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ADMINISTRATIVE DUE PROCESS IN MILITARY PROCEEDINGS

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I. ADMINISTRATIVE DUE PROCESS IN GENERAL

The expansion of administrative agencies in the government during this century has resulted in the development of a body of administrative law which primarily relates to the various adjudicating and rule making agencies. The Administrative Procedure Act affects most of these agencies but does not encompass most of the administrative processes in the Department of Defense. Nevertheless there have developed in the Department, both through intra-departmental rulings and judicial decisions, certain principles relating to administrative due process. While there is a plethora of writing on administrative law and administrative due process in general, there seems to be a dearth of articles on administrative due process in military administrative procedures. "Administrative due process" as herein considered is the constitutional concept of due process of law applied to administrative actions.

It is characterized as the due process required in every administrative proceeding or other action which might result in the deprivation of individual life, liberty or property. It is therefore not limited, nor does the fifth amendment limit it, to the trial of criminal cases or solely to the judicial branch of the government. It extends to every

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branch and agency of the government: legislative, judicial, executive, military and administrative,[1] for the Constitution contemplates that the life, liberty and property of all persons shall be protected by the requirements of due process. These requirements serve two general purposes, first, to insure the integrity of judicial and administrative processes leading to a decision of a case or the determination of an isssue, and, second, to protect human dignity.[2]

A criminal trial which involves life or liberty requires different and higher standards than a fact finding inquiry in an administrative proceeding, even though the administrative board may make a determination which may affect property or status.

The safeguards required in an administrative hearing may therefore vary from those in a criminal trial[3] due to the difference in the nature of the issue presented. The phrase "administrative due process"

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[1]See, e.g., Greene v. McElroy, 360 U.S. 474, 497 (1959): "This Court has been zealous to protect these rights [of confrontation and cross-examination] from erosion. It has spoken out not only in criminal cases... [citations], but also in all types of cases where administrative and regulatory actions were under scrutiny.... [citations]"

"'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature." Stuart v. Palmer, 74 N.Y. 183, 190 (1878).

"... the constitutional guaranty of due process of law, the object of which is to preserve personal and property rights against the arbitrary action of public officials, applies to administrative as well as judicial proceedings...." 42 Am. Jur., Public Administrative Law § 116 (1942).

[2]Cf. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 346 (1957). The central problem is found in the integration of private with public welfare according to Bolgar, The Concept of Public Welfare, 8 Am. J. Comp. L. 44, 61 (1959) and Miller, An Affirmative Thrust to Due Process?, 30 G. Wash. L. Rev. 399, 427 (1962).

[3]"'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." Chief Justice Warren speaking for the Court in Hannah v. Larche, 363 U.S. 420, 442 (1960).

has also been stated to have a different meaning from "due process."[4] This difference is found in a federal court statement:

> "[W]here administrative regulations set a higher standard of procedural due process than that required by the Constitution or statute, violation amounts to a denial of administratively-established due process of law."[5]

Herein, however, administrative due process is treated as due process in administrative proceedings whether prescribed by the Constitution, or required by statutes or regulations, and is not limited to "administratively-established due process." And this administrative due process does not lose its character as such because it imposes stricter requirements than the minimum under the Constitution. Dependent upon its mandatory or discretionary terms, soundly interpreted, a statute enacted by Congress or a regulation promulgated by an administrative authority is binding on an administrative agency even with respect to those rules which require procedural safeguards not required by the Constitution.[6]

It may be argued that the due process required by the Constitution is the minimum standard of fairness and that the phrase "due process" should be reserved for use in relation to the provisions of the Constitution. Such a limitation of definition might be useful in ruling upon

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[4]Meador, Some Thoughts on Federal Courts and Army Regulations, 11 Mil. L. Rev., (DA Pam 27-100-11, 1 Jan. 61) 187, 199 (1961).

[5]Jeffries v. Olesen, 121 F. Supp. 463, 476 (S.D. Calif. 1954).

[6]"Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect." Vitarelli v. Seaton, 359 U.S. 535, 545 (1959); see also Mr. Justice Frankfurter, concurring in part and dissenting in part: "[I]f dismissal from employment is based on a defined procedure even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... [citation]. This judicially evolved rule of administrative law is now firmly established and if I may add, rightly so. He that takes the procedural sword shall perish with that sword.... Id. at 546.

As shown by Meador, note 4 supra, there is little justification in holding regulations as binding the issuing administrative agency only if a statute required the issuance of the regulation. The agency might change or cancel its own regulation, and this may be easier or more difficult dependent on the statutory background; but as long as a regulation stands unchanged its terms indicate its binding or discretionary character. The situation might be quite different where deviation from a regulation does not affect adversely anyone's life, liberty, property, or other legitimate interests. Thus, upon request of the member concerned the Secretary of the Navy or delegated authority might ratify an enlistment contract that was entered into for a period more extensive than authorized by regulation.

a constitutional principle only if the case cannot be decided otherwise.[7] But in this article administrative "due process" is treated as encompassing the Constitution applied in the administrative area, and the statutory and regulatory implementations, whether minimum or better.

When Chief Justice Hughes said in a landmark case, "[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process,"[8] he rather rejected the idea of due process being limited to a historical minimum.

II. Military Due Process

In addition to the phrase "administrative due process," the term "military due process" has come into use in recent years. In one of its earliest decisions, the Court of Military Appeals referred to military due process as a set of rules to be observed in the trial of military offenses by courts-martial and intended to point up "the minimum standards which are the framework for the concept and which must be met before the accused can be legally convicted."[9] The court in this decision, however, denied that the Constitution is the foundation of the structure saying: "[W]e do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress...."[10] Two years later, Chief Justice Vinson voiced a different view: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."[11] Subsequently and after a change in

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[7]Cf., e.g., St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936), syllabus No. 14: "In determining whether a legislative rate consists with due process under the Constitution, the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation...."

[8]West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937). See Miller, note 2 supra, at 410.

[9]United States v. Clay, 1 USCMA 74, 77, 1 CMR 74, 77 (1951). The opinion also contains the following definition of due process: "Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights."

[10]Ibid.

[11]Burns v. Wilson, 346 U.S. 137, 142 (1953). To the same effect, see Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205, 207 (1947): "It would seem to go without saying that these amendments apply as well to military tribunals as to civil ones." See also United States v. Hiatt, 141 F.2d 664 (3d Cir. 1944): "We think that this basic guarantee of fairness afforded by the due process clause of the fifth amendment applies to a defendant in criminal proceedings in a federal military court as well as in a federal civil court... the military law provides its own dis-

membership, the Court of Military Appeals revised its standpoint and found it "apparent that the protection of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."[12]

With the constitutional foundation well recognized, the term "military due process" continues to serve a practical purpose in distinguishing the Bill of Rights as applicable to a civil citizen, and the Bill of Rights as applicable to a serviceman subject to the exclusion for the serviceman of those protections "which are expressly or by necessary implication inapplicable."[13] In addition, the phrase "military due process" aids in making understandable due process as applicable to the military with the inclusion of some statutory safeguards beyond those granted by the Constitution. Article 31 of the Uniform Code of Military Justice is a good example.[14]

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tinctive procedure to which the members of the armed forces must submit. But the due process clause guarantees to them that this military procedure will be applied to them in a fundamentally fair way. In 1956, Mr. Justice Black observed, "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." Reid v. Covert, 354 U.S. 1, 37 (1956).

[12]United States v. Jacoby, 11 USCMA 428, 430, 29 CMR 244, 246 (1960). The Jacoby case illustrates a practical consequence of basing military due process in the first place on the Constitution: The Court construed article 49 of the Uniform Code of Military Justice (10 USC 849), dealing with depositions, to the effect that the accused must be afforded the opportunity for confrontation with witnesses against him under the sixth amendment, i.e., the opportunity to be present with his counsel at the taking of a deposition on written interrogatories. The Court overruled contrary previous decisions (United States v. Sutton, 3 USCMA 220, 11 CMR 220 (1953); United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956) and modified in effect the Presidential regulations on the subject (E.O. 10214, Manual for Courts-Martial, United States, 1951, par. 117b).

[13]Supra. text to note 12. Wiener, Courts-Martial and the Bill of Rights, 72 Harv. L. Rev. 1, 266, 296 (1958) concluded that, subject to necessary modifications, all rights are available except indictment by grand jury and trial by petty jury, the right to confrontation, the right to bail and the right to collateral review. One of the excepted rights, i.e., the right to confrontation should be no longer listed as excepted because of the Court of Military Appeals' holding in the Jacoby case.

