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Military Institutions: Due Process for Cadets

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MILITARY INSTITUTIONS: DUE PROCESS FOR CADETS—*Andrews v. Knowlton*, 367 F. Supp. 1263 (S.D.N.Y. 1973), *aff'd* 509 F.2d 898 (2d Cir. 1975).

Much litigation in the past has dealt with the rights of college students.[1] It was the landmark decision of *Dixon v. Alabama State Board of Education*[2] which first held that procedural due process was to be applied to the disciplinary actions of colleges and universities. Following that decision the courts generally have adopted a standard of fairness and reasonableness when considering whether or not a student's rights to due process were violated.[3] The cumulative effect of the litigation which followed *Dixon* manifests itself in the 1969 decision of *Esteban v. Central Missouri State College*.[4] In that decision the court held that the following criteria should be met in order to comply with the requirements of due process:

1. the accused must be given adequate notice, in writing, of the specific allegation lodged against him/her and the nature of the supporting evidence;
2. the accused shall be given an opportunity to be heard;
3. there must be substantial evidence to support the action.

Although the courts are not compelled to adhere strictly to the criteria set forth in *Esteban*, it is evident that they are quite concerned with affording college students protection under the safeguard of due process.[5]

Contrawise, there has been very little litigation dealing with students of the United States military institutions, save the well publicized cases concerning such things as cheating on examinations. Although it may be argued that not many cadets have sought judicial remedies, the lack of judicial determination concerning the rights of cadets may indicate a reluctance on the part of the court system to afford these students protection under the constitutional safeguards which were designed to be applied to *all* persons equally.[6]

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1. *See* Due v. Florida A & M Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Zander v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190 (M.D. Tenn. 1968); Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969); Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1887). *See also* Smart, *The Fourteenth Amendment and University Disciplinary Procedure*, 34 Mo. L. REV. 253 (1969).

2. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

3. Due v. Florida A & M Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

4. 415 F.2d 1077 (8th Cir. 1969).

5. K. ALEXZANDER & E. SOLOMON, COLLEGE AND UNIVERSITY LAW, 430-38 (1972).

6. This proposition is a basic assumption in the following analysis of the case of cadet Albert Andrews. It is duly noted at this point that one of the reasons for the lack of judicial

Whether or not the courts are unwilling to enter into a direct confrontation with the military because of its link to the executive branch of government, or whether the courts refuse to invoke their power because of the high ethical standard supposedly attributable to the military schools, it remains that *all* persons should be entitled to the minimal safeguards of due process. A graphic illustration of the court's reluctance to uphold such a proposition is the case of *Andrews v. Knowlton.*[7]

I. STATEMENT OF FACTS

On February 3, 1973 cadet Albert Andrews was apprehended by the military police for driving an unauthorized vehicle onto the West Point campus.[8] Subsequently, Andrews was ordered to provide an investigating officer with a written explanation of his presence on campus in such a vehicle. Andrews stated that he had driven another cadet to the campus and was on the premises for 15 or 20 minutes. The report by the military police indicated that the car had been observed on campus for a period in excess of two hours. Therefore, Andrews was subjected to the Academy's disciplinary procedure for violations of the Cadet Honor Code.[9]

The adjudication of the alleged violation by Andrews took part in two stages: a proceeding before the Honor Committee followed by an Officer Board hearing. In a closed hearing the Honor Committee found Andrews guilty of a violation of the Honor Code for lying on his explanation report.[10] Subsequently, in a questionably de novo proceeding, the Board of Officers found Andrews guilty of lying, the

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determinations concerning the rights of cadets is that many cadets have not pursued a judicial remedy.

7. 367 F. Supp. 1263 (S.D.N.Y. 1973), *aff'd*, 509 F.2d 898 (2d Cir. 1975). Although the *Andrews* case was combined on appeal with White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1973), *aff'd* 509 F.2d 898 (2d Cir. 1975), this combination was initiated to avoid duplication of arguments. This note will concentrate on the *Andrews* case only.

8. The military police also found cadet Andrews to be out of uniform and transporting alcohol. The original charge was that of "gross misconduct" which would have resulted in Andrews' receiving only demerits.

