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Peacetime Martial Law in Guam

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ACCORDING to the United States Navy, Guam is under martial law and has been for many years. In February 1941 President Roosevelt issued Executive Order No. 8683[1] establishing the Guam Island Naval Defensive Sea Area and the Guam Island Naval Airspace Reservation. Administrative authority was vested in the United States Navy. To assist the Navy in enforcing the security clearance a number of regulations have been

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[1] 6 Fed. Reg. 1015 (1941). The Executive order reads:

By virtue of the authority vested in me by the provisions of section 44 of the Criminal Code, as amended (U.S.C., title 18, sec. 96), and section 4 of the Air Commerce Act approved May 20, 1926 (44 Stat. 570, U.S.C., title 49, sec. 174) the territorial waters between the extreme highwater marks and the three-mile marine boundaries surrounding the islands of Rose, Tutuila, and Guam, in the Pacific Ocean, are hereby established and reserved as naval defensive sea areas for purposes of national defense, such areas to be known, respectively, as "Rose Island Naval Defensive Sea Area", "Tutuila Island Naval Defensive Sea Area", and "Guam Island Naval Defensive Sea Area"; and the airspaces over the said territorial waters and islands are hereby set apart and reserved as naval airspace reservations for purposes of national defense, such reservations to be known, respectively, as "Rose Island Naval Airspace Reservation", "Tutuila Island Naval Airspace Reservation", and "Guam Island Naval Airspace Reservation."

At no time shall any person, other than persons on public vessels of the United States, enter any of the naval defensive sea areas herein set apart and reserved, nor shall any vessel or other craft, other than public vessels of the United States, be navigated into any of said areas, unless authorized by the Secretary of the Navy.

At no time shall any aircraft, other than public aircraft of the United States, be navigated into any of the naval airspace reservations herein set apart and reserved, unless authorized by the Secretary of the Navy.

The provisions of the preceding paragraphs shall be enforced by the Secretary of the Navy, with the cooperation of the local law enforcement officers of the United States; and the Secretary of the Navy is hereby authorized to prescribe such regulations as may be necessary to carry out such provisions.

Any person violating any of the provisions of this order relating to the above-named naval defensive sea areas shall be subject to the penalties provided by section 44 of the Criminal Code as amended (U.S.C., title 18, sec. 96), and any person violating any of the provisions of this order relating to the above-named naval airspace reservations shall be subject to the penalties prescribed by the Civil Aeronautics Act of 1938 (52 Stat. 973).

issued.[2] One section, which is not in the Instruction (naval directive, or regulation) issued to the general public, provides as follows:

> *Compliance with laws and regulations.* All persons, vessels and aircraft entering the Guam Island Naval Defensive Sea Area or the Guam Island Naval Airspace Reservation, *whether or not in violation of Executive Order 8683* . . . shall be governed by such regulations and restrictions upon their conduct and movements as may be established by the Commander, U.S. Naval Forces, Marianas, whether by general regulation or by special instructions in any case.[3]

The foregoing regulation clearly purports to establish martial law in Guam. Civilians are under martial law whenever an Executive order authorizes a military commander to prescribe rules of action—make laws—governing civilians in military areas set up in domestic territories upon the sole standard of military necessity.[4]

One well might ask how the Navy derived authority from Executive Order No. 8683 to govern the conduct and movement of all persons on the island of Guam regardless of whether or not they had violated the order. If the Navy has that authority, then Guam is under martial law. It is the argument of this Article that the foregoing regulation is illegal, and, further, that all of the regulations issued by the Navy under the ostensible authority of the Executive order are illegal and the power exercised by the Navy in administering the security clearance program is unauthorized and unconstitutional.

I

HISTORY OF THE NAVAL "SECURITY CLEARANCE" PROGRAM IN GUAM

The unincorporated territory of Guam is an insular possession of the United States located in the Pacific Ocean about 5,200 miles southwest of San Francisco and 1,350 miles southeast of Tokyo. Guam is the largest and most southern island of the archipelago known as the Mariana Islands. It is 32 miles in length and varies from 4 to 10 miles in width. Its 206 square miles give it an area nearly 10 times that of Manhattan Island.[4a]

The United States acquired Guam from Spain in 1898. By Presidential Executive order of December 23, 1898, the Secretary of the Navy was designated by the President to administer Guam. Except for Japanese occu-

[2] For the latest version of these regulations, see 32 C.F.R. §§ 761.1–.24 (Supp. 1959). Some have heen printed in pamphlet fonn as OPNAV Instruction 5500.11B, Nov. 27, 1957. This pamphlet is made available to those requesting information on clearance regulations. No mention is made in the pamphlet of the other applicahle regulations.

[3] 32 C.F.R. § 761.21 (Supp. 1959). (Emphasis added.)

[4] Ochikubo v. Bonesteel, 60 F. Supp. 916, 929 (S.D. Cal. 1945).

[4a] See map, App. C. For a general survey of the history of Guam, see STEVENS, GUAM, U.S.A., BIRTH OF A TERRITORY (1953). For a concise review of current social, political and economic conditions in Guam, see 1958 GOV. GUAM ANN. REP.

pation during World War II this administration continued until August 1, 1950. The island was therefore directly administered by a naval governor who was a naval officer assigned to the post for a tour of duty. Civil government was organized but only for the carrying out of such naval policies as might be established by the governor or the Secretary of the Navy.

For some years prior to the beginning of World War II it had been obvious that Japan had been building up military forces in the Pacific Islands. Saipan and Tinian are approximately 120 miles from Guam and Rota only 40 miles from Guam. All these islands were known by 1940 to be strongholds of Japanese military forces, both air and naval.

To preserve the security of the defense efforts in Guam and other Pacific Islands such as Wake, Johnston and Midway, President Franklin D. Roosevelt promulgated Executive Order No. 8683.[5] Insofar as Guam was concerned the Executive order established two defensive areas known as the Guam Island Naval Defensive Sea Area and the Guam Island Airspace Reservation. The Secretary of the Navy was delegated the power to authorize entry at his discretion and to prescribe such regulations as were necessary for carrying out the provisions of the order.[6]

When Guam was recaptured by the United States in July 1944, Executive Order No. 8683 was not immediately reinstated.[7] In May 1946 the naval government was reestablished and the Navy resumed administration of civil affairs in Guam. Following resumption of the naval government, the civilian economy of the island began to expand, and labor, goods and services were in great demand. The Navy adopted the policy of preventing

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[5] 6 Fed. Reg. 1015 (1941); see note 1 *supra*. For a case illustrating the scope accorded Executive orders validly promulgated, see Perko v. United States, 204 F.2d 446 (8th Cir.), *cert. denied*, 346 U.S. 832 (1953).

[6] Executive Order No. 8683 expressly refers only to *aircraft* entering the airspace reservation and to vessels *and persons* entering the Defensive Sea Area. In practice, the Navy enforces the order in reverse, being apparently more concerned about "persons" entering Guam by aircraft than by vessel.

[7] "Guam is a naval base under naval government and the Harbor of Apra is a closed port, and shall not be *visited by any commercial or privately owned vessel of foreign registry;* nor by any foreign national vessel, except by special authority of the United States Navy Department in each case. (Executive Order 26 September 1912). United States Navy Regulations, 1920, Article 78, paragraph 1: *Certain military districts on the island are closed to visitors.*" CIVIL REGULATIONS WITH THE FORCE AND EFFECT OF LAW IN GUAM ch. 34, at 73 (U.S. Gov't Printing Office ed. 1947) [hereinafter CIVIL REGULATIONS]. (Emphasis added.) Though first promulgated in 1936, the "Civil Regulations" were reprinted in 1947 and no reference was made to Exec. Order No. 8683 in the 1947 edition. ("Civil Regulations with the Force and Effect of Law in Guam" were issued originally on March 1, 1936, by order of G. A. Alexander, Governor of Guam, and replaced the theretofore existing "Orders and Regulations with the Force and Effect of Law in Guam." The "Regulations" were suspended during Japanese occupation and were reestablished July 21, 1944, by order of Admiral Nimitz. For a brief discussion of the origin and development of "Civil Regulations," as well as of other pre-Organic Act Guam laws, see United States v. Johnson, 181 F.2d 577, 580 (9th Cir. 1950).)

non-Guamanians from entering the island in order to enter business, unless there were no local people qualified or financially able to supply the particular service or handle the merchandise in question.[8]

This exclusion policy was enforced mainly through the business license provisions of the Government Code of Guam, as it existed at that time, and through regulations and orders issued by the naval governor. As a matter of fact the policy did not completely succeed because a considerable number of employees brought in by contractors eventually went into business for themselves.

In 1947 the Navy was confronted with an additional problem concerning business competition with local residents. Naval officers or personnel who had reached the age of retirement were attempting to return to Guam to enter business. To prevent this the Chief of Naval Operations issued a directive to the naval governor of Guam stating that former Navy officers or personnel who were retiring from active duty were not to be allowed to enter Guam for the purpose of engaging in private enterprise.[9] Since the Navy had complete control of the island and all of the inhabitants, no effort was made to enforce actively the provisions of Executive order No. 8683 or to enact regulations thereunder.