[14]The text as set forth in 10 USC is as follows: Section 831. Art. 31. Compulsory self-incrimination prohibited.

"(a) No person subject to this chapter [i.e., the Uniform Code of Military Justice] may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

"(b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

"(c) No person subject to this chapter may compel any person to make a state-

The fifth amendment protects a person from being compelled in any criminal case to be a witness against himself. This is usually understood to mean that a person may not be compelled to incriminate himself or to answer any question, the answer to which may tend to incriminate him. This principle is restated in article 31(a) of the Uniform Code of Military Justice; but article 31(b) goes further. According to this provision, no person has to make any statement regarding the offense of which he is accused or suspected, regardless of whether the statement would tend to incriminate him, and he must be informed of his right to refrain from making any statement.[15] It has been well said that military due process "begins with the basic rights and privileges defined in the Constitution" but "does not stop there" and is "something more, and something different."[16]

Another area in which statute and regulation provide for rights and privileges of servicemen beyond the bare minimum is the right to counsel.[17] The Uniform Code of Military Justice prescribes that an

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ment or procure evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

"(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." (Aug. 10, 1956, ch. 1041, 70A Stat. 48.)

Another salutary feature of the term "military due process" as applied by the Court of Military Appeals to a set or list of fundamental rights is the use of the phrase as a collective title of guarantees, not limited to the due process clause itself but incorporating therein other safeguards, paralleling similar trends in Constitutional Law. Cf. Wiener, note 13 supra at 299 and 303.

[15]See United States v. Williams, 2 USCMA 430, 9 CMR 60 (1953); United States v. Taylor, 5 USCMA 178, 17 CMR 178 (1954). Applying article 31 and revising in effect the Presidential regulations on the subject (Manual for Courts-Martial, cited in note 12, par. 150b) of military police work and criminal investigation, the Court of Military Appeals ruled that a person may not be required to make a sample of his writing or to utter words for the purpose of voice identification; also that a person may not be required to give a sample of his urine or to submit to a blood alcohol test; the Court distinguished blood tests for clinical purposes. Cf. United States v. Rosato, 3 USCMA 143, 11 CMR 143 (1953); United States v. Eggers, 3 USCMA 191, 11 CMR 191 (1953); United States v. Greer, 3 USCMA 576, 13 CMR 132 (1953); United States v. Jones, 5 USCMA 537, 18 CMR 161 (1955); United States v. Speight, 5 USCMA 668, 18 CMR 292 (1955); United States v. Brown, 7 USCMA 251, 22 CMR 41 (1956); United States v. Jordan, 7 USCMA 452, 22 CMR 242 (1957); United States v. Musguire, 9 USCMA 67, 25 CMR 329 (1958); United States v. Morse, 9 USCMA 799, 27 CMR 67 (1958); United States v. McClung, 11 USCMA 754, 29 CMR 570 (1960); United States v. Hill, 12 USCMA 9, 30 CMR 9 (1960).

[16]Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225, 232 (1961).

[17]Under the sixth amendment, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

accused my select his own civilian counsel, select military counsel of his choice or have military counsel appointed for him. This right to a qualified lawyer is provided by statute for general court-martial trials, for the formal pretrial investigation preceding a general court-martial, and for appellate review.[18] An accused before a special court-martial is also entitled to counsel but the government is not required to furnish a lawyer unless the trial counsel, i.e., the government's representative is a lawyer. The right of representation by counsel is granted by law also to persons designated as a party before a court of inquiry,[19] which is a statutory fact-finding body used by command to develop the facts and circumstances of an incident or event for the purpose of efficient administration.[20] While the law merely indicates the right of a party before a court of inquiry to be represented by counsel, implementing regulations[21] provide for the same three choices granted by statute in the situations mentioned above[22] though assignment of an officer-lawyer is modified. In addition, the same regulations extend the three choices to proceedings before administrative fact-finding bodies other than courts of inquiry, i.e., boards of investigation and one-officer investigations.[23]

The Court of Military Appeals has been instrumental in clarifying that an accused or suspect may obtain representation by counsel at any step of the proceedings against him, including the preliminary informal investigation by military law enforcement agents.[24] Denial of the right will render a confession obtained from the accused in the course of such preliminary investigation inadmissible as evidence at the trial.[25]

As observed above, while due process applies to administrative as well as judicial proceedings, the safeguards necessary for the different types of proceedings may well differ.[26] But judicial functions are

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[18]UCMJ article 27, 32, 38, 70 (10 USC 827, 832, 838, 870).

[19]UCMJ article 135(c) (10 USC 935(c)).

[20]Navy JAG Manual pars. 0201, 0202; 32 CFR 719.150, 719.151(a-b).

[21]Navy JAG Manual § 0304b; 32 CFR 719.157(b).

[22]See text to note 18.

[23]See note 21 supra; also Navy JAG Manual § 1006d (32 CFR 755.6(d)) for proceedings to redress injuries to property under UCMJ 139 (10 USC 939).For a statutory background of these investigations see R.S. 183 as amended (5 USC 93).

[24]United States v. Gunnels, 8 USCMA 130, 23 CMR 354 (1957); United States v. Rose, 8 USCMA 441, 24 CMR 251 (1957); United States v. Wheaton, 9 USCMA 257, 26 CMR 37 (1958); United States v. Odenweller, 13 USCMA 71, 32 CMR 71 (1962).

[25]Ibid.

[26]See text to notes 1 and 3.

not limited to courts, and administrative functions are not limited to administrative agencies. Administrative officials and military officers may be vested by statute with judicial and quasi-judicial functions affecting directly the rights of individuals, and their proceedings and decisions require due process necessary to safeguard the integrity and fairness of their judicial actions. The Uniform Code of Military Justice, for example, refers as follows to the "judicial acts" of the officers and other officials who appoint ("convene") courts-martial and review and approve or disapprove the proceedings, findings and sentences of courts-martial:

> "No person subject to this chapter [i.e., the Uniform Code of Military Justice] may attempt to coerce or, by any unauthorized means, influence the action of a court-martial ... or the action of any convening, approving, or reviewing authority with respect to his judicial acts."[27]

The Court of Military Appeals has dealt several times with the requirement of due process in regard to the actions of reviewing officers, emphasizing, for instance, that this concept forbids a reviewing officer approving a court-martial's *finding of guilty* on the basis of circumstances outside the trial record and delineating the safeguards required for considering matters outside the trial record in connection with the question whether the *punishment* adjudged by the court should be approved.[28]

In accordance with previous law, the Uniform Code of Military Justice provides that commanding officers may deal summarily with minor disciplinary infractions and offenses by imposing disciplinary

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[27]Article 37 (10 USC 837). Article 66 (10 USC 866) provides for boards of review as intermediate appellate agencies below the Court of Military Appeals. A naval organization manual explains the status of the boards as follows: "Boards of Review under the Code are units appointed by the Judge Advocate General in his office and under his general administrative control, and Board members, although judicially autonomous, are under his military and employment control. ... While organized by and under the general administrative control the Judge Advocate General, Boards of Review are by law totally independent in the discharge of their judicial duties." Organization and Functions of Office of the Judge Advocate General, published by Bureau of Naval Personnel, NavPers 10843-A 1961, page 121.

[28]United States v. Duffy, 3 USCMA 20, 23, 11 CMR 20, 23 (1953); United States v. Lanford, 6 USCMA 371, 20 CMR 87 (1955). In Duffy, the court observed: "Without hesitation, we say that the right of an accused to a review confined to the record adduced at the trial is safely within the guaranty of military due process of law. [Citations.] We cannot conceive of a concept more repugnant to elementary justice than one which would permit appellate reviewing authorities to cast beyond the limits of the record for 'evidence' with which to sustain a conviction."

punishments without resort to courts-martial.[29] Referred to as "commanding officer's non-judicial punishment" by the Code, the punitive measures may be imposed by a commanding officer upon officers and enlisted members of his command for minor violations of the Code, not requiring trial by court-martial but requiring more than a nonpunitive administrative censure or rebuke. The authorized punishments include such measures as punitive censure, restriction to specified limits for a period not exceeding two weeks, and (for enlisted members) reduction to the next inferior grade. Effective February 1, 1963, the range of authorized punishment was increased,[30] primarily for the reason of dealing promptly and efficiently with infractions without resort to court-martial and avoiding the stigma of a federal criminal conviction.[31] (Under one of the new provisions, however, a serviceman except one attached to or embarked in a vessel may demand trial by court-martial before and instead of submitting to the commanding officer's disciplinary punishment. By requesting a court-martial, a serviceman may thus secure the additional safeguards of a criminal trial.)[32]

The statutory phrase "commanding officer's nonjudicial punishment" is intended to indicate that the law "provides a means whereby military commanders deal with minor infractions of discipline without resorting to criminal law processes" and that the punishment "has

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[29]UCMJ article 15 (10 USC 815). For corresponding previous law see Articles of War article 104 (10 USC 1946 ed. 1576) and Articles for the Government of the Navy articles 24 and 25 (34 USC 1946 ed. 1200 arts. 24, 25).

