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# Comments

## OTHER-THAN-HONORABLE MILITARY ADMINISTRATIVE DISCHARGES: TIME FOR CONFRONTATION†

*This Comment examines the military's current procedure for discharging servicemembers and imposing undesirable, other-than-honorable service characterizations on their service records. The Comment concludes that due to the potential for erroneous imposition of damaging other-than-honorable service characterizations, the process of handling such discharges should be made procedurally more careful. It is suggested that either additional due process rights be grafted onto the current administrative discharge system, or that the other-than-honorable discharge process be placed in the hands of the military court-martial system.*

### INTRODUCTION

About 400,000 men and women enter the military services each year. Most return to civilian life after a single tour of duty or less.<sup>1</sup> The military is a specialized society separate from the civilian society — with unique laws and traditions developed during its long history.<sup>2</sup> The primary business of the armed forces is to fight, or be ready to fight, wars.<sup>3</sup> To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life.<sup>4</sup> The laws and traditions governing that

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1. COMPTROLLER GENERAL, REPORT TO THE CONGRESS, MILITARY DISCHARGE POLICIES AND PRACTICES RESULT IN WIDE DISPARITIES: CONGRESSIONAL REVIEW IS NEEDED (1980). In 1981, 530,718 people were discharged from the services. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, 362 (103d edition) Washington, D.C., 1982.

2. Chappell v. Wallace, 103 S. Ct. 2362, 2367 (1983); Parker v. Levy, 417 U.S. 733, 743 (1974).

3. Toth v. Quarles, 350 U.S. 11, 17 (1955).

4. "The military constitutes a specialized community governed by a separate disci-

discipline have a long history and they were inspired by military exigencies. These exigencies are as powerful now as in the past.<sup>5</sup> This legacy of duty and discipline is responsible for the military's policy of administratively discharging individuals who are either unfit or unsuitable for military service.<sup>6</sup>

Most decisions regarding the composition, training, equipping, and control of the armed forces are beyond judicial review.<sup>7</sup> Ultimate responsibility for these decisions is vested by the Constitution exclusively in the legislative and executive branches.<sup>8</sup> The courts have traditionally acknowledged their incompetence in the area of military affairs.<sup>9</sup> The traditional position regarding review of military decisions was stated by the Supreme Court in *Reaves v. Ainsworth*.<sup>10</sup> The *Reaves* Court held that decisions of military tribunals, acting within the scope of their lawful powers, could not be reviewed or set aside by the courts.<sup>11</sup> Judges were not then and are not now given the task of running the army.<sup>12</sup> Therefore, the courts are reluctant to

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pline 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, 94 (1953).

5. *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). The servicemember who does not conform to required standards of duty and discipline burdens the service in terms of cost, administrative efforts, degradation of morale, and substandard mission performance. See *infra* note 44 and accompanying text.

6. 32 C.F.R. § 41.3 (a)(1) (1983). "Unfitness" applies to individuals showing patterns of shirking, drug abuse, sexual perversion, unsanitary habits, failure to pay just debts, or failure to support dependents. "Unsuitability" connotes inaptitude for military service. Department of Defense Directive 1332.14, paras. VII-G, I (October 1, 1982), [hereinafter cited as DoD Directive].

7. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); accord, *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 970 (E.D. Wis. 1980).

8. Congress has power "To make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible — as the judiciary is not — to the electoral process." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

9. The Supreme Court in *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973), stated: [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system . . . [emphasis in original].

*Accord*, *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

10. 219 U.S. 296 (1911).

11. *Id.* at 304. The *Reaves* Court asserted, "To those in the military or naval service of the United States the military law is due process." *Id.* at 304.

12. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). Recently, the Ninth Circuit Court of Appeal rested on this *Orloff* principle in upholding the military's right to discharge homosexual servicemembers. *Watkins v. United States Army*, 721 F.2d 687 (9th Cir. 1983). As Chief Justice Earl Warren stated, "Courts are ill-equipped to determine

interfere with the military's exercise of discretion over its internal affairs. This reluctance is particularly apparent when the military makes personnel changes, pursuant to its regulations, through its promotion or discharge procedures.<sup>13</sup> Yet, "Restricted judicial review is not . . . the equivalent of no judicial review. Courts will review, without hesitation, cases in which it is alleged that the military violated the Constitution, applicable statutes, or its own regulations."<sup>14</sup>

One military decision that has been receiving increasing judicial attention is the military administrative discharge decision.<sup>16</sup> Courts

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the impact upon discipline that any particular intrusion upon military authority might have." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962). *But cf.* Varice v. United States, 434 F. Supp. 826 (N.D. Tex. 1977) (upholding the validity of Air Force personnel weight regulations against an equal protection attack):

[T]he court is not overly impressed with the Air Force's attempt to drape itself in bunting and dust off *Orloff v. Willoughby* [citation omitted] [*supra* note 12]. The desire of the judiciary to avoid entanglement in military administration is strong, but no court today can avoid reasoned analysis of a serious constitutional claim under the catchphrase that judges do not run the army.

Rather than summarily consign a particular complaint to the realm of internal military affairs, a court must balance the special needs of the military against the constitutional rights of the individual, keeping always in mind that constitutional claims are themselves unequal in the whole scale of values.

*Id.* at 833. Justice Marshall, dissenting in *Rostker v. Goldberg*, 453 U.S. 57, 89 (1980), stated:

[E]ven in the area of military affairs, deference to congressional judgments cannot be allowed to shade into an abdication of this Court's ultimate responsibility to decide constitutional questions. As the Court has pointed out: "[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'

*United States v. Robel*, 389 U.S. 258, 263-264 (1967), quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934).

13. *Dilley v. Alexander*, 603 F.2d 914, 919-20 (D.C. Cir. 1979); *accord*, *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972). "There is a strong, but rebuttable, presumption that military administrators discharge their duties correctly, lawfully, and in good faith." *Kalista v. Secretary of the Navy*, 560 F. Supp. 608, 615 (D. Colo. 1983).

14. *ben Shalom v. Secretary of the Army*, 489 F.Supp. 964, 971 (E.D. Wis. 1980); *accord*, *Mindes v. Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). In an exhaustive review of the case law, the court in *Arnheiter v. Ignatius*, 292 F. Supp. 911, 920 (N.D. Cal. 1968), *aff'd*, 435 F.2d 691 (9th Cir. 1970), concluded that:

The Supreme Court is prepared to relax the traditional non-reviewability rule sufficiently to admit ultimate, collateral federal court review of claims by military personnel of denial of constitutional due process in such matters as court martial convictions which involve life, liberty or other penalty, and administrative discharges from the services which involve their quasi property rights.

