

Comments

GOD, THE ARMY, AND JUDICIAL REVIEW: THE IN-SERVICE CONSCIENTIOUS OBJECTOR

[J]udges are not given the task of running the Army. The responsibility . . . rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

—*Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953)

Seldom does one encounter a proposition so unexceptionable as that given expression by Justice Jackson in the above extract from the majority opinion in *Orloff v. Willoughby*.¹ For who would deny—in view of the doctrine of separated powers,² the express constitutional delegation to Congress and the President of fundamental authority over military affairs,³ and the specialized nature and unique disciplinary requirements of the armed forces—that it ill befits the federal judiciary⁴ to “interfere” with “legitimate Army matters”? In refusing so to interfere on behalf of an army doctor seeking judicial review of his alleged unlawful retention in the army as an enlisted man, the *Willoughby*⁵ court was merely observing, and to a certain extent rejuvenating, a principle of such venerable origins and frequent application over the years as to readily admit

¹ 345 U.S. 83 (1953).

² In the words of James Madison: “It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.” *THE FEDERALIST* No. 48, at 308 (H. Lodge ed. 1888) (Madison).

³ The Constitution expressly empowers Congress to:

[P]rovide for the common Defence . . . ;

....

To declare War . . . ;

To raise and support Armies . . . ;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces

U.S. CONST. art. I, § 8. It further provides that: “The President shall be Commander in Chief of the Army and Navy of the United States” U.S. CONST. art. II, § 2.

⁴ The Supreme Court has acknowledged for almost a century that *state* courts have no jurisdiction over actions taken by United States military authorities. See *Tarble v. United States*, 80 U.S. (13 Wall.) 397 (1871); cf. *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

⁵ This case is discussed in some detail in text accompanying notes 204-18 *infra*.

to characterization as a "rule" of administrative law. To wit: determinations of the armed services which involve only their own personnel are normally not reviewable by civilian courts.⁶ This rule of nonreviewability of internal military actions is reflected not only in the absence of any provision for the direct review of courts-martial convictions by the civil courts,⁷ but also in the traditional limitation of their collateral review to habeas corpus proceedings,⁸ at which the single question they consider is the military court's jurisdiction.⁹ It is also manifested in the well established notion that military *administrative* action demands an

⁶ See Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186-87 (1962); Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223 (1967); notes 7-11 *infra*.

⁷ The decisions of courts-martial are not subject to direct review in the federal courts. *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953); *Hiatt v. Brown*, 339 U.S. 103 (1950); *Johnson v. Sayre*, 158 U.S. 109 (1894); *Ex parte Vollandigham*, 68 U.S. (1 Wall.) 243 (1863); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 50 (2d ed., Gov't Printing Office Reprint, 1920) [hereinafter cited as WINTHROP]. Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876 (1964), provides:

Finality of Proceedings, findings, and sentences.—The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive . . . and . . . are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

See generally Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961); Kuenzel, *Federal Court Jurisdiction over Courts-Martial*, 1 WASHBURN L.J. 25 (1960).

⁸ Historically, the findings and sentences of military tribunals have been subject to limited collateral review by the federal courts, primarily by writ of habeas corpus. See *Burns v. Wilson*, 346 U.S. 137, *rehearing denied*, 346 U.S. 844 (1953); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Reed*, 100 U.S. 13 (1879); *cf. Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966). In enacting the Uniform Code of Military Justice, Congress clearly intended to preserve this procedure as an unwritten exception to the general finality provision of article 76, see note 7 *supra*. See H.R. REP. No. 491, 81st Cong., 1st Sess. 35 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949).

⁹ In *Hiatt v. Brown*, 339 U.S. 103, 111 (1950), the Court stated: "It is well settled that 'by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial The single inquiry, the test, is jurisdiction.' *In re Grimley* 137 U.S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision." In *Ex parte Reed*, 100 U.S. 13, 23 (1879), the Court said: "Every act of a court beyond its jurisdiction is void. . . . [But a] writ of *habeas corpus* cannot be made to perform the function of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous and voidable, but absolutely void." *Accord, Carter v. McClaughry*, 183 U.S. 365 (1902); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858). But see text accompanying notes 219-30 *infra*, for recent developments in this area.

exception to the presumptive availability of judicial review¹⁰ which applies to the general body of administrative activity.¹¹

The courts have stated the principle that they should not examine the legality of otherwise reviewable actions which take place within the military establishment so often and with such conviction that its validity as a general precept can scarce be questioned. As Chief Justice Warren recently observed:

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel.¹²

As is so often the case with principles, however, the appearance of clarity obtainable in its abstract expression—witness Justice Jackson's oft-quoted and rather platitudinous language above—is largely dissipated in its application to the concrete case.

This phenomenon is especially noticeable where the concrete case does not involve a matter of formal "military justice" as administered by courts-martial. In the area with which this Comment is primarily concerned—that of nonjudicial administrative action—it is but necessary to examine a cross-section of the decisions which purportedly reflect a "hands off" attitude to discover that while the principle may remain constant, its application produces a number of distinct variations. Some of the cases deal with the *fact*¹³ of review, others focus on the *scope*¹⁴

¹⁰ 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.07, at 31 (1958) [hereinafter cited as DAVIS]: "The decisions of the past two or three decades fit reasonably well the idea of a *presumption of reviewability* that may be rebutted by affirmative indication of legislative intent in favor of unreviewability, or by some special reason for unreviewability growing out of the subject matter or the circumstances." (Emphasis added.)

Professor Davis points out, however, that the Supreme Court has not expressly formulated this presumption. *Id.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336 (1965) [hereinafter cited as JAFFE] states: "I start with a rash, and some will say a meaningless, proposition. It is this: in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity. This is to me the teaching of our history and tradition. It is our common law, and in a lesser measure a corollary of our constitutions."

¹¹ 4 DAVIS, *supra* note 10, at § 28.07, at 32; JAFFE, *supra* note 10, at 363, 366-69; see *Harmon v. Brucker*, 243 F.2d 613, 619 (D.C. Cir. 1957), *rev'd on other grounds*, 355 U.S. 579 (1958); *Palmer v. United States*, 72 Ct. Cl. 401, 406 (1931).

¹² Warren, *supra* note 6, at 187.

¹³ Professor Jaffe refers to this aspect of the problem as "judicial review *vel non*," by which is meant the elementary question "whether an action is in any likely case reviewable at all." JAFFE *supra* note 10, at 336-37. Professor Davis is more specific: "Action is called unreviewable when the court theoretically may neither decide questions of law nor determine whether substantial evidence supports the findings." 4 DAVIS, *supra* note 10, at § 28.02, at 8.

¹⁴ The term "scope of review" possesses both a broad and a narrow meaning in com-

of review, while still others emphasize the proper *time*¹⁵ for review. Not infrequently, the courts exhibit a tendency to blur the boundary lines separating these theoretically distinct concepts and to lump them all together within the framework of a deceptively simple reviewable-non-reviewable dichotomy.¹⁶ Even greater difficulties often arise from the fact that the principle is not absolute. As the use of the word "normally" in the above statement of the rule¹⁷ implies, the courts have recognized a number of significant exceptions whose dimensions resist precise definition.

Nowhere is this conceptual disorganization and lack of uniform application of the basic principle better illustrated than in five recently reported cases¹⁸ concerning "in-service conscientious objectors."¹⁹ These

mon usage. In the former sense, it is used to describe the mode or measure of review adopted by an appellate court. Thus, the "scope of review" in a particular case might extend, for example, to any or all of the following: 1) jurisdictional questions; 2) constitutional issues; 3) matters of statutory interpretation; 4) allegations of clear abuse of discretion; 5) questions of fraud; or 6) issues of fact. *See* 4 DAVIS, *supra* note 10, at § 28.02, at 6-7. In its narrow sense, "scope of review" refers to the proper standard of review of the facts. For example, an appellate court might examine the record to determine whether the findings of the trial court are supported by "substantial evidence," have a "basis in fact," are "clearly erroneous," or are against the "weight of the evidence." *See* JAFFE, *supra* note 10, at 596, 618-20. In the interest of clarity, the term will be used only in its broad sense in this Comment, all references to the more narrow concept being expressed in terms of the "standard of review."

¹⁵ See text accompanying notes 245-48 *infra*.

¹⁶ *See* 4 DAVIS, *supra* note 10, at § 28.02; JAFFE, *supra* note 10, at 153.

¹⁷ See statement of rule in text accompanying note 6 *supra*.

¹⁸ *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967), *petition for cert. filed*, 36 U.S.L.W. 3317 (U.S. Feb. 5, 1968) (No. 1081); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3250 (U.S. Dec. 19, 1967); *Chavez v. Fergusson*, 266 F. Supp. 879 (N.D. Cal.), *appeal docketed*, No. 21, 944, 9th Cir., June 27, 1967; *Gilliam v. Reaves*, 263 F. Supp. 378 (W.D. La. 1966); *In re Kanewski*, 260 F. Supp. 521 (N.D. Cal. 1966). These cases are discussed in text accompanying notes 25-65 *infra*.

¹⁹ At the time the petitioners in these cases initiated their respective actions, § 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. § 456(j) (1964), provided in part as follows:

Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objection whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate.

In June 1967, Congress redesignated this act as the "Military Selective Service Act of 1967"

cases involved members of the armed services who claimed to have become bona fide conscientious objectors after²⁰ having entered upon active duty. In each case the serviceman first sought to obtain recognition of his conscientious objector status through administrative procedures provided by his particular service,²¹ and in each case the military authorities disapproved the application under circumstances which afforded the applicant a basis for challenging the denial on constitutional or statutory

and made several substantive changes in its provisions without, however, materially altering the language quoted above. 50 U.S.C.A. APP. §§ 451, 456(j) (1951), as amended, (Supp. 1967). On the general nature and history of the conscientious objector exemption, as well as particular problems in its administration, see *United States v. Seeger*, 380 U.S. 163 (1965); NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE, IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (*Marshall Report*) 48-51 (Feb. 1967); I CONSCIENTIOUS OBJECTION (Selective Service System Special Monograph No. 11, 1950); Conklin, *Conscientious Objector Provisions; A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963); Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION AND THE PUBLIC ORDER 3 (1966); Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952); Comment, *Constitutionality of Requiring Belief in Supreme Being For Draft Exemption as Conscientious Objector*, 64 COLUM. L. REV. 938 (1964); Comment, *Conscientious Objection and the First Amendment*, 34 U. CHI. L. REV. 79 (1966).

²⁰ Selective Service Regulations provide that a claim for conscientious objector status must be made *before* the individual concerned has been ordered to report for induction. 32 C.F.R. § 1625.2 (1967). See *United States v. Taylor*, 351 F.2d 228 (6th Cir. 1965); *Boyd v. United States*, 269 F.2d 607 (9th Cir. 1959). But cf. *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966). See generally Comment, *Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption*, 72 YALE L.J. 1459 (1963). The Department of Defense and the various armed services have incorporated similar waiver provisions into their regulations governing recognition of in-service conscientious objectors. See note 21 *infra*.

²¹ Pursuant to his general power to control the Department of Defense under 10 U.S.C. § 133 (1964), the Secretary of Defense has issued a directive, the stated purpose of which is to establish "uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection." Department of Defense Directive No. 1300.6, pt. I (Aug. 21, 1962) [hereinafter cited as DOD 1300.6]. These procedures apply to "all personnel of the Army, Navy, Air Force, and Marine Corps and to all Reserve components thereof." *Id.* at pt. II (emphasis added). No distinction is made between inductees and enlistees. See note 26 *infra*. Part III of the directive is entitled "POLICY," and in addition to certain provisions discussed *infra* at note 69, it contains the following: "[R]equest for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained." *Id.* at pt. III, ¶ c. Part IV is entitled "CRITERIA," and sets forth the guidelines to be used in evaluating the claim. Part V describes in detail the "PROCEDURE" to be followed in processing a claim. Each of the individual services has promulgated its own regulation in implementation of this directive. See Army Reg. 635-20 (May 1, 1967); Air Force Reg. 35-24 (March 8, 1963); Bureau of Naval Personnel Instruction 1616.6 (Nov. 15, 1962). The Army Regulation is discussed in detail in text accompanying notes 109-26 *infra*.

grounds.²² The individual servicemen subsequently initiated proceedings in federal district courts, seeking by various means to obtain full judicial review of the administrative process which denied them the status and concomitant benefits to which they believed they were entitled.

As the summary of these cases below will reveal, in only one case²³ did the court show no hesitancy in granting the petitioner the full measure of review he sought. In the remaining four, the courts demonstrated with varying degrees of clarity their awareness of a limitation upon their power of review, derived from the fact that the action to be reviewed was that of the military. What is more significant, however, is the fact that even where such a principle was expressly recognized, the courts failed to give it uniform application. While this lack of uniformity might be neither surprising nor cause for concern had the cases involved differing factual situations or a diversity of issues for review, or even had they been decided over a substantial period of time, there are no such mitigating factors here. The inconsistency with which the courts handled these five cases—strikingly similar factually and arising within a single year—leads one to the inescapable conclusion that the principle of judicial restraint which *Willoughby* enunciated is not at all well defined or understood by the courts whose actions it purports to govern.

The second lesson to be extracted from these cases, only slightly less obvious than the first, flows from the realization that the application or nonapplication of the principle did not take place in a vacuum. This striking absence of judicial harmony arose in the context of five concrete lawsuits, all involving basically the same type of petitioner, type of claim, and set of grievances. It is possible, therefore—and perhaps even likely in view of the lack of familiarity of the courts with such cases²⁴—that the apparent confusion grew as much from a lack of understanding of the in-service objector and his claim, as from an inadequate grasp of the nonreviewability rule.

This Comment, therefore, will be devoted to both the rule and its

²² See text accompanying notes 127-49 *infra*.

²³ *In re Kanewske*, 260 F. Supp. 521 (N.D. Cal. 1966).

²⁴ Other than the five cases cited in note 18 *supra*, there is apparently only one reported case dealing with the denial of a serviceman's request for conscientious objector status: *In re Green*, 156 F. Supp. 174 (S.D. Cal. 1957), *appeal dismissed*, 264 F.2d 63 (9th Cir. 1959). This case is not deemed worthy of treatment in the text for two reasons: 1) The petitioner's application for discharge was made pursuant to regulations which were superseded in 1962 when the Department of Defense adopted its current policy regarding discharge of conscientious objectors under DOD 1300.6, *supra* note 21; 2) the *Green* court listed at least seven different grounds upon which relief could have been denied—ranging from a lack of jurisdiction to review the claim, to the insufficiency of the merits of the petitioner's case—thus rendering the decision of doubtful value in the context of an attempt to isolate and evaluate the reasons underlying a grant or denial of judicial review.

object. Part I will examine in some detail the basis for and nature of the serviceman's claim, while Part II will attempt to unravel the uncertainty which surrounds *Orloff v. Willoughby* and the principle of nonreviewability for which it stands. A necessary first step is a brief review of the five above-mentioned cases, which, when viewed collectively, illustrate in rather dramatic fashion the dimensions of the problem.

I

THE IN-SERVICE CONSCIENTIOUS OBJECTOR

*A. To Review or Not To Review: Five Recent Cases**1. In re Kanewske*²⁵

The petitioner enlisted²⁶ voluntarily in the United States Navy. Approximately six months later he submitted an application to be discharged as a conscientious objector. Upon receiving notification that his application had been denied, he left his place of duty without proper authority, remaining away for some two months before surrendering to naval authorities at Treasure Island, California. While in confinement awaiting trial, he compounded his difficulties by refusing to inventory his sea bag and don brig clothing when ordered to do so. Tried by court-martial on charges of unauthorized absence and refusal to obey lawful orders, he was convicted and sentenced to serve three years in confinement at hard labor. This sentence was subsequently reduced to eighteen months, and Kanewske was transferred to the naval brig at Portsmouth, New Hampshire, for the period of his confinement.

²⁵ 260 F. Supp. 521 (N.D. Cal. 1966).

²⁶ There are three modes of entry into the military service of this country: 1) enlistment; 2) induction; 3) appointment. The term "enlistment" describes the process by which an individual enters into a voluntary contract with the United States, whereby the former agrees to serve in the armed forces for a specified term of years. WINTHROP, *supra* note 7, at 538. More than a simple contractual relationship is created, however, since enlistment also confers upon the individual a kind of disability known as "military status." *In re Grimley*, 137 U.S. 147, 152 (1890); *United States v. Blanton*, 7 U.S.C.M.A. 664, 665, 23 C.M.R. 128, 129 (1957). While the ramifications of the concept are not easily encapsulated, the principal effect of such "status" on the enlistment contract is to render it a "transaction in which private right is subordinated to the public interest. In law, it is entered into with the understanding that it may be modified in any of its terms, or wholly rescinded, at the discretion of the State." WINTHROP *supra* note 7, at 539.

The term "induction," on the other hand, refers solely to individuals conscripted under the draft law, and may be defined as "the procedure . . . and necessary processing to complete the transition from civilian to military status, for a period of defined obligation under the Universal Military Training and Service Act [now the Military Selective Service Act, 50 U.S.C.A. APP. §§ 451-73 (1951), *as amended*, (Supp. 1967)], as amended." Army Reg. 601-270, ¶ 17g (August 1965). The term "appointment" applies only to officers, denominating the process whereby an individual is vested with military office. *See, e.g.*, 10 U.S.C. §§ 593, 597, 3284, 3447 (1964).

While in custody at Treasure Island, the petitioner filed two petitions for writs of habeas corpus,²⁷ each alleging that the navy was holding him in unlawful custody and challenging the validity of the prior administrative denial of his application for discharge as a conscientious objector. In the first petition, he took the position that the denial was arbitrary and unwarranted by the evidence; in the second, he challenged the procedure which the applicable Department of Defense and Navy regulations established,²⁸ contending that it did not satisfy the minimum requirements of procedural due process. The district judge took a very liberal approach to the question of the proper measure of review, as is demonstrated by his fourth "Finding of Fact", contained in the order denying the first petition:

Respondents have followed and complied with provisions of applicable directives of the Department of Defense and Articles of the Manual of the Bureau of Naval Personnel in according petitioner full opportunity to submit his request and in the disposition thereof. The record contains a full and adequate statement of evidence upon which the Secretary of the Navy could base his finding that the petitioner is not entitled to a discharge as a conscientious objector.²⁹

Such a finding indicates a review of the facts which would seem entirely inconsonant with any rule of nonreviewability. In like manner, the court proceeded to consider fully the merits of the constitutional claims which the second petition raised, never intimating that it recognized any limitation whatsoever on its power of review. While the second petition ultimately shared the fate of the first, leaving Kanewske to languish in the Portsmouth Naval brig, he could at least console himself with the knowledge that he had obtained—as will become increasingly apparent—an exceptionally comprehensive judicial review of his claims.

2. *Gilliam v. Reaves*³⁰

Gilliam, an army inductee undergoing basic training at Fort Polk, Louisiana, sought a writ of habeas corpus on grounds that the army had acted in an arbitrary and unconstitutional manner in denying him a discharge as conscientious objector. In particular, he urged that the language which the Adjutant General used in denying his request was proof that

²⁷ The first petition was filed and relief was denied while Kanewske was in confinement at Treasure Island awaiting trial. Civil No. 45235 (N.D. Cal., July 8, 1966). The second petition was filed after his conviction by court-martial, but prior to his departure from California. The court's reported order dismissing this later petition forms the basis for the discussion of the case in the text.

²⁸ DOD 1300.6, *supra* note 21; Bureau of Naval Personnel Instruction 1616.6 (Nov. 15, 1962).

²⁹ 260 F. Supp. at 523.

³⁰ 263 F. Supp. 378 (W.D. La. 1966).

the army had "placed a premium upon church membership, thereby stepping over Mr. Jefferson's wall and the law as set out in *Seeger*."³¹ He thus asked the court to review the factual basis for the army's administrative action, not so much to determine whether the record contained "substantial evidence" to support the denial, but rather to determine whether the denial was actually based on the fact that petitioner was not a churchgoer. If this was the case, observed the court, "then that action would not only have violated the rule of *Seeger*, but it would also have violated the Due Process Clause of the Fifth Amendment, as well as the Free Exercise and Establishment Clauses of the First Amendment in that it would have rewarded church membership while discriminating against non-church membership."³²

Having accepted the petitioner's premise concerning the unconstitutionality of discriminating against nonchurchgoers, the court focused its attention upon the decisionmaking process and the evidence upon which the Adjutant General might have made his decision. In so doing, there can be little doubt that it thoroughly examined the factual basis for Gilliam's claim to conscientious objector status, as is indicated by the court's explicit statement that "the evidence substantiates the denial."³³ It should be noted, however, that such an unlimited review was by no means essential to the court's conclusion that: "The totality of the evidence convinces us that the Army rejected the request for discharge because it concluded that Gilliam's professed 'religious belief' was not truly held." ³⁴

³¹ *Id.* at 382 (footnote omitted). Here the reference is to *United States v. Seeger*, 380 U.S. 163 (1965), and to Justice Frankfurter's concurring opinion in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), wherein it is stated: "Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a 'wall of separation,' not of a fine line easily overstepped." *Id.* at 231. The petitioner's contention was based upon the army's official response to his application:

1. The application for release as a conscientious objector submitted by Private Warren E. Gilliam, Jr., is not favorably considered.

2. *Private Gilliam is not a member of a religious organization or Sect* and the evidence as presented does not warrant separation. In reaching this decision consideration was given to the opinion of the Director of the Selective Service System.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/ H. F. Wise

[for the] Adjutant General

263 F. Supp. at 382 (emphasis added). It should be noted that the particular challenge raised by Gilliam was predicated upon the language given emphasis above. Had the army adhered to its usual practice of omitting any such explanation from its notification of denial, this method of attack would not have been available. See text accompanying note 124 *infra*.