A. Background and Legislative History of the Organic Act

In July 1950 the United States Congress passed the Organic Act of Guam[10] which transferred administration of governmental affairs from the Navy to the Department of the Interior. The act provided a bill of rights, established civilian courts, and in other ways took away control of governmental affairs from the Navy. A District Court of Guam was created and patterned after the federal district courts. The legislature was given authority to create inferior courts and transfer causes from the district court to those inferior courts.[11]

The clear congressional intent of the Organic Act, as revealed by committee hearings and numerous exchanges of correspondence among Senators and others,[12] was to give United States citizens residing in Guam full

[8] Enlisted men were not allowed to engage in business if it "interfere[d] with the customary employment . . . of local civilians . . . ." CIVIL REGULATIONS ch. 2, para. 17, at 4.

[9] None of the specific orders or regulations are available to the writers, but this information is well verified by statements of reputable former naval officers now in business in Guam.

[10] 64 Stat. 384 (1950), as amended, 48 U.S.C. §§ 1421–25 (1958).

[11] Organic Act of Guam § 22, 64 Stat. 389 (1950), as amended, 48 U.S.C. § 1424 (1958).

[12] S. REP. No. 2109, 81st Cong., 2d Sess. (1950). See, *e.g.*, Letter From Harry S. Truman to J. A. Krug, Secretary of the Interior, May 14, 1949, in *id.* at 3; Letter from J. A. Krug to Alban W. Barkley, May 3, 1949, in *id.* at 6–9. The report stated that "given a period of peace, the growth of Guam as a transportation and commercial center for American interests in the Far East seems almost a foregone conclusion. American business enterprise in the area will want, and need, a center in which it can have the full protection of American laws and legal procedure." *Id.* at 4. The business community on Guam is generally agreed that the security

civil rights.[13] The indications are that Executive Order No. 8683 was then dead and forgotten. However, the Navy resurrected the order on December 4, 1950, thus enabling it to retain its long-enjoyed power over the civilian community.[14]

B. The "Security Clearance" Program After the Organic Act

Although the Navy officially stated that it was strongly in favor of the passage of the Organic Act,[15] the Chief of Naval Operations reinstituted the security clearance entry program for Guam less than 3 months after the act became effective.[16]

Since that time the regulations have been vigorously enforced by the Navy. All persons desiring to come to Guam[17] who are not within certain excluded categories[18] are required to obtain a security clearance from the Secretary of the Navy or his subordinates before they are permitted to enter. A person coming to Guam for the first time files the application directly or indirectly with the Chief of Naval Operations. In the case of a citizen of the United States who is a resident of Guam and who desires to leave Guam temporarily with intent to return, an application for a re-entry

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clearance requirement has seriously hampered Guam's economic development, particularly as to tourist business. There are no public hotels on Guam though thousands of tourists transit the island annually. Navy red tape discourages stopovers.

[13] "All American tradition and history dictates that government shall rest upon law, rather than upon executive decree. By international treaty also, the Congress has a direct responsibility for the government of Guam. The second paragraph of Article IX of the treaty ceding Guam to the United States provides: 'The civil rights and political status of the native inhabitants of the Territories hereby ceded to the United States shall be determined by the Congress (30 Stat. 1759).' In addition to the obligation under the Treaty of Paris, the United States has additional treaty obligations with respect to Guam as a non-self-governing Territory. Under Chapter XI of the Charter of the United Nations, ratified by the Senate June 26, 1945 (59 Stat. at p. 1048), we undertook, with respect to the peoples of such Territories, to insure political advancement, to develop self-government, and taking 'due account of the political aspirations of the peoples ...' to assist them in the progressive development of their free political institutions...." S. REP. No. 2109, 81st Cong., 2d Sess. 2 (1950).

[14] See note 16 *infra*. What was perhaps the prime initiating cause of the resurrection of the order, and the reinstitution of the entry-clearance program, *i.e.*, the Korean conflict, of course no longer justifies the Navy's conduct, even assuming it justified it then. See text at note 22 *infra*. See also text at note 56 *infra*.

[15] S. REP. No. 2109, *op. cit. supra* note 12, at 9.

[16] Entry clearance requirements were reinstituted by Letter [Directive] From Chief of Naval Operations, serial no. 5235P21, Dec. 4, 1950. This directive was superseded by subsequent regulations.

[17] Prior to the passage of the Organic Act, Guam law provided: "Residents of Guam shall not be permitted to leave Guam without a passport issued by the Governor or a certificate of identification issued by the Department of Records and Accounts." CIVIL REGULATIONS ch. 21, para. 1, at 45. After passage of the Organic Act the Department of Immigration required United States citizens coming to Guam to have a passport until Nov. 7, 1958.

[18] 32 C.F.R. § 761.10 (Supp. 1959). See text at note 65 *infra*.

permit must be made to the Commander, Naval Forces Mariana Islands.[19]

Enforcement of the naval security program is not difficult inasmuch as the only two permissible ways to enter Guam are through naval reservations. Apra Harbor is the only sea port, and it is within the confines of the naval station.[20] All port operations are under the direction of the Commander, Naval Forces Mariana. This includes piloting, tug boats, ship repair, and to a lesser extent, cargo operations. Persons entering Guam by way of air carrier are required to land at the naval air station. There are no civilian airport facilities in Guam.

To insure that persons entering Guam have the required entry-clearance documents, the Navy has ordered civilian transportation agencies to require these documents before allowing prospective passengers to purchase a ticket. This is true of the airlines and the steamship lines.[21]

After the reinstitution of the security clearance requirement, many United States citizens were faced with the necessity of obtaining a security clearance from the Navy to come to a United States territory. Many persons, citizen and alien alike, objected to the requirement, and some were refused entry for various reasons. In answer to the many complaints, letters were written by naval officers, the Chief of Naval Operations, and even the Secretaries of Navy and Interior. The reasons given for the con-

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[19] So-called multiple-entry clearances are difficult for nonresidents to obtain and are usually limited to 1 or 2 years. Although residents are treated more liberally, those not favored with a multiple-entry clearance are required to fill out the forms and reapply for re-entry each time they leave or be excluded when they try to return to their homes. A sample multiple-entry clearance reads as follows:

> U.S. Pacific Fleet
> Commander Naval Forces Marianas
>
> My dear.....,
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> Your application has been reviewed and authorization is hereby granted for .....to enter and re-enter the Guam Defensive Sea Area for a period of two years beginning..... for the purpose of making repeated business trips off the island.... This letter . . . must be in your possession when traveling in the above areas.
>
> Sincerely yours,
> Island Government Officer

Note that the administrator of the clearance program is called, significantly, "The Island Government Officer."

[20] The Commercial Port of Guam is operated by the Government of Guam, but it is within the Apra Harbor area and access from the sea is controlled by the Navy. Both air and sea access to Guam in civilian areas could be arranged, however, if the Navy ceased requiring entry clearance to the entire island.

[21] The carriers comply with Navy orders, and except for occasional oversights they will not sell a ticket to Guam passengers not holding a security clearance. The Navy contends that the carriers are "fully responsible for restricting the activities of the passengers in their custody so as not to permit violation of entry clearance requirements." Letter From Rear Adm. W. B. Ammon, Commander, U.S. Naval Forces, Marianas, to G. Selwyn, Manager, Pan American World Airways, September 6, 1956, on file with the authors. Unless otherwise noted, personal letters cited are on file with the authors.

tinued enforcement of the security clearance requirement were many and included the following:

1. The clearance is necessary so long as the Korean War continues to exist.[22]
2. Because of the huge expenditure of appropriated funds on defense projects, Guam draws from nearly every walk of life civilians whose purpose is making as much money as possible, directly or indirectly, from the salaries of military and government employees.[23]
3. Many aliens are excluded because their long-term presence would be detrimental to the effective use of Guam for its primary mission of defense.[24] (This reason did not prevent entry of aliens married to citizens if the citizen-spouses worked for the Government.)
4. The island of Guam is an important United States naval and military base, and its protection fully warrants those measures authorized by Executive Order No. 8683.[25]
5. The Navy is required by Executive Order No. 8683 to enforce the order.[26]
6. The clearance is necessary to enable the Navy to assist the local government in keeping the "riff-raff" out of Guam.[27]
7. Entry into Guam is limited to persons who contribute to its "strategic development."[28]

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[22] Letter From Ira H. Nunn, Navy Judge Adv. Gen., to Rear Adm. H. A. Houser, June 3, 1953.

[23] Letter from Comdr. Edward L. Beach, Naval Aide to the President, to F. L. Moylan, Guam Businessman, September 20, 1956, citing a certain report from the Secretary of the Navy. In a recent letter, answering a request for a copy of the full report, Commander C. E. Herrick stated that it could not be found. Letter From Comdr. C. E. Herrick, Office of Chief of Naval Operations, to W. Scott Barrett, July 31, 1959.

[24] "The very presence of large numbers of aliens owing allegiance elsewhere would constitute an obvious threat to security." Letter From Charles S. Thomas, then Secretary of the Navy, to Gayle Shelton, then President, Guam Chamber of Commerce, September 21, 1956.

[25] *Ibid.* This view was also expressed by Douglas MacKay, Secretary of the Interior. Letter From Douglas MacKay to G. M. O'Keefe, Guam Businessman, June 8, 1953 (during the Korean War). Pearl Harbor is also a naval defensive sea area, but no clearance is necessary to enter the island of Oahu, which is no more than twice the size of Guam. Also, almost as great a percentage of Oahu is occupied by military reservations.