9. Upon matriculation all cadets sign an oath of allegiance which requires that they abide by military regulations and orders from their superiors. One such order was a memo from the Commandant, in 1972, which required the Honor Committee to make initial determinations in all cases of alleged Honor Code violations. Therefore, cadet Andrews was brought before the Honor Committee. The signing of the oath is not a waiver of constitutional safeguards per se. However, when considered in light of the fact that the federal courts feel that the government can limit the application of constitutional safeguards because of an overriding interest in preserving the high ethical standard carried by military personnel, signing the oath does operate as a waiver.

10. The Honor Code provides that "No cadet shall lie, cheat, steal or tolerate those who do."

sole penalty for which is separation from the Academy.

Andrews then brought suit in the United States District Court for the Southern District of New York to contest his separation from the Academy; but was dismissed before full pretrial discovery took place. This decision was affirmed by the court of appeals.[11]

II. Denial of Due Process

In the instant case, Andrews was brought before an Honor Committee made up of elected cadets on a charge of lying.[12] The actual Honor Committee is comprised of 44 cadets, but only 12 cadets are selected to hear a given case.[13] The applicable standard is "guilty beyond a reasonable doubt" and a unanimous vote is required to convict.[14] After a hearing this Committee found Andrews guilty of violating the Honor Code.

The court of appeals found that this stage of the factual adjudication of Andrews' case was totally lacking in procedural safeguards.[15] To quote the court:

> While it is clear that the proceedings before the Cadet Honor Committee were wholly lacking in procedural safeguards, we are unpersuaded by the record now before us that the hearing was a critical stage in the separation of the appellant from the Academy for Honor Code violations.[16]

It is also clear from this quotation that the court does not consider the Honor Committee hearing a "critical stage" in the Academy's separation procedure. This part of the court's opinion seems illogical and irreconcilable with the factual situation presented here.

Article 16 of the Regulations for the United States Military Academy governs the separation of cadets.[17] This provision makes no mention of the Honor Committee being part of that procedure. However, in 1972, the Commandant issued a memo entitled "USCC Processing of Cadet Honor Cases" which specifically requires that apparent violations discovered by officers be referred to the Honor Committee first. Thus, without a unanimous vote of guilty by the

11. *Review denied* 44 U.S.L.W. 3183 (U.S. Oct. 7, 1975).

12. Brief for Appellant at 4, White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1973).

13. This is mandated by custom and written interpretation of the Honor Code.

14. Brief for Appellant at 21, White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1973).

15. Cadet Andrews was not given notice of the specific allegations made against him. Neither was he informed of the names of the witnesses who were to testify against him, nor was he permitted to confront those witnesses. Although Andrews was permitted to testify on his behalf, several defense witnesses were unable to appear because of receiving 48 hours notice as to a change in the hearing date.

16. 509 F.2d at 907.

17. § 16.04 is the provision which governs separation of cadets.

Honor Committee any proceeding initiated against a cadet for violating the Honor Code is ended. The Honor Committee is, in fact, an indispensible step in the separation procedure of the U.S.M.A.

The court's use of the word "critical" is an exercise in semantics. Critical is the equivalent of indispensible in this case. No Officer Board hearing of separation would have resulted if the Honor Committee had not found Andrews guilty of violating the Honor Code. What could be more *critical* than the initial step in depriving Andrews of his degree, his military rank, and his potential career earnings?

If the Academy's disciplinary proceeding, *i.e.*, the Honor Committee hearing, was to have any meaning or effect for Andrews, it would seem that he should have been alerted to the specific allegations lodged against him, as well as being given an ample opportunity to be heard.[18] Although not all disciplinary proceedings require the same degree of due process, the implications and consequences of this Committee's proceedings require, at the very least, the application of certain minimal, constitutional safeguards.[19] Assuming arguendo, that there is no distinction between Andrews' status as a cadet and his status as a student, a composite of minimal due process in this situation should be:

1. an adequate notice of the hearing,[20]
2. a definite written statement of the charges prior to the hearing,[21]
3. information as to the nature of the evidence against him,[22]
4. an opportunity to be heard,[23]
5. the right to consult with counsel in preparing a defense.[24]

In determining precisely which safeguards are essential to insure a fair hearing, it is proper to consider the burden which would be imposed upon the Committee by such measures.[25] Given the magnitude of the private interests which exist in the instant case,

18. Andrews was only informed of the nature of the charges against him at the Honor Committee hearing. It is questionable whether he could prepare an adequate defense on such short notice.