³² 263 F. Supp. at 383.

³³ *Id.* at 384.

³⁴ *Id.* at 385. Note that the court did not hold that the petitioner's objection was in-

Had the court said no more than this, the case would clearly fit the pattern of unrestricted reviewability established by *Kanewske*. There is unmistakable language in the opinion, however, which indicates that the court—its actions to the contrary notwithstanding—recognized a definite limitation upon at least the *standard* of review allowable when the action being reviewed was that of the military establishment. Witness the following paragraph, which immediately preceded the court's conclusion:

Our attention has not been directed to any reported case challenging a military denial of a discharge by a conscientious objector; but in our judgment, the scope for reviewing the action of a selective service board by habeas corpus³⁵ is identical to that to be applied in reviewing the action of the Army. . . . Surely, under the facts of this case and the *narrow scope of review* given, we would not be justified in overturning the Army's refusal to grant the exemption.³⁶

Thus, Gilliam remained the guest of Uncle Sam at Fort Polk, his sense of satisfaction at having been accorded full judicial review doubtless undiminished by the suggestion that the court might have overstepped its powers.

3. *Brown v. McNamara*³⁷

Private David Brown, an army enlistee stationed at Fort Dix, New Jersey, also professed to have become a conscientious objector since entering the service. Having completed only two weeks of basic training, his religious beliefs allegedly "crystallized" to the point where he felt unable to continue to serve as a soldier in the United States Army. He therefore refused to proceed further with combat training, and initiated

sincere, but merely that the army—right or wrong—had so determined. Because of the rather novel mode of attack employed in this case, the measure of review which the court would have afforded a straightforward "arbitrary and capricious denial" argument is uncertain.

³⁵ (Author's footnote.) The standard of review applicable in cases where the subject of the court's scrutiny is a draft classification established by the Selective Service System has been described as the "narrowest known to the law." *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir. 1957). The decision of a local draft board can be reversed "only if there is *no basis in fact* for the classification which it gave the registrant." *Estep v. United States*, 327 U.S. 114, 122-23 (1946) (emphasis added) (this was the result of the Court's interpretation of statutory language which expressly provided that the determinations of local boards would be "final"). Although *Estep* was not a habeas corpus proceeding, the Court decreed that the same standard should be applied in such cases also. *Id.* at 123 n.14. See 4 DAVIS, *supra* note 10, at § 28.12; see generally *United States v. Seeger*, 380 U.S. 163, 185 (1965); *Dickinson v. United States*, 346 U.S. 389, 394 (1953); Comment, *The Selective Service System: An Administrative Obstacle Course*, 54 CALIF. L. REV. 2123, 2137-41 (1966); Comment, *Fairness and Due Process Under the Selective Service System*, 114 U. PA. L. REV. 1014, 1019-23 (1966).

³⁶ 263 F. Supp. at 384 (emphasis added).

³⁷ 387 F.2d 150 (3d Cir. 1967).

a request for discharge as a conscientious objector. The Adjutant General denied this request, and Brown was ordered to draw combat equipment and proceed with training. He refused. After trial by court-martial and suspension of his sentence by the reviewing officer, the petitioner again refused to obey the orders of his superiors, causing the authority which had convened the court-martial to vacate the suspension and order him confined in the stockade for a period of three months.³⁸

Like Kanewske and Gilliam, Brown subsequently sought by habeas corpus to obtain judicial review of the army's denial of his request. He filed a petition in federal district court, alleging the existence of four separate grounds upon which he was entitled to relief: First, that the army's determination was incorrect and violated the applicable statute and regulations; second, that the denial of his application was in violation of the constitutional guarantee of substantive due process in that it was arbitrary and without basis in fact; third, that the procedures which the controlling service regulations established were devoid of the minimum standards of procedural due process required by the fifth amendment; and fourth, that he had been denied equal protection of the laws in that he had not been afforded the hearing rights available to preinduction conscientious objectors.³⁹

Commencing in a manner reminiscent of *Kanewske*, the district court initially gave close attention to Brown's three-pronged constitutional attack on the administrative scheme, only to reject it as being without merit.⁴⁰ Upon returning to his first contention, however, the court dispelled any impression of *deja vu* by resolutely declining to proceed further. Citing *Harmon v. Brucker*⁴¹ and quoting the passage from *Willoughby* which introduces this Comment, the district judge observed:

We are asked here merely to determine if there is any basis in fact for the determination which was made by the adjutant general. Even this narrow scope of review could result in the disruption of military operations discussed above. It is our feeling that the benefits to be derived from the added safeguard of having us review the administrative determination are outweighed by the burdens on the military which would result. Consequently, we refuse to accept jurisdiction to pass on the factual adequacy of [the] administrative decision.⁴²

³⁸ A footnote in the opinion of the court of appeals indicates that after serving his three-month sentence, Private Brown again refused to obey orders, thus incurring another court-martial sentence, eighteen months at hard labor, to be served at Fort Leavenworth, Kansas. *Id.* at 152 n.2.

³⁹ The allegations of the petition are summarized in the opinion of the trial court. 263 F. Supp. 686, 690 (D.N.J. 1967).

⁴⁰ *Id.* at 691.

⁴¹ 355 U.S. 579 (1958), discussed in detail in text accompanying notes 231-43 *infra*.

⁴² 263 F. Supp. at 693.

It would be difficult to imagine a more abrupt departure from the approach taken by the two preceding cases. Although Brown only asked the court to apply the narrow "basis in fact" test which *Gilliam* expressly approved, rather than the usual "substantial evidence" standard which both *Gilliam* and *Kanewske* actually applied, the district court was totally unwilling to compromise in an area where it saw its duty clearly as one of total abstinence.

Unwilling to accept this rebuff as final, Brown appealed to the Third Circuit. The resulting decision was a dramatic example of the judicial confusion surrounding the nonreviewability principle. In affirming the lower court's ruling the court of appeals produced three separate opinions, no two of which agreed on both the result and the reasoning to support it.

Delivering the "opinion of the court," Judge Van Dusen began by upholding the district court's finding that the administrative scheme contained no constitutional defect.⁴³ This conclusion left two major issues outstanding: First, the question of the factual sufficiency of the petitioner's claim to conscientious objector status; and second, the question of the court's jurisdiction to review the record in this regard.

Employing a mind-boggling succession of negatives,⁴⁴ Judge Van Dusen reached the conclusion that the factual adequacy of the army's decision was reviewable; however, he declined to specify what particular standard of review applied.⁴⁵ He then went on to examine the record before concluding, with more than a trace of equivocation, that the evidence it contained

constitute[s] a sufficient basis for the Army's decision *within the guidelines of DOD 1300.6*. In this posture, Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice,

⁴³ 387 F.2d at 152. "Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction." *Id.*

⁴⁴ The judge reasoned as follows: "*We do not decide*, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, *we do not hold* that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. *With this view of our jurisdiction*, we reject the appellant's petition on the basis of our examination of this particular record."⁴ The court's footnote reads: "⁴ Such concerns as interference with the military are *not* irrelevant or necessarily of slight importance. . . ." *Id.* (emphasis added).

⁴⁵ "Whether or not our review of the question of substantive due process which may be presented in any case of a person voluntarily enlisted in military service is as broad as or limited to the 'basis in fact test' . . . we need not decide in this case." *Id.* Likewise, the court declined to decide "whether an indispensable prerequisite to our exercise of jurisdiction is always the complete exhaustion of military remedies . . ." *Id.*

that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army.

For these reasons, the petitioner is not *now* entitled to a writ of habeas corpus and we will affirm the decision of the court below.⁴⁶

Chief Judge Staley concurred in affirming the lower court's denial of the writ: however, he reached this result by a much more direct route. Unlike Judge Van Dusen, he was in full agreement with the district court's resolution of the reviewability issue: "As stated in the opinion below, the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the doctrine of the separation of powers."⁴⁷

Judge Maris completed the triangle by concurring in part and dissenting in part. While he agreed with Judge Van Dusen on the question of the court's jurisdiction to review the "substantive elements of the military proceedings under which Brown was denied discharge," he felt that the petitioner was entitled to a reversal on the merits.⁴⁸

By a majority of two to one, therefore, *Brown v. McNamara* apparently represents a very permissive approach to the question of the reviewability of military administrative action. This conclusion is partially undermined, however, by the apparent lack of conviction which marks Judge Van Dusen's treatment of the problem. In any event, when the four separate opinions of the trial and appellate judges are taken together, they amply illustrate the diversity of judicial thinking extant in this area.

4. *Chavez v. Fergusson*⁴⁹

Comes now Felix Chavez, Jr., an army enlistee, seeking an injunction staying his pending trial by court-martial, and a declaratory judgment recognizing his status as a conscientious objector, thereby entitling him to be discharged from the armed services. The facts of the case are not unlike those of *Brown v. McNamara*. As in that case, the plaintiff enlisted voluntarily and soon came to realize his mistake. Although he had not been a conscientious objector at the time of his enlistment, Chavez' religious thinking allegedly underwent a marked transformation during his initial training, principally as a result of his conversion to the faith of the Jehovah's Witnesses. "After accepting the teachings of the Jehovah's Witnesses, he could not carry out any order which involved

⁴⁶ *Id.* at 154 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 266 F. Supp. 879 (N.D. Cal. 1967), *appeal docketed*, No. 21,944, 9th Cir., June 27, 1967.

training for preparation of war; he could not salute an officer, and could not in any manner participate in military work."⁵⁰

The plaintiff's refusal to obey orders led to his trial and conviction by court-martial, which sentenced him to six months confinement in the post stockade. Upon his release, Chavez submitted a request for a conscientious objector discharge under the appropriate regulation. On the same day, however, he again disobeyed the lawful orders of his superior, thus subjecting himself to a second court-martial and an additional six months in confinement. While still confined in the stockade, he received notification that the army had denied his request for discharge. At the completion of his second sentence, Chavez was again released. For the third time, he refused to proceed with training, and again charges were filed against him.

At this point, the plaintiff had been on active duty for approximately fifteen months, twelve of which he had spent in confinement. Evidently recognizing the futility of continued passive resistance, he brought an action in federal district court, seeking a court order declaring him a conscientious objector and prohibiting the army from taking further disciplinary action against him.

Considering only the request for declaratory relief—the prayer for an injunction being irrelevant to this Comment's purposes—the petitioner's contention was simply the familiar claim that the army denied his request for administrative discharge "for no legal reason nor justification."⁵¹ The court's response to his request that it review the factual basis of this denial was equally straightforward: "[T]his Court believes that it is without jurisdiction to entertain such a matter. The reason is quite simple; the courts should and must stay out of the business of running military affairs. This is the lesson of *Orloff v. Willoughby*"⁵²

Relying, strangely enough, on both *Kanewske* and *Brown*,⁵³ in addition to *Willoughby*, the court disposed of Private Chavez so peremptorily as to leave little doubt that it knew and appreciated the value of the non-reviewability principle. Although the presiding judges were different,⁵⁴ this was the same court which had decided *Kanewske* a scant five months earlier.

⁵⁰ Brief for Appellant at 5, *Chavez v. Fergusson*, *appeal docketed*, No. 21,944, 9th Cir., June 27, 1967. Private Chavez reported for active duty at Ford Ord, California, on September 10, 1965; his conscientious objection allegedly matured on or about October 19, 1965. *Id.* at 4, 5.

⁵¹ *Id.* at 2.

⁵² 266 F. Supp. at 881.

⁵³ At the time *Chavez* was decided, the Third Circuit had not yet delivered its opinion in the *Brown* case. This reference is therefore to the district court decision, 263 F. Supp. 686.

⁵⁴ Judge Wollenberg decided *Kanewske*; Judge Carter heard *Chavez*.

5. *Noyd v. McNamara*⁵⁵

The fifth and last of the recent cases is easily the most interesting, not only because the moving party was a regular commissioned officer, but also because his religious beliefs were far removed from those of the orthodox conscientious objector. Captain Dale Noyd, an air force pilot with over eleven years service, submitted a letter of resignation to the Secretary of the Air Force, stating as his reason for resigning his opposition "to the war that this country is waging in Vietnam"⁵⁶

While awaiting a reply to this communication, the plaintiff learned of his impending reassignment from the Air Force Academy, where he had been serving as an assistant professor of psychology, to a training base in New Mexico, where he would either prepare for personal assignment to Vietnam, or train others for such duty. In response to this information, Captain Noyd dispatched two additional letters, the first requesting that any reassignment be to duties providing minimum conflict with his professed beliefs, and the second⁵⁷ requesting, in the alternative, that he be separated from the service as a conscientious objector, pursuant to Air Force Regulation 35-24.⁵⁸

The Secretary responded negatively to each of these requests, and the plaintiff soon received orders assigning him to Cannon Air Force Base, New Mexico, for upgrading in combat aircraft of the type currently in use in Vietnam. He thereupon initiated an action in federal court, seeking declaratory relief, an injunction, and writs of habeas corpus and mandamus in order to establish his status as a conscientious objector and to compel the air force either to assign him to duty consistent with his professed beliefs, or to accept his resignation. His grievance was essentially threefold, the complaint alleging that:⁵⁹ First, the air force improperly and discriminatorily denied his application for recognition as a conscientious objector in violation of his rights under the Constitu-

⁵⁵ 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3250 (U.S. Dec. 19, 1967).

⁵⁶ *Noyd v. McNamara*, 267 F. Supp. 701, 703 (D. Colo. 1967).

⁵⁷ "This letter was submitted as an addendum to plaintiff's original request, and it repeated the ground for separation therein set forth. It also contained an explanation of his humanist beliefs which were defined by him as 'respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to ameliorate some of the banes of the human condition.' Noyd was specific in asserting that he does not believe in the traditional Christian concept of a personal or anthropomorphic God, and does not claim membership in a particular religious organization. He reiterated that he is not a 'total pacifist.' Accompanying the letter was a statement from plaintiff's Base chaplain testifying to his sincerity and recommending that he be utilized in areas other than Vietnam. However, the chaplain stated that he could not classify plaintiff as a conscientious objector." *Id.* at 703-05 (footnotes omitted).

⁵⁸ See note 21 *supra*, for relation of this regulation to the overall regulatory scheme.

⁵⁹ The allegations of the complaint are paraphrased in the opinion of the trial court. 267 F. Supp. 701, 705 (D. Colo. 1967).

tion and relevant statutes and regulations; second, the governing air force regulation was unconstitutional in that it failed to meet the minimum standards of procedural due process; and third, in processing his application for separation, the air force failed to follow its own regulation, with resulting prejudice to himself.

Faced with this impressive array of serious allegations, the district court might have been expected to find great virtue in a policy of judicial restraint. Nor would such expectations have been disappointed, for the court came no closer to the merits than "[t]he threshold question . . . whether this court has jurisdiction to entertain the suit and grant the relief requested."⁶⁰ In denying plaintiff even the barest review of the constitutional questions, the court couched its refusal in terms of a rather unique version of the "exhaustion of remedies" doctrine, which when subjected to careful scrutiny appears to have no other basis than the familiar rule of nonreviewability. Citing both *Brown* and *Chavez*, the court quoted at length from *Willoughby* on the inadvisability of interfering with "legitimate Army matters."⁶¹ Thereafter, with an almost audible sigh of relief, the court concluded that it was "without jurisdiction to hear the plaintiff's claim. It is a collateral attack regardless of whether it is considered in the framework of habeas corpus, injunction, or declaratory judgment, and the result is always the same. We must restrain ourselves from interfering with the military processes."⁶²

Captain Noyd promptly carried his fight to the Tenth Circuit, which delivered its per curiam opinion within the month. Motivated to some extent, perhaps, by its desire to expedite termination of its outstanding restraining order, the court adopted the district court's opinion as its own, adding only a short statement which expanded slightly upon the exhaustion theory and included the following:

Military regulations must be considered in the light of military exigencies . . . and great and wide discretion exists in the executive department both in the formulation and application of regulations and in their interpretation in such matters as what constitutes "for the good of the service. . . ." The essence of the appellant's claim is that the federal judiciary should review and determine the validity of military assignments to duty. This we cannot do.⁶³

It would be difficult to imagine a more strict application of the non-reviewability doctrine. The court did not merely restrict the scope of its review of the facts to the "basis in fact" standard endorsed in *Gilliam*, nor did it simply deny all factual review as did *Chavez* and the *Brown*

⁶⁰ *Id.*

⁶¹ *Id.* at 707.

⁶² *Id.* at 708.

⁶³ *Noyd v. McNamara*, 378 F.2d 538, 540 (10th Cir. 1967).

district court. Here the court denied review period—and denied it in the face of constitutional questions of the greatest magnitude. The harshness of the result is partially concealed by the court's emphasis upon "exhaustion of the military process" as a prerequisite to judicial review.⁶⁴ The implication, of course, is that the petitioner's action was simply ill-timed and that the court is postponing rather than denying review. As will be demonstrated below, however,⁶⁵ such a notion is purely illusory. Viewed from a practical standpoint, the court's action amounted to a complete and unequivocal denial of Captain Noyd's request for a civil forum in which to pursue his claims.

B. Basis for the Claim: A Matter of Right or Privilege

The premise underlying the following discussion is that the serviceman who measures up in all respects to the standard which the services have established for evaluating conscientious objector claims is entitled as a matter of legal right to official recognition of his status and to either discharge or noncombatant assignment. If this premise is invalid, the claim in question being not one of right but merely a variety of privilege, it follows that the serviceman has no legal basis for seeking the intervention of the courts when the military denies his application.⁶⁶ For if the recognition of conscientious objectors is no less discretionary with the service secretary than the granting of promotions or the determination of individual duty assignments, then no denial thereof, however arbitrary, gives rise to a justiciable claim.⁶⁷

Throughout the in-service conscientious objector cases, the petitioner

⁶⁴ *Id.* at 539.

⁶⁵ See text accompanying notes 289-90 *infra*.

⁶⁶ "[T]he touchstone to justiciability is injury to a legally protected right." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 140 (1951) (separate opinion of Justice Burton announcing the Court's judgment, concurred in by Justice Douglas); *Id.* at 150-57 (concurring opinion of Justice Frankfurter); Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938); see Administrative Procedure Act § 10(a), 5 U.S.C. § 1009(a) (1964); 4 DAVIS, *supra* note 10, at § 28.19 at 102-03; H. M. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 170 (1953).

⁶⁷ Orloff v. Willoughby, 345 U.S. 83 (1953); Reed v. Franke, 297 F.2d 17, 20 (1961) (dictum); see 37 U.S.C. § 201(g) (1964); 4 DAVIS, *supra* note 10, at § 28.07, at 32. But see JAEFF, *supra* note 10, at 369. Note also that while an interest may not be sufficiently substantial to merit judicial protection from erroneous or even arbitrary denial, it will almost invariably be entitled to protection from outright discrimination. See, e.g., Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 898 (1961). As Professor Davis puts it: "A citizen who is thus discriminated against has a constitutional right to be free from such discrimination, whether the interest that is affected by the discrimination is important or unimportant and whether it is a right or privilege or gratuity. A citizen's right to be free from racial or religious discrimination is a right which can stand alone, irrespective of the other interests that may be affected or unaffected." 1 DAVIS, *supra* note 10, at § 7.12, at 169 (Supp. 1965).

and the government have been seriously at odds on this issue. The government has consistently propounded a "mere privilege" argument based on Department of Defense Directive 1300.6 (DOD 1300.6), Part III of which (entitled "POLICY") provides in pertinent part as follows:

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.
- B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection to participation in war⁶⁸. . . . Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized *to the extent practicable and equitable*.⁶⁹

Viewing this directive, along with its implementing regulations, as the sole authority on which a serviceman might base his request for discharge, the government holds it to be beyond dispute that no person legally in the service, regardless of the genuineness of his conscientious objection, is entitled as of right to be discharged prior to the completion of his obligation.⁷⁰ The petitioners, on the other hand, have insisted not only that they have a right to official recognition of their claims, but, in some cases, that such right is of constitutional proportions.⁷¹

Faced with such disparate contentions, the courts have chosen to embrace neither extreme, indicating that the truth lies somewhere in between. Just where in between may seem primarily a matter of academic interest with little practical significance; however, in view of the fact that the availability of certain procedural rights, including the opportunity for a trial type hearing on the facts⁷² and even the availability of judicial review,⁷³ is sometimes contingent upon the nature and importance of the

⁶⁸ (Author's footnote.) See note 19 *supra*.

⁶⁹ DOD 1300.6, *supra* note 21, at pt. III, ¶ B (emphasis added).

⁷⁰ See *Noyd v. McNamara*, 267 F. Supp. 701, 705 (D. Colo. 1967); *In re Kanewski*, 260 F. Supp. 521, 524 (N.D. Cal. 1966); Letter from Major General Kenneth G. Wickham, The Adjutant General of the Army, to Robert E. Montgomery, Jr., Dec. 7, 1967; on file with the *California Law Review*.

⁷¹ See *Noyd v. McNamara*, 267 F. Supp. 701, 705 (D. Colo. 1967); *Chavez v. Fergusson*, 266 F. Supp. 879, 880 (N.D. Cal. 1967).

⁷² 1 DAVIS, *supra* note 10, at §§ 7.11-.12 (1958, Supp. 1965); see also JAFFE, *supra* note 10, at 369 n.246. But cf. 1 DAVIS, *supra* note 10, at § 7.15, at 479 (pointing out that in several major cases procedural rights have been curtailed despite the fact that some of the highest values were involved).