[30]Public Law 87-648, approved September 7, 1962, amending 10 USC 815. For restriction to specified limits, for example, the maximum was increased to 60 days dependent, however, on the grade or exercise of general court-martial jurisdiction of the commanding officer and subject to limitations which may be prescribed by the President or the Secretary of a military department.

[31]Senate Report 1911 of August 23, 1962 (to accompany H.R. 11257), 87th Congress, 2d Session; 1962 Cong. News 2603, 2605. See the Secretary of the Navy's ALNAV of September 7, 1962: "The primary objective of the new law is to provide greater latitude in correcting the offender for his minor breaches of discipline without the stigma of a court-martial conviction. The increased punishment authority under the new law in the hands of command leaders will be an effective tool for the promotion of discipline with justice." See also Senate Report 1911, at 2606: "As an example, the Army has indicated that they would expect that about 75 per cent of their summary courts-martial would be eliminated by the enactment of this legislation."

[32]"The Committee [Senate Armed Services Committee] would like to emphasize that only in rare cases would it appear that personnel would demand a trial by court-martial. It would be expected that nonjudicial punishment would be accepted for most minor infractions." Senate Report 1911 (cited in note 31 at 2604. In the Army and Air Force there has heretofore existed a right to demand a court-martial; see Manual, cited in note 12, par. 133a.

no connection with the military court-martial system."[33] The word "nonjudicial" is therefore used to indicate that no court-martial is involved but the law leaves no doubt that the use of this punitive authority requires impartiality and fairness on the part of the commanding officer, and implementing regulations spell out these requirements in some detail.[34] The law itself provides for the additional safeguard of a right to appeal.[35]

III. Administrative Discharge Proceedings and Security Clearance

A series of recent decisions of Federal courts deal with the question whether discharge from Government Service or revocation of security clearance causing termination of civil employment may be invalid because of denial of due process in the administrative proceedings leading to the discharge or revocation. The cases frequently present a clash of competing interests and the courts' efforts to weigh and strike a balance. The Government has an interest in eliminating from public service any person whose continuous employment would not be clearly consistent with national security. It must also eliminate undesirable members of the armed services without giving them the highest type

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[33]Senate Report 1911, note 31 supra, at 2604.

[34]Executive Order 10214, Manual for Courts-Martial, United States, 1951, paragraph 133b (3 CFR 1949-1953 Comp. page 538); Navy JAG Instruction P5800.7, Manual of the Judge Advocate General § 0101d(2), 32 CFR 719.101(d)(2), requiring that each hearing preceding action under article 15 "shall include the following elemental requirements:

"(a) Presence of the individual concerned before the officer conducting the hearing;

"(b) Advice to the individual concerned of the offense or offenses of which he is suspected;

"(c) Explanation to the individual concerned of his rights under article 31(b) of the Code;

"(d) Receipt of the oral statements of witnesses against the individual concerned in his presence or providing the individual concerned with copies of written statements of witnesses against him;

"(e) Availability to the individual concerned of all items of information in the nature of physical or documentary evidence for his inspection;

"(f) Full opportunity to the individual concerned to present any matters in defense, mitigation or extenuation of the suspected offense or offenses."

The regulations have been revised to require, e.g., also advice that the member may demand trial by court-martial; see text to note 32. The list of requirements has been incorporated in the Manual for Courts-Martial; E.O. 11081 of Jan. 29, 1963, 28 F.R. 945, 954.

[35]UCMJ article 15(d) (10 USC 815(d)), redesignated 15 (e) (10 USC 815(e)) by Public Law 87-648.

of discharge thus preserving the character of an honorable discharge for those who have truly rendered honorable service.[36]

The Government also has an interest in preserving and protecting sources of confidential information. On the other hand, the individual has an interest in his reputation and employment opportunities. The employee may or may not have a right to continue in his present employment. In any event when these conflicting claims are at stake he seeks to preserve his job and his employability. Thus the administrative process for determining the issue becomes important. The decided cases deal with the procedural safeguards, such as hearing, confrontation and cross-examination which are necessary to obtain a fair determination. The problem has been stated as "the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government."[37] It has also been observed that, in any weighing or balancing process between the conflicting interests, the extent of the injury to the competing interests "is necessarily of major, and in some instances may be of controlling significance."[38]

An outline of the statutory and regulatory background should precede discussion of the cases. Subject to statutory provisions, the authority of the Government to terminate an enlistment contract or period of obligated service without the consent of the enlisted member is well recognized.[39] The enlistment contract itself[40] provides for a number

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[36]As explained in 32 CFR 730. 1 and 730.51, there are five types of discharges for military personnel: (1) Honorable discharges, (2) General discharges under honorable conditions, (3) Undesirable discharge or discharges under conditions other than honorable, (4) Bad conduct discharges and (5) Dishonorable discharges and dismissals. The separations under (1), (2) and (3) are effected by administrative action and under (4) and (5) by court-martial. A general discharge under honorable conditions is issued if the military record of the member concerned is not sufficiently meritorious to warrant the issuance of an honorable discharge. For instance, an enlisted member who suffered two special court martial sentences during his period of service will ordinarily receive only a general discharge; cf. 32 CFR 730.53; Bureau of Naval Personnel Manual article C-7821(9)(b). See also Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961). The basic reasons, and procedures for undesirable discharges under conditions other than honorable are set forth in 32 CFR 41, with implementing provisions for the naval service in 32 CFR 730.

[37]Benjamin, A Lawyer's View of Administrative Procedure, 26 Law & Contemp. Prob. 203 (1961), quoting from his earlier report on Administrative Adjudication in the State of New York 9 (1942).

[38]Bland v. Connally, note 36 supra, at 853.

[39]The decision whether a member shall retain his military status or be discharged and the discharge itself, whether honorable or less, are always based on determinations of material and relevant factors of the military record and involve

of years of active duty unless the service is terminated sooner by proper authority of the Department. Similarly the six or eight year period of obligated service under the Universal Military Training and Service Act, as amended, is subject to prior termination when the Government discharges the member for the purpose of separation (as distinguished from certain situations such as discharge from enlisted status for the purpose of commissioned service).[41] While the authority of the Government to terminate an enlistment at any time is unquestioned, questions arise from time to time in regard to safeguards to protect the members interests where the discharge is less than honorable in character.[42]

If the separation is on account of physical disability, the law provides expressly that no member of the Armed Forces, whether officer or enlisted, may be retired or separated for physical disability without a full and fair hearing if he demands it.[43] Other statutory safeguards provide for a double review of any administrative discharge:

(1) A Discharge Review Board in each Armed Force has authority to review any discharge or dismissal (excepting only a discharge or

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substantive and adjective safeguards. 32 CFR Parts 41, 42 (28 F.R. 1796), 723, 724, 729, 730.

[40]The form of the enlistment contract is reproduced in the Bureau of Naval Personnel Manual, article B- 2310.

[41]10 USC 651; 50 USC App. 454(d)(3). See 32 CFR 50.4(b)(3)(ii): "The military service obligation acquired under provisions of subsection 4(d)(3) of the UMT&S Act, as amended is considered terminated upon a discharge for the purpose of complete separation from military status...."

[42]See, e.g., Reed v. Franke, 297 F.2d 17, 20 (4th Cir. 1961): "He [plaintiff] asserts that a hearing prior to discharge, under the facts of this case, is a requirement of due process. The principal constitutional claim, as we understand it, is not that plaintiff has a right to stay in the Navy until he has served sufficient time to retire with a pension. Such claim, if asserted, would be frivolous and would provide no basis for the court's jurisdiction to interfere with the normal operations of the military services."

