to extend a level, legal playing field to all service members raises a serious legal and moral dilemma. "Today, with the smaller Army, I don't think you have a choice but to use National Guard units," stated Representative Ike Skelton, ranking member on the United States House Committee of Armed Services.[75] Currently, RC units comprise fifty-four percent of the fighting force while the active Army is only forty-six percent.[76]

A modern military force, drawn from increasingly reluctant civilian volunteers, cannot afford the Army's departure from fundamental constitutional principles for its RC officers. This is especially evident in light of the military's celebration of the fiftieth anniversary of the Uniform Code of Military Justice and its ascension among the respected jurisprudence of criminal law.

For example, provisions of the National Defense Authorization Act for Fiscal Year 2000 show the depth of concern among lawmakers about recruiting problems and the personnel shortage.[77] "We are at the edge of despair [said one Congressional aide] . . . [where] nothing is rejected out-of-hand as an unreasonable approach [to recruiting and retention]."[78] Patrick T. Henry, the Army's Assistant Secretary for Manpower and Reserve Affairs, expressed alarm about a recruiting slump that shows no signs of abating. Claiming a need to portray a better image to the public, the Assistant Secretary stated that "America has to understand that we are not an employer of last resort . . . . [Rather,] folks should be enthusiastically embracing the young people who want to join the Army, be it for the education, adventure, lifestyle or a standard of living they can be proud of."[79]

In today's military, with the regular force more reliant than ever on part-time soldiers to fulfill critical missions, a "better image" must extend to the treatment of both AGR and activated Reservists. It may be argued that it promotes readiness to quickly eliminate problem RC officers, particularly the AGR officer who trains and administers RC units. However, this is a

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70. Gonzalez v. United States, 44 Fed. Cl. 764, at 765 (1999).

71. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(b), (d) (2000); Pierce v. Underwood, 487 U.S. 552, 565 (1988).

72. *Gonzalez*, 44 Fed. Cl. at 770.

73. *Id.* At 771.

74. Jim Tice, *Lawsuits Settled In Ousted Soldiers' Favor*, ARMY TIMES, Aug. 6, 1999, at 22.

75. Steven Komarow, *National Guard Facing Mission Impossible?*, USA TODAY, Sept. 13, 1999, at 24A.

76. *Id.*

77. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 §§ 571-574 (options to improve recruiting for Army Reserve), 581 (survey of military members on why they are leaving the service), 586 (members under burdensome personnel tempo), 113 Stat. 614-615, 622-624, 633-634, 637-639 (1999).

78. Rick Maze, *Congress On Edge Of Despair Over Recruiting Retention, Recruiting*," A.F. TIMES, Aug. 13, 1999, at 13.

79. Jane McHugh, *Army Rolls Out Big Guns To Boost Recruiting,* ARMY TIMES, Aug. 30 1999, at 22.

luxury the Army can ill afford amid the modern Total Force Concept with its critical reliance on RC volunteers. Moreover, the second-class treatment of RC officers—and particularly non-probationary AGR officers—facing involuntarily separation from active duty undoubtedly portrays an image that America's now vital citizen-soldiers are unworthy of basic due process.

Proposed Remedy

Neither the Air Force nor the Navy provides a distinct involuntary release process for career RC officers. Instead, even probationary officers are subjected to a screening board that determines whether a hearing is appropriate in particular cases.

Air Force Approach

The Air Force effectively affords all of its active duty officers minimum constitutional due process. Moreover, analysis of Air Force procedures reveals that similar protections are extended to RC officers.[80] Officers "entitled" to a show cause hearing by a board of inquiry include non-probationary officers, probationary officers if recommended for a discharge under other than honorable conditions (OTH), and officers accused of homosexual conduct.[81]