⁷³ See authorities cited note 66 *supra*; JAFFE, *supra* note 10, at 369 (noting the practice with disapproval).

right at stake, a limited investigation into this problem seems appropriate. The first step in such an endeavor is the acceptance of Professor Davis' observation that "[t]he right-privilege dichotomy is too crude for consistent application, and the courts have often sought and found ways to circumvent it."⁷⁴ By replacing this unrealistic concept with a full spectrum of rights and privileges, ranging from the weakest "mere privilege" at one end of the scale to the strongest constitutional right at the other, it becomes possible to work methodically down the scale and arrive at an approximate relative value or stature for any given right.

1. *The Constitutional Claim*

Applying this technique to the claim of the in-service conscientious objector brings one face to face with the serviceman's contention that the first amendment ban on laws "prohibiting the free exercise" of religion⁷⁵ gives constitutional compulsion to DOD 1300.6 and renders meaningless the contrary language therein contained. The Supreme Court has never found occasion to pass squarely on this question; however, in several instances over the years it has spoken of the exemption which the draft law affords⁷⁶ as a matter of legislative grace rather than constitutional right;⁷⁷ and the number of lower court selective service cases which

⁷⁴ 1 DAVIS, *supra* note 10, at § 7.20, at 508. The inaptness of this dichotomy is particularly striking in the present context, for even the statutory exemption afforded preinduction objectors has been denominated a "privilege" for certain purposes. See *Uffelman v. United States*, 230 F.2d 297, 299 (9th Cir. 1956). This characterization, however, has not prevented the courts from exercising a limited power of review over selective service classifications. *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946); See authorities cited note 35 *supra*.

⁷⁵ U.S. CONST. amend. I.

⁷⁶ See note 19 *supra*.

⁷⁷ One of the earliest such cases involved the question whether Congress had made the taking of an oath to bear arms in defense of the nation a statutory prerequisite to naturalization. *United States v. Macintosh*, 283 U.S. 605 (1931). Faced with the contention that the free exercise clause of the first amendment prohibits congressional interference with the rights of conscience, and that a citizen could not, therefore, be forced to bear arms in contravention of his religious scruples, the Court said:

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. . . . No other conclusion is compatible with the well-nigh limitless extent of the war powers . . . which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. *Id.* at 623-24.

As one commentator has pointed out, however, the Court proceeded "rather ungracefully" and ineffectually to hedge its denial by suggesting that while conscientious objection is not protected by the first amendment, the religious dissenter might somehow find protection from congressional exercise of the war power "in applicable principles of international law." *Id.* at 622. See Conklin, *supra* note 19, at 266.

have reached the same result is legion.⁷⁸ If the first amendment does not compel Congress to exempt from military service conscientious objectors who raise their claims as registrants, then a fortiori, it does not compel the military establishment to provide for their exemption once legally enlisted or inducted.⁷⁹

Despite the overwhelming frequency with which the courts have faithfully recited the formula that the exemption is simply a matter of legislative grace, one should not summarily dismiss the constitutional argument. With increasing vigor in recent years, the commentators have argued that there is more to this question than the courts have been willing to admit, suggesting that the Supreme Court might now speak differently on the subject should Congress attempt to withdraw its grant of grace. They have called attention to the high position which freedom of conscience holds in our value hierarchy,⁸⁰ the long and continuous practice in this country of showing respect and deference to religious scruples,⁸¹ and above all, the modern trend of the Court to require a compelling state interest as justification for government curtailment of religious practices.⁸²

Although the absolutist position adopted in *Macintosh* was repudiated in *Girouard v. United States*, 328 U.S. 61 (1946) (holding that the naturalization statute does not require an oath to bear arms as a condition of naturalization), the Court's language in two intervening opinions seems to support the *Macintosh* dictum. *Hamilton v. Regents of the Univ. of Calif.*, 293 U.S. 245 (1934) (relying upon *Macintosh* to uphold an order of the University Board of Regents which absolutely conditioned the enrollment of all male students upon their willingness to take a required course in military science and tactics); *In re Summers*, 325 U.S. 561 (1945) (relying upon *Macintosh* and *Hamilton* to sustain the refusal of the Illinois Supreme Court to admit to the state bar an otherwise qualified candidate because he refused to swear to defend the constitution of Illinois by arms). Compare L. PFEFFER, CHURCH, STATE, AND FREEDOM 618-21 & n.41 (1967), and Conklin, *supra* note 19, at 269, with Mansfield, *supra* note 19, at 61-66.

⁷⁸ See, e.g., *United States v. Fleming*, 344 F.2d 912 (10th Cir. 1965); *Bouaziden v. United States*, 251 F.2d 728 (10th Cir.), *cert. denied*, 356 U.S. 927 (1958); *Clark v. United States*, 236 F.2d 13 (9th Cir.), *cert. denied*, 352 U.S. 882 (1956); *United States v. Henderson*, 180 F.2d 711 (7th Cir.), *cert. denied*, 339 U.S. 963 (1950); *United States ex rel. Goodman v. Hearn*, 153 F.2d 186 (5th Cir.), *cert. dismissed*, 329 U.S. 667 (1946); *Van Bibber v. United States*, 151 F.2d 444 (8th Cir. 1945).

⁷⁹ See *Brown v. McNamara*, 263 F. Supp. 686, 690 (D.N.J. 1967); *Gilliam v. Reaves*, 263 F. Supp. 378, 381 (W.D. La. 1966).

⁸⁰ See, e.g., Giannella, *Religious Liberty, Non-establishment, and Doctrinal Development, Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1412-13 (1967); Mansfield, *supra* note 19, at 12, 48-49.

⁸¹ See, e.g., *United States v. Seeger*, 380 U.S. 163, (1965); Conklin, *supra* note 19, at 256-63; Giannella, *supra* note 80, at 1413 & n.91; Russell, *supra* note 19.

⁸² See *In re Jenison*, 375 U.S. 14 (1963) (state's interest in obtaining competent jurors insufficient to justify compelling service of those whose religious beliefs would be infringed thereby); *Sherbert v. Verner*, 374 U.S. 398 (1963) (while a state's interest in eliminating abuses and reducing costs of its unemployment compensation scheme may justify the adoption of a general rule which makes eligibility for payments contingent upon the

These are points well taken, and the present Court, which has shown a heightened sensitivity in general to government encroachment upon individual freedoms,⁸³ might indeed be more inclined to view the exemption in a first amendment light than were its predecessors. It is doubtful, however, that such thoughts will soon transcend the speculative; Congress shows no sign of abandoning its traditional policy of honoring conscientious objector claims, and until it does so, the Court will have no cause to act. Furthermore, even should the Court eventually recognize a constitutional compulsion to exempt the preinduction objector, it would not necessarily follow that the right of his in-service counterpart would also assume constitutional proportions.⁸⁴ It must be concluded, therefore, that while constitutional ground swells are beginning to make themselves felt, and while the mere involvement of a first amendment value may add something to its dignity, the claim of the in-service objector has today no direct constitutional basis.

recipient's willingness to accept employment if offered, such interest is not sufficiently important to justify the application of said rule so as to deny compensation to an otherwise qualified individual who refuses for religious reasons to work on Saturdays). *But cf.* *Braunfeld v. Brown*, 366 U.S. 599 (1961) (the first amendment does not require exemption from Sunday closing laws for an Orthodox Jewish merchant whose observance of the Sabbath on Saturday causes him to lose two day's business rather than one); *L. PFEFFER*, *supra* note 77, at 616-19 (emphasizing the "paramountcy" of the state's interest in its own defense). See generally Comment, *The Conscientious Objector and the First Amendment; There but for the Grace of God . . .*, 34 U. CHI. LAW REV. 79 (1966).

⁸³ See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (overturning the state's antimiscegenation statute); *Afroyim v. Rusk*, 387 U.S. 253 (1967) (holding citizenship to be a constitutional right which can be lost only through voluntary renunciation and is not subject to unilateral withdrawal by Congress); *Redrup v. New York*, 386 U.S. 767 (1967) (overturning obscenity conviction as violative of the first amendment right of free expression); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (striking down as unconstitutionally vague New York's Feinberg Law and other statutes designed to prevent the appointment or retention of "subversive" persons in state employment); *DeGregory v. Attorney General*, 383 U.S. 825 (1966) (reversing contempt conviction of witness at a New Hampshire investigation of subversive activities who refused on fifth amendment grounds to answer questions concerning his alleged membership in the Communist Party seven years earlier); *Brown v. Louisiana*, 383 U.S. 131 (1966) (upholding the right to engage in reasonable and orderly protest against the unconstitutional segregation of a public facility); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state birth-control law as an unwarranted infringement upon an individual's right to privacy); *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964) (holding that the constitutional guarantee of freedom of expression precludes "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with . . . knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80).

⁸⁴ The test in such situations is essentially a process of balancing the importance of the individual's freedom from restrictions upon his religious practice against the importance to the state of the particular regulation in question. See cases cited note 82 *supra*. While the former will remain constant for all individuals, whether in or out of the service, the state might well be deemed to have a more compelling interest in obtaining efficient and uninterrupted service from men already in uniform than it does in drafting each and every individual in the original manpower pool.

2. *The Statutory Claim*

Granting that the in-service conscientious objector has no greater right to an exemption than that historically afforded by congressional grace through the draft law, the inquiry is then whether his right is even this substantial. The answer is readily forthcoming, for while the statutory exemption represents a time-honored national policy of exempting from military service individuals whose religious scruples would be offended thereby,⁸⁵ section 456(j) of the Military Selective Service Act clearly has no direct application to persons already in the service. This is evident both from the purpose and language of the Act itself⁸⁶ and from the unanimous refusal of the courts to consider favorably the arguments of in-service objectors to the contrary.⁸⁷ It follows, therefore, that the basis for the in-service claim must lie further down the scale of rights, in the realm of departmental regulation and executive grace.

3. *The Claim Under Service Regulations*

As has been pointed out above, the Department of Defense and its three subordinate service departments interpret the procedures they have established for handling in-service objectors as creating only privileges, and not vested rights.⁸⁸ Implicit in this position are two distinct premises: First, that the procedures so established are in no sense required, but could be freely eliminated at the Secretary's discretion; and second, that such procedures constitute no more than a guide for the Secretary, who, not being bound thereby, is free in every case to dispense or withhold his "grace" in accordance with what he deems "practicable and equitable."⁸⁹ If the first of these propositions is valid, the promulgation and implementation of DOD 1300.6 being totally independent of any legislative mandate, the in-service objector's claim possesses considerably less stature than that of the registrant under section 456(j). While only an act of Congress can deprive the preinduction objector of his right to an exemption, acceptance of the government's first premise would render the in-service claim susceptible to instant obliteration by mere departmental

⁸⁵ *United States v. Seeger*, 380 U.S. 163, 169-73 (1965); see I CONSCIENTIOUS OBJECTION (Selective Service System Special Monograph No. 11, 1950); Conklin, *Conscientious Objector Provisions: A View in the Light of Toraes v. Watkins*, 51 GEO. L.J. 252 (1963); Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952).

⁸⁶ See note 19 *supra*.

⁸⁷ See *Chavez v. Fergusson*, 266 F. Supp. 879, 881 (N.D. Cal. 1967); *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J. 1967); *In re Green*, 156 F. Supp. 174, 181 (S.D. Cal. 1957), *appeal dismissed*, 264 F.2d 63 (9th Cir. 1959).

⁸⁸ See text accompanying notes 66-71 *supra*.

⁸⁹ DOD 1300.6, *supra* note 21, at pt. III, ¶ B; see *Brown v. McNamara*, 387 F.2d 150, 151 (3d Cir. 1967); *In re Kanewske*, 260 F. Supp. 521, 524 (N.D. Cal. 1966).

decree. If the second proposition is valid, furthermore, the claim falls even lower on the scale of rights and must be considered wholly unenforceable.

Considering the premises individually, there is good reason for rejecting the first. Although the mandate of section 456(j) is directed to the Selective Service System and thus has no direct application to the military establishment, DOD 1300.6 is clearly linked very closely to this statutory expression of legislative policy. Witness the above-quoted language of the directive itself and the great extent to which the services have incorporated Selective Service System standards and machinery into the military procedure.⁹⁰ In view of this partial integration of the two systems, and the numerous instances in which the courts have characterized the draft law exemption provision as a strong expression of national policy,⁹¹ it is difficult to envision the Department of Defense suddenly deciding to chart a separate course. This is not to imply that the statute constitutes a legal obstacle to their doing so—a suggestion belied by the recent origins of the practice of recognizing in-service objectors⁹²—however, the practical difficulties inherent in any such unilateral action by the military might well prove insurmountable.

There is another good reason for rejecting the first premise. The existence of a statutory exemption from military service for conscientious objectors whose claims mature prior to induction—however voluntary such a policy might be on Congress' part—may well necessitate granting a similar exemption to those raising their claims from within the armed services. To deprive the latter of rights at least substantially similar to those of the former could constitute a denial of equal protection of the laws. The equal protection guarantee of the fourteenth amendment⁹³

⁹⁰ Consider the following provisions of the regulation:

F. The standards used by the Selective Service System in determining 1-0 or 1-A-0 classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. . . .

DOD 1300.6, *supra* note 21, at pt. III, ¶ F.

G. In order to insure the maximum practicable uniformity among the services and between members of the same service, advisory opinion by the Selective Service that a classification of 1-0 is appropriate will *normally* be a requisite for discharge or release of members with less than two years active service based on conscientious objection.

Id. at ¶ G (emphasis added).

⁹¹ See authorities cited note 85 *supra*; *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966), *quoted* in note 143, *infra*.

⁹² While the statutory exemption has existed for decades, the Department of Defense apparently did not see fit to establish procedures for discharging personnel expressly by reason of conscientious objection until 1962. Wickham Letter, *supra* note 70.

⁹³ See *Bolling v. Sharpe*, 347 U.S. 497 (1954), which rendered this guarantee enforceable against the federal government by implicitly incorporating the standards of the equal

does not, of course, prohibit all classifications or laws which bear unequally upon different individuals or groups. It does, however, forbid distinctions which are arbitrary or which do not serve a proper governmental purpose.⁹⁴ Judged by this standard, it would be exceedingly difficult to justify denying the exemption to bona fide conscientious objectors solely because they happened to be already in uniform at the moment their beliefs crystallized sufficiently to warrant raising their claims.⁹⁵ It seems, therefore, that the Government's first premise is untenable. The procedures which DOD 1300.6 establishes are almost certainly required, both as a necessary implementation of congressional policy and as a means of affording servicemen the equal protection of the laws.

The second premise is, if anything, less valid than the first. The regulations of the armed services have the force and effect of law,⁹⁶ and are binding not only upon all those legally within their purview, but also upon the promulgating authority himself until properly repealed or superseded.⁹⁷ Although this proposition may not have been true at all times in the past, especially as regards regulations issued under the general executive authority of the Secretary rather than by way of implementing a particular statute,⁹⁸ there are two reasons for accepting it as the law

protection clause of the fourteenth amendment into the due process clause of the fifth. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 487 & n.1 (1965) (concurring opinion); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

⁹⁴ See *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-89 (1911).

⁹⁵ But see note 84 *supra*, where, in a slightly different context, it is suggested that the state's interest in exercising uninhibited control over the members of its armed forces might provide justification for affording unequal treatment to in-service and preinduction objectors. This argument is theoretically plausible; however, in view of the relatively small number of individuals in the former category, and the fact that for more than five years the military has been recognizing their right to special treatment without suffering any perceptible loss in efficiency, its ability to withstand an aggressive "equal protection" assault well supported by facts and figures is, at best, highly doubtful.

⁹⁶ *Paul v. United States*, 371 U.S. 245, 255 (1963); *Public Util. Comm'n v. United States*, 355 U.S. 534, 542 (1958); *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942); *In re Kanewskie*, 260 F. Supp. 521, 524 (N.D. Cal. 1966).

⁹⁷ *Cravens v. United States*, 124 Ct. Cl. 415 (1952); *WINTEROP*, *supra* note 7, at 32; see generally Meador, *Some Thoughts on Federal Courts and Army Regulations*, 11 *MIL. L. REV.* 187.

⁹⁸ The military establishment has long held the view that regulations issued in implementation of a particular statute possess the force of law and bind even the promulgating authority. Those regulations not issued pursuant to an act of Congress, but merely under the Secretary's general executive powers, however, have not been considered binding upon the latter, leaving him free to make exceptions in their application as he saw fit. Meador, *supra* note 97, at 187 & n.1. On occasion, older cases appear to have supported this view. See, e.g., *Reid v. United States*, 161 F. 469, 472 (S.D.N.Y. 1908), *writ of error dismissed*, 211 U.S. 529 (1909); *In re Smith*, 24 Ct. Cl. 209, 215-16 (1889); *Byrne v. United States*, 24 Ct. Cl. 251, 255 (1889).

today. First, the 1956 revision and enactment into positive law of Title 10 of the United States Code largely destroyed the meaningfulness of the traditional distinction between military regulations in implementation of statutes and those which are not.⁹⁹ Second, and of much greater import, the Supreme Court has handed down three relatively recent decisions¹⁰⁰ which clearly demonstrate that:

[A]lthough a matter may be wholly within otherwise judicially uncontrollable executive discretion, when the executive prescribes regulations as to the manner in which he will exercise that discretion he is bound to follow his own regulation; action by him to the detriment of an individual in violation of such regulations is illegal, and relief can be had in court.¹⁰¹

While none of these three cases dealt with the military establishment,¹⁰² they represent simply the refusal to sanction a departure from the "rule of law,"¹⁰³ and there is no logical reason why the same reasoning should not extend to military regulations also.¹⁰⁴

A possible answer to this, of course, is that while the service secretaries may be bound by DOD 1300.6 and its implementing regulations, they are nevertheless free to exercise their discretion within the scope of the terms "practicable and equitable," since this much latitude is written into the directive itself. This is true, and to the extent that the secretaries can apply this condition objectively and consistently, there is

⁹⁹ When Congress codified in Title 10 the existing statutory law dealing with the armed forces, it included several broad grants of power to issue regulations. Section 3012, for example, which enumerates the powers of the Secretary of the Army, contains this provision: "(g) The Secretary may prescribe regulations to carry out his functions, powers, and duties under this title." The inclusion of this provision and others of similar import would appear to render all subsequently promulgated military regulations "in implementation of statute." Note that DOD 1300.6 was issued pursuant to 10 U.S.C. § 133, which sets out the general executive authority of the Secretary of Defense. *Brown v. McNamara*, 263 F. Supp. 686, 688 (D.N.J. 1967).

¹⁰⁰ *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

¹⁰¹ Meador, *supra* note 97, at 190.

¹⁰² The departments involved were Interior (*Vitarelli*), State (*Service*), and Justice (*Accardi*).

¹⁰³ Consider Judge Prettyman's language in a case not unlike *Accardi*:

The basic problem is the "rule of law." We have law—either statute or rules legally adopted—and we are supposed to be governed by them. If our governors merely do whatever strikes them as just and fair and reasonable at the moment, we have rule by men instead of rule by law. These are not clichés. Rule by law alone is the precise essential which differentiates our system from the totalitarian system.

McKenna v. Seaton, 259 F.2d 780, 786 (D.C. Cir. 1958) (dissenting opinion).

¹⁰⁴ At least four federal courts have so held: *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965); *Roberts v. Vance*, 343 F.2d 236 (D.C. Cir. 1964); *Ingalls v. Zuckert*, 309 F.2d 659 (D.C. Cir. 1962); *Smith v. United States*, 155 Ct. Cl. 682 (1961).

indeed room here for executive discretion. Since virtually all administrative acts involve the exercise of some discretion,¹⁰⁵ however, this in itself is no reason to denominate the subject of the act as unenforceable privilege. To the contrary, if the latitude for discretion were so wide as to render the right unenforceable, the regulation would no longer be consonant with the "rule of law."¹⁰⁶ For while the limitations it imposes may be extremely vague and difficult to define, they do exist and cannot be circumvented through the simple expedient of writing into a regulation conditions so vague and subjective as to amount to an express reservation of power to make exceptions at will.¹⁰⁷ To the extent, therefore, that the "practicable and equitable" provision purports to allow such unfettered discretion, it is void and without effect.¹⁰⁸

The conclusion, therefore, is that although the claim of the in-service objector finds direct support in neither the Constitution nor congressional enactment, it is nevertheless an enforceable legal right under existing military law. It is a right which arises at least indirectly from a time-honored national legislative policy, which in turn can be said, at minimum, to have first amendment implications. As such, far from being the "mere privilege" described by the Government, the interest of the bona fide applicant for conscientious objector status stands well up on the scale of rights, and the courts should not hesitate to treat it accordingly.

C. Nature of the Claim: A Catalogue of Grievances

The previous section was devoted to evaluating the substance of the right upon which the in-service objector bases his claim for judicial review. The purpose of this section is not to weigh or evaluate on their merits, but merely to describe the various forms which such a claim might take. Obviously, the serviceman whose request for discharge has been denied cannot petition the court for relief, alleging simply that the denial was unjust; he must also specify the manner in which it was unjust. From the practical standpoint, he can accomplish this only through the use of one or more of three basic approaches: 1) an attack on the final decision, as having been unreasonably, arbitrarily, or discriminatorily made; 2) an attack on the procedural scheme which the regulations establish, either as lacking the minimum essentials of constitutional due process or as fostering the denial of equal protection of the laws; 3) an attack on the procedure actually followed in the particular case, as

¹⁰⁵ JAFFE, *supra* note 10, at 181.

¹⁰⁶ See *id.* at 182.

¹⁰⁷ Meador, *supra* note 97, at 199.

¹⁰⁸ As the Court of Claims has observed, it is inconsistent with our respect for law that "an administrator should have the reserved power to follow the law he has made, or depart from it, at his discretion." *Cravens v. United States*, 124 Ct. Cl. 415, 429 (1952).

involving an unlawful departure from the administrative scheme. Each of these basic forms of attack merits more detailed examination; however, it will be helpful to preface that discussion with a description of the existing procedures by which the serviceman's claim is processed.