[43]USC 1214; cf. 10 USC 1004. See 32 CFR 725.401: "No member o fthe naval service shall be separated or retired by reason of physical disability from an active duty status without a hearing before a physical evaluation board unless such hearing is waived by the member concerned. No member of the naval service shall be separated or retired by reason of physical disability from an inactive duty status without a hearing before a physical evaluation board if such member shall demand it."

See also 32 CFR 725.103(a): "It is the policy of the Navy Department that laws pertaining to physical disability retirement or separation be administered fairly, equitably, and with due regard for the interest of both the individual and the Government. Although these laws should be so administered as to protect the U.S. Government from assuming unwarranted responsibility for payment of disability and retirement benefits, reasonable doubt as to the entitlement of a member to such benefits will be resolved in favor of the individual."

dismissal by sentence of a general court-martial) upon its own motion or upon the request of the former member. The review is required to be based upon the records of the Armed Force concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. The person requesting review is allowed to appear before the board in person or by counsel.[44]

(2) Acting through a board of civilians in the executive part of the department, the Secretary of each military department may correct any military record to correct an error or remove an injustice.[45]

Other statutory safeguards apply to members of reserve components:

If a Reserve on active duty is within two years of becoming eligible for retired or retainer pay, he may not be involuntarily released from that duty before he becomes eligible for that pay unless he is released under regulations prescribed by the Secretary of a military department (or the Secretary of the Treasury for the Coast Guard) and his release is approved by the Secretary.[46] This provision applies not only to separation from the military service by way of discharge but also to release from active duty without discharge because of the adverse effect of such release on eligibility for retired pay requiring twenty years of active duty.

A Reserve who is separated for cause is entitled to a discharge under honorable conditions unless:

(1) He is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary of the military department concerned (or the Secretary of the Treasury for the Coast Guard).

(2) He consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

(3) He is dropped from the rolls on account of unauthorized absence of three months or more, or a civil court sentences him to con-

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[44] 10 USC 1553; 32 CFR 724.

[45] 10 USC 1552. Section 1552(a) provides inter alia that, except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States. The implementing regulations provide for a hearing and for the individual's right to present witnesses in his behalf; 32 CFR 723, 723.4(d) 713.5.

[46] 10 USC 1163(d) as added by Public Law 87-651 of September 7, 1962. See also 10 USC 1006(e).

finement in a penitentiary or correctional institution and the sentence becomes final.[47]

In the case of an officer of a reserve component with at least three years of commissioned service, the law provides in addition that he shall not be separated from that component without his consent except under an approved recommendation of a board of officers convened by an authority designated by the Secretary.[48] This provision, however, does not apply where the officer is dropped from the rolls (for one of the reasons indicated under (3) of the preceding paragraph) or dismissed by sentence of a general court-martial, or, in time of war, by order of the President.

Every board convened for the appointment, promotion, demotion, involuntary release from active duty, discharge, or retirement of Reserves shall include an appropriate number of Reserves as prescribed by the Secretary of the military department concerned under standards and policies prescribed by the Secretary of Defense. Further, each member of a board convened for selection for promotion, or for demotion or discharge of Reserves must be senior in rank to the persons under consideration by the board.[49] All of these safeguards are cumulative.[50]

The statutory requirement of approved findings of a board of officers for discharge under conditions other than honorable[51] applies by its terms only to Reserves. There is no similar statutory requirement for members of the regular components. Implementing regulations of the Secretary of Defense, however, extend to enlisted members of regular as well as reserve components.[52] The statute itself recognizes the difference in administrative discharges, i.e., discharges under honorable conditions and under conditions other than honorable and does not require proceedings by a board if the discharge is under honorable conditions.[53] The statute does not specify that the board of officers considering the separation of an individual under conditions other than honorable hold a hearing but the regulations of the Seceretary of Defense[54] require that the individual concerned

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[47]10 USC 1163(b-c).

[48]10 USC 1163(a).

[49]10 USC 266.

[50]I.e., under 10 USC 1163, 1553 and 1552.

[51]10 USC 1163(c).

[52]32 CFR 41. For additional regulations applying to administrative discharges from the naval service see 32 CFR 730.

[53]Another statutory provision recognizes that discharges under honorable conditions fall into two categories: honorable discharges and discharges under honorable conditions; see 10 USC 772(d).

[54]32 CFR 41.8(d)(1).

be given an opportunity to request or waive, in writing, the following privileges:

> To have his case heard by a board of officers and, subject to his availability, appear in person before the board.[55]
>
> To be represented by counsel who, if reasonably available, should be a lawyer.
>
> To submit statements in his own behalf.

The implementing naval regulations provide also for obtaining military witnesses and the voluntary appearance of civilian witnesses.[56] If the member considered by the board is a Reserve, the board must include an appropriate number of Reserve officers.[57] In the case of a female member, the board must have at least one female officer.

Administrative separation of an enlisted member under conditions other than honorable may only be effected by an officer exercising general court-martial jurisdiction or higher, including departmental, authority after review of the findings and recommendations of the board.[58]

For naval officers, there are several statutory provisions for mandatory separation under proceedings which are not adversary in character and do not involve a hearing. The law provides, for instance, for separation of officers who fail twice of selection for promotion.[59] Boards of officers are charged with the statutory function of considering the records of officers eligible for promotion and to make recommendations regarding those best fitted for promotion.[60] While the process of selection does not involve any hearing, eligible officers are privileged by statute to communicate with boards in writing.[61] There is another safeguard provided by regulation to the effect that adverse or unfavorable matter may not be placed in any officer's record without his knowledge and without giving him an opportunity to make a statement in regard thereto.[62] An officer's record is always available to him for inspection, just as enlisted members have access to their records.[63]

In addition to separation because of failing twice of selection for promotion, the law provides for separation of naval officers whose

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[55]Confinement by civil authorities renders a member unavailable.
[56]32CFR 730.15.
[57]See note 49 for statutory basis.
[58]32 CFR 41.8(d)(2); cf. 32 CFR 730.15(g-j).
[59]See 10 USC 564, 5776, 5903, 6382, 6383, 6389.
[60]10 USC 5707.
[61]10 USC 5755, 6407.
[62]U.S. Navy Regulations (issued under 10 USC 6011) article 1701.8.
[63]U.S. Navy Regulations article 1701.9; 32 CFR 701.1(e).

record of performance is reported by a selection board or similar statutory board as unsatisfactory.[64] Just as reports of selection boards recommending officers for promotion, a report that an officer's record of performance is considered unsatisfactory becomes effective only after review and approval by the President or other cognizant authority.[65] While the determination of unsatisfactory service is entirely within the discretion of the board under such standards as it may establish, supplementary proceedings are possible where fairness requires, e.g., where adverse matter was improperly in the record.

There are several other statutory provisions for the separation of officers. In some instances, an adversary proceeding with a hearing is not provided and could serve no useful purpose, for instance, in cases where separation is based on a statutory maximum age..[66] In others, adversary proceedings with hearings are provided for either by law or by implementing regulations.[67]

In *Harmon v. Brucker*,[68] a soldier was separated with a discharge under conditions other than honorable upon consideration of pre-induction activities of the member. The Supreme Court held that the discharge cannot be sustained because the type of discharge to be issued is to be determined solely by the soldier's military record. The Court supported this holding by referring *inter alia* to the statute providing for review of discharges by a Discharge Review Board on the basis of "all available records of" the military department concerned "relating to the person requesting such review (now codified

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[64]10 USC 560(e), 1166, 5708(f), 6383, 6384, 6395.

[65]10 USC 5710.

[66]10 USC 1164, 1255, 1263, 6390, 6391, 6396. See also 10 USC 6401 and 6402 providing for separation of women officers for length of service.

[67]See 10 USC 5864 and 5865 (officers found by examining boards not morally qualified or not professionally qualified); 10 USC 1163, 1165, 6392 (termination of probationary status within 3 years of appointment); 10 USC 1002 (reserve officers failing to earn minimum number of points required for retention); 10 USC 6410 (separation of reserve officers to provide a steady flow of promotion); 10 USC 6393, 6397, 6403, E.O. 10240 (termination of appointments of women officers); 10 USC 680 (opportunity to be heard by a board of officers before a Reserve serving under an active duty agreement is released from active duty during the period of the agreement.)