[26] Letter From Ira H. Nunn, *supra* note 22: "[T]he existence of this Defensive Sea Area is not inconsistent with the newly acquired status of Guam, nor is there any legal authority to discontinue security clearance as long as the Executive Order is in effect."

[27] Remarks of a naval officer, quoted in Bauer, *American Guam Off-Limits to Americans,* Portland Oregonian, Aug. 4, 1957, p. 42, cols. 3–4.

[28] "Because of the strategic importance of Guam, entry into this area has been limited to persons who contribute to the strategic development of this area.... Inasmuch as Mr. McCready does not work for the United States Government, you do not qualify . . . [to enter Guam]." Letter From Adm. Arleigh Burke, Chief of Naval Operations, to Mrs. Gordon McCready, July 25, 1956. Mrs. McCready is the Japanese-national wife of many years of a local businessman. Mrs. McCready had asked why she could not join her husband when aliens mar-

The validity of the foregoing reasons will hereinafter be discussed. Many of them are obviously invalid; keeping the "riff-raff" out of Guam and being concerned about whether civilians come to Guam to make money are simply not the concern of the United States Navy.

Officially, the Navy has set forth a number of grounds on which clearance can be denied,[29] although the regulations specifically state that the reason for a denial may not be given to any person.

II

THE LEGAL EFFECT OF THE ORGANIC ACT ON THE SECURITY CLEARANCE PROGRAM

Following the reinstitution of the security clearance program on December 4, 1950, the Attorney General of Guam wrote an opinion[30] which concluded that the Organic Act had repealed Executive Order No. 8683 by implication. The opinion relied heavily upon the wording of section 33 of the Organic Act,[31] which authorized the President to designate *parts* of Guam as naval or military reservations.

By Executive Order No. 10178[32] the President expressly reserved to the United States parts of Guam for military bases. Those parts of Guam reserved to the military constitute less than one-third of the land area of the island. There is no indication that the Senate intended the whole island to be under military control. The Organic Act also gave the President power to treat Guam as a closed part with respect to the vessels and aircraft of *foreign nations*. Had Congress been aware of Executive Order No. 8683 and intended to perpetuate it, the language of section 33 was surplusage. By saying in section 33 that "nothing contained herein shall be construed as limiting the authority of the President . . . to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations," Congress expressed an intent that the President has *no authority to treat Guam as a*

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ried to government employees were allowed to enter. Subsequently Mrs. McCready entered without a clearance and promptly was granted one! Several other persons who have entered without a clearance are presently "at large" on the island and have never been prosecuted.

[29] 32 C.F.R. § 761.6 (Supp. 1959). The grounds listed include: (1) prior non-compliance with entry-control regulations; (2) wilfully furnishing false or misleading information in application for entry; (3) advocacy of the overthrow of the United States; (4) sabotage, espionage and sedition; (5) acting so as to serve the interests of another government detrimental to that of the United States; (6) deliberate unauthorized disclosure of classified defense information; (7) membership in subversive organizations; (8) serious mental irresponsibility or chronic alcoholism; (9) conviction of certain felonies; (10) illegal presence in the United States or being the subject of deportation proceedings.

[30] Dec. 13, 1951, in STATUTES AND AMENDMENTS TO THE CODES OF THE TERRITORY OF GUAM, FIRST GUAM LEGISLATURE, 1951–1952, at A–14 (1952).

[31] 64 Stat. 393 (1950), 48 U.S.C. § 1421k (1958).

[32] 15 Fed. Reg. 7313–15 (1950).

closed port to United States citizens on domestic vessels and aircraft.[33] Thus, the Organic Act does supersede and overrule Executive Order No. 8683.

Subsequent to the Guam Attorney General's opinion, the Office of the Judge Advocate General of the United States Navy issued a contrary opinion.[34] Unfortunately, the opinion is *classified* and therefore not available to the general public.[35]

III

UNCONSTITUTIONAL ADMINISTRATION OF A VOID EXECUTIVE ORDER

Beyond the determination of the effect of the enactment of the Organic Act upon the present validity of Executive Order No. 8683, the question remains whether the administration of that order denies certain fundamental personal rights guaranteed by the Constitution of the United States. For example, if the United States Navy has failed to provide an adequate administrative hearing to persons denied a security clearance, such persons may be deprived of liberty or property without procedural due process of law. Likewise, if the regulations promulgated by the United States Navy exceed the authority of the order, or if Navy practices exceed the authority of its own regulations, persons denied a security clearance may be deprived of liberty or property without substantive due process of law.

A. Constitutional Guarantees in an Unincorporated Territory

The question arises as to what extent United States citizens residing in Guam or attempting to visit Guam for any purpose are protected by guarantees extended by the federal constitution to United States citizens. The constitutional guarantees extended to a citizen residing within continental United States or in an incorporated Territory are not always extended to United States citizens residing in unincorporated territories.[36] The status of Guam is similar to that of Puerto Rico at the time of the *Balzac* case.[37] In the *Balzac* case the United States Supreme Court held that a Puerto Rican cannot insist upon the right of trial by jury except to the extent it is conferred upon him by his own representatives in his own legislature.[38] In Guam, the Court of Appeals for the Ninth Circuit held that a United States citizen residing in Guam had no constitutional right to a grand jury indict-

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[33] See note 12 *supra*.

[34] The opinion is cited in Letter, *supra* note 22.

[35] "I regret that the classification of this opinion makes it impossible to comply with your request." Letter From Capt. Wilfred Hearn, Asst. Navy Judge Adv. Gen., to W. Scott Barrett, July 30, 1959.

[36] Balzac v. Porto Rico, 258 U.S. 298 (1922).

[37] *Compare* the Organic Act of Guam § 3, 64 Stat. 384 (1950), 48 U.S.C. § 1421a (1958), *with* the Organic Act of Puerto Rico (Jones Act), ch. 145, 39 Stat. 951 (1917) codified in scattered sections of 48 U.S.C. relating to Puerto Rico), as construed in Balzac v. Porto Rico, *supra* note 36, at 305–14.

[38] Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

ment,[39] but that such citizen did have that right pursuant to the Federal Rules of Criminal Procedure.[40] Congress subsequently amended the Organic Act so as to require grand jury indictment only if made available by local law.[41]

Regardless, however, of whether or not all procedural constitutional guarantees are reserved to United States citizens residing in an unincorporated territory, there are certain fundamental rights that are reserved to all United States citizens. In the *Balzac* case, the Court stated:

> The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning, full application in the Philippines and Porto [former sp.] Rico . . . .[42]

B. Substantive Due Process of Law Denied

In a very real sense exclusion from Guam by reason of denial or revocation of a security clearance is a deprivation of liberty and in some instances possibly of property. The only justification for depriving a citizen of liberty and the free choice of residing wherever he pleases within the confines of the United States, including its possessions, and in traveling freely throughout such areas, lies in the war power. However, the extent to which the war power can be used to deprive private citizens of their life, liberty or property without due process of law has been carefully limited,[43] the courts often quoting Mr. Justice Holmes' language in *Chastleton Corp. v. Sinclair:*

> A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.[44]

1. Liberty—The Right to Travel and Work Where One Pleases

> There is more absoluteness about the more directly personal aspects of freedom. . . . However strong the reaction to interference with rights of property or trade, it does and ought to take second place to the reaction against interference with the legal safeguards of personal liberty. Vigilance against the temporary removal of such safeguards . . . is therefore more universally supported than protests against governmental powers over property.[45]

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[39] Pugh v. United States, 212 F.2d 761, 762 (9th Cir. 1954).

[40] *Id.* at 763 (FED. R. CRIM. P. 7(a)).

[41] Act of Aug. 27, 1954, § 1, 68 Stat. 882, amending the Organic Act of Guam § 22(b), 64 Stat. 390, as amended, 48 U.S.C. § 1424(b) (1958). To this date the local legislature has not provided for a grand jury.

[42] Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922).

[43] See, *e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Scherzberg v. Maderia, 57 F. Supp. 42 (E.D. Pa. 1944); Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943); Schueller v. Drum, 51 F. Supp. 383 (E.D. Pa. 1943).

[44] Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924).

[45] FRIEDMANN, LEGAL THEORY 446 (2d ed. 1949).

The right to travel, unrestricted by unreasonable regulations, is one of the rights guaranteed to United States citizens by the fifth amendment of the United States Constitution. The right to work and to reside in any area, State, Territory, or possession of the United States is also a constitutionally guaranteed right, and no restraints may be imposed upon such rights except by reasonable regulations under law. While during World War II the rights of United States citizens were infringed upon to a greater extent than ever before, the courts nevertheless made it quite clear that only an extreme emergency such as the danger of invasion could justify restrictions on the movement of citizens. In recent passport cases the courts have held that the right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law, and that any restraint upon this liberty must conform with the provisions of the fifth amendment.

(a) The "Security Clearance" and "Exclusion" Cases.—During World War II United States citizens of Japanese ancestry were uprooted from their homes and relocated away from the Western Coast. This exercise of the war power was ratified by the Supreme Court in *Korematsu v. United States*.[46] The Court said:

> We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. . . . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[47]

Also during World War II, the Supreme Court upheld a curfew restriction requiring all persons of Japanese ancestry to be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m.[48] Both the exclusion order and the curfew restriction had been imposed pursuant to Executive order.[49] In upholding the validity of the curfew, the Supreme Court stated:

> Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulga-

[46] 323 U.S. 214 (1944).