1. *The Administrative Process*

Although each of the three major services has issued its own regulation in implementation of DOD 1300.6, that of the army is representative and will be the only one treated here. The regulation in question is Army Regulation 635-20 (May 1, 1967).¹⁰⁹ It purports to set forth "the policy, criteria, and procedures for disposition of military personnel who, by reason of religious training and belief, claim conscientious objection to participation in war in any form."¹¹⁰

The paragraph outlining the procedure which the serviceman must follow provides that he must submit an application for discharge or non-combatant status in writing to his immediate commanding officer on Department of the Army (DA) Form 1049, the standard army personnel action form.¹¹¹ The applicant must incorporate in his application certain specific information in the form of answers to a detailed questionnaire, the principal subdivisions of which are entitled "General information,"¹¹² "Religious training and belief," "Participation in organizations,"¹¹³ and "References."¹¹⁴ He may also submit any additional information he desires to have considered with his request.¹¹⁵

¹⁰⁹ This regulation was promulgated by the Secretary of the Army pursuant to his general executive authority under 10 U.S.C. § 3012 and 10 U.S.C. § 3811. *See Brown v. McNamara*, 263 F. Supp. 686, 689 (D.N.J. 1967).

¹¹⁰ Army Reg. 635-20, ¶ 1 (May 1, 1967).

¹¹¹ *Id.* at ¶ 4(a).

¹¹² Subparagraphs (k) and (l) under this heading provide:

- (k) Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?
- (l) If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes_____ No_____. Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes_____ No_____.

Id. at ¶ 4(a)(1).

¹¹³ This subparagraph includes the questions:

- (a) Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.
- (b) Are you a member of a religious sect or organization? . . .

Id. at ¶ 4(a)(3).

¹¹⁴ Here the applicant is required to submit the names of persons who can vouch for the sincerity of his professed convictions.

¹¹⁵ Note, however, that the applicant must make his entire case in writing, or when

Upon receipt of such an application, the individual's commanding officer must interview him personally,¹¹⁶ after which he must arrange for a counseling interview with a chaplain and a psychiatric interview with a psychiatrist.¹¹⁷ The chaplain is required to submit a report of his interview, which must include his opinion of the applicant's sincerity and the source of his belief. The psychiatrist must submit a psychiatric evaluation of the applicant, indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels.

The application for discharge, together with the reports of interviews and the recommendation of the applicant's immediate commanding officer, is then forwarded through military channels to the Adjutant General in Washington, D.C.¹¹⁸ Pending decision on his application, the serviceman is to be retained in his unit and assigned duties providing the minimum conflict with his professed beliefs.¹¹⁹

When the file reaches the Adjutant General's office, it is referred to the National Director of Selective Service for an advisory opinion.¹²⁰ On

appearing before the chaplain, psychiatrist, or his unit commander. See text accompanying notes 116-17 *infra*. Unlike his preinduction counterpart, he is afforded no hearing before the decisionmaking body. See *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J. 1967); *In re Kanewske*, 260 F. Supp. 521, 523 (D.N. Cal. 1966); *cf.* 32 C.F.R. § 1624 (1967) (outlining procedure for personal appearance by registrant before local draft board). While the registrant can appeal the local board's decision as a matter of right, however, he is afforded no hearing before the appeal board. See 32 C.F.R. § 1626.24 (1967); 1 SELECTIVE SERVICE SYSTEM, THE CLASSIFICATION PROCESS 157-58, 160-61 (Special Monograph No. 5, 1950). Until recently, a registrant seeking conscientious objector status was given a hearing before a Department of Justice hearing officer; however, provision for this procedure was omitted from section 456(j) when Congress amended the Universal Military Training and Service Act in June 1967. 50 U.S.C.A. App. §§ 451, 456(j) (1951), *as amended* (Supp. 1967).

¹¹⁶ Army Reg. 635-20, ¶ 4(b) (May 1, 1967).

¹¹⁷ *Id.* at ¶ 4(c).

¹¹⁸ The applicant's immediate commanding officer is required to include the reasons for his recommendation; other officers higher up in the chain of command may limit their forwarding remarks to recommendations for approval or disapproval. *Id.* at ¶ 4(e).

¹¹⁹ *Id.* at ¶ 5.

¹²⁰ This referral is required by both Army Reg. 635-20, ¶ 4(f) (May 1, 1967), DOD 1300.6, *supra* note 21, at pt. III, ¶ G, and pt. V, ¶ C(3). The latter makes the procedure mandatory only when the applicant has served less than two years on active duty; the former makes no such distinction. Advisory opinions are requested for both inductees and enlistees, see note 26 *supra*, and until recently they were provided not only when the applicant sought a discharge on conscientious objector grounds, but also when he merely requested noncombatant assignment. Such referrals have now been discontinued in cases of the latter type. Letter from Daniel Oner, Deputy Director of the Selective Service System, to Robert E. Montgomery, Jr., Nov. 6, 1967; on file with the *California Law Review*. One possible reason for having this system whereby every application submitted in any of the three services is referred to a single agency for an advisory opinion might be its tendency to promote uniformity in this area, both among the services and between them and the Selective Service System. In the absence of some such system, it is not inconceivable that the practice of interservice "forum shopping" might spring up, and it is even possible to imagine the anomalous situation in which individuals discharged from the military service

the basis of the information contained in the file as received from the Department of the Army, the Director determines whether the applicant would qualify for exemption under Section 456(j) of the Selective Service Act if he were being considered for induction at that time.¹²¹ This decision is transmitted to the Adjutant General in the form of an opinion which, though "advisory" and in no way legally binding upon the army, is an important factor in the ultimate disposition of the case.¹²² The Adjutant General's Office makes the final decision, and all requests which are not approved are turned over to the Office of Personnel Operations for consideration of possible noncombatant assignment.¹²³

Finally, the applicant receives written notification that his application either has or has not been favorably considered. If his request has been denied, he is not informed of the reasons for the denial.¹²⁴ The action of

at one level of objection might subsequently be inducted by the Selective Service System pursuant to a higher set of criteria.

¹²¹ A letter addressed to the Director made this inquiry: "2) When a request [from the military] for such an advisory opinion is received by Selective Service, how is it processed? From which level of the system does the opinion come, and upon what information is it based?" The Deputy Director replied: "In response to your second question, the advisory opinion comes from the Director of Selective Service. It is based on all the information which is contained in the file submitted." Omer Letter, *supra* note 120. Even on the reasonable assumption that the number of in-service objector cases which arise is quite limited, this could hardly mean that the Director personally reviews the file of each applicant. The more logical conclusion is that the cases are reviewed and the advisory opinions prepared by an individual or committee within the Office of the Director. *But see* Gilliam v. Reaves, 263 F. Supp. 378, 384 (W.D. La. 1966) ("General Hershey [the current Director of Selective Service] *himself* wrote that Gilliam would not be classified as a conscientious objector if he were being considered by his draft board at that time.") (emphasis added). On either interpretation, it is interesting to note that Congress has given the Director no similar authority with regard to the classification of draft registrants, the corresponding decisions in those cases being made by local and appeal boards composed of the applicant's fellow citizens. *See* 50 U.S.C. App. § 460 (1964). *But cf.* 32 C.F.R. § 1622.60 (1967).

¹²² The precise extent to which the Director's opinion influences the army's decision is uncertain. Both the Adjutant General of the Army and the Deputy Director of Selective Service have stated that such opinions are truly "advisory," and that the service department can and does make its own independent determination in each case. Wickham Letter, *supra* note 70; Omer Letter, *supra* note 120. In view of the DOD 1300.6 policy declaration that a favorable advisory opinion "will normally be a requisite for discharge," *see* note 90 *supra*, however, it seems probable that an applicant who fails to win General Hershey's approval has little if any chance of success.

¹²³ Wickham Letter, *supra* note 70.

¹²⁴ *Id.* *See, e.g.,* Brown v. McNamara, 263 F. Supp. 686, 690 (D.N.J. 1967). Private Brown's notification by the army that his request for a discharge had been denied was quite succinct:

Application for separation submitted by Private David W. Brown, RA 11797464, based on his conscientious objection to military service is not favorably considered. The opinion of the Director of Selective Service that Private Brown would not be properly classified as I-O or I-A-O if he were being considered for induction at this time was considered in making this decision. Therefore, Private Brown will be detained on active duty without assignment limitations to complete his obligated

the Adjutant General is final, the applicant having no administrative right of appeal or review.¹²⁵ His only recourse is to bring an action in the federal courts,¹²⁶ challenging the denial. The following sections consider the possible forms of such an attack.

2. *Unreasonable Denial*

Aside from the futile expedient of impugning an unfavorable decision as merely mistaken,¹²⁷ the simplest and most direct method of attack is to allege that in evaluating the facts of the case the military made a serious error in judgment, with the result that the denial is not supported by substantial evidence. This approach, while not actually requesting the court to substitute its judgment for that of the service secretary, does ask for a determination whether on the record such a finding was reasonable. Although the test involved in such a determination—the “substantial evidence” test—governs practically all review of evidence in the federal courts,¹²⁸ it is not a test likely to appeal to a court whose predisposition is to interfere as little as possible with the military establishment.¹²⁹

3. *Arbitrary Denial*

A more promising method of attacking an unfavorable decision is to allege that it was made arbitrarily and has no basis in fact.¹³⁰ This

period of service unless sooner released by proper authority.

BY ORDER OF THE SECRETARY OF THE ARMY:

/s/ H. F. Wise

[for the] Adjutant General

Brief for Appellant at 24a, *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967). *But see* note 31 *supra*.

¹²⁵ However, “He may resubmit his application if he has additional evidence not previously presented and not substantially the same as in his original application for discharge.” Wickham Letter, *supra* note 70.

¹²⁶ See notes 293-94 *infra*, and accompanying text for a discussion of the possibility that an applicant whose request has been denied by the Adjutant General may still have access to an avenue of administrative relief within the military.

¹²⁷ Such an allegation in effect asks the court for the broadest possible scope of review: complete substitution of judicial judgment on questions of fact, to include the applicant’s credibility. See 4 DAVIS, *supra* note 10, at § 29.01, at 114. In an area where the debate has been whether the scope of review should be “as broad as or limited to the ‘basis in fact test,’ ” see note 45 *supra*, it is indeed unlikely that any court would go so far as to overrule the military’s decision merely on the ground that it was incorrect.

¹²⁸ 4 DAVIS, *supra* note 10, at § 29.11, at 186.

¹²⁹ See cases cited note 18 *supra*. With regard to the proper scope of review of court-martial decisions on petitions for habeas corpus, the Supreme Court has held: “[W]hen a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence.” *Burns v. Wilson*, 346 U.S. 137, 142, *rehearing denied*, 346 U.S. 844 (1953).

¹³⁰ See, e.g., *Dickinson v. United States*, 346 U.S. 389 (1953); *Estep v. United States*, 327 U.S. 114 (1946); *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967); *Chavez v. Ferguson*, 266 F. Supp. 879 (N.D. Cal. 1957).

approach asks less of the reviewing court than the charge of unreasonable denial, since no weighing of the evidence is required and the presence of *any* supporting facts is sufficient to sustain the administrative action. Such a challenge invokes the protection of the fifth amendment's guarantee of due process of law, and therefore possesses the dual advantage to the petitioner of simplicity and constitutional stature.¹³¹ Because of the latter attribute, the courts faced with the allegation have shown great reluctance to deny judicial review, even where the action alleged to have been arbitrary was made "final" by statute.¹³² As the Supreme Court said in *Dickinson v. United States*, "dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the [Selective Service] Act and foreign to our concepts of justice."¹³³

4. *Discriminatory Denial*

Another mode of attack which focuses on the decision and its underlying factual basis involves the allegation that while the determination was based upon fact, it was based upon the wrong fact. The claim is simply that while the record might contain other evidence which would support his action, the decisionmaker actually based his determination upon facts of which he was for one reason or another forbidden to take cognizance. This was the challenge raised in the *Gilliam* case,¹³⁴ where the petitioner contended that the government had pegged its denial of his claim on the fact that he was not a churchgoer. As the court in that case made abundantly clear, even where the determination is largely discretionary, it is invalid if made in contravention of the specific dictates of the Bill of Rights.¹³⁵ This form of attack, like the claim of arbitrariness, can take on constitutional dimensions. Its major drawback, of course, is the difficulty inherent in proving that a decision was based upon a particular factor.¹³⁶

5. *Denial of Procedural Due Process*

The claim need not challenge the decision directly, but may take the form of an attack on the administrative scheme.¹³⁷ One of two possible

¹³¹ See *Gilliam v. Reaves*, 263 F. Supp. 378, 380 (W.D. La. 1966).

¹³² See, e.g., *Estep v. United States*, 327 U.S. 114 (1946); cf. 4 DAVIS, *supra* note 10, at § 28.12; JAFFE, *supra* note 10, at 356.

¹³³ 346 U.S. 389, 397 (1953).

¹³⁴ *Gilliam v. Reaves*, 263 F. Supp. 378, 380 (W.D. La. 1966), discussed in text accompanying notes 30-36 *supra*.

¹³⁵ *Id.* at 383. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

¹³⁶ The difficulty lies in the fact that the decisionmaker is not required to state the reasons for his decision, and he normally does not do so. Compare note 31 *supra*, with note 124 *supra*, and accompanying text.

¹³⁷ See *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967); *Noyd v. McNamara*, 378

courses open to the in-service objector in this regard is to allege that the procedure which Army Regulation 635-20 establishes falls short of the minimum requirements of procedural due process. Such a claim might be founded upon the absence from the regulation of any provision for a hearing, or for an opportunity to know and rebut adverse evidence or to cross-examine adverse witnesses.¹³⁸ Although the success of such an approach depends upon the premise that the traditional notions of procedural due process are applicable to military administrative proceedings, the Supreme Court has strongly indicated that this is the case.¹³⁹

6. Denial of Equal Protection

The second method of attacking the administrative scheme relies upon the fourteenth amendment's guarantee of equal protection of the laws, as subsumed under the fifth amendment by *Bolling v. Sharpe*.¹⁴⁰ The argument involves three steps: First, Congress, through the Selective Service System, has established an elaborate procedural framework for hearing and evaluating the conscientious objector claims of selective service registrants;¹⁴¹ second, the equal protection clause demands that

F.2d 538 (10th Cir. 1967), both cases discussed in text accompanying note 37-65 *supra*. This attack is valid in all cases where the right at stake is more than a mere privilege. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Homer v. Richmond*, 292 F.2d 719, 722 (D.C. Cir. 1961) ("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."); *cf. Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961).

¹³⁸ See *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 167 (1951) (concurring opinion); *Londoner v. Denver*, 210 U.S. 373 (1908); *Philadelphia Co. v. SEC*, 175 F.2d 808, 818 (D.C. Cir. 1948).

¹³⁹ Witness the Court's statement in *Burns v. Wilson*: "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." 346 U.S. 137, 142 (1953). The courts have consistently held the fifth amendment applicable to military discharge procedures. See, e.g., *Davis v. Stahr*, 293 F.2d 860 (D.C. Cir. 1961); *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961); *Unglesby v. Zimny*, 250 F. Supp. 714, 718 (N.D. Cal. 1965); *Clackum v. United States*, 296 F.2d 226, 228 (Ct. Cl. 1960). Both the federal courts and the U.S. Court of Military Appeals, furthermore, have frequently stated that courts-martial must observe the recognized standards of procedural due process. See, e.g., *In re Stapley*, 246 F. Supp. 316 (D. Utah 1965); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); *United States v. Wilson*, 10 U.S.C.M.A. 337, 27 C.M.R. 411 (1959). But see *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967). See generally Quinn [Chief Judge of the U.S. Court of Military Appeals], *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHNS L. REV. 225 (1961).

¹⁴⁰ 347 U.S. 497 (1954); see note 93 *supra*; *cf.* note 95 *supra*, where the question was not whether the equal protection clause requires substantially equivalent procedural safeguards for preinduction and in-service objectors, but whether it necessitates the maintenance of *any* procedures for recognizing the claims of the latter.

¹⁴¹ See 50 U.S.C. APP. § 460 (1964); 32 C.F.R. §§ 1624-27 (1967).

the Government afford substantially equal procedural safeguards to in-service objectors, unless there is some rational basis for distinguishing between the two classes;¹⁴² third, the mere fact that the claims of one group mature before, and those of the other after, the induction process is no such rational basis.¹⁴³ Unfortunately for the petitioner, the success of this argument hinges upon overcoming two major obstacles. The first is the well known fact that an individual who enters the service undergoes an abrupt legal transformation. In addition to a short haircut and a fixed service obligation, he acquires military "status."¹⁴⁴ This "status" entails the subordination of the individual's rights and interests to those of the service, and might reasonably be deemed a "rational basis" for denying the in-service objector the procedural protection enjoyed by his preinduction counterpart. The second difficulty lies in the tendency of courts to take judicial notice of the specialized nature and urgent responsibilities of the military establishment, and to assume without proof that these factors constitute a rational basis for allowing at least a modicum of discrimination against its members.¹⁴⁵

¹⁴² See *Douglas v. California*, 372 U.S. 353 (1963); *Hoyt v. Florida*, 368 U.S. 57 (1961); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹⁴³ Cf. *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966): "The long history of exempting conscientious objectors, coupled with the specific statutory right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures—even if this occurs after an induction notice is sent out but before actual induction—be entitled to have his application considered by the Local Board."

¹⁴⁴ See note 26 *supra*.

¹⁴⁵ See, e.g., *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J. 1967), where the court stated:

[T]he necessity of the armed services to order and control those already within its operation is a sufficiently rational basis for such a distinction. As the Court recognized in *Burns v. Wilson*, [citation omitted] the rights of members of the armed forces are not always as great as those of civilians because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"

In affirming the decision of the district court, however, the court of appeals completely misconstrued the basis for the distinction:

We agree with the excellent opinion of Judge Lane on the issue of procedural due process. Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life.

387 F.2d 150, 152 (3d Cir. 1967). Here the court is not distinguishing between in-service and preinduction objectors, but between men who have voluntarily enlisted, on the one hand, and those who have been inducted or discharged into civilian life, on the other. The court would presumably include preinduction objectors in the latter class, the basis for the classification apparently being the voluntary nature of enlistments; however it is difficult

7. *Failure to Follow Departmental Regulations*

Finally, the challenge can take the form of an allegation that the procedure actually followed in the petitioner's case failed in some material aspect to conform with the controlling regulation.¹⁴⁶ As was pointed out earlier, the "rule of law" demands that once a procedure is established, it must be strictly adhered to.¹⁴⁷ Failure to do so constitutes a denial of due process and invalidates the action in question.¹⁴⁸ Furthermore, if the agency adheres to the procedure which the regulation establishes in some cases and not in others, the party who is denied its benefits is thereby also denied equal protection of the laws.¹⁴⁹

D. *The Prima Facie Case for Review*

The foregoing discussion demonstrates not only that the dispute between the in-service objector and the military involves a claim of substantial legal right, but also that the serviceman's attack may be formulated so as to raise questions of substance under federal law. Only one element remains lacking for the establishment of a prima facie case for review: a jurisdictional basis upon which the federal courts can hear the case.

The most obvious solution to this requirement lies in the "federal question" jurisdiction of the United States district courts; however, should this avenue for any reason be closed to the in-service objector,¹⁵⁰ Congress has provided an alternate basis in the form of federal habeas corpus jurisdiction.¹⁵¹ This statutory provision empowers the federal

to see the validity of such reasoning. While the changing magnitude of the state's interest might support a distinction based upon whether the applicant for conscientious objector status was a full-fledged serviceman or merely a Selective Service registrant, the same logic will not justify the classification suggested by the appellate court. The "overriding demands of discipline and duty" are the same with regard to all individuals in a military status, regardless of whether they originally enlisted or were inducted. The court's proposed distinction, therefore, could only rest upon the notion that one who enters the service through enlistment experiences a simultaneous diminution of his interest in religious freedom by virtue of the voluntariness of his action, while one who is conscripted dons his uniform with such interest fully intact. This theory, however, must be rejected. Not only is it patently illogical, but it fails to consider the fact that a substantial percentage of those who enlist in the armed forces are not really acting voluntarily, but are merely keeping one step ahead of their draft boards. See *Marshall Report*, *supra* note 19, at 11.

¹⁴⁶ See, e.g., *Brown v. McNamara*, 387 F.2d 150 (3d Cir. 1967); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967).

¹⁴⁷ See text accompanying notes 101-04 *supra*.

¹⁴⁸ Cases cited notes 100 & 104 *supra*.

¹⁴⁹ *Brown v. McNamara*, 263 F. Supp. 686, 691 (D.N.J. 1967).

¹⁵⁰ As in the unlikely event, for example, of his inability to prove that the "matter in controversy" exceeded \$10,000—the minimum figure upon which the exercise of this type of jurisdiction is predicated, 28 U.S.C. § 1331 (1964).

¹⁵¹ 28 U.S.C. §§ 2241-55 (1964). Another possible basis for invoking federal court jurisdiction is the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (Supp. II, 1967),

courts to grant writs of habeas corpus to prisoners "in custody under or by color of the authority of the United States."¹⁵² In earlier years the Supreme Court insisted upon genuine physical restraint in the sense of confinement as a prerequisite to granting habeas corpus relief.¹⁵³ Although this view still surfaces occasionally today,¹⁵⁴ the vast majority of courts have adopted the position of *Orloff v. Willoughby*¹⁵⁵ to the effect that any person in the armed forces is "in custody" within the requirements of section 2241 of Title 28, United States Code, and that a petition for writ of habeas corpus is a proper means for testing the lawfulness of such detention.¹⁵⁶

II

THE NONREVIEWABILITY DOCTRINE

Having examined the in-service objector's claim, and having noted the *prima facie* case for review, the time has come to explore the nature and rationale of the doctrine of judicial restraint enunciated by *Orloff v. Willoughby*.¹⁵⁷ This section will therefore be devoted to ascertaining its scope and limitations with a view toward determining the extent to which it should affect the quantum of review available to such petitioners as Brown, Noyd, and Chavez. Before proceeding, however, it is essential to reiterate the point made at the outset that the type of internal military action with which this Comment—and the in-service objector—is concerned, is not disciplinary action by courts-martial, but *administrative* action of a nonjudicial, nonpunitive character.