15. *Harmon v. Brucker*, 355 U.S. 579 (1958) established the reviewability of mili-

are willing to scrutinize *how* the decision to separate a servicemember prior to the normal expiration of his enlistment is reached, especially when the military decides to characterize the servicemember's discharge as under other-than-honorable conditions.<sup>16</sup> A discharge characterized or graded as other-than-honorable stigmatizes its recipient<sup>17</sup> and deprives him of substantial veterans' benefits normally incident to service characterized as honorable; this causes other harms as well, without affording the servicemember the due process protections of a court-martial.<sup>18</sup> This Comment examines the military's administrative discharge process, and suggests that better protection of servicemembers' due process rights is required when the military issues other-than-honorable discharges. Courts have asserted that the Constitution provides servicemembers protection from arbitrary or unfair administrative discharges.<sup>19</sup> However, the contours of due process in the military community are far from clear.<sup>20</sup> Once it is determined that due process applies, the question remains, what process is due?<sup>21</sup>

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tary administrative discharges. The Department of Defense defines a discharge as "complete severance from all military status." Separation is "a general term which includes discharge and release from active duty." Administrative Separation is a "discharge or release from active duty upon expiration of enlistment or required period of service, or prior thereto, in the manner prescribed by [this directive] or by law, but specifically excluding separation by sentence of general or special court-martial." DoD Directive, *supra* note 6, at para. IV.

16. The term "characterization" refers to the label or grade given one's record of service, e.g. honorable, general, other-than-honorable, dishonorable, or bad conduct. "The purpose of a discharge certificate is to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge." *Harmon v. Brucker*, 355 U.S. 579, 583 (1958) (quoting Army Regulation 615-375, para. 2(b)). More modern regulations provide:

Characterization of service at separation shall be based upon the quality of the member's service [which] shall be determined in accordance with standards of acceptable personal conduct and performance of duty for naval personnel. These standards are found in the UCMJ, directives and regulations issued by the Department of Defense and [the Navy], the Enlisted Performance Evaluation System, and the time-honored customs and traditions of the naval service.

Naval Military Personnel Manual § 3610300(2)(a) (changes complete through October, 1983) [hereinafter cited as NAVMILPERSMAN].

17. *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970); *see infra* note 53 and accompanying text.

18. *See infra* notes 53-67 and accompanying text.

19. *See infra* notes 67-74 and accompanying text.

20. *Correa v. Clayton*, 563 F.2d 396, 399 (9th Cir. 1977). Regulations provide that discharge board proceedings "should be formalized to the extent of assuring full opportunity for presentation of the respondent's case." 32 C.F.R. § 730.15(d)(2)(1983). This Comment partly concerns the meaning of that phrase. *See infra* note 94.

21. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

*Background*

The use of less than fully honorable discharges began about 1890.<sup>22</sup> There was no historical precedent for such discharges and to date it is doubtful whether statutory authority exists for issuing them.<sup>23</sup> Less than honorable discharges were called "blue" discharges until 1947, when the "general" and "undesirable" designations appeared. Since that time, approximately one million general and undesirable discharges have been issued.<sup>24</sup>

Administrative discharge procedure is governed by regulations, directives, and orders handed down by Congress and the military departments.<sup>25</sup> Department of Defense Directive 1332.14, first issued in 1965, is the modern source of discharge procedure law.<sup>26</sup> Much discretion is given the Secretaries of the Army, Air Force, and Navy to promulgate orders governing discharge procedure within Department of Defense guidelines.<sup>27</sup>

There are two steps to a separation, whether separation is by court-martial or by administrative means. The first step is deciding whether to separate the servicemember, and the second is selecting the type of discharge to give him: that is, determining what characterization is appropriate for his service record.<sup>28</sup>

Both of these decisions may be made without an administrative board hearing if an honorable or general discharge is to be

22. D. ADDLESTONE AND S. HEWMAN, *ACLU PRACTICE MANUAL ON MILITARY ADMINISTRATIVE DISCHARGE UPGRADING* 6 (1975).

23. See Comment, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV. C.R.-C.L. L. REV. 227 (1974).

24. D. ADDLESTONE AND S. HEWMAN, *supra* note 22, at 6. During approximately the same period, from 1950 to 1980, about 21 million people were separated from the military. COMPTROLLER GENERAL, *REPORT TO THE CONGRESS*, *supra* note 1.

25. Authority for administrative discharges derives from 10 U.S.C. § 1169 (1982), which provides:

No regular enlisted member of an armed force may be discharged before his term of service expires, except —

- (1) as prescribed by the Secretary concerned;
- (2) by sentence of a general or special court-martial; or
- (3) as otherwise provided by law.

26. DoD Directive, *supra* note 6. See 32 C.F.R. § 41 *et seq* (1983).

27. The *Secretaries of the Military Departments* shall prescribe implementing documents to ensure that the policies, standards, and procedures set forth in this part are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. 32 C.F.R. § 41.4(a) (1983) (emphasis in original). This delegation is recognized by Congress in 10 U.S.C. § 1169 (1) (1982), *supra* note 25.

28. DoD Directive, *supra* note 6, at para. IX (B). 32 C.F.R. § 41.1, App. A, Part 3 (1983).

awarded.<sup>29</sup> However, an other-than-honorable discharge may only be given if the servicemember has been afforded the opportunity to have an administrative board hearing.<sup>30</sup> The board serves three functions for the member facing an other-than-honorable discharge. First, it acts as a fact finder and determines whether the servicemember did the acts for which he is being discharged.<sup>31</sup> Next, the board recommends whether the member should be separated or retained.<sup>32</sup> Finally, if the decision is to separate, the board recommends a discharge characterization.<sup>33</sup>

If one is separated pursuant to a court-martial, only a bad conduct or a dishonorable discharge may be imposed.<sup>34</sup> Bad conduct and dishonorable discharges may not be given administratively.<sup>35</sup> They are forms of punishment and, compared to other-than-honorable discharges, they are relatively rarely given.<sup>36</sup> The other three types of discharge — honorable, general (under honorable conditions), and undesirable (under other-than-honorable conditions) — are granted administratively.<sup>37</sup> An honorable discharge is awarded when the servicemember's record demonstrates proper military behavior and proficient performance of duty.<sup>38</sup> General or undesirable discharges may be imposed when honorable discharge standards are not met.<sup>39</sup> Grounds for granting general or undesirable discharges include unfit-

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29. *Keef v. United States*, 185 Ct. Cl. 454, 467 (1968). However, if a servicemember has been in the service for more than six years, he may request a Board. NAVMILPERSMAN, *supra* note 16, at § 3640300 (1)(a)(1).