For implementing regulations, see, e.g., Navy Department General Order 16, Regulations Applicable to the Revocation of Commissions of Male Officers; Secretary of the Navy Instruction 1900.2, Regulations governing discharges... of members of the Naval Reserve and the Marine Corps Reserve; also 32 CFR 714.1, Regulations governing termination of commissions of women officers.

Cf. Court-Martial Order 4-1949, 91 discussing the rights implied where opportunity to be heard is granted.

[68]355 U.S. 579 (1958).

in 10 USC 1553). *Harmon v. Brucker* does not prohibit military authorities from considering the falsity of an answer of the member in reply to questions regarding his preinduction or pre-enlistment activities. Discovery of a disloyal or felonious or otherwise discrediting preinduction or pre-enlistment activity may well lead to separation. The falsity of the answer or concealment may affect the type and character of the separation.[69] *Harmon v. Brucker* is also relevant for a general holding that 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.

In *Greene v. McElroy*[70] an aeronautical engineer's security clearance was revoked on the ground of alleged Communistic associations and sympathies. He lost his position as general manager of a private corporation when his clearance was revoked. He then sued for a judgment declaring that the revocation of his security clearance was invalid. The Supreme Court held in his favor on the ground that, in the absence of explicit authorization from the Congress or the President, the Department of Defense was not authorized finally to revoke his security clearance by means of proceedings in which he was not afforded opportunity for confrontation and cross-examination of adverse witnesses on controverted issues of fact. The Court did not reach or decide the constitutional question whether the President or the Congress could authorize such proceedings without violation of the due process clause of the Constitution. The Court indicated its serious concern in regard to restrictive proceedings without explicit decisions by the President or Congress within their respective constitutional powers.

In order to provide for the missing Presidential regulations, the President, on February 20, 1960, issued Executive Order 10865,[71] giving express authority to certain departments, including the Department of Defense, to issue regulations and prescribe requirements for the safeguarding of classified information within industry. Most importantly in light of the *Greene* decision, this Executive Order set forth express authority, under certain clearly defined circumstances or conditions, to limit opportunity for confrontation and cross-examination. While this may be regarded as remedying proceedings

[69]See 32 CFR 42.4 (28 F.R. 1796, Feb. 27, 1963), with additional rules delineating the review of the military record.

[70]360 U.S. 474 (1959).

[71]As amended by Executive Order 10909, 50 USC 401 note. Additional legislation is pending (H.R. 11363, 87th Congress, 2d Session); cf. House Report 1945, 87th Congress, 2d Session. H.R. 951 and 1644, 88th Congress 1st Session.

under industrial security review regulations, the opinion of the Court retains great weight because of its general observations that, in the absence of express statutory or Presidential authorization, administrative agencies lacked authority to reach final adjudicative determinations affecting substantial rights of an individual by means of procedures which did not provide for opportunity for confrontation and cross-examination on disputed issues of fact.[72] The Department of Defense regulation implementing Executive Order 10865 affords the individual whose clearance is under review "an opportunity to cross-examine the person providing the information either orally or by

[72]"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where 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. While this is important in the case of documentary evidence, it is even more important when the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be prejurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the sixth amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, [Citations] but also in all types of cases where administrative and regulatory actions were under scrutiny. [Citations.]

"... [E]ven in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance system which affords affected persons the safeguards of confrontation and examination.

"...Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearing where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. [Citations] Such decisions cannot be assumed by acquiescence or non-action. [Ciations] They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, [Citation] but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

"Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process....

"...We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross examination." 360 U.S. at 496-97, 506, 507, and 508.

written interrogatories" except upon certificate of the Secretary of Defense or certain other agency heads that disclosure of the source of information would be substantially harmful to the national interest.[73] In all such cases, in accordance with the express requirements of Executive Order 10865, a final adverse decision can be reached only by the Secretary of Defense, based on his personal review of the case. Between August 1, 1960, and the end of February 1962, out of a total of about 800 cases considered under the 1960 program of reviewing industrial personnel access authorizations, it has not been found necessary to use a certificate in a single case. On the contrary, in every case during this period in which a personal appearance proceeding was requested and held, the individual concerned was afforded a full opportunity of cross-examination of adverse witnesses on issues of fact placed in controversy.

In 1950 Congress passed Public Law 733 (5 USC 22-1) which authorized the summary suspension without pay of employees of certain governmental departments in the absolute discretion of the head of the department "when deemed necessary in the interest of national security." This law provides for thirty days notice to the employee when consistent with the national interest, and a written statement to the employee of the charges against him, with an opportunity for the employee to reply.

The head of a department after review may terminate the employment of a suspended employee "whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States." The law provides for reinstatement in the discretion of the head of a department. This law was implemented by Executive Order 10450. In interpreting the law the Supreme Court in *Cole v. Young*,[74] held that the authority in the act was limited to cases where the employment actually affected the national security. In effect the Court required that the employee should be in a "sensitive" position, requiring an evaluation of the risk to the national security that retention of the employee would entail. So it was held that dismissal of a food and drug inspector charged with association with an allegedly subversive organization was not authorized under the act. The Court said:

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[73]Department of Defense Directive 5220.6, of July 28, 1960, Industrial Personnel Access Authorization Review Regulations, paragraph IIIE2b; 32 CFR 155, 4-5(b)(2).

[74]351 U.S. 536 (1956).

> "[I]t is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the national security the normal dismissal procedures seem fully adequate and the justification for summary powers disappears. Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets."

In addition to Executive Order 10865 reference may be had to Executive Order 10987, entitled "Agency Systems for Appeals From Adverse Actions" and prescribing principles of procedure for the reconsideration of administrative decisions to make adverse action against a Government employee.[75] The military personnel security regulations concerning industrial personnel of contractors, and Executive Order 10450 as amended, entitled "Security Requirements for Government Employment" incorporate the security standard and criteria of Executive Order 10450.[76]

Cafeteria Workers v. McElroy,[77] a case involving security but really dealing with the right of a commanding officer to control and deny access to the installation he commands, involved a cook employed by a business firm operating a cafeteria at the Naval Gun Factory in Washington, D. C. She lost her job when naval authorities required her to turn in her identification badge on the ground that she failed to meet the security requirements of the installation. After

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[75]5 USC 631 note. See also E.O. 10988, Employer-Management Cooperation in the Federal Service (5 USC 631 note). Implementing regulations prescribed by the Civil Service Commission are set forth in 5 CFR 22 (27 F.R. 4759 of May 19, 1962).

[76]Department of Defense Directive 5210.9 of June 19, 1956 (superceding an issue of April 7, 1954) implemented for the naval service by 32 CFR 729, "Navy and Marine Corps Military Personnel Security Program."

"Military Personnel Security, unlike other Government screening programs, rests neither on Congressional enactment nor Executive Order but is based on the inherent disciplinary powers of the military organizations.

"...Following the issuance of Executive Order 10450 establishing the Eisenhower program for all Federal civilian personnel, the Secretary of Defense, on April 7, 1954, reissued, as DOD Directive 5210.9, the previous directives so as to incorporate for military personnel the new security standard and the new security criteria thus established as national policy for Government civilian personnel...." Government Security and Loyalty, published by Bureau of National Affairs, Inc., page 31:1.

[77]367 U.S. 886 (1961).

naval authorities at the Gun Factory denied her request for a hearing, she sued for restoration of her badge. The Supreme Court held that she was not entitled to relief, as under an explicit Presidential regulation [78] and the historically unquestioned power of a military commander to exclude civilians from the area of his command, the Superintendent of the Naval Gun Factory was authorized to exclude the cook from the premises on the ground that she failed to meet security requirements. The summary exclusion was held not to violate the due process clause of the fifth amendment. The Court also pointed out that security requirements cover many matters other than loyalty, that the cook was not accused of disloyalty or any intentional wrongdoing and not deprived of employment opportunities anywhere outside the Gun Factory.

In *Bland v. Connally*,[79] an inactive naval reservist received a discharge under conditions other than honorable after he was charged with subversive associations while an inactive member of the Naval Reserve. Bland did not contest the Government's authority to discharge him but objected to receiving a discharge other than honorable on the basis of evidence withheld from him and without confrontation with witnesses against him. The Court of Appeals for the District of Columbia seemed to follow the line of reasoning of the Supreme Court in *Greene v. McElroy*,[80] finding that there is no statute providing for the procedure used. If there were a statute authorizing the procedure, it would be scrutinized as to whether it complies with the due process clause of the Constitution. In the absence of a statute, the court held that the administrative agencies should not be regarded as authorized to withhold the benefits of confrontation and cross-examination from a member suffering serious disadvantage by receiving an inferior discharge.