A. Historical Antecedents

The *Willoughby* rule derives from two distinct concepts, both widely held in this country during the nineteenth century. The first is the ancient

amending 5 U.S.C. § 1009 (1964). See *Estrada v. Ahrens*, 296 F.2d 690 (5th Cir. 1961); JAFFE, *supra* note 10, at 372-74.

¹⁵² 28 U.S.C. § 2241(c)(1) (1964).

¹⁵³ See, e.g., *McNally v. Hill*, 293 U.S. 131 (1934); *In re Grimley*, 137 U.S. 147 (1890); *Wales v. Whitney*, 114 U.S. 564 (1885); *McCord v. Page*, 124 F.2d 68 (5th Cir. 1941).

¹⁵⁴ See, e.g., *United States ex rel. McKiever v. Jack*, 351 F.2d 672, 673 (2d Cir. 1965); *In re Green*, 156 F. Supp. 174, 180 (S.D. Cal. 1957), *appeal dismissed*, 264 F.2d 63 (9th Cir. 1959).

¹⁵⁵ 345 U.S. 83 (1953).

¹⁵⁶ See, e.g., *Gilliam v. Reaves*, 263 F. Supp. 378 (W.D. La. 1966); *In re Phillips*, 167 F. Supp. 139 (S.D. Cal. 1958). A like result has been reached in Selective Service cases where the registrant has allowed himself to be inducted and then filed for habeas corpus. See, e.g., *Gibson v. United States*, 329 U.S. 338 (1946); *Arbitman v. Woodside*, 258 F. 441 (4th Cir. 1919); *Ex parte Cohen*, 254 F. 711 (E.D. Va. 1918); cf. *Jones v. Cunningham*, 371 U.S. 236 (1963) (parolee still "in custody" for purpose of 28 U.S.C. § 2241; restraint need not be physical).

¹⁵⁷ 345 U.S. 83 (1953). In the interest of brevity, the "principle" or "doctrine" that internal military action is non-reviewable will hereinafter be referred to simply as the "*Willoughby* rule."

doctrine, recognized in England from the time of the Norman Conquest, that military tribunals constitute a system of jurisprudence entirely separate from their civilian counterparts.¹⁵⁸ This view is reflected in such early Supreme Court decisions as *Dynes v. Hoover*,¹⁵⁹ which in 1857 held that military courts are not part of the federal judiciary under article III of the Constitution, but rather agencies of the executive branch, established pursuant to articles I and II.¹⁶⁰ It followed logically from this notion of a "split constitution"¹⁶¹ that the decisions of courts-martial are not subject to review by direct appeal, writ of error, or certiorari.¹⁶²

With the sentences of courts martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.¹⁶³

As might well be imagined, it was not difficult for a judiciary steeped in the necessity for this "hands off" attitude toward the decisions of military tribunals to adopt a similar philosophy with respect to the non-judicial actions of the military establishment. Thus, by a rather loose analogy, the doctrine of *Dynes v. Hoover* was to become one of the twin supports of the *Willoughby* rule.

The second concept from which the rule has evolved is simply the notion that the judiciary should not concern itself with the internal functioning of the executive branch—a doctrine which Chief Justice Taney stated memorably in the 1840 case of *Decatur v. Paulding*.¹⁶⁴ The

¹⁵⁸ See *Ex parte Reed*, 100 U.S. 13, 20 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 83 (1857); Wurfel, *Military Habeas Corpus: I*, 49 MICH. L. REV. 493, 495 (1951).

¹⁵⁹ 61 U.S. (20 How.) 65 (1857).

¹⁶⁰ *Accord*, *Swaim v. United States*, 165 U.S. 553 (1897); WINTEROP, *supra* note 7, at 48-50. As Chief Justice Chase later observed: "The Constitution itself provides for military government as well as for civil government." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 137 (1866) (concurring opinion).

¹⁶¹ For a discussion of this concept, see Barker, *Military Law—A Separate System of Jurisprudence*, 36 U. CIN. L. REV. 223 (1967).

¹⁶² See authorities cited note 7 *supra*; cf. authorities cited note 8 *supra*.

¹⁶³ *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1857).

¹⁶⁴ 39 U.S. (14 Pet.) 497 (1840). This case arose from the fact that Congress had (in a single day) enacted both a general pension statute granting pensions to widows of officers who had died in the naval service, and a special resolution granting a similar pension only to "Susan Decatur, widow of the late [Commodore] Stephen Decatur." *Id.* at 497. When Mrs. Decatur applied to the Secretary of the Navy for both pensions, she was informed, on the advice of the Attorney General, that she was not entitled to both, but might take

issue before the Court was the propriety of reviewing an administrative action of the Secretary of the Navy, allegedly based upon an incorrect statutory interpretation. In an opinion couched in terms of the now discredited,¹⁶⁵ and even then rather foggy, distinction between ministerial and executive functions,¹⁶⁶ the Court held that the Secretary's action was not reviewable. In arriving at the conclusion that "we have no jurisdiction over the acts of the secretary in this respect,"¹⁶⁷ the Chief Justice expressed the Court's philosophy concerning the wisdom of such review in language which generations of government lawyers have since quoted approvingly:

The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund, and the whole subject of pensions, into the greatest confusion and disorder.¹⁶⁸

It should be noted that the administrative action which the *Decatur* case held unreviewable involved a function which is usually deemed to lie primarily within the area of expertise of the judiciary: the interpretation of acts of Congress. Even more significant is the fact that the Court's broad condemnation of judicial interference in no way relied upon the respondent's military character. Nowhere in the opinion does the Court differentiate between the Secretary of the Navy and any other department head, or even emphasize the fact that the military establishment

either one at her election. Without conceding the validity of the Secretary's position, Mrs. Decatur accepted what was due her under the statute, and subsequently sought a writ of mandamus to compel payment of the additional amount.

¹⁶⁵ See 3 DAVIS, *supra* note 10, §§ 23.11-12; *id.* §§ 23.09, 23.11-12 (Supp. 1965); JAFFE, *supra* note 10, at 181.

¹⁶⁶ For other illustrations of the use of this distinction, see *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821); *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). In *Kendall*, the Court departed from the position it had taken in the two earlier cases, to uphold the issuance of a writ of mandamus to the Postmaster General, thus establishing for the first time the Court's power to review the legality of executive action. Chief Justice Taney dissented. See generally Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287 (1948).

¹⁶⁷ 39 U.S. (14 Pet.) at 517.

¹⁶⁸ *Id.* at 516. One commentator, observing that the critical facts in *Decatur* differed very little, if at all, from those of *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), discussed in note 166 *supra*, has suggested that the abrupt about face within a two-year period was largely due to non-legal considerations of practical politics: "Having forged its weapon the Supreme Court was content to bide a better day to wage battle with it. . . . After the *Kendall* case in 1838 it was forty-two years (1880) before the Supreme Court held another executive function to be ministerial." Lee, *supra* note 166, at 294-95.

was involved. This strongly reinforces the impression given by the general language quoted above that Chief Justice Taney's "nonreviewability doctrine" applied equally to *all* executive action—not merely that of the military.¹⁶⁹

Throughout the remainder of the nineteenth century the Court adhered closely to the Taney philosophy with regard to administrative action in general. In *United States v. Eliason*,¹⁷⁰ decided just two years after *Decatur*, the Court was asked to intervene in a dispute between the army and one of its disbursing officers, concerning the latter's entitlement to certain remuneration. The outcome of the disagreement hinged upon the validity of an army regulation issued pursuant to an act of Congress, the contention of the respondent officer being that the army had misinterpreted the legislation in question, and that the implementing regulation was therefore void. The trial court decided in favor of the disbursing officer. The Supreme Court, however, holding that the lower court had no business reviewing the legality of an army regulation, unanimously reversed.¹⁷¹ Again it should be noted that the Court's exercise of judicial restraint was not a sign of deference to the military establishment per se but to the executive branch of which it was a part. Similar treatment was subsequently afforded the actions of other department heads.¹⁷²

¹⁶⁹ For additional evidence that this was the case, consider the following extract from Justice Catron's separate opinion:

Between the circuit court of this district, and the executive administration of the United States, there is an open contest for power. The court claims jurisdiction to coerce by *mandamus*, in *all cases* where an officer of the government of *any grade* refuses to perform a ministerial duty; and of necessity claims the right to determine, in every case, what is such duty

39 U.S. (14 Pet.) at 518g (emphasis added).

¹⁷⁰ 41 U.S. (16 Pet.) 291 (1842).

¹⁷¹ The language of the opinion clearly reflects the "separation of powers" view of Chief Justice Taney; however, unlike *Decatur*, it also places heavy emphasis upon the internal military character of the dispute—a factor which makes the case one of the earliest genuine precursors of the *Willoughby* rule:

The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied, because they may be thought unwise or mistaken. . . . [The] consequences [of such questioning], if tolerated, would be a complete disorganization of both the army and the navy.

41 U.S. (16 Pet.) at 301-02.

¹⁷² See, e.g., *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166 (1868) (holding that remission of a penalty by the Secretary of the Treasury was not reviewable); *Hadden v. Merritt*, 115 U.S. 25 (1885) (holding that the valuation of foreign currency by the Secretary of the Treasury, which rested upon a disputed question of statutory interpretation, was not reviewable). In *Keim v. United States*, 177 U.S. 290 (1900), the Court declined to review the discharge for inefficiency of an employee of the Interior Department. Citing

In the 1902 case of *American School of Magnetic Healing v. McAnnulty*,¹⁷³ however, the Supreme Court adopted a radically different approach to the subject of judicial review of administrative action. In what was the first major departure from the philosophy of *Decatur*, the Court held that an administrative determination is reviewable in the absence of statutory prohibition. The object of the Court's scrutiny was a fraud order issued by the Postmaster General pursuant to a statute authorizing him to deny the use of the mails to any person who he determined was using them for fraudulent purposes. Noting that the case was before the Court on demurrer, and that the Court must therefore assume that the plaintiff's business was legitimate and beyond the scope of the statute, Justice Peckham stated:

That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head . . . of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. . . .¹⁷⁴

To Justice Peckham, the importance of allowing such review was obvious: "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual."¹⁷⁵

The importance of *McAnnulty* as an enabling factor in the development of the *Willoughby* rule can hardly be overstated. Under the Taney theory that virtually all executive action was immune from judicial review, there was no need for such a rule. The military orientation of such cases as *Decatur* and *Eliason* did not qualify them for special treatment, but served only to solidify the Court's strong preexisting disposition against review. With the coming of *McAnnulty* and its progeny,¹⁷⁶ how-

Decatur v. Paulding for the principle that "the courts have no general supervising power over the proceedings and action of the various administrative departments of government," 177 U.S. at 292, the Court held: "These are matters peculiarly within the province of those who are in charge of and superintending the departments, and, until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers." 177 U.S. at 296.

¹⁷³ 187 U.S. 94 (1902).

¹⁷⁴ 187 U.S. at 108.

¹⁷⁵ *Id.* at 110. It is significant to note that not only was the statute in question silent on the question of review, but there was a complete absence of any legislative history indicating an intent that the Postmaster General's determinations should be examined by the courts.

¹⁷⁶ See, e.g., *Stark v. Wickard*, 321 U.S. 288 (1944); *Dismuke v. United States*, 297 U.S. 167 (1936); *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904).

ever, the judicial pendulum began to swing away from the position that administrative determinations are unreviewable unless Congress affirmatively provides for review,¹⁷⁷ and toward the general "presumption of reviewability" which has been preeminent for almost a half century.¹⁷⁸

This turn of events put the problem of military administrative action in a new light. No longer would such action be shielded from review by the broad cloak of *Decatur*. If it were to continue to enjoy immunity, the justification would henceforth have to be couched in terms of considerations peculiar to the military establishment. This is not to suggest the total demise of the separation of powers concept which underlay Chief Justice Taney's philosophy. Nothing could be farther from the truth; for the theme of *Decatur* and *Eliason* is still quite prominent in today's applications of the *Willoughby* rule.¹⁷⁹ The point is simply that after *McAnnulty*, the Taney concept alone was no longer an adequate basis for denying judicial review, whether in a military context or otherwise. With this in mind, it is probably accurate to describe the rule applied in the in-service objector cases as a twentieth century phenomenon, the development of which has roughly paralleled the growth of modern administrative law. While its roots lie in the nineteenth century cases of *Decatur v. Paulding* and *Dynes v. Hoover*, it owes its present form to a series of cases commencing in 1911 with *Reaves v. Ainsworth*.¹⁸⁰

B. The Discharge Cases

At least numerically, by far the most important class of cases involving the reviewability of military administrative action has been that

¹⁷⁷ See, e.g., *Keim v. United States*, 177 U.S. 290 (1900); *Hadden v. Merritt*, 115 U.S. 25 (1885).

¹⁷⁸ See note 10 *supra*. Professor Davis suggests that:

The probable explanation for the early judicial attitude is that the judges had not yet developed a clear vision of the possibility of a limited review. If the choice was between something approaching a judicial assumption of administrative tasks and a refusal of all review, a preference for unreviewability was easy. But the courts gradually developed systems of limited review. As soon as the judges clearly perceived that they could restrict their review to questions of jurisdiction, statutory interpretation, fair procedure, and substantial evidence, it is hardly surprising that the presumption gradually shifted to the side of reviewability.

4 DAVIS, *supra* note 10, at § 28.07, at 31.

¹⁷⁹ See, e.g., *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Brown v. McNamara*, 387 F.2d 150, 154 (3d Cir. 1967) (concurring opinion); *Noyd v. McNamara*, 267 F. Supp. 701, 707 (D. Colo.), *aff'd per curiam*, 378 F.2d 538 (10th Cir.), *cert denied*, 36 U.S.L.W. 3250 (U.S. Dec. 19, 1967). The early cases are still cited occasionally as support for a denial of review of military action; however, their precedential value is, at best, highly questionable. See, e.g., *Harmon v. Brucker*, 243 F.2d 613, 618 (D.C. Cir. 1957), *rev'd per curiam*, 355 U.S. 579 (1958) (*Eliason*); *Overseas Media Corp. v. McNamara*, 259 F. Supp. 162, 163 (D.D.C. 1966) (*Decatur*); *Beard v. Stahr*, 200 F. Supp. 766, 776 (D.D.C. 1961) (*Decatur*).

¹⁸⁰ 219 U.S. 296 (1911).

group of decisions occasioned by servicemen's objections to their discharges. In fact, it was almost exclusively against the background of these numerous disputes over the fact or type of discharge that the *Willoughby* rule developed during the first half of the twentieth century.¹⁸¹

The first and most important of these cases to reach the Supreme Court was *Reaves v. Ainsworth*.¹⁸² Reaves was a second lieutenant of

¹⁸¹ For an exceptionally able review of this development and an analysis of the major cases contributing thereto, see Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 COLUM. L. REV. 917 (1957).

¹⁸² 219 U.S. 296 (1911). One earlier lower court case deserves mention. In *Reid v. United States*, 161 F. 469 (S.D.N.Y. 1908), writ of error dismissed, 211 U.S. 529 (1909), the court was asked to review an action taken by the President in his capacity as Commander-in-Chief of the armed forces. The plaintiff, one of a large number of soldiers suspected of having been involved in a riot at Brownsville, Texas, was discharged "without honor" by the personal order of the President. The court disclaimed any authority to review the facts of the case:

Several matters discussed at bar must be laid aside as immaterial to the disposition of this cause. Whether Reid or his comrades, or any of them, were guilty of the riotous disturbance in question; or whether Reid personally committed any infraction of good order or military discipline; or whether he is in fact a desirable soldier; or whether he knew or withheld anything tending toward the discovery of the perpetrators of the Brownsville riot; or whether, so far as Reid or others are concerned, the President's action was unnecessarily severe, cruel, or unjust—are questions beyond this judicial investigation.

Id. at 470. Having thus limited the scope of its inquiry, the court rejected on their merits Reid's contentions that the President was not the "proper authority" to terminate his enlistment contract, and that his discharge "without honor" constituted an unlawful imposition of punishment:

The exact method of this soldier's discharge and the quantum or kind of character that should be given, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine, while that a discharge with a very bad character is not a punishment to the man discharged within the meaning of any federal statute is settled

Id. at 472. While this case does present the reviewability question in a "discharge" context, the decision clearly has much more in common with *Decatur* and *Eliason* than with the later discharge cases of the *Ainsworth* type. In *Reid*, the court seems to base its denial of review not on any exigencies peculiar to the military, and not even on Chief Justice Taney's general deference toward acts of the executive branch, but upon the narrower ground that the challenged action was actually taken by the President personally. This very narrow version of the *Decatur* philosophy has to some extent survived *McAnnulty*, and even today it constitutes a recognizable influence on judicial review. Although it can be a factor in a military context, where the challenged action may be nominally taken by the President in his capacity of Commander-in-Chief, this personal involvement of the Chief Executive is of much greater significance in the area of foreign affairs, where even the most limited review is practically unheard of. See *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States Overseas Airlines, Inc. v. CAB*, 222 F.2d 303 (D.C. Cir. 1955). But cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912). See generally JAFFE, *supra* note 10, at 363-66; Hoch-

artillery who had been honorably discharged by the President, acting on the recommendation of an examination board established pursuant to an act of Congress. The statute authorized the President "to prescribe a system of examination for all officers below the rank of major, to determine their fitness for promotion,"¹⁸³ and provided that: "[s]hould the officer fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in line of duty he shall be *retired* . . . but if he should fail for any other reason . . . he shall be honorably *discharged* with one year's pay"¹⁸⁴

The first board which examined Reaves found him temporarily physically incapacitated for duty and unable to proceed with the mental examination, due to a nervous ailment "contracted in line of duty."¹⁸⁵ Had the President approved this finding, the plaintiff would have been entitled to be retired with three-quarters pay for life; however, because the board had held out some hope for recovery, the army took no action, and Reaves was ordered before a second board some three months later. This time, despite clear evidence of his continuing mental illness, the board found him physically qualified and directed him to take the mental examination. Reaves attempted to do so, but because of weeping spells and other "marked symptoms of neurasthenia" he was unable to complete it. Upon the basis of his practically blank examination papers, the board found him unqualified for promotion and discharged him with one year's pay.

By petition for certiorari, the plaintiff sought judicial review of the board proceedings, annulment of the order discharging him, and placement on the list of retired officers. He questioned the sufficiency of the evidence, the fairness of the procedure,¹⁸⁶ and the statutory authority of

man, *Judicial Review of Administrative Processes in which the President Participates*, 74 HARV. L. REV. 684 (1961).

¹⁸³ 219 U.S. at 298.

¹⁸⁴ *Id.* at 298-99 (emphasis added).

¹⁸⁵ *Id.* at 299. The Court's opinion includes the following description of Reaves' disability:

He alleges that for the last two years he has been suffering from an extremely acute case of cerebral neurasthenia, or nervous exhaustion, for which he has been almost continuously under the care of physicians, some of whom are the most famous in the world as specialists for nervous diseases. And, further, that he is to-day in as bad a condition as at any time during the last two years and is wholly unable to exercise mental effort; his memory is at times a blank, and it is, and for two years has been, utterly impossible for him "to study, read or think consecutively, except for a few moments at a time, and 'his' sleep has not averaged more than about two and one-half hours per day."

Id. at 301.

¹⁸⁶ Specifically, he alleged that: "The [second] board refused to call in witnesses, on the ground that the doctors had already filed certificates, and that the laymen were not

the President to discharge him, in light of the first board's report. Of these claims, the Court considered only the last on its merits, rejecting it on the grounds that the first report was merely provisional—"an indulgence to the afflicted officer, giving him a chance for recovery and promotion and assignment to the active list of his profession."¹⁸⁷ Turning to Reaves' due process claims, the Court harked back to the rationale of *Dynes v. Hoover*, observing: "[W]hat is due process of law must be determined by circumstances. To those in the military or naval service of the United States the military law is due process."¹⁸⁸ The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."¹⁸⁹

The Court went on to justify further its denial of review in terms of the traditional *Decatur* doctrine. It is important to note, however, that while the challenged action was nominally that of the President, and although *McAnnulty* had not really come into its own,¹⁹⁰ the Court felt constrained to add something to the time-honored separation of powers dogma. The result was the first legitimate articulation of the *Willoughby* rule:

The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but *greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army.* . . . If it had been the intention of Congress to give an officer the right to raise issues and controversies with the board . . . and carry them over the head of the President to the courts . . . such intention would have been explicitly declared. *The embarrassment of such a right to the service, indeed the detriment of it, may be imagined.*¹⁹¹

More than a decade passed before the subject again came before the Court, this time in the form of *United States ex rel. French v. Weeks*¹⁹² and *United States ex rel. Creary v. Weeks*,¹⁹³ companion cases involving

expert witnesses. Plaintiff in error was not allowed to call witnesses, nor to inspect exhibits presented to the board, not to cross-examine the surgeons on their report. All testimony, documentary or otherwise, was taken in secret." *Id.* at 302.

¹⁸⁷ *Id.* at 300.