[47] *Id.* at 219–20.

[48] Hirabayashi v. United States, 320 U.S. 81 (1943).

[49] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

> tion, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. . . . [W]e decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.[50]

It should be noted that the Supreme Court in both the *Korematsu* and *Hirabayashi* cases recognized that individual liberties were being restricted and that under ordinary circumstances the restriction would be unconstitutional. Nevertheless the admittedly discriminatory treatment of United States citizens was justified solely on the ground that the President and Congress could restrict the liberty of citizens by exercise of the war power at a time of great emergency.

Subsequent to the *Hirabayashi* and *Korematsu* cases several cases arose in the United States District Courts involving United States citizens of German ancestry.[51] The plaintiffs in these cases had been excluded by military order from a coastal strip along the eastern seaboard of the United States. Authority to exclude certain persons from such areas had been given to military commanders by an Executive order[52] which had been ratified and confirmed by Congress.[53]

In *Schueller v. Drum*[54] the district court acknowledged that from the evidence produced the plaintiff appeared to be a German sympathizer. Nevertheless the court held that there was not shown such danger as would warrant denial to the petitioner of her right to due process of law. In regard to the situation existing on the eastern seaboard at the time Mrs. Schueller was excluded, the court stated:

> The normal civilian life of the area was being pursued; commercial and industrial activities, their tempo heightened by a demand for greater production, were in private ownership; the courts both federal and state were open and functioning as well as all the administrative and executive departments of government, and it could not be honestly said that ordinary law did not adequately secure public safety and private rights. Accordingly, it would seem to me that Congress "cannot authorize the executive to establish by conclusive proclamation the very thing which, upon familiar principle, would have been the subject of judicial scrutiny." [citing Fairman, *Law of Martial Rule,* 55 HARV. L. REV. 1253, 1272 (1942)]
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> . . . [W]hile I am not unmindful that the issuance of the proclamation by the Commander of the area is some evidence of the finding of the necessity for his assuming control of the functions of civil government, yet where there is a direct interference as here with one's liberty and property,

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[50] Hirabayashi v. United States, 320 U.S. 81, 101–02 (1943).

[51] Scherzberg v. Maderia, 57 F. Supp. 42 (E.D. Pa. 1944); Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943); Schueller v. Drum, 51 F. Supp. 383 (E.D. Pa. 1943).

[52] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[53] Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (now, as amended, 18 U.S.C. § 1383 (1958).

[54] 51 F. Supp. 383 (E.D. Pa. 1943).

> conduct normally beyond the scope of governmental power. such action could only be justified, a constitutional guarantee of freedom can only be abridged, when the danger to the government is real, impending and imminent.[55]

Under present world conditions it cannot be said that the danger of sabotage to Guam is real, impending and imminent. Certainly it cannot be said that there is any impending danger of invasion, nor is the danger of attack any greater to Guam than it is to the entire State of Hawaii or to any city in the United States. Whether or not present conditions justify the Navy in continuing to require a security clearance from United States citizens is subject to judicial review.[56] The consistent conduct of the Navy in immediately granting a clearance in cases of entry without a clearance rather than allowing the matter to be heard by a court of competent jurisdiction indicates that even the Navy is convinced that judicial review would not be favorable to the continuation of the clearance requirement. United States citizens have been prevented from coming to Guam to engage in a legitimate occupation or to live in the place of their choice. This deprivation of those rights under present circumstances is in clear violation of the due process clause of the United States Constitution.[57]

(b) The Passport Cases.—More recently the United States courts have been confronted with the right of United States citizens to travel as affected by regulations issued by the Department of State.[58] The two cases reaching the Supreme Court did not raise the constitutional issue,[59] but the Secretary of State was held not to have authority to deny a passport to citizen applicants solely because of their refusal to be subjected to inquiry into their beliefs and associations.

In the *Shachtman* case[60] the plaintiff sued in the district court to enjoin the Secretary of State from denying application for a passport to visit Europe. His complaint was dismissed and he appealed. The plaintiff had

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[55] *Id.* at 387.

[56] *Cf.* Sterling v. Constantin, 287 U.S. 378, 400–01 (1932); Ebel v. Drum, 52 F. Supp. 189, 195–96 (D. Mass. 1943).

[57] Even a military order placing a civilian establishment "off-limits" is subject to review. If not well-founded it is unconstitutional as being a deprival of a property right without due process of law. Barn Ballroom Co. v. Ainsworth, 67 F. Supp. 299, (E.D. Va. 1946); *cf.* 32 C.F.R. § 761.18 (Supp. 1959). Apparently the Navy places the burden upon the United States citizen to prove he has "legitimate cause" to enter Guam. What is "legitimate" is committed to the Navy's sole discretion.

[58] Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958); Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956); Kraus v. Dulles, 235 F.2d 840 (D.C. Cir. 1956); Shachtman v. Dulles, 235 F.2d 938 (D.C.Cir. 1955).

[59] Kent v. Dulles, *supra* note 58; Dayton v. Dulles, *supra* note 58. Although the constitutional issue was not reached, the language of the Court was extremely strong. See Kent v. Dulles, *supra* at 125.

[60] Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

been granted "a hearing of a sort." The court did not decide whether the hearing complied with all procedural requirements, but held that the action of the Secretary of State in denying the passport was arbitrary and thus denied plaintiff substantive due process of law. The principal ground for the denial appeared to be that the Secretary of State alleged that the plaintiff was a member of an organization listed by the Attorney General as subversive. The correctness of this characterization was denied by the plaintiff.[61]

> What is involved at the present stage is a question of substantive due process—whether the refusal for the reason given, as alleged in the complaint and undisputed thus far by the Secretary, was arbitrary. If so, it is not a valid foundation for the denial, for the Government may not arbitrarily restrain the liberty of a citizen to travel to Europe. Discretionary power does not carry with it the right to its arbitrary exercise. Otherwise the existence of the power itself would encounter grave constitutional doubts.[62]

When one compares the language of the *Shachtman* case with that of the Naval Guam regulations[63] it immediately becomes apparent that the regulations deny substantive due process of law to any applicant who is denied a security clearance to enter Guam. The regulations arbitrarily provide that "under no circumstances will a notice of disapproval include a statement of the reason therefor."[64] Clearly, if the regulations are followed, any denial of a security clearance to any United States citizen is a denial of substantive due process under the fifth amendment of the Constitution. Unexplained denial of a security clearance is arbitrary administrative action outside the authority of law in view of the circumstances existing on the island of Guam at the present time.

2. Equal Protection of the Laws

In its Guam regulations the United States Navy has chosen to discriminate against certain "types" of United States citizens.[65] Those born on Guam or those who became citizens of the United States under the Guam Organic Act of 1950[66] may enter the Guam Island Naval Defensive Sea Area and the Guam Island Airspace Reservation without a clearance. Approximately 35,000 United States citizens are in that category, and a security clearance is not required of them, while a clearance is required of other United States citizens who were not fortunate enough to be born on Guam.

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[61] Shachtman v. Dulles, 225 F.2d 938, 943 (D.C. Cir. 1955).

[62] *Id.* at 941.

[63] 32 C.F.R. §§ 761.1–.24 (Supp. 1959).

[64] 32 C.F.R. § 761.16 (Supp. 1959).

[65] See 32 C.F.R. § 761.10 (Supp. 1959).

[66] 64 Stat. 384, as amended, 48 U.S.C. §§ 1421–26 (1958).

The regulations also discriminate against citizens who do not work for the Government—for that reason alone. Civil service employees and military dependents and many other groups are not required to be cleared, nor does the Navy claim that they have been checked for security purposes.

It would seem that few would venture to vouch for the undivided loyalty of all persons belonging to any of the Navy's favored groups solely because of membership in that group. Yet the Navy arbitrarily requires no clearance of such persons. Clearly the exclusion of such large groups from the clearance requirement is for the purpose of naval convenience and has no relation to security.

Were they to be enacted by a State the naval Guam regulations would undoubtedly be in violation of the fourteenth amendment, which extends equal protection of the laws to all United States citizens. While the fourteenth amendment does not extend to authority exercised by the United States,[67] the Supreme Court has tested the validity of federal legislation under the due process clause of the fifth amendment by the same rules of equality that are employed to test the validity of state legislation under the fourteenth amendment.[68] The equal protection of the laws afforded by the due process clause of the fifth amendment has been spoken of as "that mere minimum of equal protection secured both by the due process clause and by the equal protection clause of the Fourteenth Amendment."[69] Furthermore, the statute or regulation may be so discriminating or so arbitrary and injurious in denying equal protection of the law that it may be said to violate the due process clause of the fifth amendment even though the fifth amendment contains no equal protection clause and provides no guarantee against discriminatory legislation by Congress.[70]

The Supreme Court has held that discrimination against United States citizens of Japanese ancestry was not unconstitutional as being in violation of the fifth amendment where the circumstances were such as to make racial distinctions relevant.[71] During the time United States was at war with Japan racial distinctions were relevant, as it was then possible that some United States citizens of Japanese ancestry might have loyalties toward their mother country. No such distinction is relevant at the present time in respect of Guam.[72] Discrimination against United States citizens on the

[67] Truax v. Corrigan, 257 U.S. 312, 340 (1921).

[68] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937); District of Columbia v. Brooke, 214 U.S. 138 (1909).

[69] Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955).