Davis v. Stahr[81] was decided by the same court the same day as the Bland case. Davis was issued a discharge under conditions other than honorable on the ground that he failed to disclose subversive preinduction associations and that he made derogatory statements about the United States Government while on active duty. At a field board hearing the Government presented no witnesses. Davis declined to take the stand or introduce other evidence. After Davis received an undesirable discharge, he petitioned the Army Discharge Review Board for an honorable discharge. The Board refused this relief but

[78] U.S. Navy Regulations, article 0734.
[79] 293 F.2d 852 (D.C. Cir. 1961).
[80] 360 U.S. 474 (1959).
[81] 293 F.2d 860 (D.C. Cir. 1961).

concluded Davis should be given a discharge under honorable conditions, a type inferior to an honorable discharge. The report of the case is not entirely celar as to whether Davis's undesirable discharge was actually changed to a discharge under honorable conditions.

The court regarded the charge of failure to disclose preinduction activities as a matter of little weight as the preinduction activities themselves could not be considered in view of *Harmon v. Brucker.* As regards the alleged derogatory remarks about the Government, the court pointed out that Davis, if court-martialed, would have had the right of confrontation with and cross-examination of witnesses against him. The court found there was no authority for refusing confrontation and issuing an inferior discharge.

In assimilating the alleged failure to disclose subversive associations or giving false answers in regard thereto with the alleged preinduction associations themselves, the opinion of the court is particularly unconvincing. Such false answers are not a preinduction activity, but a positive part of the enlistment contract.

In *Clackum v. United States,*[82] a female member of the Air Force sued in the Court of Claims for her pay, asserting that her discharge under conditions other than honorable was invalid. She had been discharged on the ground of alleged homosexual matters. She denied the charges and demanded a court-martial. Instead, she was discharged without facing her accusers and without disclosure of the evidence against her. The court held that:

> "[T]he Air Force had the undoubted right to discharge her whenever it pleased.... But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties."

The court found the undesirable character of the discharge being of the very essence and the discharge invalid.

Reede v. Franke[83] was a suit to enjoin the Secretary of the Navy from separating a serviceman with general discharge under honorable conditions. Reed contended that an honorable discharge is a valuable property right of which he could not be deprived without due process of law. He asserted that a hearing prior to discharge was a requirement of due process. The court disagreed, pointing out that Congress provided for the review of a discharge in 10 USC 1552 and 1553, that Section 1553 includes provisions for a full hearing and that plaintiff

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[82]296 F.2d 226 (Ct. Cl. 1960).
[83]297 F.2d 17 (4th Cir. 1961).

has no constitutional right to a hearing prior to discharge: "[D]ue process requirements are satisfied if the individual is given a hearing at some point in the administrative proceedings. Those fundamental requirements of fairness which are of the essence of due process in the proceedings pursuant to the pertinent regulations are met by the provisions of the statutes above noted." The court regarded as irrelevant the fact that the regulations controlling a discharge on the ground of unsuitability do not provide for a hearing where the statutory provisions cited supply this protection.

In *Ogden v. Zuckert*,[84] an Air Force officer whose disability rating was reduced from 40 to 10 per cent brought suit against the Secretary of the Air Force for declaration that he was entitled to be retained on the retired list rather than being discharged. The Court of Appeals for the District of Columbia held, contrary to the weight of authority,[85] that failure of the officer to resort to the Board for Correction of Errors under 10 USC 1552 did not deprive the District Court of jurisdiction but that it is discretionary with the District Court either to act on the case or to require plaintiff first to exhaust his administrative remedies.

In regard to administrative discharges of military personnel, the foregoing survey of recent cases serves to reaffirm the authority of the Armed Forces to effect the separation of a member with an honorable discharge without necessarily disclosing evidence against him and to do so with a lower grade discharge provided the reason is disclosed and the evidence warrants the lower grade. The foregoing is merely a generalization of the cases mentioned. It does not fit all types of situations; nor does it fully reflect the principle of military necessity on which the Armed Forces may have to rely, dependent on the factual situation and circumstances involved.

The constitutional clause refers to due process of law in relation to life, liberty and property, and this has been the basis of the rule that due process is required under the Constitution where an individual's rights are at stake as distinguished from a mere privilege. This differentiation alone, however, does not always lead to just conclusions. A serviceman may have no right against the Government that his service be continued. Nevertheless, when it comes to the character or type of discharge, courts may point out that the Government, on

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[84]298 F.2d 312 (D.C. Cir. 1961).

[85]Cited in the dissenting opinion. See, e.g., Myers v. Bethlehem Corp., 303 U.S. 41, 50 (1938), referring to "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

the other hand, has no right to stigmatize the individual with an other than honorable discharge and to harm his reputation and employment opportunities without allowing him to meet the charges and evidence against him and to confront and cross-examine adverse witnesses.

The most recent security risk case before the Supreme Court was largely decided on the basis of the distinction between right and privilege:[86] the Court held that the employee of a private business firm has no right to demand that Government continue permission to enter a restricted military reservation. The Government has the power to terminate permission without a hearing. But the opinion of the Court pointed out that, if the Government had based the termination on a discriminatory ground, the individual would be protected even if he or she had only a privilege. Even an absolute power may not be exercised on a discriminatory basis.

The right-privilege distinction has played an extensive role in licensing cases; cases involving entry and deportation of aliens; passports; pardon, parole and probation; Government employment in general and loyalty and security risk cases in particular. A leading treatise[87] observes that Supreme Court decisions are somewhat conflicting in regard to the right and privilege distinction and that at least two recent Supreme Court cases recognize public civilian employment as protected by due process.[88] The same treatise refers to the differentiation between right and privilege as "useful" but as "too crude for consistent application."[89] For such reasons, the sharp yes-no distinction between right and privilege is sometimes replaced by speaking of legitimate interests and by weighing the legitimate interests of the opposing parties.

When a statute required that, prior to deciding whether a serviceman should be discharged for cause, the individual be given "an

[86]Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). The opinion of the Court qualified the privilege theory by quoting from a licensing case: "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." Homer v. Richardson, 292 F.2d 719, 722 (D.C. Cir. 1961). In the Cafeteria case, the opinion of the Court qualified the privilege theory also by indicating that the weighing of the interests involved might lead to a different decision where the Government's action resulted in serious damage to the individual's future employment opportunities. The Court found there was no such damage in the instant case. (After revocation of admittance to the Gun Factory, the employer offered the cook another job at a different cafeteria in the Washington area; the cook declined the offer on the ground that the location was inconvenient.)

[87]1 Davis, Administrative Law Treatise § 7.20 (1958).

[88]Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Bd. of Higher Education, 350 U.S. 551 (1956).

[89]1 Davis, note 87 supra at 507-08.

opportunity to be heard..."[90] and when the member concerned was granted only the opportunity to submit a statement, the Judge Advocate General of the Navy held the discharge invalid.[91] His opinion stated that the term "opportunity to be heard," unless there is a clear statutory indication to the contrary, implies:

> (a) the right to written notice of the time and place for the hearing, mailed to the individual's address of record at a time reasonably in advance of the date set for the hearing;
>
> (b) the right of the individual to a full and clear disclosure of the charges against him, which disclosure should specify the charges in such detail and with such precision as fully to inform him of what dereliction of duty or other shortcoming is urged against him;[92]
>
> (c) the right to submit all the evidence and arguments which, within reason, he deems essential to the proper consideration of his case;[93]
>
> (d) the right to have all pertinent evidence considered and to have any essential findings supported by the weight of evidence;[94] and
>
> (e) the right to be represented by counsel.

As the serviceman was not granted any hearing at all, the foregoing list of elements of a hearing was amply sufficient to demonstrate that the opportunity had been denied. The list, however, is not sufficient for all purposes. In many cases, particularly those where facts are in controversy, the most essential element of a hearing is the opportunity to meet the opponent's evidence first by being informed of it, then by means of confrontation and cross-examination and also by introducing rebuttal evidence. The above list mentions in this respect only an opportunity for the serviceman to introduce evidence but does not mention disclosure of the Government's evidence and confrontation and cross-examination of the Government's witnesses.[95] Nor does the list mention opportunity to be present during the opposing party's argument and to reply thereto.[96]

A determination of the essential elements of a hearing to insure

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[90]Naval Reserve Act of 1938 § 6, 34 USC 1946 ed. § 853d.