¹⁸⁸ (Author's footnote.) This doctrine has been clearly overruled. See *Burns v. Wilson*, 346 U.S. 137 (1953); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

¹⁸⁹ 219 U.S. at 304. As authority for this proposition the Court cited two courts-martial cases: *Johnson v. Sayre*, 158 U.S. 109 (1895); *Mullan v. United States*, 212 U.S. 516 (1909).

¹⁹⁰ Professor Davis fixes the turning point circa 1920. 4 DAVIS, *supra* note 10, at § 28.07, at 31. Compare *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904) (denying review), with *Eberlein v. United States*, 257 U.S. 82 (1921) (granting review).

¹⁹¹ 219 U.S. at 306 (emphasis added).

¹⁹² 259 U.S. 326 (1922).

¹⁹³ 259 U.S. 336 (1922).

the Army Reorganization Act of 1920,¹⁹⁴ the purpose of which was to reduce the size of the army to peacetime proportions while maintaining a high standard of efficiency. The Act provided for: (1) a preliminary classification of all officers as either Class A (should be retained) or Class B (should not be retained); (2) an optional hearing before a court of inquiry for all those placed in Class B; (3) a reconsideration of each case by a Final Classification Board whose finding "shall be final and not subject to further revision except upon the order of the President";¹⁹⁵ (4) a review of all officers still remaining in Class B by an Honest and Faithful Board, to determine whether their classification was due to "neglect, misconduct or avoidable habits." If so, the officer was discharged; if not, he was retired with pay.

French and Creary, both army colonels, fell victim to this statutory pruning hook, the former being retired and the latter discharged. Each sought by writ of mandamus to compel the Secretary of War to vacate his separation order and restore him to the rank and status previously held. In both cases the Supreme Court affirmed the lower court action dismissing the petition. After weighing on its merits and rejecting the plaintiffs' contention that the statute imposed on the President a nondelegable duty to review all cases personally, the Court declined to consider the allegations of insufficiency of evidence and denial of procedural due process.

The reasoning offered in support of this exercise of judicial restraint reflects the completion of the transition begun in *Reaves*. While observing that the lower court had held the Secretary of War's action unreviewable as an executive action of the President, the Supreme Court preferred not to pursue this line of justificatory argument. Instead, the Court chose to rely wholly upon the analogy to courts-martial and the historical separation of the civil courts therefrom as enunciated in *Dynes v. Hoover*. Echoing *Reaves*, the Court stated: "As a Colonel in the Army, the relator was subject to military law and the principles of that law, as provided by Congress, constituted for him due process of law in a constitutional sense."¹⁹⁶ Noting, furthermore, that the plaintiff's demurrer had conceded the correctness of the board's composition, and observing that it had rejected his claim of unlawful delegation, the Court concluded:

Thus we have lawfully constituted military tribunals, with jurisdiction over the person and subject-matter involved unquestioned and unquestionable, and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy

¹⁹⁴ Act of June 4, 1920, ch. 227, 41 Stat. 759.

¹⁹⁵ 259 U.S. at 330.

¹⁹⁶ *Id.* at 335.

that under such conditions decisions by military tribunals, constituted by Act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise.¹⁹⁷

The question of the reviewability of military discharges did not again reach the Supreme Court until 1947, when it granted certiorari in *Patterson v. Lamb*,¹⁹⁸ a case involving a rather belated challenge to an unusual discharge procedure employed during World War I. His local draft board had directed Lamb to report on November 11, 1918 (Armistice Day), for "immediate military service." No sooner had he reported, however, than news of the armistice was received, followed by notification that his draft call had been canceled and he could return home, still a soldier, to await further orders. Four days later, his draft board notified him that he was discharged from the army, and that cancellation of his induction orders would have the effect of an honorable discharge. Instead of the usual honorable discharge certificate, however, Lamb subsequently received a document entitled "Discharge from Draft."¹⁹⁹

¹⁹⁷ *Id.* at 335-36, citing *Dynes v. Hoover* and other cases denying review of courts-martial. In *Creary*, the Court provides an insight into the underlying rationale for such statements:

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

Id. at 343.

¹⁹⁸ 329 U.S. 539 (1947). In the interim, there had been a number of discharges contested in the lower courts, the decisions all going against the servicemen-plaintiffs. *See, e.g.,* *Davis v. Woodring*, 111 F.2d 523 (D.C. Cir. 1940) (court without jurisdiction to review the validity of a "discharge from draft"); *Hurley v. United States ex rel. Gladman*, 47 F.2d 431 (D.C. Cir. 1931) (statutory procedure for discharge from National Guard satisfies requirements of constitutional due process); *Nordman v. Woodring*, 28 F. Supp. 573 (W.D. Okla. 1939) (War Department's interpretation of act of Congress authorizing discharge of serviceman held unreviewable); *Palmer v. United States*, 72 Ct. Cl. 401 (1931) (plaintiff without standing to challenge his commanding officer's failure to follow Coast Guard procedure in issuing discharge); *Gaston v. United States*, 34 A.2d 353 (D.C. Mun. Ct. 1943), *aff'd*, 143 F.2d 10 (D.C. Cir.), *cert. denied*, 322 U.S. 764 (1944) (the sad case of a seventy-four year old former national guard captain who unlawfully, but apparently innocently, wore the uniform of an army captain while seeking out servicemen to invite to a local church "canteen"—and received for his efforts a \$150 fine and ninety days in jail).

¹⁹⁹ A "discharge from draft" was authorized by army regulations during World War I for fresh recruits who failed to meet physical requirements at the mobilization camp.

Believing that he had been honorably discharged, the plaintiff failed to question the correctness of his discharge certificate until, almost twenty years later, he was denied certain state tax exemptions by reason of the fact that he had not received an honorable discharge from the service. He thereupon attempted to obtain the requisite certificate from the army. Upon denial of administrative relief, he brought suit in federal court, seeking a declaratory judgment and mandatory injunction to compel the army to issue him a certificate of honorable discharge.

Noting the absence of any applicable statutory law and the fact that the relevant army regulations had not been promulgated with Lamb's rather unique situation in mind, the Supreme Court simply weighed the equities of the case and concluded that "Respondent was inducted into the Army and was discharged before he reached a mobilization camp for final processing. His discharge indicates these facts. The law demands no more."²⁰⁰

In reaching this result, the Court examined the merits of the plaintiff's claim in a manner seemingly incompatible with the philosophy expressed in the earlier discharge cases. A close look at the decision, however, reveals two factors which, taken together, largely negate its significance as a precedent for judicial review of military discharges in general. First, it is obvious from a practical viewpoint that this case never really offered the potential for judicial interference with the internal functioning of the military. By undertaking to examine the merits of Lamb's claim, the Court was merely reviewing what amounted to no more than an unusual extension of the induction process. The opinion takes pains to point out that:

[D]espite the fact that draftees became subject to military law and duty from the moment of their arrival for entrainment at the local board, Selective Service Regulation 174-176 provided that they nevertheless were not finally accepted for military service, and could be rejected after arrival at camp. And it was not until they had been finally accepted that they could or would be assigned to full-fledged duty as soldiers.²⁰¹

Lamb, therefore, was only a "quasi-soldier" during his four days on active duty, and the Court could reasonably assume that the military had never consolidated its control over an individual who was discharged even before he could board the train for mobilization camp.

A second significant aspect of the decision is the court's express dis-

Although in no sense a derogatory form of separation, such a discharge did not qualify the recipient for veterans' benefits. *See Davis v. Woodring*, 111 F.2d 523 (D.C. Cir. 1940).

²⁰⁰ 329 U.S. at 545.

²⁰¹ *Id.* at 543-44.

claimer of any intent to indorse judicial review of military discharges in the conventional sense:

Whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers, is a question that we need not here determine For we are satisfied that the War Department was within its power in granting a discharge from draft rather than the type of discharge it granted soldiers who performed military service after having been fully and finally absorbed into that service.²⁰²

This statement clearly indicates that the Court did not intend to overrule, either expressly or by implication, such cases as *Reaves*, *Creary*, and *French*.

At the same time, however, it must be noted that some fresh reasoning would have been required on the part of the *Lamb* court in order to support in that context the complete denial of review which characterized the earlier cases. Because Lamb's discharge was not the result of board action and involved no "military tribunal" of any sort, the Court would have been hard put to justify a denial of review solely by analogy to the *Dynes v. Hoover* rationale. Unfortunately for both the plaintiff and the student of the *Willoughby* rule's history, however, the length of the former's service was woefully insufficient to force the issue. The lesson of the "discharge cases" was thus limited to situations involving formal quasi-judicial board action of the type encountered in the earlier decisions.²⁰³ Within this narrow context, however, there could be no doubt of the Court's unwillingness to review the vast majority of claims—even those of constitutional dimensions.

C. *Orloff v. Willoughby*²⁰⁴

The centerpiece of the modern nonreviewability doctrine was a by-product of the acute doctor shortage which confronted the armed services at the outbreak of the Korean War. In an effort to combat this problem Congress enacted special legislation, known as the Doctor's Draft Act,²⁰⁵ which authorized the induction of otherwise overage "medical and allied

²⁰² *Id.* at 542 (emphasis added).

²⁰³ *Reaves*, *Creary*, and *French* all involved formal board action. Among the lower court cases, two did not fit this pattern, however, neither is very helpful. In *Reid v. United States*, 161 F. 469 (S.D.N.Y. 1908), discussed in note 182 *supra*, the court's denial of review was based on the pre-*McAnnulty* approach, heavily laced with judicial deference to the personal acts of the President. In *Davis v. Woodring*, 111 F.2d 523 (D.C. Cir. 1940), plaintiff's claim that the regulation should have been promulgated by the President, rather than the Secretary of War, was too flimsy to give his plea for review a fighting chance.

²⁰⁴ 345 U.S. 83 (1953).

²⁰⁵ Act of Sept. 9, 1950, ch. 939, 64 Stat. 826 (codified in scattered sections of 5, 37 U.S.C., 50 U.S.C. App.).

specialist categories," and provided for their immediate commissioning in various officer grades, depending upon their medical training and qualifications.

Orloff, a psychiatrist who had been educated at government expense and who was beyond normal draft age, was inducted into the army under the Doctors' Draft Act. Because of his refusal to answer certain questions concerning prior Communist Party affiliations on grounds of possible self-incrimination, however, he was not commissioned or given the usual duties of an army doctor. Instead, he was retained in an enlisted status and assigned duties as a laboratory technician. Convinced that his statutory rights were violated, Orloff filed a petition for writ of habeas corpus in federal court, alleging that his retention in the army in any capacity other than as a commissioned doctor was unlawful. He did not question the legality of his induction, nor did he challenge the operative administrative procedure; he merely asked that he be given the rank and duties to which the circumstances of his induction entitled him, or, failing this, that he be discharged.

The court was thus asked to review two routine administrative actions by the army: First, its denial of the plaintiff's application for a commission; second, its assigning him to duty as a laboratory technician. Before the trial judge, Orloff withdrew his demand for a commission, and insisted only that the army must utilize him as a doctor or discharge him. The Government responded that the Doctors' Draft Act did not require that individuals conscripted thereunder be used solely as doctors, but that doctors drafted under the statute could be "used for any purpose the Army saw fit, that duty assignment for such inductees was a matter of military discretion."²⁰⁶ Agreeing with this construction of the Act, the trial judge denied the writ. On the same grounds, the court of appeals affirmed.

By the time the case reached the Supreme Court, the parties had, as Mr. Justice Jackson put it, "changed positions as nimbly as if dancing a quadrille."²⁰⁷ The Government, which had successfully argued below that the statute required no particular type of duty assignment, now conceded that the petitioner was entitled to duties generally within a doctor's field, and pointed out that the army had recently reassigned him accordingly. Orloff, on the other hand, while contesting the Government's characterization of his present duties as those of a doctor,²⁰⁸ reasserted

²⁰⁶ 345 U.S. at 87.

²⁰⁷ *Id.*

²⁰⁸ Although the petitioner had admittedly been reassigned to medical duties associated with the treatment of psychiatric patients, he was still denied the prerogatives of a commissioned officer and restricted from administering certain drugs and treatments said to induce

his theretofore dormant claim that commissioned status was also a prerequisite to his lawful retention in the army.

Addressing itself initially to a preliminary task which a number of its predecessors had likewise been willing to undertake,²⁰⁹ the Court examined the validity of the army's interpretation of the statute. It concluded that the Government's concession had been well-advised, since the Act clearly obligated the army "to classify specially inducted professional personnel for duty within the categories which rendered them liable for induction."²¹⁰ While the statute did entitle the petitioner to this much by way of duty assignment, however, the Court concluded that it did not entitle him to a commission as a condition precedent to his service obligation:

It is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief. Whatever control courts have exerted over tenure or compensation under an appointment, they have never assumed by any process to control the appointing power either in civilian or military positions.²¹¹

Having thus interpreted the Doctors' Draft Act as entitling Orloff to an assignment in the medical field, but not to a commission, the sole remaining question was whether the particular duties to which he was presently assigned fell within the scope of the statutory command. This question the Court declined to resolve:

[I]t is not within the power of this Court by habeas corpus to determine whether specific assignments to duty fall within the basic classification of petitioner. . . . [T]here must be a wide latitude allowed to those in command. . . . While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.²¹²

When subjected to detailed analysis, this denial of review in *Will-*

hypnosis—apparently out of the fear that he would extract from his patients classified information which might be transmitted to the enemy. *Id.* at 93.

²⁰⁹ See, e.g., *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *United States ex rel. French v. Weeks*, 259 U.S. 326 (1922), both cases discussed in text accompanying notes 181-97 *supra*.

²¹⁰ 345 U.S. at 88.

²¹¹ *Id.* at 90. Illustrative of the Court's predilection for disclaiming any authority to review a discretionary act, only to go ahead and review it, is the fact that Orloff's claim to a commission was actually examined closely and rejected on its merits. Reviewing the record, the Court observed that: "[E]nough appears to make plain that there was cause for refusing him a commission. . . . The petitioner appears to be under the misconception that a commission is not only a matter of right, but is to be had upon his own terms." *Id.* at 89-90.

²¹² *Id.* at 93-94. The language omitted from the center of this extract is the much-quoted passage which appears at the head of this Comment.

oughby is seen to be extremely narrow. Although three Justices—Black, Douglas, and Frankfurter—dissented on the ground that the majority had misconstrued the statute,²¹³ the Court was unanimous in its willingness to review the military's interpretation of the law, and, if necessary, to require the army to assign petitioner to duties within a particular field.²¹⁴ The majority even went so far as to reject on its merits Orloff's claim to a commission. By comparison, the area in which review was denied appears insignificant. The Government's judicious concession and reassignment of petitioner before the high court heard the case effectively transformed what had been a substantial claim of malassignment into a hollow shell of a grievance. The petitioner was admittedly being used in the general medical capacity which Congress intended, and he was even practicing his particular specialty. The Court could hardly have felt many qualms at refusing to examine his claim that the imposition of a handful of restrictions on his accustomed mode of practicing psychiatry entitled him to a premature discharge from the service.

It is quite possible, furthermore, that even this limited denial of review resulted as much from the Court's lack of sympathy for the petitioner as from some measure of deference to the integrity of military administrative determinations. While Justice Jackson's sweeping language clearly imports a respect for, if not a devotion to, the nonreviewability principle,²¹⁵ the majority's distaste for Dr. Orloff was no less apparent. In addition to the Court's emphasis of the fact that the government had paid for Orloff's education, and its reference to his apparent belief that he could have a commission "on his own terms," witness the following commingling of the two strains of thought:

Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown by this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of

²¹³ The dissenters thought that the Doctors' Draft Act clearly required that individuals inducted thereunder who could not qualify for commissions be released, and that the petitioner was "held in the Army not to be used as a medical practitioner, but to be treated as a kind of pariah in order to punish him for having claimed a privilege which the Constitution guarantees." *Id.* at 97.

²¹⁴ But see 4 DAVIS, *supra* note 10, at § 28.06, at 29, where the author states with regard to *Willoughby* that "the Court divided on the reviewability question . . ."

²¹⁵ It is significant to note, however, that the Court was either unable or unwilling to cite a single case in support of the theory upon which it denied review.

the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities.²¹⁶

In sum, the centerpiece of the doctrine turns out to be something of a paper tiger. For all its unequivocal language in support of the non-reviewability principle, the decision itself is ambiguous.²¹⁷ One faces the dilemma of not knowing whether to do as the Court says, or as the Court does. Assuming that the latter is the reasonable choice, *Willoughby* is authority for only a very circumscribed rule of nonreviewability: *When it is clear that the military has not exceeded its statutory authority*—as by assigning an individual to an entirely improper general field—its exercise of discretion *within the purview of such authority*—as in the determination of particular duty assignments—is not reviewable.²¹⁸

D. Developments Since *Willoughby*

The fifteen years which have passed since the Supreme Court imparted new vigor and stature to the nonreviewability principle at Dr. Orloff's expense have seen several major developments in the closely related areas of civil review of both courts-martial convictions and military discharges. While the time-honored separation of military and civil judicial systems recognized in *Dynes v. Hoover*²¹⁹ has been unequivocally upheld,²²⁰ the traditional practice of limiting the *scope* of federal habeas corpus review of courts-martial determinations to the narrow question of jurisdiction²²¹ has to some extent been abandoned. A trend toward broader review in civilian habeas corpus cases²²² had long foreshadowed this re-

²¹⁶ 345 U.S. at 94-95.

²¹⁷ Compare 4 DAVIS, *supra* note 10, at § 28.19, at 104, with JAFFE, *supra* note 10, at 367. See also *United States ex rel. Boscola v. Bledsoe*, 152 F. Supp. 343, 346 (W.D. Wash. 1956), which cites *Willoughby* as authority for the court's power to review an action taken by the Secretary of the Navy.

²¹⁸ Soon after the decision in the principal case, two lower courts followed the lead of the dissenters and ordered a pair of servicemen discharged on the basis of an amendment to the Doctors' Draft Act, which appeared to supersede *Willoughby*. One of these opinions was subsequently vacated when Congress, by a second amendment to the statute, expressly authorized the army to retain as enlisted men doctors who failed to qualify for commissions. 50 U.S.C. APP. § 454a(a) (1964). See *Nelson v. Peckham*, 210 F.2d 574 (4th Cir. 1954); *Levin v. Gillespie*, 121 F. Supp. 239 (N.D. Cal. 1954), *vacated*, Civil No. 33574 (N.D. Cal., March 24, 1955).

²¹⁹ 61 U.S. (20 How.) 65 (1857), *discussed* in text accompanying notes 159-63 *supra*.

²²⁰ See *Fowler v. Wilkinson*, 353 U.S. 583 (1957); *Burns v. Wilson*, 346 U.S. 137 (1953). See generally Warren, *supra* note 6; Quinn, *supra* note 139.

²²¹ Cases cited note 9 *supra*.

²²² For some of the major milestones in this development, see *Moore v. Denipsey*, 261 U.S. 86 (1923); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Waley v. Johnston*, 316 U.S. 101 (1942); *Hawk v. Olson*, 326 U.S. 271 (1945).

sult, and in *Burns v. Wilson*²²³ the Court approved an expanded scope of consideration for review of military tribunals.

Although unwilling to obliterate entirely the distinction between military and civilian habeas corpus proceedings,²²⁴ the Court clearly repudiated the traditional notion that "the single inquiry, the test, is jurisdiction."²²⁵ Basing its denial of relief on the fact that the military appellate courts had "fully and fairly" dealt with the petitioner's allegations, the *Burns* Court stated:²²⁶

Had the military courts manifestly refused to consider those claims, the District Court was empowered to review them *de novo*. For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from crude injustices of trial so conducted that it becomes bent upon fixing guilt by dispensing with rudimentary fairness²²⁷

The Court went on to conclude that, "It is the limited function of the civil courts to determine whether the military have given fair consideration to each of [the petitioner's] claims."²²⁸

This ostensibly represents a significant expansion of the standard which governed when *Reaves*, *French*, and *Creary*²²⁹ were decided; and to the extent, therefore, that the *Willoughby* rule rests upon the analogy between military administrative action and courts-martial decisions, *Burns* must be assimilated into the doctrine which these early cases enunciated.²³⁰ Whatever may be the limitations of the analogy for

The Supreme Court appears to have put the capstone on this trend when, in the recent case of *Fay v. Noia*, 372 U.S. 391 (1963), it reread its history and concluded, in a civilian context, that habeas corpus never had been strictly limited to matters of jurisdiction.

²²³ 346 U.S. 137 (1953).

²²⁴ "[I]n military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases." *Id.* at 139.

²²⁵ *Hiatt v. Brown*, 339 U.S. 103, 111 (1950), quoting *In re Grimley*, 137 U.S. 147, 150 (1890).

²²⁶ There were four written opinions in this case, none of which was concurred in by a majority of the Court. Chief Justice Vinson announced the judgment of the Court, and he was joined by Justices Reed, Burton, and Clark. Justice Jackson concurred only in the result, with no written opinion. Justice Minton wrote a separate opinion, concurring in the affirmance of the judgments. Justice Frankfurter was convinced that the case should be reargued, and Justices Black and Douglas dissented from the Court's decision. Only Justice Minton favored application of the traditional test.

²²⁷ 346 U.S. at 142.

²²⁸ *Id.* at 144 (emphasis added).

²²⁹ These cases are discussed in text accompanying notes 180-97 *supra*.

²³⁰ Because of the multiplicity of opinions and the ambiguity of the Chief Justice's language, the precise extent to which *Burns* represents a liberalization of the traditional test has never been quite clear. Just two years after the decision came down, the Seventh Circuit—in a case involving the habeas corpus petition of one of three soldiers serving twenty-year court-martial sentences for attempted rape—read *Burns* as expanding the permissible scope of review, at least to the extent of shifting the emphasis from mere jurisdiction to "broader

the use to which the Court put it in *Reaves*, it is invulnerable when its purpose is the establishment of a minimum level of review in the administrative context.