Prior to March 2000, for probationary officers not facing an OTH discharge recommendation, the Air Force provided constitutional safeguards through a screening board process conducted by either the Probationary Officer Discharge Board (PODB) or the Air Force Personnel Board (AFPB).[82] The show cause authority (SCA) referred an officer's case to a PODB if recommended for a general discharge, or directly to the AFPB if recommended for an honorable discharge.[83] In the former, the PODB reported its findings and recommendations for an honorable or general discharge back to the SCA, who then referred the case to the AFPB.[84] On 10 March 2000, the Air Force eliminated its PODB, although this change did not alter the reserve Air Force officer's right to a board of inquiry.[85] Instead, the change was intended "solely to streamline and speed up processing time" by combining review into a single board, the AFPB.[86] The due process rights previously extended under the PODB—including judge advocate review and recommendation to convene a hearing—are now combined at the AFPB level.[87]

Under current Air Force guidelines, the AFPB operates as the initial review directly from the SCA, and the board is given wide latitude to recommend to the Secretary of the Air Force the following options: honorable or general discharge, return the case for a board of inquiry or take "proper action [after] determining that unusual circumstances warrant different procedures."[88] Finally, staff judge advocate (SJA) involvement, and other appropriate examination of legal issues raised by the officer, occur during this process.[89]

Navy and Marine Corps Approach

The Navy's discharge procedures for RC officers serving on active duty are less explicit than the Air Force procedures. However, the Navy does not impose a distinct separation process for RC officers analogous to the Army's DAADB system.[90] The Navy officer administrative separation regulation begins by declaring that the policies and provisions therein,

80. U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS, para. 4.33 (19 June 1998) (concerning discharges for cause) [hereinafter AFI 36-3206]. *See generally* U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 36-3207, SEPARATING COMMISSIONED OFFICERS, ch. 3, Involuntary Separations (1 Sept. 1996).

81. AFI 36-3206, *supra* note 79, attach. 1, terms (A non-probationary officer is (1) a regular officer with five or more years of active commissioned service, computed from the total active federal commissioned service date; or (2) a reserve officer with five or more years of commissioned service, computed from the total federal commissioned service date). All reserve officers are automatically considered for regular status by their promotion selection boards for the rank of Major. Failure to be selected for regular status does not subject these career Air Force Reservists to an analogy of the Army's DAADB, however. *See id.*

82. *Id.* chs. 5, 6.

83. *Id.* para. 4.32.

84. *Id.* paras. 5.7, 5.8.

85. Telephone Interview with Nancy Baker, Air Force Officer Separations, Randolph Air Force Base, Texas (July 21, 2000). Ms. Baker co-authored the recent changes to AFI 36-3206. *Id. See* Major General William A. Moorman, Air Force 2000 TJAG Annual Summary, Address Before the American Bar Association Standing Committee on Armed Forces Law (July 8, 2000).

86. Telephone Interview with Nancy Baker, *supra* note 84.

87. *Id.*

88. AFI 36-3206, *supra* note 79, para. 6.4.

89. *Id.* paras. 1.2 (role of SJA), 4.14 (Commander's Responsibilities), 4.22 (Delegating Administrative Actions), 4.26 (SCA determinations), 6.3 (officers or their counsel may appear before AFPB proceedings if necessary under the circumstances).

"apply to all officers and warrant officers of the Regular and Reserve components of the Navy and Marine Corps."[91]

Non-probationary Navy and Marine Corps officers, those officers with five or more years of commissioned service, are "entitled" to an administrative separation board.[92] Although the Navy's administrative board procedures are intended for regular commissioned officers, the Secretary of the Navy "may refer any case which he or she considers it appropriate, to an administrative board."[93] In addition, probationary officers are "entitled" to an administrative board of inquiry if discharged or released for misconduct or moral or professional dereliction.[94] Thus, Navy procedures for officer separations implicitly provide minimum constitutional due process to RC officers separated for recognized stigmatizing reasons.