[91]CMO 4-1949, 88.

[92]Morgan v. United States, 304 U.S. 1 (1938).

[93]Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Backus, 154 U.S. 421, 426 (1894).

[94]The Chicago Junction Case, 264 U.S. 258, 265 (1924).

[95]The reason for the omission was very simple: in the particular case, the fact on which the Government relied was not in dispute. The fact was a letter written by the serviceman to superior authority. The issue rather was whether the letter was insolent.

[96]See Davis, note 87 supra, §§ 7.02, 7.07, 7.09.

fundamental fairness depends therefore on the type of the issue which is under consideration. Further, the type of the case is also an essential factor in deciding whether a hearing is required at all to comply with the concept of due process. This is a question first to be considered when the law is drafted; if the law is silent, when the implementing regulation is written; and finally, if law and regulation are silent, in the application of law or regulation. If the matter at hand is to be decided by way of inspection, test or examination, a hearing may not be essential or even practical at all.

The foregoing can be best illustrated by turning to a wide field of administrative action in which a hearing is only one of several possible methods of reaching a determination: the adjudication of claims.

IV. Claims Procedures

The following are examples of statutory authority for the administrative settlement of claims against the United States:[97]

Personnel claims under 10 USC 2732: claims for not more than $6,500 by a civilian employee of the Department of Defense or a member of the Army, Navy, Air Force or Marine Corps for damage to, or loss of, personal property incident to his service.

Claims under the Military Claims Act (10 USC 2733): claims for not more than $5,000 for damage to, or loss of, real property, personal property, or personal injury or death caused by a civilian employee of the Department of Defense or member of the Army, Navy, Air Force or Marine Corps, acting within the scope of his employment, or otherwise incident to noncombat activities of the Department.

Foreign claims under 10 USC 2734: claims for not more than $15,000 for damage to, or loss of, real or personal property of any foreign country or inhabitant of a foreign country or for personal injury to, or death of, any inhabitant of a foreign country, if the damage occurs outside the United States, or the Territories, Commonwealths or possessions, and is caused by or otherwise incident to noncombat activities of, the Armed Forces or is caused by a member thereof or a civilian employee. The statute (10 USC 2734) has been rendered inapplicable in certain foreign areas by treaties or international agreements which, generally, provide that the foreign government involved shall handle the claim and thereafter the United States and the foreign government share the expense of any payment made;

[97]For implementing procedual regulations see, e.g., 32 CFR Parts 750-755.

the statutory authorization or recognition may be found in 10 USC 2734a-b.

Nonscope-of-duty claims under 10 USC 2736 (Pub. L. 87-769, enacted October 9, 1962): claims for not more than $1,000, not cognizable under any other provision of law for damage to, or loss of, property or personal injury or death caused by a member of an Armed Force or a civilian employee of the Department of Defense or Coast Guard, incident either to the use of a vehicle of the United States anywhere or any other property of the United States on a Government installation.

Admiralty claims under 10 USC 7621 and 7622: claims for not more than $1,000,000 for damage caused by a vessel in the naval service or compensation for towage and salvage service rendered a vessel in the naval service. There is corresponding authority to settle admiralty claims by the United States if the net amount to be received by the United States is not more than $1,000,000 and authority to settle affirmative salvage claims of the Navy (10 USC 7365, 7623).[98]

Claims under the Federal Tort Claims Act (28 USC 2671-2680): claims for not more than $2,500 for damages to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any civilian or military member of the Department while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

One of the basic legal differences under these laws relates to the question whether there is a requirement of showing negligence or other culpable action on the part of the Government, as under the Federal Tort Claims Act, or whether negligence or other tortious conduct is not a necessary factor for establishing a claim, as under the Military Claims Act. The various different legal conditions of a claim affect to some extent the methods employed for establishing a claim. In comparing the two statutes, a manual observes:

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[98]The basis of governmental liability is the Suits in Admiralty Act (46 USC 741-752), the Public Vessels Act (46 USC 781-790) and the Federal Tort Claims Act (28 USC 1346(b), 2671-2680). The Suits in Admiralty Act prescribes a procedure for bringing suit against the United States on a claim which could be asserted in admiralty if a private person, vessel, cargo or other property were involved. Wherever a suit in admiralty could be brought against a private party or vessel, a suit can be brought against the United States in like circumstances. All naval vessels are public vessels and litigation because of damage caused by such vessels must proceed under the Public Vessels Act.

> "It is ... very often difficult or impossible to prove that a given crash occurred through the negligence of the Navy, and the law is generally interpreted to give as wide an application as possible to the Military Claims Act since it is less demanding procedurally."[99]

If a claim is within the scope of the Military Claims Act, except that it exceeds the statutory settlement authority of the Secretary of a military department ($5,000), the Secretary "may pay the the claimant $5,000 and report the excess to Congress for its consideration" (10 USC 2733(d)). In regard hereto, the manual emphasizes the potential for rapid claims settlement of the Military Claims Act within a period averaging from two to three months.[100]

Generally speaking, settlement is founded on a determination of the legal liability of the United States. The burden is on the claimant to establish the liability of the United States and the claimant's right to payment.[101] This does not mean that investigation is delayed until a claim is filed: "Every service connected incident which may result in claims against or in favor of the Government shall be promptly and thoroughly investigated by trained personnel."[102] The duties of the investigating officer in a typical case under the Military Claims Act include the following:

> (1) To conduct investigation of the matter in a fair and impartial manner.
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> (2) To secure and consider signed statements from all competent witnesses. Witnesses should be interviewed by the investigating officer at the earliest opportunity. The interests of the United States may be seriously prejudiced if the investigating officer fails to obtain such statements before witnesses lose their clear recollection or can be confused by questioning by persons with adverse interests.
>
> (3) To inspect the property damage and to interview injured persons or their representatives personally.
>
> (4) To ascertain the nature, extent , and amount of damage and to obtain all pertinent repair bills.
>
> (5) To secure from qualified persons statements concerning the extent of damage or injury.
>
> (6) To reduce to writing and incorporate into a unified report all pertinent testimony, exhibits, etc.

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[99]Organization and Functions of Office of the Judge Advocate General, Published by Bureau of Naval Personnel, NAVPERS 10843-A, 1961, page 84.

[100] Id. at 85.

[101]See General Accounting Office Manual Policy and Procedures Manual for Guidance of Federal Agencies § 2040, Basis of Claim Settlement.

[102]32 CFR 750.33.

(7) To furnish the proper claim forms to any person who inquires concerning the procedure for making claim against the Government as a result of a service-connected incident, and to advise such person where the claim should be filed and what substantiating evidence should accompany the claim.[103]

(8) To submit the complete investigative report to his commanding officer as promptly as the circumstances permit; and in the case of an incident involving any personal injury or property damage estimated to be in excess of $1,000, to submit immediately a preliminary report.[104] (In lieu of the report required above, a short certificate may be sufficient where the claim does not exceed $100.)[105]

Ordinarily the report of the investigating officer is reviewed by his commanding officer and then submitted to a superior authorized to approve the report whereupon an amount recommended therein is payable provided the claim is approved in the full amount claimed. It the approved amount is less than the amount claimed, the approved amount is payable if the claimant agrees to accept the amount as final settlement.[106]

The administrative settlement of claims is based on the simple principle: "The interests of the United States and the Navy are best served by insuring to the claimant a just disposition of his claim, not by laying a basis for denial which distorts the circumstances."[107]

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[103]The enactment of 10 USC 2736 (Pub. L. 87-212 of Sept. 8, 1961) authorizes also preliminary payment not exceeding $1,000 in advance of the submission of a claim cognizable under the Military Claims Act (10 USC 2733) or Foreign Claims Act (10 USC 2734) to avoid hardship or relieve suffering where the circumstances indicate prima facie a liability of the Government. The preliminary payment will be deducted from the final amount of settlement.

[104]32 CFR 750.37.

[105]See 32 CFR 750.38(b).

[106]See, e.g., 32 CFR 750.39-750.44.