A second development, roughly paralleling the first, has taken place with regard to the reviewability of administrative discharge actions. In *Harmon v. Brucker*,²³¹ a case which presents an interesting contrast to such earlier decisions as *Creary* and *French*, the Supreme Court once again broke sharply with tradition. Harmon had been inducted into the army in 1952 and subsequently assigned to nonsensitive duties because he had allegedly engaged in certain subversive activities prior to his induction. In 1954, when he had completed more than three-quarters of his obligated service, the Department of Defense promulgated a directive²³² which expanded its security program to include military as

considerations of the 'fullness' and 'fundamental fairness' of the court-martial proceedings." *De Coster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955). With this view of its powers, the *De Coster* court determined that the military court had not dealt "fully and fairly" with the petitioner, and ordered him released. Soon thereafter, however, *De Coster's* former co-defendants brought similar actions in federal courts of the third and fifth circuits, and in both cases the courts of appeals denied relief on jurisdictional grounds. *Jackson v. Taylor*, 234 F.2d 611 (3d Cir. 1956); *Wilkinson v. Fowler*, 234 F.2d 615 (5th Cir. 1956). On certiorari to the Supreme Court, both decisions were affirmed. *Jackson v. Taylor*, 353 U.S. 569 (1957); *Fowler v. Wilkinson*, 353 U.S. 583 (1957). Emphasizing the fact that neither petitioner had claimed deprivation of constitutional rights, the majorities disclaimed the power to review the appropriateness of the sentences imposed. In each case, four justices dissented on the basis of the reasoning in *De Coster v. Madigan*. The history of subsequent cases decided by lower federal courts indicates substantial uncertainty as to the meaning of *Burns*, in light of *Jackson* and *Fowler*. While there seems to be general agreement that the distinction between military and civilian habeas corpus has been preserved, the courts disagree on the extent to which it remains valid. Compare *Swisher v. United States*, 326 F.2d 97 (8th Cir. 1964), with *Williams v. Heritage*, 323 F.2d 731 (5th Cir. 1963), and *Bennett v. Davis*, 267 F.2d 15 (10th Cir. 1959), and *Day v. McElroy*, 255 F.2d 179 (D.C. Cir. 1958), and *Sweet v. Taylor*, 178 F. Supp. 456 (D. Kan. 1959). A major question mark for the present, of course, is the extent to which the Court's recent liberalization of the scope of review in civil habeas corpus cases, as announced in *Fay v. Noia*, 372 U.S. 391 (1963), will carry over into the area of courts-martial habeas corpus actions. Chief Justice Warren has given an ambiguous appraisal:

... The various opinions of the members of the Court in *Burns* are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Despite *Burns*, however, it could hardly be expected that the regular federal judiciary would play a large role in regulating the military's treatment of its own personnel. The considerations militating against such intervention remain strong. Warren, *supra* note 6, at 188 (emphasis added). Consider also Professor Jaffe's rather pessimistic conclusion with regard to *Burns*: "It is not unusual for special bodies to vindicate their own procedures, thus review without retrial may not be a very effective protection. But it does at least put some pressure on the military authorities to watch their own procedures." JAFFE, *supra* note 10, at 369.

²³¹ 355 U.S. 579 (1958) (per curiam).

²³² Department of Defense Directive No. 5210.9, April 7, 1954.

well as civilian personnel. When the Department reexamined Harmon's case under this program, it designated him a security risk and, despite an "excellent" service record, gave him an undesirable discharge.²³³

After having applied unsuccessfully to both the Army Discharge Review Board and the Army Board for Correction of Military Records, Harmon sued in federal court for a declaration that his discharge was void and an order directing the army to issue him the honorable discharge to which he believed his service record entitled him. In his petition Harmon argued that the issuance of a less than honorable discharge largely if not solely upon the basis of preinduction conduct, much of which involved the exercise of first amendment rights, was unconstitutional and a violation of pertinent statutes and regulations. He also challenged the administrative procedure which the army followed in such cases as lacking the essentials of constitutional due process.

Observing that "the courts have been scrupulously careful not to interfere with, or intervene in, authorized and legitimate army matters,"²³⁴ the district court entered summary judgment in favor of the Secretary of the Army. The court of appeals affirmed,²³⁵ with Judge Prettyman declaring that "the courts have held many times that they have no power to review the administrative processes by which the President and the Secretarys administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service."²³⁶ The court went on to quote at length from *Willoughby* and to justify its denial of review in terms of both the theoretical concept of separation of powers and the practical difficulties for both the military and the judiciary which would otherwise result.²³⁷

²³³ While his case was pending in the courts, Harmon's discharge was changed from "undesirable" to "general," a less derogatory type, but still one notch below "honorable." The court of appeals rejected the Secretary of the Army's suggestion that the case had thereby become moot. *Harmon v. Brucker*, 243 F.2d 613, 616 (D.C. Cir. 1957).

²³⁴ *Harmon v. Brucker*, 137 F. Supp. 475, 477 (D.D.C. 1956).

²³⁵ *Harmon v. Brucker*, 243 F.2d 613 (D.C. Cir. 1957).

²³⁶ *Id.* at 617-18 (citing *Eliason*, *Reaves*, *Creary*, and *French*, among others).

²³⁷ *Id.* at 619:

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. . . . Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant, action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of his commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As

On certiorari to the Supreme Court, however, the long line of cases stretching all the way back to *Reaves v. Ainsworth*²³⁸ was finally broken. With but a single dissenter, the Court held: First, that the district court had jurisdiction to review an action of the Secretary of the Army to determine whether it was in excess of his statutory authority; second, that the petitioner had standing to bring the action; third, that the relevant statute and army regulation required the Secretary to base his determination of the type of discharge he would issue solely upon "all available records of *military service*"; and fourth, that the Secretary had therefore exceeded his statutory authority in basing Harmon's discharge upon conduct antedating his induction.²³⁹ In reaching this result the Court did not expressly overrule the reasoning or the precedents which Judge Prettyman employed to justify the appellate court's refusal to review. Instead, the Court simply cited *McAnnulty*²⁴⁰ for the general proposition that "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."²⁴¹ In so doing, the Court not only took in *Burns*, which would arguably have required review only of Harmon's constitutional claims,²⁴² but went beyond it to consider his rights under the interacting statute and regulation. The result was a substantial enlargement of the permissible scope of review in the administrative discharge context, and a corresponding reduction in the significance of the exception to the "presumption of reviewability" which was carved out by *Reaves* and its progeny.²⁴³

While it is still too early to determine the precise extent to which *Burns* and *Harmon* have undermined the nonreviewability doctrine, they have clearly been major forces in, or manifestations of, a strong movement in the direction of greater reviewability of military actions, both

a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden with which the courts are wholly unequipped to cope.

²³⁸ 219 U.S. 296 (1911), discussed in text accompanying notes 180-91 *supra*.

²³⁹ The Government had early conceded that if the Court had jurisdiction to review the case and petitioner had standing to sue, the Secretary's action could not be sustained. 335 U.S. at 582.

²⁴⁰ 187 U.S. 94 (1902), discussed *supra*, at notes 173-80.

²⁴¹ 355 U.S. at 581-82.

²⁴² See note 230 *supra*.

²⁴³ Since *Harmon*, a number of lower court decisions have reflected this expanded scope of review. See, e.g., *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965); *Ogden v. Zuckert*, 298 F.2d 312 (D.C. Cir. 1961); *Reed v. Franke*, 297 F.2d 17 (4th Cir. 1961); cf. *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965). But see *Payson v. Franke*, 282 F.2d 851 (D.C. Cir. 1960), cert. denied, 365 U.S. 815 (1961). See generally Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L.J. 41.

administrative and judicial.²⁴⁴ Taken together, these cases have virtually destroyed whatever remained of the notion that actions of the military establishment were not reviewable at all. At the same time, they have focused attention upon the proper *scope* of review, which by most indications—including the Supreme Court's handling of the *Willoughby* case—is where it belonged all the time.

As was indicated above,²⁴⁵ however, the concept of reviewability encompasses several elements, of which the fact and extent of the judicial intrusion are only two, albeit the major ones. A third element—namely, the proper *time* for review—has been the subject of the last important development in the area since *Willoughby*. This question of timing raises questions variously discussed under one of three interlocking rubrics: "ripeness," "standing to sue," or "exhaustion of administrative remedies."²⁴⁶ None of these concepts played a prominent role in the early development of the *Willoughby* rule, nor were they emphasized in *Harmon* or *Burns*.²⁴⁷ Recently, however, the courts have concentrated on the timing issue, principally by insisting upon strict compliance with the requirement that the aggrieved party exhaust his administrative remedies before seeking judicial review of his claim.²⁴⁸ Indeed, this emphasis upon proper timing, though fully consistent with the practice followed in courts-martial habeas corpus cases,²⁴⁹ would almost seem to have been a judicial reflex action against the trend toward broader review which has followed in the wake of *Harmon*.²⁵⁰

²⁴⁴ See JAFFE, *supra* note 10, at 368; Meador, *supra* note 97, at 189; Warren, *supra* note 6, at 187-88. A related event was the creation in 1951 of the United States Court of Military Appeals, which for the first time provided for civilian review of courts-martial determinations. Act of May 5, 1950, ch. 169, § 1 (Art. 67 of the Uniform Code of Military Justice), 64 Stat. 129, as amended, 10 U.S.C. § 867 (1964). See generally Walker & Niebank, *The Court of Military Appeals—Its History, Organization, and Operation*, 6 VAND. L. REV. 228 (1953).

²⁴⁵ See text accompanying notes 13-16 *supra*.

²⁴⁶ For a thorough treatment of these concepts, see 3 DAVIS, *supra* note 10, at §§ 20-22; JAFFE, *supra* note 10, at 395-545.

²⁴⁷ Each of these actions clearly satisfied all three aspects of the timing requirement. See *Reed v. Franke*, 297 F.2d 17, 20 (4th Cir. 1961).

²⁴⁸ See, e.g., *Beard v. Stahr*, 370 U.S. 41 (1962); *Sohm v. Fowler*, 365 F.2d 915 (D.C. Cir. 1966); *Anderson v. MacKenzie*, 306 F.2d 248 (9th Cir. 1962); *Michaelson v. Herren*, 242 F.2d 693 (2d Cir. 1957).

²⁴⁹ See, e.g., *Gusik v. Schilder*, 340 U.S. 128 (1950); *Whelchel v. McDonald*, 340 U.S. 122 (1950); *Gorko v. Commanding Officer*, 314 F.2d 858 (10th Cir. 1963); *In re Taylor*, 160 F. Supp. 932 (W.D. Mo. 1958). Note, however, that in two substantially contemporaneous courts-martial cases, the Supreme Court granted review of the jurisdictional question to petitioners who had not exhausted their administrative remedies. See *Reid v. Covert*, 354 U.S. 1 (1957) (where the accused was a civilian dependent who had accompanied her air force husband overseas); *Toth v. Quarles*, 350 U.S. 11 (1955) (where the accused was an ex-serviceman who had been honorably discharged).

²⁵⁰ See note 243 *supra*.

Only once in the last decade, in *Beard v. Stahr*,²⁵¹ has the Supreme Court had occasion to consider the reviewability of military administrative action,²⁵² and in that instance the Court denied review on the ground that the action was premature. The case involved a regular army lieutenant colonel who had been recommended for elimination from the service for "conduct unbecoming an officer."²⁵³ He sued in federal district court to enjoin the Secretary of the Army from issuing him a general discharge in accordance with the concurrent recommendations of army boards of inquiry and review. He contended that the statute under which the army had conducted its elimination proceedings was unconstitutional in that it placed the burden of proof on the accused to show cause for his retention on the active list and failed to afford him the opportunity of confronting adverse witnesses.

In a lengthy opinion which canvassed many of the pre-*Willoughby* authorities, a three-judge district court held that the statute was not repugnant to the Constitution, and that, in any event:

Armies cannot be maintained and commanded, and wars cannot be won by the judicial process. Supervision and control over the selection, appointment and dismissal of officers are not judicial functions. Dismissals of officers are not limited or controlled by the Bill of Rights.²⁵⁴

On appeal, the Supreme Court denied an application for a stay, vacated the judgment of the lower court, and remanded the cause with directions to dismiss the complaint. In a per curiam opinion expressing the views of five justices,²⁵⁵ the Court pointed out that the appellant had

²⁵¹ 370 U.S. 41 (1962).

²⁵² This discussion does not take account of a number of actions brought by ex-servicemen in the Court of Claims for the purpose of recovering back pay. Because the plaintiffs in those cases are no longer part of the military establishment, the unique considerations which limit reviewability in situations where the action is truly internal no longer apply. See, e.g., *Bell v. United States*, 366 U.S. 393 (1961) (holding that the Korean War "turncoats" who initially refused repatriation from Chinese Communist prison camps were nevertheless entitled to their service pay for the time they were prisoners); *Uhley v. United States*, 147 F. Supp. 497 (Ct. Cl. 1957); *Goldstein v. United States*, 130 F. Supp. 330 (Ct. Cl. 1955). A similar basis exists for distinguishing cases involving inactive personnel. See, e.g., *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961); *Davis v. Stahr*, 293 F.2d 860 (D.C. Cir. 1961).

²⁵³ The plaintiff's problems began when he was arrested on a homosexual charge by a civilian police detective who was offering himself as "bait" in a Washington, D.C., YMCA men's room. Prior to that time he had served on active duty for over nineteen years and compiled a record of "exemplary conduct and high efficiency ratings." 370 U.S. at 42 (dissenting opinion).

²⁵⁴ *Beard v. Stahr*, 200 F. Supp. 766, 773 (D.D.C. 1961).

²⁵⁵ The Chief Justice favored deferring the jurisdictional question pending a hearing of the case on the merits; Justice Frankfurter did not participate; and Justices Douglas and Black dissented.

not yet been removed from the active list and that until the Secretary of the Army so exercised his discretion as to remove him it would be improper to pass on the constitutional objections which had been urged. The Court declared itself satisfied that "If appellant is removed, . . . adequate procedures for seeking redress will be open to him."²⁵⁶ In a dissent concurred in by Justice Black, Justice Douglas argued that whatever the merits might be, the procedure used at Beard's hearing clearly violated constitutional standards of fairness. Noting that the appellant's professional standing and reputation were at stake, he strenuously urged immediate review: "Though the Court's opinion may be read as indicating that a collateral proceeding to set aside one discharge and to direct that an honorable one be granted may lie, we should nonetheless halt this irregular procedure *in limine*."²⁵⁷

The significance of the case is twofold. In the first place, it underlines the general trend toward reviewability of military actions, for, as the dissent points out, the majority opinion clearly implies the availability of review once the discharge became final. In the second place, the case stands for the proposition that no matter how substantial or patently valid the claim, it is not reviewable until every step in the administrative process has been completed.²⁵⁸ Though the courts have increasingly emphasized this latter requirement, Justice Douglas' forceful dissent should be taken as a warning that the requirements for ripeness and exhaustion of remedies may not always be absolutes.²⁵⁹

Recent decisions of the lower federal courts mirror the result the Supreme Court reached in *Beard*. They are in substantial agreement that the administrative acts of the military are reviewable, at least to the extent permitted in *Harmon*; yet, while they reflect an acute awareness of the timing requirement, they exhibit an admirable degree of flexibility—"inconsistency," if you will—in its application. In *Reed v. Franke*,²⁶⁰

²⁵⁶ 370 U.S. at 42.

²⁵⁷ *Id.* at 44.

²⁵⁸ The principle invoked by the majority could be classified either as an insistence upon "ripeness" in the claim, or upon the "exhaustion of administrative remedies." Although *Beard* had not as yet been discharged, he had nevertheless suffered substantial injury to his reputation and professional standing solely as a result of the unfavorable outcome of the challenged board proceedings. In this sense, the Secretary's action could only amount to the *coup de grace*.

²⁵⁹ For other authority supporting this thesis in a civilian context, see *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Wolff v. Selective Service System*, 372 F.2d 817 (2d Cir. 1967).

²⁶⁰ 297 F.2d 17 (1961). The plaintiff in this case was surely one of the unluckiest navy men of all time. With over eighteen years of service to his credit and a well-earned reputation for overindulging in spirits, he went motoring one day with a few drinks under his belt. Not only did he manage to collide with another vehicle, but he had the poor judgment to

for example, the Fourth Circuit held that the constitutionality of a challenged discharge procedure was a justiciable issue subject to review by the federal courts, notwithstanding the plaintiff's failure to exhaust his administrative remedies.²⁶¹ Bypassing the exhaustion issue without explanation, the court considered the statutory procedure on its merits and upheld it despite the absence of any provision for a factfinding hearing before discharge.

In *Ogden v. Zuckert*,²⁶² another discharge case decided just prior to *Beard*, the District of Columbia Circuit took a permissive approach to the exhaustion requirement. The district court had dismissed plaintiff's complaint on the ground that his failure to exhaust his administrative remedies had deprived the court of jurisdiction to consider his claim.²⁶³ The appellate court reversed, holding that the plaintiff's omission did not affect the court's jurisdiction, but that on remand the court might, in its discretion, refrain from exercising its jurisdiction pending exhaustion of such remedies as were available within the administrative system.²⁶⁴

In *Schwartz v. Covington*²⁶⁵ the Ninth Circuit exhibited even greater flexibility in finding compelling reasons for reviewing the lawfulness of a proposed undesirable discharge which, as in *Beard*, had yet to be executed. Finding that: First, plaintiff was likely to prevail on the merits; second, he would be irreparably injured if he were discharged, even though he might later be reinstated; and third, there had been no showing that the army would suffer serious harm as a result of his temporary retention, the court affirmed the district court's order staying the discharge until *both* the Army Board for Correction of Military Records and the lower court had acted on the merits of his petition.²⁶⁶

select as his victim an admiral, the Chief of Staff, Supreme Allied Command, Atlantic Fleet. Less than two months later, he was recommended for discharge by reason of unsuitability. See *Reed v. Franke*, 187 F. Supp. 905, 906 (E.D. Va. 1960).

²⁶¹ Pointing out that Reed had not exhausted the remedies provided by the Navy Discharge Review Board and the Navy Board for Correction of Military Records, the district court had denied relief. *Reed v. Franke*, 187 F. Supp. 905, 909-10 (E.D. Va. 1960).

²⁶² 298 F.2d 312 (D.C. Cir. 1961).

²⁶³ The plaintiff sought a declaratory judgment to the effect that he was entitled to be retained on the permanent retired list of the air force and could not be discharged. The lower court based its denial of relief on the fact that he had not first submitted his claim to the Air Force Board for Correction of Military Records. 298 F.2d at 314.

²⁶⁴ *Id.* at 317.

²⁶⁵ 341 F.2d 537 (9th Cir. 1965).

²⁶⁶ *Id.* at 539. The key to the court's decision clearly lies in two very unusual aspects of the plaintiff's case. First, although the basis for his impending discharge was his alleged homosexual conduct, he had served on active duty for sixteen years without receiving disciplinary action of any kind, and his performance of duty in his current assignment had been excellent. Secondly, the board of officers which recommended his discharge had obviously

Finally, in *Sohm v. Fowler*,²⁶⁷ a lieutenant commander in the coast guard, who had been thrice passed over for promotion and finally ordered into retirement brought an action seeking to enjoin and declare unlawful his retirement and compel his promotion to commander. The district court denied the motion for a preliminary injunction and granted summary judgment in favor of the Secretary of the Treasury.²⁶⁸ On appeal, the court refused to review the case on the ground that plaintiff had left dangling a petition seeking relief from the Board for Correction of Military Records. Effectively overruling *Ogden* while purporting to distinguish it, the court held that in the absence of "special circumstances" such as had existed in *Reed* and *Schwartz*,²⁶⁹ the Board provided an available remedy which had to be exhausted prior to judicial review.²⁷⁰ It is interesting to note that Judge Danaher, speaking in dissent, argued for a straightforward denial of review *à la Willoughby*: "I suggest that the selection and promotion of officers can not be and should not become judicial functions. When the District Court granted summary judgment for the Government, it was clearly following our established rule."²⁷¹

Because of its source and timeliness, Judge Danaher's simplistic, dogmatic, and decidedly anachronistic approach to the conundrum of civil review of military action puts a fitting capstone on this brief survey. The fact that a federal judge felt called upon to echo *Reaves v. Ainsworth*²⁷² after almost a half century of judicial gravitation in the opposite direction is persuasive evidence not only of the durability of the non-reviewability principle, but also of the patent inability of the courts to treat the question consistently and without equivocation.²⁷³ In this state of affairs, it would be extremely foolish to pretend to divine in the conglomeration of precedent discussed above any single uniform rule of reviewability. It is not unreasonable, however, to examine in general terms the rationale and more obvious features of the modern doctrine; and since this is most meaningfully accomplished in the context of a concrete fact situation, it is appropriate to consider once again the claim of the in-service conscientious objector.

exceeded its authority by considering evidence which related to the plaintiff's previous enlistment. *Id.* at 538.

²⁶⁷ 365 F.2d 915 (D.C. Cir. 1966).

²⁶⁸ *Sohm v. Dillon*, 231 F. Supp. 973 (D.D.C. 1964); 235 F. Supp. 450 (D.D.C. 1964).

²⁶⁹ 365 F.2d at 918 n.4.

²⁷⁰ *Id.* at 918.

²⁷¹ *Id.* at 920 (dissenting opinion).

²⁷² 219 U.S. 296 (1911), discussed in text accompanying notes 180-91 *supra*.