Proposed Remedy for the Army

The Army can maintain the integrity of its current procedural framework by formally adding a screening tool to guide the GOSCA and DAADB. Whether deciding to provide the RC officer with a board of inquiry, or to proceed directly with DAADB disposition, this new regulatory requirement must explicitly delineate legal review tasks at both the GOSCA and DAADB levels.[95] This would require modifications to existing regulatory language.[96] Some sort of independent, legal recommendation is already implicitly necessary under Army guidance.[97] However, the current Army regulations do not mandate a legal review in each case to determine whether a board of inquiry is required to ensure effective due process.

In GOSCA-initiated actions, the formal legal review and recommendation should be focused towards a *Holley* standard or one that ensures a similar level of analysis of the facts and law.[98] The legal criteria for recommending a board of inquiry should be comparable to that currently offered by the Air Force's AFPB process. That is, an RC officer would not be entitled to a hearing in cases limited to substandard or ineffective performance of duty when recommended for honorable characterization of service, because such cases do not involve a stigmatizing discharge.[99] In addition, RC officers that admit the underlying allegations also would not be entitled to a hearing.[100] Nevertheless, in all cases, the RC officer should be afforded a copy of the legal review.

The legal recommendation should not be legally binding on the GOSCA. This would allow GOSCA-initiated DAADB referrals to proceed despite the legal recommendation. However, a GOSCA decision to convene a board of inquiry and terminate its own DAADB referral must be binding on any later Department of the Army-initiated action to independently recommend an officer for summary DAADB release. This precaution will avoid conflicts with the administrative double jeopardy provisions of *AR 600-8-24*, paragraph 4.4. Therefore, when an RC officer is retained after a separation hearing, that officer will not be subject to later DAADB action for the same reasons, except as permitted pursuant to *AR 600-8-24*, paragraph 4.4(c).

In the event the GOSCA decides to deny a hearing, or where another Department of the Army entity initiates the DAADB referral, the RC officer must be entitled to request an adversarial hearing when submitting their case before the DAADB. As at the GOSCA level, a formal legal review should be conducted to determine whether a board of inquiry is required to ensure effective due process, and the RC officer should be afforded a copy of the legal recommendation. This legal review at the DAADB level would operate as a final due process check in all cases.

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90. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1920.6A, ADMINISTRATIVE SEPARATION OF OFFICERS (21 July 1990).

91. *Id.* para. 4a.

92. *Id.* encl. 1.

93. *Id.* encl. 4.

94. *Id.* Probationary naval officers are not entitled to an administrative board in cases of substandard performance or parenthood. *Id.*

95. For DAADB referrals from PERSCOM regarding Reservists, and DAADB referrals from Army Reserve Personnel Command regarding AGR officers.

96. *See, e.g.*, AR 600-8-24, *supra* note 2, paras. 2.31.i, j, tbl. 2-14 (defining current GOSCA actions in DAADB cases, where—if a GOSCA supports a DAADB action—he forwards it to Commander, PERSCOM); ch. 4 (eliminations), para. 4.18d (granting commanders the discretion to initiate UCMJ action or initiate elimination proceedings); tbl. 4-1, step 10 (GOSCA discretionary action after reviewing officer's election of options).

97. U.S. DEP'T OF ARMY, PAM. 27-21, ADMINISTRATIVE AND CIVIL LAW HANDBOOK, ch. 13 (Administrative Due Process), para. 13.2 (Is There A Right to Due Process?), para. 13.3 (What Process Is Due?) (18 Sept. 1990).

98. *See* Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997); cases cited *supra* note 44.

99. *Cf.* Walters v. United States, 37 Fed. Cl. 215 (1997) (stating that there is no hearing right prior to DAADB release for substandard duty performance).

100. *See Holley*, 124 F.3d at 1464 (allegations of misconduct admitted).