30. 32 C.F.R. § 730.1(d)(3) (1983). Navy and Marine Corps regulations are used in this Comment as examples. Discharge regulations are generally uniform throughout the services. *See supra* note 27. An administrative discharge board is a "board appointed to render findings based on facts obtaining, or believed to obtain, in a case and to recommend retention in the service, separation, or suspension of separation, and the reason for separation and the characterization of service or description of separation." NAVMILPERSMAN, *supra* note 16, at § 3610200 (1)(a).

31. 32 C.F.R. § 41.6, App A, Part 3 (c)(5)(g)(1),(2) (1983).

32. *Id.* at Part 3(C)(5)(g)(3),(4).

33. *Id.* at Part 3(C)(5)(g)(4)(c).

34. MANUAL FOR COURTS-MARTIAL, UNITED STATES, paras. 76a(3),(4), 127c (rev. ed. 1969).

35. 32 C.F.R. § 730.2(d),(e). A bad conduct discharge may be imposed by a special or general court-martial; a dishonorable discharge may only be given by a general court-martial. *Id.*

36. 32 C.F.R. § 724.111 (1983). In 1981, 90.8% of all discharges were honorable; 5.2% were general; 4.1% were other-than-honorable. Out of 530,718 discharges, only 4,020 were bad conduct or dishonorable. U.S. BUREAU OF THE CENSUS, *supra* note 1.

37. 32 C.F.R. § 724.109 (1983).

38. DoD Directive, *supra* note 6, para. VI (A). 32 C.F.R. § 730.2(a)(1983).

39. 32 C.F.R. § 730.2(b),(c) (1983). Distinguishing between general and undesirable discharges may be artificial. "Discharge with anything less than a record of honorable service constitutes a stigma of tremendous impact which will have a lifelong effect. This Court does not see any substantial distinction between an undesirable discharge and a General Discharge . . . ." *Unglesby v. Zimny*, 250 F. Supp. 714, 714 (N.D. Cal. 1965). *See also infra* note 50.

ness, misconduct, and security reasons.<sup>40</sup>

### POLICY CONSIDERATIONS

The Department of Defense has attempted to clearly state its policy reasons for its discharge procedure.<sup>41</sup> Adopted by the various branches of the service, this policy emphasizes that being a member of the military is a calling different from any civilian occupation.<sup>42</sup> For example, the Marine Corps Separation and Retirement Manual states: "Becoming a Marine involves a commitment to the United States, to the Marine Corps, and to one's fellow citizens and fellow Marines that one will complete successfully a period of obligated service. Failure to meet required standards of performance or discipline violates that commitment."<sup>43</sup> Members violating this commitment should be separated quickly to avoid the high cost of pay, administrative efforts, degradation of morale, and substandard mission performance that is associated with retention of servicemembers who do not conform to required standards of discipline and performance.<sup>44</sup>

The executives of the armed forces have the authority to discharge

40. 32 C.F.R. § 730.2(c) (1983). Other reasons for general or undesirable characterization include unsatisfactory performance, drug abuse, drug or alcohol abuse rehabilitation failure, separation in lieu of trial by court-martial, unsatisfactory participation in the ready reserve, and separation in the best interest of the service. NAVMILPERSMAN, *supra* note 16, §§ 3630300-3630900. Often, the difference between receipt of an honorable and general, or between a general and undesirable discharge depends on a member's performance and conduct marks on the enlisted performance evaluation system. If a member's performance and conduct marks, on a final average, fall below 2.8, or show a trait average for military behavior below 3.0, an otherwise honorable discharge becomes general. NAVMILPERSMAN, *supra* note 16, § 3610300(3)(b). *See infra* notes 99-113.

41. 32 C.F.R. § 41.3(a) (1983) provides:

It is the policy of the Department of Defense to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

- (1) Ensure that the Military Services are served by individuals capable of meeting required standards of duty performance and discipline;
- (2) Maintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service;
- (3) Achieve authorized force levels and grade distributions; and
- (4) Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances.

42. 32 C.F.R. § 41.3(b) (1983). NAVMILPERSMAN § 3610100(3)(b).

43. Marine Corps Separation and Retirement Manual, para. 6101. NAVMILPERSMAN, *supra* note 16, § 3610100(3)(b)(1).

44. 32 C.F.R. § 41.3(b)(3) (1983). NAVMILPERSMAN, *supra* note 16, § 3610200(3).



servicemembers prior to the end of their enlistments.<sup>45</sup> There appear good policy reasons, such as cost avoidance, for this rule.<sup>46</sup> However, scant policy supports the derogatory characterization of an individual's service. It would seem better to merely separate burdensome military personnel expeditiously,<sup>47</sup> in furtherance of the Defense Department policy mentioned above, with an uncharacterized discharge.<sup>48</sup>

Nevertheless, the services have been characterizing discharges for almost 100 years.<sup>49</sup> Advocates of characterization stress that characterizing discharges distinguishes honorable performance. If everyone received an honorable, or a neutrally-characterized discharge, the honor and pride of the recipient who strives for and earns an honorable discharge would be lessened.<sup>50</sup> Also, arguably, the recipients of undesirable discharges have brought their plight upon themselves.<sup>51</sup> Whatever justification is cited, the type of discharge issued serves as a judgment upon the quality of service rendered by the dischargee.<sup>52</sup> These justifications for characterization should be weighed against

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45. "The Armed Forces have the right and the duty to separate from the service with an appropriately characterized discharge certificate members who clearly demonstrate that they are unqualified for retention." DoD Directive, *supra* note 6, para. V (A). As the court stated in *Kalista v. Secretary of the Navy*, 560 F. Supp. 608, 616 (D. Colo. 1983):

A serviceman does not have a contractual right to remain in the service until the expiration of his enlistment term. However, an administrative discharge issued prior to the expiration of the enlistment term is void if it exceeds applicable statutory authority, or ignores pertinent procedural regulations or violates minimum concepts of basic fairness.