²⁷³ See also the concurring opinion of Chief Judge Staley in *Brown v. McNamara*, reproduced in part in note 47 *supra*.

III

THE RULE AND THE IN-SERVICE OBJECTOR

At the outset, it can be stated with confidence that the "rule" which was born of *Decatur*²⁷⁴ and *Dynes*,²⁷⁵ strengthened by *Reaves*,²⁷⁶ nurtured by *Creary*²⁷⁷ and *French*,²⁷⁸ rejuvenated by *Willoughby*,²⁷⁹ and modernized by *Burns*,²⁸⁰ *Harmon*,²⁸¹ and *Beard*,²⁸² does not require *or permit* an absolute denial of all review in the in-service objector situation. If the rule ever was this severe, which is questionable, *Burns v. Wilson* placed the matter beyond discussion. Granting that the recent history of backsliding from *Burns*²⁸³ has raised doubts as to the correctness of the liberal reading which that case initially received, it remains indisputable that it guarantees at least the review of plaintiff's allegations that his court-martial refused even to consider a legitimate defense. Furthermore, if one takes what is at once a more literal and a more liberal view, one can interpret *Burns* to require review not only of claims that defenses were ignored but also of all claims that constitutional defenses were not "fairly considered."²⁸⁴ On either interpretation, it is clear that not even the determinations of duly constituted military courts having jurisdiction over both the offense and the accused remain completely insulated from judicial review in the federal courts. Neither the historical separation of civil and martial judiciaries,²⁸⁵ the elaborate system of review which now exists under the latter,²⁸⁶ nor any pragmatic considerations of military

²⁷⁴ 39 U.S. (14 Pet.) 497 (1840) (enunciating Chief Justice Taney's separation of powers doctrine), discussed in text accompanying notes 164-69 *supra*.

²⁷⁶ 61 U.S. (20 How.) 65 (1857) (establishing the unreviewability of courts-martial determinations), discussed in text accompanying notes 158-63 *supra*.

²⁷⁸ 219 U.S. 296 (1911) (holding unreviewable a discharge for unfitness), discussed in text accompanying notes 180-91 *supra*.

²⁷⁷ 259 U.S. 336 (1922) (holding unreviewable the decision made by an "Honest and Faithful Board," established pursuant to the Army Reorganization Act of 1920), discussed in text accompanying notes 192-97 *supra*.

²⁷⁸ 259 U.S. 326 (1922) (companion case to *Creary*).

²⁷⁹ 345 U.S. 83 (1953) (providing the major statement of the nonreviewability doctrine), discussed in text accompanying notes 204-18 *supra*.

²⁸⁰ 346 U.S. 137 (1953) (expanding the scope of civil court review of courts-martial decisions under habeas corpus), discussed in text accompanying notes 223-30 *supra*.

²⁸¹ 355 U.S. 579 (1958) (per curiam) (expanding the scope of review of military administrative discharges), discussed in text accompanying notes 231-43 *supra*.

²⁸² 370 U.S. 41 (1962) (insisting upon strict adherence to the "exhaustion of administrative remedies" requirement as a prerequisite to judicial review of administrative elimination proceedings), discussed in text accompanying notes 251-59 *supra*.

²⁸³ See note 230 *supra*.

²⁸⁴ See *De Coster v. Madigan*, 223 F.2d 906, 909 (7th Cir. 1955).

²⁸⁵ See authorities cited notes 6, 7, & 8, *supra*, and accompanying text.

²⁸⁶ See UCMJ arts. 59-76, 10 U.S.C. §§ 859-76 (1964).

morale and efficiency—which could nowhere be more influential than where the power of the armed forces to discipline their troops is at stake—have been sufficient to preclude judicial review altogether. If this is the law of reviewability in this paradigm case, it is a fortiori the law with regard to the in-service objector claim, where the arguments for military immunity are immeasurably less convincing.²⁸⁷

Far from being dispositive of the central question, however, the realization that the nonreviewability rule permits some measure of review simply shifts the focus of attention to the much tougher subsidiary problems of when and how much review is appropriate. As far as the timing element is concerned, the recent cases are too inconsistent to permit the drawing of any satisfactory conclusion. In *Beard*, the Supreme Court seemed to be enunciating a strict ripeness-exhaustion requirement as a prerequisite to review, and a number of lower federal courts have taken a similar position. In such cases as *Ogden*, *Reed*, and *Schwartz*,²⁸⁸ however, appellate courts found good cause for circumventing the exhaustion principle, thus indicating that its application may be largely discretionary with the court, depending upon the particular exigencies of the case. On balance, the weight of authority in the discharge cases favors the strict approach of *Beard*, subject to exception where a delay of review would expose the plaintiff to irreparable injury.

Applying this rule to the in-service objector claim, it is immediately seen to bear scant resemblance to the extremely severe exhaustion requirement imposed in *Noyd v. McNamara*,²⁸⁹ where the plaintiff was told not merely to exhaust his administrative remedies—a requirement which the court evidently believed he had already met—but to exhaust the “military process,” to include raising his objections before a court-martial. In effect, the court was saying: We will not review your claim to have been denied fundamental rights by an *administrative* action already completed—the allegedly improper denial of his application for discharge—until, upon your own initiative, you break the law and subject yourself to *judicial* action by court-martial. This is clearly a perversion of the traditional exhaustion of remedies doctrine. To condition review upon an exhaustion theory which subjects the plaintiff to the risk of serious and irreparable injury to which he had not theretofore been exposed is, when viewed from the practical standpoint, tantamount to denying review altogether. Such a procedure finds justification in neither the general body

²⁸⁷ See text accompanying notes 304-05 *infra*.

²⁸⁸ These cases are discussed in text accompanying notes 260-66 *supra*.

²⁸⁹ 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3250 (U.S. Dec. 19, 1967), discussed *supra*, at notes 55-65.

of administrative law nor in the nonreviewability rule which in certain other respects justifies departures therefrom in military cases.²⁹⁰

Although the *Noyd* doctrine of exhaustion of "military process" is too severe, it remains necessary to formulate a legitimate timing requirement in the in-service objector context. Since the administrative denial of an application for conscientious objector status clearly involves a substantial legal right,²⁹¹ and since the denial is complete and final with the Adjutant General's decision,²⁹² the serviceman plaintiff should have no difficulty with regard to the "ripeness" of his suit or his "standing to sue." The exhaustion of remedies aspect, however, is not so easily dismissed; for despite the language of finality of DOD 1300.6 and its implementing regulations, a potential source of relief remains open to the unsuccessful applicant in the form of a board for correction of military records.²⁹³

²⁹⁰ It might appear as though the court is requiring no more of the in-service objector than is required of his preinduction counterpart, since the latter cannot obtain judicial review of his claim that his draft board improperly denied him an exemption until he has refused to be inducted, and thereby subjected himself to criminal prosecution. 50 U.S.C.A. APP. § 460(b)(3) (1951) (Supp. 1967). The parallel is unsound, however, for the positions of the two parties differ in three significant respects. First, the preinduction objector suffers no injury until he is actually inducted. Even after he has exhausted all administrative channels of appeal concerning his classification, the possibility of his being rejected for physical or other defects continues to exist right up to the moment of induction. Thus, it is fully consistent with the dictates of traditional exhaustion and ripeness doctrine that he be denied judicial intervention until he has actually been ordered to take the crucial step forward at the induction center. This reasoning is inapplicable to the in-service objector, however, since his claim is fully matured at the moment his request for discharge is disapproved. His alleged injury consists in being retained in the service beyond this time and is in no way contingent upon subsequent events.

Secondly, the preinduction objector who refuses induction is assured of the opportunity to raise the improper classification issue as a defense at his criminal trial. *Id.*; see authorities cited note 35 *supra*. The serviceman-plaintiff, on the other hand, may well be unable to raise this defense at his court-martial, should he refuse to obey the lawful orders of his superiors. See *Brown v. McNamara*, 387 F.2d 150, 153 n.5. (3d Cir. 1967). This uncertainty renders inapplicable the traditional exhaustion of remedies doctrine, the major premise of which is the sufficiency of the unexhausted remedy to protect the plaintiff's rights. JAFFE, *supra* note 10, at 424.

Finally, the Supreme Court has recently made it clear that procedural obstacles will not be allowed to deter the exercise of first amendment rights. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). The Second Circuit, furthermore, has expressly recognized this principle in a recent Selective Service case. *Wolff v. Selective Service System Local Bd. No. 66*, 372 F.2d 817 (2d Cir. 1967). In view of these decisions, it is impossible to justify requiring conscientious objectors to undergo the risks of punishment inherent in courts-martial simply in order to satisfy the exhaustion of remedies doctrine. Indeed, not even the preinduction objector is forced to take such a risk; for he may always allow himself to be inducted, and then obtain review of his claim by means of habeas corpus. See authorities cited note 156 *supra*.

²⁹¹ See text accompanying notes 66-108 *supra*.

²⁹² See note 125 *supra*, and accompanying text.

²⁹³ In 1946, Congress, seeking to rid itself of the numerous private bills submitted annually on behalf of members and former members of the armed forces, passed a law

While this remedy has apparently never been sought in this context—that fact in itself being some evidence of its unavailability—prudence demands that the courts treat it as available until the contrary is shown.²⁰⁴

If this premise is accepted, the degree of strictness with which the courts apply the legitimate exhaustion requirement becomes of much more than academic interest to the in-service objector. The aggrieved serviceman now faces the possibility that his petition for habeas corpus will be denied on exhaustion grounds pending his application to a board for correction of military records. Unless the federal court is willing to follow *Reed* or *Ogden* in treating such an unexhausted remedy as superfluous, the plaintiff may well have to choose between obeying orders which oblige him to act contrary to his conscience, and refusing to obey them, in which case he can be court-martialed. The alternative presented by the *Schwartz* case—namely, obtaining a court order temporarily staying further injurious action by the military pending completion of all appeals—would seem unavailable on two grounds. While the plaintiff could meet the requirement of showing the likelihood of irreparable injury, it might be far more difficult in the present case for him to convince the court that he could ultimately prevail on the merits. An even greater obstacle, furthermore, is presented by the corollary requirement of showing that the military would incur no serious injury if the stay were granted.²⁰⁵ It is one thing for a court to order the army to delay the discharge of a soldier whose operational efficiency is unquestioned; it is a far different thing for a court to order the army not to do anything to

which empowered the service secretaries, acting through boards of civilian officers of their respective departments, to alter military records when necessary to prevent injustice. Legislative Reorganization Act § 207, 10 U.S.C. § 1552 (1964), *formerly* 60 Stat. 837 (1946). The submission of private bills to correct military records was simultaneously prohibited. Legislative Reorganization Act § 131, 2 U.S.C. § 190(g) (1964), *formerly* 60 Stat. 831 (1946). Pursuant to this legislation, each service established a board for correction of military records. *See, e.g.,* Army Reg. 15-185, (Jan. 8, 1962).

²⁰⁴ The language of the enabling statute is clearly broad enough to give boards for corrections jurisdiction over the in-service objector's claim. "The Secretary of a military department . . . may correct any military record of that department when he considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a) (1964). Because the Secretary may act only through a board, the latter's jurisdiction must be equivalent to that of the former. And since the boards were intended to provide relief in cases previously disposed of by Congress, they must have power to take whatever action Congress could have taken. 40 OP. ATT'Y GEN. 504, 508 (1947). Boards for corrections may correct any type of military record, to include records of trial by courts-martial. 41 OP. ATT'Y GEN. 8 (1949). And in deciding whether an error has been made, they may substitute their own judgment for that of any official or body which made a previous determination of the same matter. 41 OP. ATT'Y GEN. 19 (1952).

²⁰⁵ The *Schwartz* court predicated its grant of relief upon the satisfaction of these three prerequisites. *See* 341 F.2d at 538.

offend the conscientious scruples of a soldier who may be unwilling to perform any military duties whatsoever.²⁹⁶

In so far as the timing element is concerned, therefore, it can be concluded that there may be a basis—short of the perversion encountered in *Noyd*—for conditioning review of the in-service objector claim upon prior appeal to a board for correction of military records. This is clearly an area in which further exploration is warranted, both by the service-man-plaintiff and by the government, and until such time as the question of the availability of these remedies is resolved it is impossible to do more than hypothesize along the lines indicated above.

The final and most difficult aspect of the reviewability problem concerns the proper scope of review,²⁹⁷ a subject with regard to which the reported cases are of only marginal value. *Burns*, of course, establishes a minimum requirement that review extend to claims of denial of fundamental constitutional rights, and *Harmon* expands this to include claims that the decisionmaker exceeded his statutory authority. Beyond this, however, the courts not only exhibit little unanimity as to the permissible extent of their investigation, but far too often profess to be doing one thing, while actually doing the opposite.²⁹⁸ Another difficulty arises from the fact that virtually all the recent cases involving the nonreviewability principle involve challenges to involuntary retirement or to the fact or type of discharge from the service. The relevance of these decisions to the in-service objector situation is questionable where the scope of review is under consideration, because in the majority of the discharge-retirement situations, the court was reviewing the action of a military board whose determinations had been specifically made "final" by statute.²⁹⁹ This distinction was of no import when the courts were using the latter type of case to establish a "floor" for review of the conscientious objector claim, but when one resorts to the discharge cases in search of a "ceiling", its significance becomes obvious.³⁰⁰ Whereas it is clear that the Supreme Court would have been no less willing to review *Harmon's* claim had there been no statutory "finality" provision, it does not follow that the rela-

²⁹⁶ See, for example, the discussion of the *Chavez* case in text accompanying note 50 *supra*.

²⁹⁷ See note 14 *supra*.

²⁹⁸ See, e.g., *Orloff v. Willoughby*, 345 U.S. 83 (1953), discussed in text accompanying notes 204-18 *supra*; *Gilliam v. Reaves*, 263 F. Supp. 378 (W.D. La. 1966), discussed in text accompanying notes 30-36 *supra*.

²⁹⁹ See, e.g., 10 U.S.C. § 1552(a) (1964), which provides that the actions of a board for correction of military records, "except when procured by fraud," shall be "final and conclusive on all officers of the United States."

³⁰⁰ The assumption is that a court should be willing to grant at least as much review in the absence of such a provision as it granted where there was one.

tively narrow scope of review adhered to in the recent discharge cases would not have been more expansive in the absence of such a provision.

This being the case, it is best to disregard the more recent decisions, and look for guidance directly to the last major case in which no congressionally imposed limitation on review was involved, *Orloff v. Willoughby*.³⁰¹ The factual similarities of that case to the in-service objector situation are striking: the plaintiff's action took the form of a petition for habeas corpus; he did not challenge the legality of his entry into the service; he sought as an alternative form of relief an order directing his discharge; he had already applied for such relief through administrative channels and had been denied; and his claim was not founded in the Constitution but in the language of the controlling statute. As will be recalled, the Supreme Court's response to the plea for review raised in this highly analogous context was ambiguous. On its face, the language of the opinion seemed to deny all review of the facts, limiting the area of inquiry to the interpretation of statute. In fact, however, the Court not only construed the law, but undertook a review of the facts sufficient to insure that the plaintiff's assignment lay within the proper general classification. Only when it came to the point of a detailed analysis of plaintiff's duties did the court balk, declaring that the military's determination was unreviewable; even here, furthermore, it is possible that certain subjective considerations influenced the Court in its decision. The case most directly in point must therefore be accepted as fully supporting the application of the *Harmon* measure of review in the nondischarge situation, and probably justifying at least a limited review of the facts if this is necessary to prevent serious abuse.

Aside from the more or less directly related case law, there is an additional consideration which bears indirectly upon the proper scope of review. This is the obvious parallel presented by the review of conscientious objector claims raised and denied outside the military. The registrant for the draft who considers his classification unjust can obtain federal court review thereof either by refusing induction or by allowing the army to induct him, and then filing for habeas corpus. In either event, the allowable scope of judicial review includes an inquiry into the facts to determine whether there exists a "basis in fact" for the challenged classification.³⁰² This particular provision is admittedly the result of the court's "interpretation" of a statutory finality provision; however, in view of the virtually identical subject matter presented for review in the in-service objector case, it is difficult to fault the conclusion of the *Gilliam*

³⁰¹ 345 U.S. 83 (1953), discussed in text accompanying notes 204-18 *supra*.

³⁰² See authorities cited notes 35 & 156 *supra*.

court that the scope of review in the two instances should likewise be identical.³⁰³

While these conclusions as to the fact, time, and scope of review properly afforded the in-service objector claim may not appear fully consistent with certain isolated actions and dicta encountered in the survey undertaken above or elsewhere, they are clearly in accord with the best case authority and the most recent development of the nonreviewability doctrine. It is equally important to note that these conclusions find substantial support in the realm of governmental policy. A look at the dominant policy considerations reveals, first of all, that the nineteenth century emphasis on the theoretical separation of powers has long since lost its magic in so far as judicial review of administrative action is concerned.³⁰⁴ Ever since *Reaves*, in fact, the primary factor weighing against such review has not been the sanctity of the executive branch, but the supposed detrimental effect of judicial intervention upon the morale and efficiency of the armed forces. The efficacy of this objection to review in the in-service objector case, however, is at best dubious. For one thing, it is highly unlikely that *any* action affecting so minute a group as that composed of in-service conscientious objectors could measurably impair morale or efficiency.³⁰⁵ It should be noted, furthermore, that the present case, unlike the typical discharge case, has no disciplinary implications which might give rise to an erosion of morale if the courts were to countermand a decision of the military authorities.

The other principal argument against review—namely the judiciary's lack of familiarity with military affairs—is even less convincing in the present context. Here the court is not being asked to decide whether the record supports a finding that a man is entitled to be promoted, or retained in the service, or honorably discharged; it is being asked to determine whether the record supports a finding by the military that an individual is not a bona fide conscientious objector. This is hardly a matter concerning which the military establishment has any monopoly of expertise, as it tacitly acknowledges by providing that in each case the

³⁰³ 263 F. Supp. 378, 384 (W.D. La. 1966), quoted in text accompanying note 35 *supra*.

³⁰⁴ As Professor Jaffe has pointed out: "The separation of powers has probably always been understood by well-informed and dispassionate students as the expression of a general attitude rather than [an] inexorable table of organization." JAFFE, *supra* note 10, at 28-29.

³⁰⁵ Although exact figures as to the number of servicemen who have sought recognition as conscientious objectors are not available, published statistics relating to preinduction objectors provide ample justification for this conclusion. In World War II, for example, the number who claimed the exemption was 0.55% (72,000) of those inducted (13,000,000), but only 0.40% (52,000) received the exemption. Registration was 34,000,000. See SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION 53, 314-15 (Special Monograph No. 11, 1950); Comment, *The Conscientious Objector and the First Amendment: There but for the Grace of God . . .*, 34 U. CHI. LAW REV. 79, 88-89 (1966).

service concerned must obtain an advisory opinion from the Director of Selective Service. Indeed, it would seem beyond question that this is just the type of claim which is least at home in a military environment and most obviously suited to judicial determination.

CONCLUSION

The decision to grant or withhold judicial review of particular administrative action is not one the courts should make by unthinking resort to juridical dogma or talismanic formulae. It is axiomatic that times and people change, and that the needs of today are seldom wholly satisfied by the unaltered wisdom of yesterday. Yet the courts are oftentimes remarkably loath to modify or cast away entirely a comfortable mode of thinking which has long served them well, but which modern conditions have clearly rendered obsolescent. So it is with the time-honored principle that internal actions of the military establishment are not reviewable by the civil courts—at least in so far as the claim of the in-service conscientious objector is concerned.

What were a century ago good reasons for a judicial policy of non-interference with the military have either lost their force by virtue of the changing times or been outweighed by emergent factors in the present context. In the former category one finds the rigid separation of powers doctrine of Chief Justice Taney and the traditional notion that Presidential action wears a cloak of absolute immunity from review—both concepts long since grown *passé*. In the latter vein, the desire to maintain a high level of military discipline and efficiency remains strong, of course, as does the realization that few judges are well-versed in martial lore; but the uncommon nature of this particular petitioner and his claim substantially reduces the weight to which these factors are entitled.

Ultimately, however, it is not so much the weakness of the arguments *against* review as the strength of the countervailing forces that tips the balance against the doctrine of *Orloff v. Willoughby*. Prominent among these forces is the importance of the in-service objector's claim, and the relatively summary procedure which the armed forces have adopted for its evaluation and disposition. Of even greater moment, however, is the metamorphosis which the military establishment has undergone since this nation's inception. From an initial authorized strength of well under one thousand, our army alone has grown into a behemoth numbering well over a million men even in time of nominal peace. No longer does the military lie dormant and unnoticed for years on end, coming to the attention of the typical citizen only in time of war. Today every male resident is a potential soldier, sailor, or airman; and it has been estimated that even in time of peace such service occupies at least four percent of the

adult life of the average American reaching draft age. As Chief Justice Warren recently observed:

When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.³⁰⁶

The final and decisive reason for reviewing the in-service objector claim is that by so doing the courts would not be undermining, but actually strengthening the administrative processes of the military.³⁰⁷ The current opposition of the military to such review is thus both shortsighted and self-defeating, for the impression inevitably conveyed to the uninitiated is that there is something somewhere in the process which cannot stand the strong light of judicial scrutiny. If so, then justice demands that the courts intervene. If, as is more likely, the armed forces have nothing to hide, then they themselves stand to gain the most from that review which can only legitimize a procedure which now rests solely upon naked power. In the words of Professor Jaffe: "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."³⁰⁸

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³⁰⁶ Warren, *supra* note 6, at 188.

³⁰⁷ See 4 DAVIS, *supra* note 10, at § 28.21, at 112.

³⁰⁸ JAFFE, *supra* note 10, at 320.