Corresponding amendments should follow to the language of *AR 600-8-24*, paragraph 2.31j. The current language in paragraph 2.31j states that the initiating GOSCA need only "consider the [RC] officer's rebuttal and either close the case . . . or forward the case with the officer's rebuttal to the [DAADB]." The amended provisions should state:

> The initiating GOSCA will consider their legal advisor's due process analysis, including the advisor's factual findings and legal recommendation. A copy of the legal advisor's findings and recommendation will be furnished to the respondent officer. The initiating GOSCA will also consider the officer's statement of rebuttal. The GOSCA will then decide to: close the case; initiate elimination proceedings pursuant to paragraph 4.18d; or forward the action to Commander, PERSCOM, for DAADB consideration. In cases where the officer is retained after a GOSCA-initiated elimination proceeding, the officer will not be subject to subsequent DAADB action for the reasons underlying the GOSCA-initiated separation, unless the requirements of paragraph 4.4 are satisfied, and such DAADB action is approved by the Secretary of the Army.

Similar amendments should be made to the language of *AR 600-8-24*, paragraph 2.31g, and table 2-14. However, the references to the GOSCA above should be replaced with DAADB, or Commander, PERSCOM, as appropriate.

Requiring formal legal review at the GOSCA level would ensure adequate due process to the RC officer, while preserving the GOSCA's discretion to choose the separation forum. Past institutional practice reveals confidence in the GOSCA's ability to seriously consider judge advocate advice when confronted with making the right decision for the good of the service member and the Army. Adding a formal legal review and recommendation at the DAADB level would complement the GOSCA-level legal review, and serve as a final due process check for separation cases initiated at both the GOSCA and PERSCOM levels. To drive home the larger policy concerns, pre-command courses could emphasize this process with relevant and succinct legal education. Moreover, expert legal instructors could convey the importance of weighing the Army's interest in immediately separating compelling cases without inviting litigation, while respecting the Total Force Concept, public perception, and the volunteer force.[101]

The Army need not adopt the Air Force's expansive but prudent system for releasing RC officers. Nor should the Army adopt the Navy's mandate that extends hearings to all officers, regardless of recommended service characterization, in cases of misconduct and moral or professional dereliction. Rather, the Army can formally incorporate the recommended legal review framework into the existing GOSCA and DAADB processing steps. This will effectively fill the gaping hole in due process protections now left to Army RC officers that face a "stigmatizing" separation.[102] These reforms would require the least amount of bureaucratic change, while shielding the Army's administrative separation procedures from most due process challenges.

Since *Gonzalez*, informal legal reviews probably occur routinely at the GOSCA and DAADB levels. However, the lack of any regulatory requirement for legal review creates uncertainty in the process. This shortcoming also diminishes the awareness of GOSCAs' of the vital importance of ensuring constitutional due process for soldiers under their command. The current approach is apparently intended only to assist the non-lawyer GOSCA and DAADB members in sorting through any complicated legal issues. The legal review is not formally structured, nor is it designed to guide the GOSCA and DAADB in determining whether due process considerations dictate a board of inquiry or allow summary DAADB action.

Instructive on the issue of formal legal review are the facts in *Gonzalez*, where the Article 32 IO evaluated the evidence and issued a recommendation on disposition of the charges. The IO cautioned the convening authority that questions of fact dictated a recommendation for disposition through the administrative show cause process. However, the Army cannot rely on this type of *ad hoc* process, nor is it necessary that a GOSCA convene the equivalent of a formal and cumbersome Article 32 proceeding, or an Air Force PODB equivalent, every time the GOSCA wants to separate a Reservist. Nevertheless, in the Article 32 context, the IO recommendation still constituted a legal recommendation and findings of fact that Major Gonzalez fortuitously relied upon to later claim his right to a hearing under *Codd*,[103] and to successfully set aside his involuntary release.

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101. Moreover, since 1995, the Army has added over seventy-five full-time Reserve JAG positions to its AGR ranks, which is consistent with the parallel 20% increase in overall AGR force. *See generally* Deborah R. Lee, Assistant Secretary of Defense for Reserve Affairs, Statement Before the Readiness Subcommittee, Senate Armed Services Committee (March 21, 1996) (detailing proposed increased numbers of RC personnel).