*Accord*, *Waller v. United States*, 461 F.2d 1273, 1276 (Ct. Cl. 1972).

46. *See supra* notes 41 and 44 and accompanying text.

47. Processing time goals for administrative separations are outlined by NAVMILPERSMAN, *supra* note 16, at § 3610100(8).

48. Uncharacterized discharges are already provided for in cases of entry level separation and for orders for release from the custody and control of the armed forces because of void enlistment or induction. NAVMILPERSMAN, *supra* note 16, § 3610300(1)(c).

49. *See supra* note 22 and accompanying text.

50. *To Limit the Separation of Members of the Armed Forces Under Other Than Honorable Conditions: Hearings on H.R. 523 (H.R. 10422) To Amend Title 10, United States Code Before the Subcomm. No. 3, 92nd Cong., 1st Sess. 5825, 5866 (1971)* (statement of Major General Leo Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy) [hereinafter cited as *1971 Hearings*]. *But cf.* the statement of the court in *Bland v. Connally*, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961): "Since about 90% of all discharges issued are honorable, a discharge of that type is commonly regarded as indicating acceptable, rather than exemplary service. In consequence, anything less than an honorable discharge is viewed as derogatory, and inevitably stigmatizes the recipient." *See also supra* note 36.

51. "Conditions within the service are . . . designed to produce an honorable discharge, and a soldier who fails or is unable or unwilling, to abide by the regulations of the service and its traditions and social code, has placed himself in jeopardy." *1971 Hearings, supra* note 50, at 5917 (statement of Colonel William Weber).

52. *Bland v. Connally, supra* note 50, at 853 n.1. *See Harmon v. Brucker, supra* note 16 (discussion concerning various discharges and reasons for granting them) and *supra* note 40, discussion concerning performance evaluations.

the harm characterization inflicts. It is also arguable however that the equitable balance weighs in favor of discontinuing the practice, even after 100 years.

### THE PROBLEM WITH CHARACTERIZATION

The undesirable discharge certificate symbolizes much more than merely separation from the service. "There can be no doubt that a military discharge on other-than-honorable grounds is punitive in nature, since it stigmatizes the serviceman's reputation, impedes his ability to gain employment and is in life, if not in law, prima facie evidence against the serviceman's character, patriotism or loyalty."<sup>53</sup> Only a court-martial, however, is authorized to impose punitive discharges.<sup>54</sup> Derogatory characterization of administrative separations is not an authorized means for imposing punishment in the military law system.<sup>55</sup>

Among the punitive results of an other-than-honorable discharge is a preclusion of reenlistment in any of the services,<sup>56</sup> and restriction of opportunities in other government and private employment.<sup>57</sup> This penalty arguably infringes on the servicemember's liberty interests protected by the due process clause of the fifth amendment.<sup>58</sup> The

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53. *Stapp v. Resor*, 314 F. Supp. 475, 478 (S.D.N.Y. 1970). An undesirable discharge "is worse than a bad conduct discharge, as far as its implications are concerned, and the results are also quite severe . . . I think it is a very severe penalty." 1971 *Hearings*, *supra* note 50, at 5825 (testimony of Chief Judge Quinn of the Court of Military Appeals). "In terms of its effects on reputation, the stigma experienced by the recipient of a discharge under other than honorable conditions is very akin to the concept of infamy . . ." Everett, *Military Administrative Discharges — The Pendulum Swings*, 1966 DUKE L.J. 41, 50.

54. *Grant v. United States*, 162 Ct. Cl. 600, 609 (1963).

55. 32 C.F.R. § 730.2(d),(e) (1983). "So long as an administrative discharge is not used as a summary guise for punitive action, [citation omitted] . . . the military remains within legally proper bounds when it chooses to grant an honorable discharge for the Government's convenience." *Birt v. United States*, 180 Ct. Cl. 910, 913-14 (1967). See generally Comment, *Punishment of Enlisted Personnel Outside the UCMJ*, *supra* note 23; Comment, *Nonjudicial Punishment Under Article 15 of the Uniform Code of Military Justice: Congressional Precept and Military Practice*, 19 SAN DIEGO L. REV. 839 (1982).

56. 32 C.F.R. § 730.16(f) (1983); NAVMILPERSMAN, *supra* note 16, § 3620100(b).

57. To decide whether a state (the government) must afford procedural protections against arbitrary state action, the threshold question is whether a property or liberty interest protected by 5th and 4th amendments is at stake. *Wright v. Enomoto*, 462 F. Supp. 397, *aff'd*, 434 U.S. 1052 (1978). Here, the serviceman's liberty interest is in being free from the stigma of an undesirable discharge. Such a stigma often directly restricts his opportunities in civilian and other government employment.

58. *Giles v. Secretary of the Army*, 475 F. Supp. 595, 598 (D.D.C. 1979). "Job application forms almost universally require a statement as to military service and the

Supreme Court in *Board of Regents v. Roth*<sup>59</sup> described a two-prong liberty-interest test for determining whether due process protects an individual facing termination of his employment. The first prong involves harm to one's reputation; the second concerns harm to one's future employment opportunities. The Court stated that when a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, due process applies to protect him.<sup>60</sup> Furthermore, governmental action that forecloses a range of employment opportunities also deprives the affected person of a liberty interest, thereby invoking due process. "[T]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury."<sup>61</sup> Thus, the court in *Rew v. Ward*<sup>62</sup> stated that because the government would likely communicate derogatory information to possible future employers, the airman being discharged had a liberty interest in continued service in the Air Force protected by the fifth amendment.<sup>63</sup> The military recognizes the potential for harm to one's civilian future and provides periodic counseling to warn servicemembers of the likelihood of restricted employment opportunities should they receive an undesirable discharge.<sup>64</sup>

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type of discharge received; since about ninety per cent [sic] of the discharges issued are honorable, disclosure of discharge in any other form is ordinarily certain to produce further inquiry with predictable results." *Bland v. Connally*, 293 F.2d 852, 858 n.10 (D.C. Cir. 1961).

59. 408 U.S. 564 (1972).

60. *Id.* at 573 (citing *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). *But cf.* *Paul v. Davis*, 424 U.S. 693 (1976) (mere injury to reputation does not fall within constitutionally protected liberty).