[70] Detroit Bank v. United States, 317 U.S. 329 (1943); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[71] Hirabayshi v. United States, *supra* note 70. The Court also said, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people...." *Id.* at 100.

[72] It should be noted that by far the greater number of "locally born citizens" are natives of Guam whose ancestry is principally Spanish, Filipino and Chamorro.

sole ground they were not born on Guam is arbitrary and unjustifiable. The regulation appears clearly to be so objectionable on its face that it violates the due process clause of the fifth amendment.

3. Power Exercised by United States Navy Exceeds the Authority of the Executive Order

Assuming Executive Order No. 8683 is valid today, it is submitted that the practical power exercised by the Navy exceeds the authority of the Executive order, and that as a result substantial rights have been denied both United States citizens and aliens.

(a) Enforcement of Exclusions.

> Wherever law ends tyranny begins, if the law be transgressed to another's harm. And whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not . . . may be opposed, as any other man who by force invades the right of another.[73]

The Navy has acknowledged that it has no power whatsoever to exclude anyone from the island of Guam.[74] In spite of that acknowledgment, however, the Navy has as a practical matter excluded numerous persons from Guam by the simple expedient of revoking their security clearance and notifying their employers that they must be repatriated.[75] A prevalent reason for the revocation of an alien's security clearance is that he has placed himself "out of status" for having had the temerity to marry a United States citizen. Employers invariably cooperate, knowing well that future importation of labor depends upon favorable Navy action on security-clearance applications. Though such action is admittedly contrary to law,[76] the Navy continues to revoke clearances, thereby arbitrarily exercising a power it does not have. The rights of aliens under the fifth amendment are also protected if they are permanent residents. In *Kwong Hai Chew v. Colding*[77] the Supreme Court so ruled, saying:

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[73] LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT sec. 202 (1690).

[74] Letter From J. H. Smith, Jr., then Ass't Secretary of the Navy for Air, to Senator William Langer, in Guam Daily News, Dec. 8, 1954, p. 1, cols. 2–4.

[75] A typical exchange of letters will be found in App. A.

[76] In Wilcox v. Emmons, 67 F. Supp. 339 (S.D. Cal. 1946), the plaintiff had been excluded from a military area in continental United States. The military commander who had excluded the plaintiff acted under color of law in an honest belief that he was empowered lawfully to direct the acts of expulsion and exclusion by physical force. The court held that the exclusion order was not self-executing and that defendant did not have lawful power to expel or exclude plaintiff from such area, the statute being a limitation on the power of the military and providing for criminal penalties only. *Cf.* Ochikubo v. Bonesteel, 57 F. Supp. 513 (S.D. Cal. 1944), 60 F. Supp. 916 (S.D. Cal. 1945).

[77] 344 U.S. 590 (1953).

> It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment.[78]

Aliens who have been admitted though not with "permanent resident" status do not have constitutional protection.[79] When the language used in *Kwong Hai Chew* is applied to the Guam situation, however, it would appear that even nonresident aliens should have some rights. The Court there said:

> This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. . . . Before receiving clearance for his foreign cruise, he was screened and approved by the Coast Guard. Before acceptance of his petition for naturalization, as well as before final action thereon, assurance is necessary that he is not a security risk.[80]

Before he enters Guam for any purpose an alien presumably is screened to determine whether he is a security risk. Therefore, an alien subsequently excluded by the Navy without explanation should be given some opportunity to be heard and to show that he has not become a security risk in the interim.

The Navy has exercised considerable arbitrary power in forcing repatriation of aliens, particularly to the Philippines, without lawful authority. A very much-needed and well-qualified nurse employed at the Guam Memorial Hospital was separated from her job due to the fact that her security clearance was revoked shortly after she married a United States citizen.[81] In justification of the policy of revoking an alien's clearance for marrying a citizen a Naval spokesman said that the Navy favors keeping "Guam for the Guamanians."[82] The only other justification ever given by the Navy for

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[78] *Id.* at 596.

[79] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 545 (1950). Even here the majority of the Court justified denial of procedural due process to an alien on the ground that a state of war still technically existed. The Court admitted that in peacetime Congress had provided aliens with a hearing.

[80] Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953). The language of Mr. Justice Jackson in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224–27 (1953) is of interest also, though in a dissenting opinion.

[81] The Government of Guam terminated Mrs. Delfina A. Cataluna's contract for the reason that the Navy had revoked her authority "to remain within, or re-enter the Guam Naval Defensive Sea Area as per letter from Commander Naval Forces Marianas dated April 22, 1957." Termination Notice, April 30, 1957, Signed by Peter C. Siguenza, Director of Personnel. Mrs. Cataluna had been hired in August 1956 on a 2-year contract.

[82] "The U.S. Navy 'does not favor the entry' of Filipinos to Guam 'for the purpose of settling permanently' because U.S. Navy policy is 'to keep Guam for Guamanians,' Rear Admiral William B. Ammon, commander of the U.S. Naval Forces in the Marianas said. Ammon's 'Guam for the Guamanians' statement was in reply to a question as to why the Navy frowns upon any effort of Filipinos to settle permanently on Guam. 'Navy policy is to keep Guam for Guamanians, therefore, it does not look with favor on the entry of any foreigner to Guam for

revocation of an alien's clearance because of marriage to a citizen is that the Navy feels it is not in the best interests of the United States to build up in Guam an alien colony whose members are qualified to become permanent residents.[83]

Just why an alien colony in Guam is detrimental to the interests of national defense has never been fully explained, particularly in view of the fact that there are presently only about 6,500 aliens on the island of Guam, and by far the greater portion of those aliens are working for the United States Government or for contractors of the Government. The fallacy of the "alien colony" argument advanced by the Navy is particularly revealed by the fact that although the United States has far more extensive operations on the island of Okinawa than in Guam, Okinawa has an "alien colony" residing thereon, numbering almost 800,000. This is more than one-hundred times the number of aliens on Guam, although the land area of Okinawa is little more than twice that of Guam. Nor has the Navy given any reason why Filipino aliens should be more detrimental to national defense because they happen to reside in Guam, than Okinawans loyal to the Japanese are detrimental to defense because they reside in the small land area of Okinawa.[83a]

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the purpose of setttling permanently,' he said." Abcede, *Guam Policy Explained,* The Manila Times, Oct. 12, 1956, p. 2, col. 1.

More recently Mr. Abcede wrote a long article in a Manila newspaper commenting on the life of the Filipino on Guam. He said in part: "Despite the enactment of the Organic Act of Guam, establishing the supremacy of civilian authority, the U.S. Navy paper curtain remains to this day. Naval intelligence has been intensifying efforts to fend off foreigners and unwanted Americans.... The clearance requirement has worked hardships on both Americans, Guamanians and Filipinos. The economic life of Guam has also been adversely affected. An estimated 200 Filipino-Guamanian families have been broken up because of this stringent requirement. Filipinos married to Guamanian women and who have been forced by circumstances to visit the Philippines found themselves unable to go back to Guam. In many instances, a breakdown of family ties resulted. The writer presented this problem to Rear Admiral W. B. Ammon, commander of the U.S. Naval Forces in the Marianas in 1956. The Navy was asked whether it discouraged the intermarriage of the two peoples and whether it frowns on any effort of the Filipinos to settle permanently in Guam. Admiral Ammon's reply is quoted: 'The Navy does not encourage or discourage intermarriages and endeavors not to become involved in domestic affairs except as necessary to administer entry clearance regulations. Navy policy is to keep Guam for Guamanians, therefore, it does not look with favor on the entry of any foreigner to Guam for the purpose of settling permanently.' " Abcede, *Filipinos In Guam,* The Manila Sunday Chronicle, July 26, 1959 (Magazine) p. 16, col. 3.

The Department of Justice maintains an Immigration and Naturalization Office in Guam, and the entry of aliens is controlled by that office. Under the ostensible authority of Executive Order 8683, however, the Navy excludes numerous aliens who have been admitted by Immigration authorities for announced reasons no better than "Guam for the Guamanians."

83 "The long term presence on Guam of aliens in large numbers would be a detriment to the effective use of Guam for its primary mission of defense, while heavy population of the island by aliens could not fail to adversely affect the people of Guam and their own economy." Letter From Comdr. Edward L. Beach, Naval Aide to the President, to F. L. Moylan, Guam Businessman, September 20, 1956. The latter reason hardly seems a proper concern of the Navy, even if true.

83a As a further justification for the imposition of the security clearance, the Navy has insisted on its duty to enforce Executive Order No. 8683. See Letter From Ira H. Nunn, Navy

(b) Penalties for Violators.—Navy Guam regulations set forth no less than five sections of the United States Code as providing penalties for violations of Executive Order No. 8683.[84] One of the sections cited[85] is really not applicable to the security clearance program inasmuch as it provides a penalty for entering military reservations. The entire island of Guam is not a military reservation and the Code section therefore applies to Guam only to the same extent that it applies to a United States military reservation, post or camp anywhere in the United States.