[107]Office of the Judge Advocate General—Duties, Organization and Administration, published by the Bureau of Naval Personnel, NAVPERS 10843, 1949, page 84 (now superseded by the publication referred to in note 99 supra). See, to the same effect, the "Air Force Policy on Claims," as stated in the Air Force Claims Manual AFM 112-1 of July 2, 1962, paragraph 1:

"a. Investigate every previously filed claim or incident which may result in a claim as soon after the occurrence as possible, to the extent commensurate with the nature and size of the claim. While the investigation of a minor claim need not be exhaustive, there should be sufficient evidence in the file to support the disposition made thereof. In the event of a major crash or similar incident involving an Air Force vehicle which it is anticipated will result in civilian claims against the Air Force, the claims officer should make every effort to be on the scene of the accident immediately thereafter. If necessary, he should provide for the injured, and, to the extent of his authority, generally give emergency aid to those affected by the crash (see emergency payment provisions in paragraph 72).

"b. Make prompt, just, and reasonable adjudications of all claims.

"c. Pay legitimate claims in the amount found necessary to restore the claimant

Since the claims authority of the services is entirely in the realm of settlement and involves no judicial decision or mandatory hearing, the requirements of due process are not usually involved. It should be noted, however, that each service has established procedure for submission of a claim, for substantiating evidence both as to the facts and as to the amount of damage. These procedures are published in the Federal Register. The method of handling is substantially uniform, and is the matter of frequent discussion by an inter-service claims committee composed of senior officers from each service.

While formal hearings are not part of the settlement procedure, any claims adjudicating authority will consider the arguments in briefs submitted by claimant's counsel and occasionally in very complex cases an informal hearing will be held if the adjudicating authority desires one.

V. Contracts and Procurement

A brief reference might be added to the field of government contract and procurement. Procurement contracts of the Department of Defense contain a disputes clause[108] under which any dispute concerning a question of fact arising under the contract shall be decided by the Contracting Officer and his decision shall be final unless the contractor appeals to the Secretary of the department within thirty days. The decision of the Secretary or his duly authorized representative, i.e., the Armed Services Board of Contract Appeals in the Department of Defense (32 CFR 30.1, 27 F.R. 6139) shall be final unless determined by a court to have been fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. This scope of judicial review is prescribed by statute,[109] but derives its force from the consent of the parties to the contract terms. The law provides also that no government contract shall contain a clause making final the decision of the contracting officer or other reviewing Government official or board on a question of law.[110] This does not preclude the contracting officer or board of contract appeals from considering any question of law in connection with, and for the purpose of, their decisions but their decisions are

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as nearly as possible to status quo. Bear in mind that it is not the function of the claims officer to pressure a settlement of legitimate claims for the smallest amount that the claimant will accept, but to compensate him for the damage incurred as the result of an Air Force activity."

[108]32 CFR 7.103-12. See also 41 CFR 1-7.101-12.

[109]Act of May 11, 1954 (41 USC 321).

[110]Act of May 11, 1954, § 2 (41 USC 322).

not final as to questions of law so as to preclude review by a court of such questions.[111]

The disputes clause provides expressly that, in connection with any appeal under the clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal.

A recent and otherwise rather critical study has found "the success of, and general public confidence in, the Armed Services Board of Contract Appeals" so significant that this appeals procedure was recommended for adoption by other Government agencies, particularly because of the fact that decisions of the board are binding on the Government and are not only advisory as far as the head of the department or agency is concerned.[112]

VI. Relation of Administrative Procedure Act

As the Administrative Procedure Act[113] may be regarded as a blueprint or pattern of administrative due process, an outline is added to indicate the principles of the act in relation to administrative proceedings in the Department of Defense. The headings of the following paragraphs state the principles and the text thereunder indicates the extent of application or inapplicability dividing the exclusions or exceptions into two groups: first exceptions which apply to all Government agencies generally and then exceptions which apply specifically to military and foreign affairs functions.

1. Keeping the public currently informed of organization, procedures and rules (§ 3, 5USC 1002):

Applicable except (1) generally for (a) functions requiring secrecy in the public interest and (b) matters relating solely to the internal management of the agency (§ 3, 5 USC 1002) and (2) specifically for courts-martial, military commissions and military or naval authority exercised in the field in time of war or in occupied territory (§2(a), 5 USC 1001(a)).[114]

2. Giving the public an opportunity to participate in the rule-making process (§4, 5 USC 1003):

Excepted: (1) generally any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts

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[111]Navy Contract Law § 9.30 (2d ed. 1959).

[112]Oulahan, Federal Statutory and Administrative Limitations Upon Atomic Activities, in Stason, Estep and Pierce, Atoms and the Law 1356 (1959).

[113]5 USC 1001-1011.

[114]See U.S. v. Aarons and Swann, 310 F.2d 341 (2d Cir. 1962).

and (2) specifically any military, naval and foreign affairs function of the United States (§4, 5 USC 1003).[115]

3. Uniform standards for adjudicatory proceedings (§ 5, 5 USC 1004):

Applicable only where a statute requires determination on the record after opportunity for an agency hearing.

(1) General exceptions: (a) any matter subject to a subsequent trial of the law and the facts de novo in any court; (b) the selection or tenure of an officer or employee of the United States other than hearing examiners appointed under § 11, 5 USC 1010; (c) preceedings in which decisions rest solely on inspections, tests or elections; etc.

(2) Specific exceptions: military, naval and foreign affairs functions of the United States. (§ 4, 5 USC 1003.)

4. Judicial review of agency action (§10, 5 USC 1009):

Applicable except (1) generally so far as (a) statutes preclude judicial review or (b) agency action is by law committed to agency discretion (§10, 5 USC 1009) and (2) specifically for courts-martial, military commissions and military or naval authority exercised in the field in time of war or in occupied territory § 2(a), 5 USC 1001 (a)).

VII. Conclusion

In the course of a recent article on due process, the concept is referred to as evolving, evolutionary, elastic, accordionlike, dynamic and as a living principle rather than a dead catalogue. [116] Chief Justice Warren's statement in *Hannah v. Larche,* quoted earlier in a note, is to the same effect.[117] One of the indications of the wide range of the concept is the fact that it has been equated with such terms as law of the land,[118] government under law and the rule of law,[119] and the equal-protection-of-the-law concept is considered included in due process.[120] Another illustration of the power and range of the principle

[115]The exception for courts-martial, military commissions and military or naval authority exercised in the field in time of war or in occupied territory (§ 2(a), 5 USC 1001 (a)) listed under paragraphs 1 and 4 applies also under paragraphs 2 and 3 but is not listed under the latter paragraphs because the exception may be regarded as encompassed by the more extensive exceptions for military, naval and foreign affairs functions of the United States listed under paragraph 2 and 3.

[116]Miller, note 2 supra.

[117]Note 3 supra.

[118]The Constitution, Analysis and Interpretation, Senate Document 170, 82d Congress, 2d Session, 845 (1952).

[119]Miller, note 2 supra at 401. Cf. Meador, note 4 supra at 191, 195.

[120] Bolling v. Sharpe, 347 U.S. 497 (1954).

of due process is the far reaching development of substantive due process from a restriction on legislators to a positive requirement in the interest of the common welfare and the equal protection of the laws.[121]

Each officer's first commitment in taking the oath of office is to support and defend the Constitution against all enemies, foreign and domestic.[122] There is no dichotomy or basic conflict between due process and efficient government or military necessity. The military serves to preserve the Constitution, including due process. There may be, however, and sometimes is a difference of views and interests in specific cases as to whether the individual's rights and liberties are restricted unreasonably by the demands of efficient administration of the Government whose raison d'etre includes the upholding of these rights and liberties. The weighing of conflicting values and interests and a rational determination are the very essence of due process. As has been said, "[t]he test of due process is essentially a test of reasonableness."[123]

With loyalty to the United States, sound judgment and doing always the best we can, the goals of preserving national security, improving national welfare, maintaining efficient administration and the enjoyment of individual freedoms are compatible; it is not necessary to lose one in advancing the others.[124]

Due process in all procedures is democracy's method of insuring a legal, fair, just and reasonable result. It works to insure that the individual's rights are protected, but equally preserves the rights of all the people against the claims of an individual by providing procedures whereby the relative rights and duties can be fairly decided.

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[121]See Miller, note 2 supra at 407, 411. Also Senate Document, note 118 supra at 853, 854.

[122]R.S. 1757 as amended (5USC 16). Public Law 87-751 of October 5, 1962, amending 10 USC 501, changed the enlistment oath to contain the same clause.

[123]16A C.J.S. Constitutional Law, § 569(3) citing Santiago v. People of Puerto Rico, 154 F.2d 811 (1st Cir. 1946).

[124]Cf. Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 203 (1962).