61. *Roth*, *supra* note 59, at 574 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, J., concurring)). The *Roth* Court further elaborated on what the "liberty" guarantee of the Due Process Clause entails:

While this Court has not attempted to define with exactness the liberty . . . guaranteed . . . the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

*Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added)).

62. 402 F. Supp. 331 (D.N.M. 1975).

63. *Id.* at 340. Another court stated: "It can be argued that officers and servicemen, upon termination of their service, have a quasi property right to have their discharges properly reflect their military record because if such discharges improperly and adversely reflect the military record they might stigmatize the dischargee and adversely affect his civilian future." *Arnheiter v. Ignatius*, 292 F. Supp. 911, 920 (N.D. Cal. 1968), *aff'd*, 435 F.2d 691 (9th Cir. 1970).

64. 32 C.F.R. § 41.4(a)(2) (1983); Marine Corps Separation and Retirement Manual para. 6103. Navy personnel being processed for an other-than-honorable discharge sign a "statement of awareness" which states, in part:

I understand that if such discharge is under Other Than Honorable Conditions, it may deprive me of virtually all veterans' benefits based upon my current

Another punitive effect of receiving an other-than-honorable discharge is ineligibility for substantial veterans' benefits.<sup>65</sup> This loss is particularly onerous because servicemembers are recruited and enlist with the expectation of receiving these benefits as a part of their compensation. Also, if the servicemember is a candidate for naturalized citizenship, receipt of an undesirable discharge is likely to cause the Immigration and Naturalization Service to deny his citizenship application.<sup>66</sup>

Being separated from the service before one's term of enlistment expires is itself a stigma. Almost all employers require job applicants to state whether they served in the military, and if so, how long. From this information, an employer can tell whether the applicant completed a full term of enlistment. If the employer perceives that the applicant did not, the employer may assume the applicant was discharged early. The general assumption is good employees are not fired. Therefore, early separation itself stigmatizes a servicemember. Derogatory characterization is an added stigma.<sup>67</sup>

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period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

"Failure on the part of the member to receive or to understand such explanation [the periodic counselling] does not create a bar to separation or characterization." 32 C.F.R. § 41.4(a)(2) (1983).

65. 39 U.S.C. § 101(2) (1982); CAL. MIL. & VET. CODE § 980 (West 1983). Some states distinguish between honorable and general discharge ratings in providing veterans' benefits. See e.g., TEX. EDUC. CODE ANN. § 54.203(a) (Vernon 1972 & Supp. 1977) (exempting only honorably discharged veterans from tuition and fees at state institutions of higher education); TEX. REV. CIV. STAT. art. 4413 (31) (Vernon 1976) (providing employment preferences only to honorably discharged veterans). As Judge Bazelon stated in *Roelofs v. Secretary of the Air Force*, 628 F.2d 594 (D.C. Cir. 1980), "the injury from a less-than-Honorable [sic] discharge is often entirely independent of the underlying reason for the derogatory characterization." *Id.* at 603 (Bazelon, S.C.J., concurring), citing TEX. REV. CIV. STAT. art. 4413 (31) (Vernon 1976) (veterans benefits denied regardless of reason for less-than-honorable discharge).

66. 8 U.S.C. § 1439 (1982).

67. In *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961), an inactive reservist was given an undesirable discharge for alleged subversive conduct engaged in while he was in inactive status. The district court assumed the Navy's right to separate any member for any cause and without a hearing through a non-derogatory, honorable discharge, but stated: "What is challenged is the right of the service to introduce the element of punishment or 'labeling' into the involuntary separation, by characterizing the discharge derogatorily." *Id.* at 858. See generally Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973).

## CURRENT DUE PROCESS

Department of Defense Directive 1332.14 outlines the rules to be followed in effecting administrative separations.<sup>68</sup> The Marine Corps Separation and Retirement Manual incorporates these procedures, expansively enumerating the rights currently afforded a Marine being processed for an other-than-honorable discharge:

- The member shall be notified in writing of the following:
- a. The basis of the proposed separation.
  - b. What type of separation could result, [e.g., to the Reserves or out of the Corps].
  - c. The least favorable characterization of service authorized for the proposed separation.
  - d. The member's right to consult with counsel.
  - e. The right to obtain copies of documents that support separation.
  - f. The right to request a board hearing.
  - g. The right to present written statements to the separation authority in lieu of a hearing.
  - h. The right to available military counsel at the board hearing.
  - i. The right to retain civilian counsel at the member's own expense.
  - j. The right to appear in person before the board.
  - k. The right to make sworn or unsworn statements before the board.
  - l. The right to challenge voting board members for cause only.
  - m. The right to examine evidence presented by the board, cross-examine witnesses appearing before the board, submit evidence and make final argument.
  - n. The right to waive the above rights.<sup>69</sup>

Conspicuously absent from this laundry list of rights is the absolute right to confront and cross-examine adverse witnesses.<sup>70</sup> The

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68. DoD Directive, *supra* note 6; 32 C.F.R. § 41 *et seq* (1983).

69. Marine Corps Separation and Retirement Manual para. 6304.

70. The Presiding Officer of the discharge board decides whether to invite witnesses to appear before the board, after considering the following criteria:

The Convening Authority may authorize expenditure of funds for production of witnesses only if the presiding officer . . . determines that:

- (a) The testimony of a witness is not cumulative;
- (b) The personal appearance of the witness is essential to a fair determination on the issues of separation or characterization;
- (c) Written or recorded testimony will not accomplish adequately the same objective;
- (d) The need for live testimony is substantial, material, and necessary for a proper disposition of the case; and
- (e) The significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness [e.g. cost and delay], favors production of the witness.