Another section cited provides a penalty for violating any regulation or order promulgated pursuant to law by military authority.[86]

A third section cited provides a punishment for knowingly making any false or fraudulent statement or representation.[87] The rather obvious reason for citing that section is seen when one considers the voluminous paper work applicants are required to execute in order to obtain a security clearance.[88]

Another section cited provides a penalty for anyone who knowingly or wilfully violates any Executive order.[89] It is this section that has been "violated" a number of times in Guam by persons who have been denied a security clearance but who nevertheless have entered the island. In their case the Navy has without fail issued them a security clearance forthwith and has not held them long enough to enable their counsel to obtain a writ of habeas corpus.[90]

Judge Adv. Gen., to Rear Adm. H. A. Houser, June 3, 1953. However, although current Navy regulations list all Naval Defensive Sea Areas and Naval Airspace Reservations set aside by Executive order, the Navy has suspended operation of entry controls in no less than nine of these areas. 32 C.F.R. §§ 761.3–.4 (Supp. 1959). Entry control with respect to Tutuila and Rose Islands was revoked by Executive Order No. 10341, 17 Fed. Reg. 3143 (1952). With respect to the other areas, "suspension of the operation of certain entry controls . . . has been accomplished administratively and is subject to reinstatement without notice at any time." Letter From Comdr. C. E. Herrick, Office of Chief of Naval Operations, to W. Scott Barrett, July 31, 1959. It is difficult, to say the least, to reconcile this administrative suspeusion of entry controls with respect to selected areas with a compelling duty of obeying Executive Order No. 8683 with respect to entry controls for Guam. Unfortunately, the opinion of the Judge Advocate General's department which concluded that the Navy had such a duty is unavailable. It is, as has been noted before, a *classified* document. See text at note 35 *supra.*

[84] OPNAV Instruction 5500.11B, Nov. 27, 1957, p. 7, 32 C.F.R. § 761.3(f) (Supp. 1959).

[85] 18 U.S.C. § 1382 (1958).

[86] 64 Stat. 1005 (1950), 50 U.S.C. § 797 (1958).

[87] 18 U.S.C. § 1001 (1958).

[88] Applicants are required to itemize in detail all places of residence and employment for the past 10 years. OPNAV Instruction 5500.11B, Nov. 27, 1957, p. 22, 32 C.F.R. 761.3(b)(3)(iv)-(v) (Supp. 1959).

[89] 18 U.S.C. § 2152 (1958).

[90] One petition for a writ of habeas corpus was actually filed, but the Navy issued a clearance thus rendering the case moot before the court made any decision. Bolosan v. Johnson, Civil No. 29–55, D. Guam, April 20, 1955.

The fifth penalty provision cited by the regulations related to the naval airspace reservations[91] and has been repealed, subject to a savings clause which provided that all orders made by the President under any provision of law repealed or amended by the act, which were in effect at the time the section takes effect, should continue in effect according to their terms until modified, or terminated, superseded, set aside or repealed by the administrator or the board or by any court of competent jurisdiction or by operation of law.[92]

C. Procedural Due Process of Law Denied

The constitutional right to a hearing has been defined in *Morgan v. United States*[93] as follows:

> The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.[94]

Prior to the fourth day of September 1956, the Navy had administered the security clearance program for some 13 years,[95] excluding the time Guam had been occupied by the Japanese, without giving persons to whom it denied a clearance any reason or right to appeal.

As Kelsen has pointed out, the liberties granted under a bill of rights are rights only if there is the right to appeal:

> The liberties it [the Bill of Rights] states are rights in a juristic sense only if the subjects have an opportunity to appeal against acts of State by which the provisions of the constitution are violated in order to get them annulled.[96]

1. The Feraru Case—Appeal Procedure Supplied

In 1953 Arthur N. Feraru was hired by United Seamen's Service to come to Guam in their employ. Subsequently the Navy informed Mr. Feraru that his application for a security clearance had been denied. Mr.

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[91] Act of May 20, 1926, ch. 344, § 4, 44 Stat. 570 (repealed by The Federal Aviation Act of 1958, § 1401, 72 Stat. 806).

[92] Federal Aviation Act of 1958, § 1504, 72 Stat. 811, 49 U.S.C. § 1301 (1958).

[93] 304 U.S. 1 (1938).

[94] *Id.* at 18–19.

[95] During the period between the time of the reoccupation of Guam and Dec. 4, 1950, the Navy did not actually enforce the security clearance; until the passage of the Organic Act in July 1950 it had unquestioned power to exclude anyone from the island. See text at notes 7–9 *supra.*

[96] KELSEN, GENERAL THEORY OF LAW AND STATE 236 (1949).

Feraru then lost his job since the employer apparently required his services only on Guam. Subsequently, in December 1955 Mr. Feraru filed suit against the Secretary of the Navy in the United States District Court for the District of Columbia.[97] The Government filed an answer admitting substantially all of the factual allegations in the complaint but denying that plaintiffs were entitled to relief and denying on information and belief that plaintiffs were loyal to the United States.

Within nine months of the filing of the *Feraru* suit the Office of the Chief of Naval Operations issued a new directive providing a procedure, though grossly inadequate, whereby a United States citizen denied entry to Guam might appeal and receive an administrative hearing.[98] This was the first attempt on the part of the Navy to establish an administrative board to hear appeals. The directive is very brief. It places the burden upon the petitioner to justify his entry into Guam. The petitioner is also required to show that his entry would serve the best interests of the United States. The directive applies only to United States citizens. The board it establishes is composed of three naval officers or employees who are not empowered to make a final decision. That decision is made by the Chief of Naval Operations to whom the board only makes a recommendation.[99]

In January 1957 the *Feraru* suit was continued by stipulation until the Navy could complete the procedure offered the Ferarus under the new directive. Thereafter, the Feraru family, because of personal problems, were forced to delay the "hearing" offered them by the Secretary of the Navy pursuant to the directive. Their counsel thereafter agreed to dismiss the suit without prejudice rather than let it remain endlessly on the docket.[100]

Regardless of the merits of his case, there is no doubt that Mr. Feraru was denied procedural due process of law. Only after suit was filed did the Navy provide for appeal. Still more time passed before the appeal machinery was actually set up. The Navy is notoriously slow in these matters. Nor do the regulations providing for appeal take cognizance of the fact that

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[97] Feraru v. Thomas, Civil No. 5603-55, D.D.C., Dec. 27, 1955.

[98] OPNAV Instruction 5420.18, Sept. 4, 1956 (reproduced in App. B). The Navy originally contended no hearing of any kind was required. "The Navy has at no time made any charges against Mr. and Mrs. Feraru. There is no statutory or legal requirement for a hearing in this case, and there has been no change in Navy Department procedures for handling requests for entry into the Island of Guam. Under the terms of Executive Order 8683 . . . no hearing is provided for and none is contemplated where refusal of entry occurs." Letter From Rear Adm. L. L. Russell to David I. Shapiro, of Deickstein, Shapiro & Friedman, New York, Counsel for Mr. and Mrs. Feraru, November 10, 1955.

[99] Compare the appellate procedure reported in Parker v. Lester, 227 F.2d 708, 712 (9th Cir. 1955). In the *Parker* case, too, the Commandant made the final decision and the burden was on petitioners to show they were good security risks.

[100] Letter From James H. Heller, Counsel for Mr. Feraru, to W. Scott Barrett, May 26, 1959.

when one desires to travel, it is usually a desire which must be acted on immediately or it is frustrated entirely. By the time the appeal procedure had been provided, Mr. Feraru had lost his job. Few persons would have the time and money and inclination to carry a court case forward under such circumstances.

2. The Parker and Greene Cases—Appeal Procedure Inadequate

Unquestionably the Navy directive offering a limited administrative hearing does not provide the procedural due process of law required by the Constitution. In *Parker v. Lester*[101] petitioners were denied security clearances by the Commandant of the Coast Guard and were thereby deprived of their employment as merchant seamen. The commandant's order had been made pursuant to an Executive order [102] authorized by statute.[103] The principal contention of petitioners was that they were subjected to procedures that deprived them of due process of law in violation of the fifth amendment. The district court judge defined procedural due process of law as "the maximum procedural safeguards which can be afforded petitioners without jeopardizing the security program,"[104] but nevertheless held against petitioners. On appeal the court of appeals reversed,[105] holding that the regulations fell short of furnishing the minimum requirements of due process in respect to notice and opportunity to be heard.[106] In so holding the appellate court discussed the regulations provided by the Coast Guard, which were strikingly similar to the Navy directive establishing the review board.[107] The Coast Guard board in *Parker* had before it the complete record on which the Commandant's initial determination to deny clearance was made, but none of this was disclosed to the seamen, although they could appear in person and by counsel and could submit testimony and documentary evidence. The burden of showing that they were good security risks was on the seamen, notwithstanding the fact that they knew neither the names nor the identities of, nor anything else about their accusers. The Commandant had final authority to grant or deny the security clearance. The board only had power to recommend.[108] The court of appeals apparently placed great weight upon the fact that the accused seamen were not furnished with a bill of particulars setting forth the source of the data upon which their security clearances were denied.[109]

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101 227 F.2d 708 (9th Cir. 1955), *reversing* 112 F. Supp. 433 (N.D. Cal. 1953).

102 Exec. Order No. 10173, 15 Fed. Reg. 7005–08 (1950).

103 Magnuson Act § 1, 64 Stat. 427 (1950), as amended, 50 U.S.C. § 191 (1958).

104 Parker v. Lester, 112 F. Supp. 433, 443 (N.D. Cal. 1953).

105 Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

106 *Id.* at 724.

107 Discussed note 98 *supra*; see App. B.

108 *Cf.* OPNAV Instruction 5420.18 (see App. B).