102. *See* Holley v. United States, 32 Fed. Cl. 265, 275 nn.9, 11 (1994); Rogers v. United States, 24 Cl. Ct. 676, 684 n.14 (1991); Casey v. United States, 8 Cl. Ct. 234, 241 (1985); Keef v. United States, 185 Ct. Cl. 454, 467-69 (1968); Harrison v. Bowen, 815 F.2d 1505, 1518 (D.C. Cir.1987). *See also* Nishitani v. United States, 42 Fed. Cl. 733 (1999) (assuming that a reservist medical officer on active duty had protected liberty interest when clinical privileges revoked and honorably released); Clark v. Widnal, No. 94-Z-455 (D.C. Colo. 1994) (stating that an activated RC medical officer's termination from civilian residency training affected a protected liberty and property interest), *rev'd on other grounds* 51 F.3d 917 (10th Cir. 1995).

103. Codd v. Velger, 429 U.S. 624 (1977).

A formal legal review process would resolve the primary question left unsettled in *Howerton*[104]—whether the bare facts constitute an admission of guilt supported by substantial evidence. In the absence of any prior agency findings of fact involving these alleged admissions, Captain Howerton faced no barrier to arguing that he met the *Codd* test of making at least a "colorable" allegation that the stigmatizing information was false.[105] A prior agency finding, whether by formal legal review at the GOSCA or DAADB levels, or both, would limit the Army's exposure to later civil suits challenging the separation due to the highly deferential legal standards applied to agency fact finding.[106] Instead of deferring to the courts, this returns the predicate fact finding process to the Army for these discretionary military matters. At present, the Army openly invites the courts to determine de novo whether the record reveals an admission of guilt or an issue of fact regarding stigmatizing allegations against separated RC officers.

Conclusion

The Total Force Concept relies on the RC officer as an ever-increasing element in meeting real-world military missions. As the current Assistant Secretary of Defense for Reserve Affairs has commented, the word "reserves" should now be rephrased as a force composed of people who "re-serve" on a continual basis—including five Presidential call-ups since the Cold War ended.[107] During this period when the Reserves and National Guard are assuming increased active duty roles worldwide, equivalent due process protections should be extended to RC officers facing involuntary administrative separation.

Although the *Gonzalez* bench opinion was unpublished, constitutional due process arguments that contest involuntary administrative separations are not moot or novel. In fact, established precedent suggests that Army reform is inevitable, whether motivated from within or as collateral to the next successful lawsuit.[108] In *Gonzalez*, the Army was unable to articulate a reasoned explanation for departing from standard due process norms.[109] This shortcoming, along with the statutory ban on discrimination between regular and reserve service members,[110] compels the Army to erase the constitutional due process inequities in its RC administrative separation process.

104. Howerton v. United States, No. 97-850C (Fed. Cl. Apr. 19, 1999).

105. *Id.*; Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447 n.5, 448 (2nd Cir. 1980) (stating that a summary motion defeated where questions of disputed fact are raised; disputes must await proper resolution by the trier of fact).

106. *See* Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (stating that the courts should not reweigh the evidence that was considered, but rather determine whether the board's conclusion was support by substantial evidence).

107. Charles L. Cragin, Assistant Sec'y of Defense for Reserve Affairs, *Demise of the Weekend Warrior*, THE OFFICER, Aug. 1999, at 38. This is the official publication of the Reserve Officer Association of the United States.

108. *See* Natural Res. Def. Counsel v. S.E.C., 606 F.2d 1031 (D.C. Cir.1979) (stating that although statute did not mandate specific substantive rule, agency's failure to adopt certain rule-making procedures held judicially reviewable). The published attorney fee opinion in *Gonzalez*, drives home this message. Gonzalez v. United States, 44 Fed. Cl. 764, at 770 (1999).

109. *Cf.* Vietnam Veterans v. Sec'y of Navy, 843 F.2d 528, 539, (D.C. Cir.1988) (stating that although Department of Defense memorandum requiring uniform discharge standards had no binding effect, agency must articulate a reasoned explanation for any departure or reversal from standard norms).

110. 10 U.S.C. § 10209 (2000).