32 C.F.R. § 41.6, App. A, Part 3(c)(5)(c) (1983). There appear several difficulties with this scheme. First, having the Presiding Officer of the discharge board decide who to call is analogous to having the foreman of a jury trial deciding which witnesses should be produced. Second, it is unlike the jury foreman making the decision in that the jury foreman is less likely subject to command influence than is the ranking officer of a board (*see infra* notes 99-113 and accompanying text). Third, it appears that the use of the conjunction "and" after part (d) requires that all five of these provisions be met before a witness is produced. The practical effect of this rule is to provide five ways for the ranking officer not to grant a witness request. Lastly, the ranking officer decides what is "essential to a fair determination" part (b), what is "necessary for a proper disposition of

servicemember may only cross-examine those witnesses that *appear* before the board; the board has no subpoena power.<sup>71</sup> Also, the rules of evidence do not apply to board hearings.<sup>72</sup> Objections by counsel are noted for the record, but not ruled upon.<sup>73</sup> Without these additional safeguards, a servicemember may be issued a damaging other-than-honorable discharge on the basis of written hearsay statements submitted by someone the servicemember may not subpoena to the board hearing to cross-examine.<sup>74</sup>

### *The Need for Confrontation and Cross-Examination*

When the discharge is honorable and carries no stigma or derogatory connotation, it may be validly accomplished without a noticed hearing.<sup>75</sup> Courts, however, will not permit the imposition of a stigma on servicemembers in connection with their discharges from military service without affording them due process.<sup>76</sup> A discharge effected in violation of statute, or in violation of the military's own regulations and directives, is a violation of due process. Such discharges are void.<sup>77</sup> Because of the potential for harm to the servicemember, the Claims Court will not sustain an undesirable discharge unless the applicable regulations were "honored in letter and spirit."<sup>78</sup> Unless and until the regulations fully guarantee the right to confront and cross-examine adverse witnesses, the regulations, even though "honored in letter and spirit," nevertheless seem insufficient and unfair.

In criminal proceedings, the right to confront and cross-examine adverse witnesses is a fundamental right, guaranteed by the constitu-

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the case" (d), and what is the "significance of the personal appearance of the witness" (e), without hearing or seeing the evidence he is excluding. This seems illogical as well as unfair to the potential dischargee.

71. 32 C.F.R. § 730.15 (b) (1983). However, the situation with a formal court-martial is different. The court-martial system provides "the trial counsel, the defense counsel, and the court-martial . . . equal opportunity to obtain witnesses . . ." 10 U.S.C. § 846 (1982). Compulsory process is "similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . ." *Id.*

72. 32 C.F.R. § 41.6, App. A, Part 3(e)(5)(e) (1983).

73. 32 C.F.R. § 730.15(d)(2) (1983).

74. *Crowe v. Clifford*, 455 F.2d 945 (6th Cir. 1972).

75. *Keef v. United States*, 185 Ct. Cl. 454, 467-68 (1968).

76. *Id.* See also *Clackum v. United States*, 296 F.2d 226 (Ct. Cl. 1960) (where plaintiff never had the chance to confront the witnesses against her or even to know the charges, hearing was a meaningless formality).

77. *Cason v. United States*, 200 Ct. Cl. 424, 436 (1973); *Keef v. United States*, 185 Ct. Cl. 454, 460-61 (1968); *Middleton v. United States*, 170 Ct. Cl. 36, 40 (1965).

78. *Glidden v. United States*, 185 Ct. Cl. 515, 517 (1968) (quoting *Conn v. United States*, 376 F.2d 878, 881 (Ct. Cl. 1967)).

tion, and deemed essential to a fair trial.<sup>79</sup> No person can be punished without first being convicted of a crime by proof beyond a reasonable doubt following a trial at which a host of procedural and substantive rights are guaranteed.<sup>80</sup>

In many ways an other-than-honorable discharge proceeding is like a criminal proceeding. Servicemembers may be discharged on the basis of acts that are crimes in the civilian justice system,<sup>81</sup> after a board finding that they did the act alleged in the discharge notice.<sup>82</sup> A characterization of "other-than-honorable" implies a moral judgment about the person affected that is similar to the moral judgments implied by criminal sanctions.<sup>83</sup> The punitive effects of other-than-honorable discharges have been discussed above.<sup>84</sup> It is therefore proper to argue that servicemembers should be afforded the basic rights of those tried in civilian criminal proceedings or their military equivalent, courts-martial. The rights of confrontation and cross-examination are included in a person's due process rights. They are no less important than the rights to reasonable notice of the charges against that person, and an opportunity to be heard in one's defense. These rights are part of an entire package of rights that comprise a citizen's right to his day in court.<sup>85</sup> These rights are as essential as one's right to counsel, a right which *is* granted by the regulations.<sup>86</sup> In *Greene v. McElroy*,<sup>87</sup> the Supreme Court stated:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evi-

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79. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). The Court also stated: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* at 405.

80. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

81. 32 C.F.R. § 730.12(b) (1983), for example, provides for the discharge of a servicemember, by reason of unfitness, if his military record reflects the use or possession of narcotics or other illicit drugs.

82. The members of a discharge board appear to be assigned the task of acting like a criminal jury resolving whether a civil burden of proof has been met. To confirm the accuracy of this analogy in the following regulation, where the regulations state "recommendations," read "sentence" and where they state "Notice," read "complaint:"

(1) The Board shall determine its findings and recommendations in closed session. Only voting members of the Board shall be present.

(2) The Board shall determine whether each allegation set forth in the notice of proposed separation is supported by a preponderance of the evidence.

(3) The Board shall then determine . . . whether the findings warrant separation with respect to the reason for separation set forth in the Notice.

32 C.F.R. § 41.6, App A, Part 3(c)(5)(g) (1983).

83. *See Bell v. Wolfish*, 441 U.S. 520, 581 n.10 (1979) (Stevens, J. dissenting).

84. *See supra* notes 53-67 and accompanying text.

85. *In re Oliver*, 333 U.S. 257, 273 (1948).

86. *Id.* *See supra* note 69 and accompanying text.

87. 360 U.S. 474 (1959).

dence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.<sup>88</sup>

Justice Douglas, dissenting in *Williams v. Zuckert*,<sup>89</sup> stated that the requirements of due process provided by the fifth amendment should protect a civil servant facing discharge "by giving him the same right to confront his accusers as he would have in a criminal trial."<sup>90</sup>

In reviewing administrative hearings, the primary concern of the courts has been to guarantee a full disclosure of charges and adverse statements with the identification of the sources, so the accused may effectively prepare and conduct an adequate defense.<sup>91</sup> One may ask, however, whether one who has been denied access to information or deprived of the privilege of cross-examination is in a position to make an offer of proof on such matters. Further, a reviewing court cannot know what a full hearing might have shown and for that reason seems incapable of speculating accurately as to the prejudice involved in case of an erroneous ruling.<sup>92</sup> "Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered . . . ."<sup>93</sup> According to the individual the right to confront and cross-examine all adverse witnesses would help ensure a *fair* consideration of all the pertinent factors relative to the discharge, in accordance with the regulations' requirement that the board proceedings "should be formalized to the extent of assuring full opportunity for presentation of the respon-

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88. *Id.* at 496-97 (citations omitted).