109 Parker v. Lester, 227 F.2d 708, 716 (9th Cir. 1955): "Thus if the Commandant's information is that at a certain time and place the accused seaman in a conversation with an ac-

The Navy directive providing for a limited hearing makes no provision whatsoever for informing the person whose application for entry clearance has been denied as to the source of information upon which the determination was based. Another directive sets forth a form letter which is sent to all persons whose requests for entry authorization are denied.[110] That letter merely states that their entry has been denied because it is not considered in the interests of national defense. The person is then advised that he may appeal the decision by submitting a letter to the Chief of Naval Operations, setting forth in full why the granting of the application would be in the best interests of national defense. Officers are expressly instructed to give no reason whatsoever when they deny a clearance.[111]

In *Greene v. McElroy*[112] an employee of an aircraft factory having access to classified information had his security clearance revoked, thereby causing him to lose his job. The Court of Appeals for the District of Columbia Circuit held that one having access to classified matter may be deprived of his employment without any procedural safeguards. That decision was discussed and criticized in the *California Law Review*,[113] the author concluding that Greene should have been given one or more of the following rights: (1) The right to know the evidence used against him; (2) the right to know the identity of his accusers and to cross-examine them; and (3) the right to inspect reports made by his accusers to the Government.

The Supreme Court granted certiorari and decided the case on June 29, 1959.[114] The Court, Mr. Chief Justice Warren writing the opinion, reversed the court of appeals. The constitutional question was not reached. Rather, the Court apparently preferred to decide the case on the ground that the type of hearing given the petitioner "was the product of administrative decision not explicitly authorized by either Congress or the President."[115] In that connection the Court said:

> 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 hearings where accusers may be confronted, it must be made clear that the President and Congress, within their constitutional powers, specifically have decided that the imposed procedures are necessary and warranted and have authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action. . . . They must be made explicitly

quaintance spoke disparagingly of the American Flag, the seaman will have no information that this incident is being considered, for to mention the charge would be to disclose the informer."

[110] OPNAV Instruction 5500.11B, Nov. 27, 1957, p. 31; see note 2 *supra*. The form letter is not printed in the Code of Federal Regulations.

[111] OPNAV Instruction 5500.11B, Nov. 27, 1957, p. 28, 32 C.F.R. § 761.16 (Supp. 1959).

[112] 254 F.2d 944 (D.C. Cir. 1958).

[113] 46 CALIF. L. REV. 828 (1958).

[114] Greene v. McElroy, 360 U.S. 474 (1959).

[115] *Id.* at 508.

> not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized... 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.[116]

Significantly, the United States Navy cites as its only authority for enforcing the security clearance entry requirement in Guam the Executive order issued by President Roosevelt in 1941. Congress did not ratify that order although the President was authorized by Congress to make it.[117] It is by no means clear that either the President or Congress within their constitutional powers have specifically decided that the procedures imposed by the United States Navy are necessary and warranted. Citizens and aliens alike have been deprived of liberty and property,[118] and the procedures used have afforded less due process than that given to Greene. It must therefore be assumed that Congress and the President intended to afford those affected by the Guam naval security-clearance entry requirement the traditional safeguards of due process.

The issue in the *Greene* case was whether the Department of Defense had been authorized to create an industrial security clearance program under which persons having access to classified information may lose their jobs on the basis of facts determined in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination. It is at once apparent that the authorization given to the Defense Department to administer its clearance program was much more complex and granted greater authority than has been given to the Navy by virtue of Executive Order No. 8683. The appellate procedure offered to Greene appeared to give him an opportunity for a fair hearing which was considerably better than that given by the appellate procedure offered to those denied a security clearance to enter Guam.[119]

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[116] Greene v. McElroy, 360 U.S. 474, 507 (1959).

[117] By virtue of the Act of Mar. 4, 1909, ch. 321, § 44, 35 Stat. 1097, as amended, ch. 180, 39 Stat. 1194 (1917), added by ch. 20, § 19, 40 Stat. 89 (1917) (now, as amended, 18 U.S.C. § 2152 (1958)).

[118] Joseph Siciliano, a local businessman, somehow incurred the enmity of the Navy and has been excluded from Guam and told never to return. The actual reasons are known to no one but the Navy. Siciliano's substantial business interests in Guam have diminished or vanished due to his prolonged absence.

[119] The Board made the final decision. Greene was informed of charges against him but not of the identity of the informers. Greene had access to three appeal boards, the Personnel Security Board (PSB), The Industrial Employment Review Board (IERB) and the Eastern Industrial Personnel Security Board (EIPSB). Greene had been cleared in 1952 by the IERB, which reversed the PSB. On March 27, 1953, the PSB and the IERB were abolished. On April 17, 1953, the Secretary of the Navy arbitrarily and without further hearing revoked Greene's clearance. More than one year later Greene was granted a hearing before the EIPSB which affirmed the Navy's decision.

CONCLUSION

If naval officials were convinced that their security-clearance program was legally unassailable it would seem that some of the many violators would have been prosecuted. On the contrary, as has been pointed out, no one has been prosecuted, and violators who enter the island without a clearance are immediately issued one or are permitted to stay without a clearance rather than allow the entire program to be tested in the civil courts.[120]

If there is some doubt in the minds of naval officials as to the legality of the clearance, why do they insist on continuing to enforce it? The answer hardly can be found in the official reasons given by the Navy as set forth in the introduction to this Article. Many of the reasons given are not valid at the present time due to change in circumstances, and many others have no justification in law. Although one can only speculate, the real reason seems to be that the Navy hesitates to relinquish power which it has exercised for many years over the entire populace of Guam. The Navy once ruled Guam with an iron hand, and the enforcement of Executive Order No. 8683 may be an attempt to retain as much of that rule as possible.

In Hawaii during World War II martial law was in existence. J. Garner Anthony, who was for a time Attorney General of Hawaii during World War II, summed up the reasons why martial law in Hawaii was allowed to continue for years after it was necessary. His words are equally applicable to Guam at the present time:

> Perhaps one of the reasons why martial law in Hawaii was allowed to continue for years without correction from the War Department in Washington lies in the application to the situation in Hawaii of the precept that judgment of the military commander in the field should not be disturbed, a principle valid enough at or near the battlefield, but dangerous when applied generally. No one likes to admit error. It is only human to defend a position once it is publicly asserted. However, in the face of convincing proof most people will give way. In the military system this would be looked upon as a sign of weakness. Once a decision is reached by a military commander, change will be resisted even in the face of almost conclusive evidence of error.[121]

Others have also spoken out against the Navy security-clearance requirement in Guam. In a speech before the Multnomah County Bar Association in Portland, Oregon, in August 1957, Judge J. Frank McLaughlin of the United States District Court of Hawaii spoke out against the legality

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[120] Numerous individuals have entered through the Air Force base in Guam without a naval clearance, though they are not included in the Navy's exempt groups. See note 28 *supra* and text at note 89 *supra*.

[121] ANTHONY, HAWAII UNDER ARMY RULE 122 (1947).

of the Guam security clearance.[122] His speech was commented upon in an editorial in the *Portland Oregonian*.[123] The editorial referred to an incident involving Ford Q. Elvidge, Governor of Guam from 1953 to 1956. Governor Elvidge wrote after leaving his post that he had been surprised by the number of prostitutes in Guam whose origins were in other countries. He asked a Navy officer why these girls, whose vocation was apparent, were admitted in such numbers whereas a casual tourist would be turned down. "Governor," said the officer, "our clearance is for security, and we haven't any reason to think these girls are subversive."

The editorial comment continued:

> There were probably few lawyers in Judge McLaughlin's audience who would want to undertake to justify legally the U.S. administration's high hand in Guam. The security regulations are, according to the Navy, based on an order issued by President Franklin D. Roosevelt.... [A]ctually the Navy is not in charge of civil administration in Guam. This, since 1950, has been the responsibility of the Department of Interior operating through a governor appointed by the President. The Government has limited the veto power over the locally elected unicameral legislature.... It is not clear why Guam should be the most stringently guarded of all U.S. territories ... [for] the scars of war have disappeared from Guam. Its beaches rival in beauty any in the Pacific. Its climate is near perfection. But U.S. tourists are not likely soon to explore its charms. The U.S. Navy doesn't want to be bothered. In fact, a Naval spokesman has been heard to take credit for keeping all sorts of "riffraff" out of Guam under cover of the Security Program.[124]

One can only conclude that the United States Navy is intentionally enforcing the naval security clearance while realizing at the same time that it is unsupported by statute and is unconstitutional. The words of Judge McLaughlin are again appropriate, though he was commenting upon the fact that the Army continued martial law on Hawaii long after it was necessary. He said:

> Yes, "they did it." They did it intentionally. They did it with design aforethought. They did it in knowing disregard of the Constitution. They did it because Hawaii is not a State. They did it because they did not have faith that Americanism transcends race, class and creed.[125]

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[122] Judge McLaughlin has visited Guam as Judge of the Guam District Court, Appellate Division.

[123] Bauer, *American Guam Off-Limits to Americans*, Portland Oregonian, Aug. 4, 1957, p. 42, cols. 4–5.

[124] *Ibid.*

[125] ANTHONY, HAWAII UNDER ARMY RULE 118 (1947), quoting from the *Honolulu Advertiser*, Feb. 28, 1946.

APPENDIX A

(1) *Denial of Clearance by Commander Naval Forces Marianas:*

U.S. PACIFIC FLEET
COMMANDER NAVAL FORCES MARIANAS
Fleet Post Office
San Francisco, California

FF5—9/20
A2—9/1
Ser 15424
Mar. 9, 1957

From: Commander Naval Forces Marianas

To: Commander 3rd Air Division (SAC) Andersen Air Force Base
ATTN: Provost Marshall

Subj: Guam entry clearances; denial of

1. In view of information obtained by Commander Naval Forces Marianas during the processing of the following Filipino contract laborers for regular Guam entry clearances, the authorization for these men to remain within, or re-enter the Guam Naval Defensive Sea Area is hereby denied:

* * * * * * * * * * *

PALICAN, Feliciano (Clerk) Laundry

* * * * * * * * * * * *

2. It is requested that these Filipino contract laborers be repatriated to the Philippines as soon as possible. It is further requested that the Commander Naval Forces Marianas be notified when the repatriation of the above men has been accomplished.

/s/ G. W. Roberts
/t/ G. W. ROBERTS
By direction

Copy to:

. . . .

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(2) *Letter Cancelling Employment*

Central Civilian Personnel Office
3960TH AIR BASE GROUP (SAC)
United States Air Force
APO 334, San Francisco, California

BPCP 29 March 1957

SUBJECT: Notice of Proposed Separation (Disqualification)

TO: Mr. Feliciano Palican
3960th Supply Squadron

ATTN: Base Laundry
APO 334

1. This notice is issued in accordance with the provisions of Civil Service Regulation 9.102(a) and Chapter AFS1 of AFM 40-1. You are hereby given 30 days notice of proposed

action to separate you from your position for disqualification not earlier than 1 May 1957 for the following reason:

(a) Your separation was requested by the Department of Navy, letter dated 9 March 1957 which indicated that your Guam entry clearance had been revoked. Since you are no longer in possession of the necessary clearance, it is therefore necessary to separate you from the service.

2. You are hereby informed of your right to reply personally and in writing to this notice of proposed separation and to show cause why the action should not be taken. You may submit affidavits and evidence in support of your answer. Your reply must be made within seven calendar days of receipt of this notice. A written reply should be made to the Civilian Personnel Office.

3. No decision to separate you has been made or will be made until after the time allowed you for reply. Your reply will be given full and careful consideration before final decision is made. Whether you reply or not, a written notice of final decision will be given you.

4. You will be continued in a work status during the notice period in your present position until you are instructed to clear the base for transportation to the Philippines Islands on or about 1 May 1957.

BY ORDER OF THE COMMANDER:

s/ William L. Puett
WILLIAM L. PUETT
Civilian Personnel Officer

APPENDIX B

Establishment of Naval Defensive Sea Area Review Board

DEPARTMENT OF THE NAVY
Office of the Chief of Naval Operations
Washington 25, D. C.

OPNAV 5420.18
Op—215
Ser. 4365P21
4 Sept 1956

OPNAV INSTRUCTION 5420.18

From: Chief of Naval Operations

To: Distribution List

Subj: Naval Defensive Sea Area Review Board; establishment of

Ref: (a) General Order No. 13

(b) OPNAV INSTRUCTION 5500.11A (Security clearance procedure for entrance of individuals to Guam, Trust Territory of the Pacific Islands, Bonin-Volcano Islands and Marcus Island, Midway, Wake and Johnston Island)

1. Purpose. This Instruction establishes the OPNAV Naval Defensive Sea Area Review Board and sets forth the policies and procedures governing operations of the Board.

2. Composition of the Board. The OPNAV Naval Defensive Sea Area Review Board is hereby established in the Office of the Chief of Naval Operations and will be composed as follows:

a. One (1) Rear Admiral USN who will act as Chairman and will be designated by the DCNO (Administration).

b. One (1) civilian member GS–14, or above, designated by the DCNO (Administration).

c. One (1) Captain USN or one civilian GS–14, member, who will be appointed by the DCNO (Administration).

d. There will be a Recorder to provide staff assistance to the Board who will be appointed by the DCNO (Administration).

3. Duties and Responsibilities of the Board. The Board will act only in the case of U.S. citizens who make application for entry into a defensive sea area and who are denied entry. Such individual whose entry is denied under the provisions of reference (b) may petition the Board for further consideration of the case, by submitting a request in writing to the Chief of Naval Operations. The petitioner may appear at his own expense or be represented by counsel, and may present a reasonable number of witnesses who have intimate knowledge of the circumstances. In this connection, the Board has the right to restrict the number of witnesses is so far as contribution of additional information is concerned. After fair and reasonable effort to ascertain facts has been made, the Board will recommend to the Chief of Naval Operations the final disposition in the case.

4. Policy. It is incumbent upon the petitioner to provide full justification for his entry and to show that the interests of the United States are served by such entry.

5. Procedures. In order to execute its mission the Board may take the following action as appropriate:

a. Request testimony (not under oath) from interested parties as deemed necessary, except that the petitioner may at his option testify under oath or submit sworn statements. The Board does not have the power of subpoena.

b. Request services of technical specialists who are able to assist the Board in the establishment of fact.

c. Obtain from other sources information which will enable the Board to render its determination without prejudice or bias.

d. The Board will prepare a brief of the significant issues and facts in presenting its recommendation to the Chief of Naval Operations for his final decision.

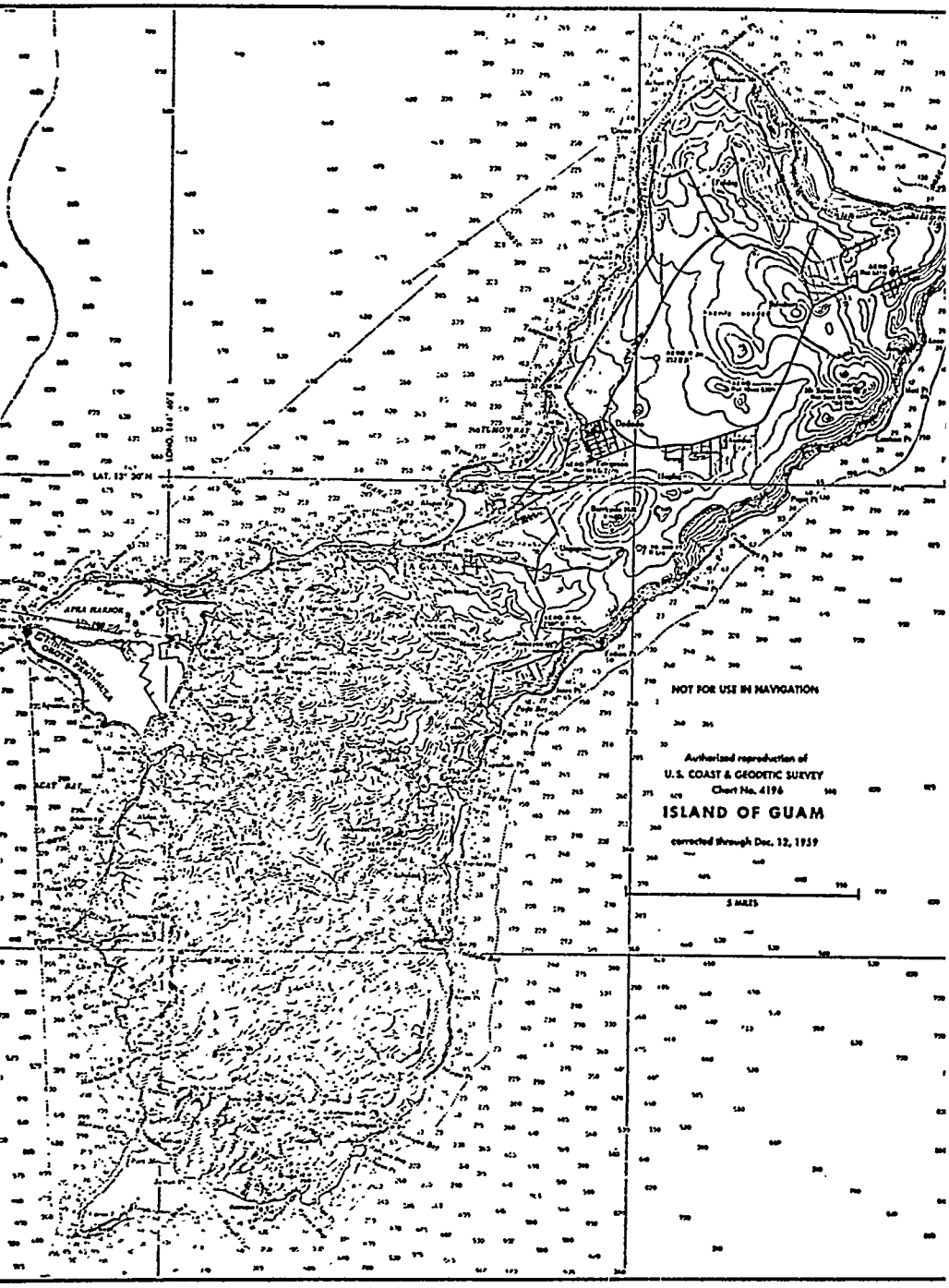
e. The Board may establish such other procedures as it deems necessary.

ARLEIGH BURKE

Distribution:

. . . .

APPENDIX C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