89. 371 U.S. 531 (1963).

90. *Id.* at 534 (Douglas, J., dissenting).

91. *Grimm v. Brown*, 291 F. Supp. 1011, 1014 (N.D. Cal. 1968), *aff'd*, 449 F.2d 654 (9th Cir. 1971).

92. *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (6th Cir. 1941).

93. *Harmon v. Brucker*, 355 U.S. 579, 583 (1958) (quoting Army Regulation 615-630, para. 7).



dent's case."<sup>94</sup>

Professor Wigmore, commenting on the importance of cross-examination, states:

For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.<sup>95</sup>

Some courts have applied the principles stated in *Greene* to void discharges granted without affording the accused the right of confrontation and cross-examination.<sup>96</sup> The court of appeal in *Bland v. Connally*<sup>97</sup> invalidated a discharge given a naval reservist, because he was not permitted to confront adverse witnesses. The court found *Bland* was entitled to have any future administrative proceedings against him conducted with this procedural safeguard.<sup>98</sup> Because of the potential for injustice and the punitive effect of other-than-honorable discharges, justice requires servicemembers should be granted the absolute right to confront and cross-examine adverse witnesses.

### *Command Influence*

A tougher problem to solve than lack of opportunity to confront and cross-examine adverse witnesses is the pervasive problem of command influence in the discharge process. The administrative dis-

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94. 32 C.F.R. § 730.15(d)(2) (1983). Construing this provision, the court in *Cason v. United States*, 471 F.2d 1225 (Ct. Cl. 1973) held that where the Board failed to have the servicemember's accusers appear at the hearing, although they were on active duty in the local area, and relied on an unattested, allegedly inaccurate transcription of a tape recording made by one of the uncalled witnesses, despite the servicemember's demand that the complete tape be produced, the Board departed from 32 C.F.R. § 730.15 (*see supra* note 20) by ignoring the intent thereof to ensure a fair hearing and the specific prescription quoted above, which includes the opportunity of the accused to test the authenticity of incriminating evidence. Accordingly, the servicemember's discharge was nullified.

95. WIGMORE ON EVIDENCE § 1367 (Chadbourn rev. 1974) (citing *Bishop v. Copp*, 96 Conn. 571, 114 A. 682 (1921)).

96. *See, e.g.*, *Clackum v. United States*, *supra* note 76; *but cf.* *Unglesby v. Zimny*, 250 F. Supp. 714 (N.D. Cal. 1965) (failure to provide compulsory process to insure the physical presence of witnesses whose statements were considered by administrative tribunal did not constitute such denial of due process or of opportunity to confront and cross-examine witnesses as would render success on appeal likely, where petitioner was well aware of evidence that would be presented and did not request such witnesses to appear voluntarily nor seek to obtain additional statements from them); *Crowe v. Clifford*, 455 F.2d 945, 947 (6th Cir. 1972) (federal constitutional provisions requiring confrontation of witnesses and federal court rulings strictly limiting the admissibility of hearsay evidence governing criminal trials held not applicable to administrative discharge hearings from Army).

97. 293 F.2d 852 (D.C. Cir. 1961).

98. *Id.* at 860.

charge process is "a system that is based on command discretion."<sup>99</sup> Command influence is an abuse of that discretion. It is difficult to detect or protect against within the existing discharge process. Ultimate responsibility for the successful accomplishment of his assigned military mission rests with the military commander. He is an executive in a competitive organization. Advancement and desirable assignments depend on how well he achieves the mission. Therefore, he desires to rid his command of poor performers and members who, through their misconduct, may discredit his command.<sup>100</sup> In pursuit of this objective, the commander may unintentionally, or otherwise, influence the discharge process to produce the results he desires. When this occurs, the board becomes merely a superficial bow to the servicemembers' due process rights.

There is danger of potential abuse in the process. The commander appoints the members of the discharge board.<sup>101</sup> The members are often within the commander's sphere of influence and may even be in his direct chain of command.<sup>102</sup> The commander may be responsible for writing some of the members' performance evaluations, upon which advancing and obtaining desirable assignments depend. The commander also appoints the "recorder," who is basically counsel for the government. The recorder presents the government's case and ensures that a record is made of the hearing.<sup>103</sup>

The discharge board quickly realizes that the commander is not apt to have appointed the board to see to it that the accused is retained in the service. This realization may color the board's decision to approve or disapprove the accused's witness requests,<sup>104</sup> and influence the board's decision to separate or retain the servicemember. Perhaps out of a feeling of loyalty and respect for the commander, the board may be persuaded to come to a decision to separate, with-

99. 32 C.F.R. § 41.4(a) (1983).

100. *See supra* note 41.

101. 32 C.F.R. § 730.15(a) (1983).

102. In *Cole v. United States*, 171 Ct. Cl. 178 (1965), the court held that where a major general having authority over the officers comprising the Board of Inquiry appeared before that Board, required the officer under charges and his counsel to leave the room, briefed the members regarding their duty to rid the service of undesirable or inefficient officers without indulging in "undue compassion" and without becoming "confused by technicalities or tactics" which might be employed by the accused or his counsel, there had been the sort of "command interference" which deprived the accused officer of his constitutional right to a fair hearing under the due process provision of the fifth amendment. *See generally*, Everett, *Military Administrative Discharges — The Pendulum Swings*, 1966 DUKE L.J. 41.

103. 32 C.F.R. § 730.15(a) (1983).

104. *See supra* note 94.

out sufficient detached regard to the facts of the case. Such thinking would be similar to a jury believing the accused in a criminal trial is guilty because why else would the police arrest him and the prosecutor bring him before a court?

Improper command influence would clearly be a violation of the accused's right to a fair hearing.<sup>105</sup> But serious proof problems (and, perhaps, fear of reprisal) prevent dischargees from charging commanders with command influence. In the absence of an overt act, such as the commander lecturing the discharge board on its duty to rid the service of undesirable personnel, command influence is difficult to prove. Presuming command influence automatically, merely because the members of the board are within the commander's sphere of influence or chain of command, cannot be supported. The way out of the dilemma is to refer all other-than-honorable discharge cases, with minor exceptions,<sup>106</sup> to courts-martial. A court-martial provides the accused with the right to confront and cross-examine adverse witnesses in a forum armed with subpoena power,<sup>107</sup> and the danger of command influence is lessened where the proceedings are in the hands of military counsel and judges outside the commander's sphere of influence.<sup>108</sup>

Servicemembers committing significant acts of misconduct should be sent to a court-martial, the proper forum for punishment.<sup>109</sup> A special court-martial may grant a bad conduct discharge and a general court-martial may impose either a bad conduct or dishonorable discharge.<sup>110</sup> The punitive effect of the bad conduct discharge is not markedly different from that of an other-than-honorable dis-

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105. U.S. CONST. amend. V; *Cole v. United States*, 171 Ct. Cl. 178 (1965).

106. It would appear useful to retain the other-than-honorable discharge, accepted in lieu of trial by court-martial, as a plea-bargaining device. NAVMILPERSMAN, *supra* note 16, § 3630650. This device allows the dischargee to admit guilt to a charge of misconduct (punishable by a punitive discharge) and saves all parties the administrative burden of a court-martial.

107. Article 46, Uniform Code of Military Justice, 10 U.S.C. § 846 (1982). Refusal to appear or testify is a punishable offense under Article 47, 10 U.S.C. § 847 (1982). Article 37 of the Uniform Code of Military Justice (UCMJ) makes improper command influence a punishable offense.

108. 10 U.S.C. § 837 (1982); *Kasey v. Goodwyn*, 291 F.2d 174 (4th Cir. 1961), *cert. denied*, 368 U.S. 959 (1962). "No person . . . may attempt to coerce, or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case . . ." 10 U.S.C. § 837(a) (1982). A similar provision prohibits the use of performance evaluations for influencing or evaluating the performance of duty of members and counsel of a court-martial 10 U.S.C. § 837(b) (1982). The language of section (a) is susceptible of extension into the administrative discharge system, as it prohibits influencing "any other military tribunal or any member thereof . . ." The author is unaware of any cases making such an extension. The conduct such as that of the major general in *Cole v. United States*, 171 Ct. Cl. 178 (1965), described *supra* note 101, seems an easy target for this section.

109. See *supra* notes 54-55 and accompanying text.

110. 32 C.F.R. § 730.2(d),(e) (1983).

charge.<sup>111</sup> The major difference between the two discharges is in the amount and quality of due process afforded the potential dischargee.

If the servicemember's misconduct would not support imposition of a bad conduct discharge in a court-martial, then the member should be processed for an honorable or general discharge, which the commander can do without providing a noticed hearing.<sup>112</sup> This recommendation accommodates both the commander's interest in quickly removing inefficient, misbehaving members from his command, and the servicemember's interest in due process protection against a damaging stigma.<sup>113</sup>

#### CONCLUSION

In *Cafeteria and Restaurant Workers Union v. McElroy*,<sup>114</sup> the Supreme Court stated: "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."<sup>115</sup> Two basic equities must be considered in thus analyzing military discharge procedure. The first is the need of the armed forces for a system that provides for the swift separation of individuals who have demonstrated their incompatibility with military service, or whose continued association is inconsistent with the needs of the service. The second is the requirement that any such system must afford fair treatment to the individual and must include procedural safeguards which adequately protect his rights.<sup>116</sup>

The individual's private interest is in being free from the stigma of a derogatorily characterized discharge. A risk of erroneous deprivation of that interest exists because the present procedures lack the absolute right of confrontation and cross-examination, and because the system is pervaded by the threat of command influence. Courts have been reluctant to impose additional due process requirements on the military out of deference to the traditional policy of non-interference in military affairs.<sup>117</sup> This Comment has considered the mili-

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111. See *supra* note 53.

112. See *supra* note 29.

113. The question then, however, becomes whether a general discharge would take on the pejorative connotations associated with the other-than-honorable discharge. See *supra* note 39.

114. 367 U.S. 886 (1961).

115. *Id.* at 895.

116. 1971 *Hearings*, *supra* note 50, at 5929.

117. See *supra* notes 7-15 and accompanying text.

tary as one of the largest employers in America, with a special military mission: the preparedness for, and the fighting of, wars.<sup>118</sup> When the government's interest is in summary dismissal of unsuitable employees who burden the military service and impede the military mission, the government's ability to do so is not questioned.<sup>119</sup> But when the government punishes a servicemember with an undesirable discharge characterization meted out through a summary administrative proceeding, the individual's interest in avoiding an unfair, damaging adjudication requires greater protection than that currently afforded by administrative regulations.<sup>120</sup> Other-than-honorable discharge candidates should be guaranteed the absolute right to confront and cross-examine adverse witnesses in administrative discharge proceedings. Alternatively, because of the risk of erroneous and unfair punishment of discharges, the process of imposing undesirable discharges should be taken out of the commander's administrative reach, and placed in the more careful, deliberate, and just hands of the court-martial system's military judges and counsel. This approach recognizes the other-than-honorable characterization for what it truly is — a punitive measure.<sup>121</sup>

Administrative discharges should not be used as a summary means of punishing servicemembers by circumventing the stricter requirements of due process before punishment mandated by the Uniform Code of Military Justice and the Constitution.<sup>122</sup>

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118. "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties." *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934). In *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Cal. 1968) the court stated that it is not for a federal court to substitute its judgment for that of the military in internal administrative matters involving command judgment concerning duty assignments and promotions under war conditions. It is not the duty of the courts to run the army. *See supra* notes 7-15 and accompanying text. It is, however, the duty of the courts to ensure that the administrative discharge process deals fairly and constitutionally with discharges. *See supra* notes 20, 90, and 93, and accompanying text.

119. *See supra* note 75 and accompanying text.

120. As stated *supra* at note 20, the contours of due process in the military community are far from clear. However, as the Supreme Court has stated:

[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers — as well as civilians — from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts.

*Burns v. Wilson*, 346 U.S. 137, 142-43 (1953).

121. *See supra* note 53 and accompanying text.

122. "So long as an administrative discharge is not used as a summary guise for punitive action, [citation omitted], . . . the military remains within legally proper bounds when it chooses to grant an honorable discharge for the Government's convenience." *Birt v. United States*, 180 Ct. Cl. 910 (1967). *See Comment*, 19 SAN DIEGO L. REV. 839, 850-55 (discussion of use of NJP to circumvent the jurisdictional limits of courts-martial); *see supra* notes 80 and 120 and accompanying text.

Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.<sup>123</sup>

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123. Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