19. The federal courts drew a clear distinction between what constitutes due process for college students as opposed to what constitutes due process for cadets. *Cf.* Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969) and Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). *Esteban* provides some guidelines for determining exactly what constitutes due process for college students and these guidelines are more demanding than those set out for cadets in *Wasson*.

20. Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969).

21. Graham v. Knutzen, 351 F. Supp. 642 (D. Neb. 1972).

22. Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

23. Esteban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969).

24. Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972).

25. *Id.* at 207.

the imposition of the aforementioned safeguards would create little, if any, relative burden on the Committee.

Another flaw in the court's reasoning becomes evident upon a close scrutiny of the following excerpt from the second stage of the adjudication of Andrews' case:

> There is no evidence in the record that the decision by the Cadet Honor Committee in any way influenced the members of the Boards of Officers. On the contrary, the record convinces us that the proceedings before the Boards of Officers were de novo and were as free from taint as is a trial in which jurors are aware that the defendant before them has been indicted by a grand jury. We find, therefore, that the Cadet Honor Committee is a charging body whose decisions had no effect other than to initiate de novo proceedings before a Board of Officers. We further hold that the requirements of *Wasson* and *Hagopian* were met because each appellant was separated from the Academy only after he was afforded a hearing with full procedural safeguards. Accordingly, we conclude that on the basis of the record now before us, the Due Process Clause does not require the utilization of any particular procedure by the Cadet Honor Committee.[26]

In analyzing this finding, the first issue that must be considered is whether or not the Board of Officers hearing was, *in fact*, a de novo proceeding.[27] In support of their contention that it was a de novo proceeding the court argues that there are no facts in the record to indicate the Honor Committee decision tainted the Board of Officers hearing. Board members are sworn to an oath of impartiality and fairness.[28] In addition, the burden of proof of an Honor Code violation is upon the Academy while the burden to rebut is upon the

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26. 509 F.2d at 908.

27. There appears to be an underlying assumption on the part of the courts that all Board of Officers hearings are de novo proceedings.

28. Army Regulation 15-6:

> Do you swear that you will faithfully perform all duties incumbent upon you as a member of this Board; that you will faithfully and impartially examine and inquire according to the evidence, your conscience, and the laws and regulations provided, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward that you will find such facts as are supported by substantial evidence of record; that, in determination of those facts which are in dispute or are difficult of proof, you will use your professional knowledge and best judgment and common sense in weighing the evidence, considering the probability or improbability thereof, and with this in mind will regard as established facts those which are supported by evidence deemed most worthy of belief; and that you will make such findings and recommendations as are appropriate to, warranted by, and consistent with your findings, according to the best of your understanding of the rules and regulations for the government of the Army, Department of the Army policies, and the customs of the services, guided by your concept of justice, both to the government and the individuals concerned. So help you God.

accused. However, it seems that these procedures do not eliminate all possibility of bias on the part of Board members. Prejudice may well exist, if only because of a desire to maintain the authoritative and disciplined structure of the armed services. This purpose might be defeated by a decision which would undermine junior officers and future leaders of the army, in this case members of the Cadet Honor Committee.

Thus, a denial of due process at the committee level might prejudice the board hearing without an independent violation at that level.[29] In light of the above, it is unrealistic to declare that the use of the proper procedure at one level would necessarily rectify any improper procedure applied at a lower level. For example, if an appeals court discovers an error committed at the trial level, the case may be remanded or reversed. It certainly is not sufficient to argue that because the appeals procedure was correct no prejudice existed.[30]

III. Right of Freedom from Self-Incrimination

In the *Andrews* case the basis for his separation from the Academy was that he allegedly lied on a written report which had been prepared in compliance with an order given by Captain Stillwell, the officer in charge of the disciplinary investigation. According to Stillwell, the "explanation report" filed by Andrews was not sufficiently detailed. Captain Stillwell instructed the cadet to be more specific as to the time and place of the incident in his second report. It was a discrepancy between this second report and one prepared by the military police which gave rise to the allegation of the Honor Code violation by Andrews.[31]

The court of appeals rejected the argument that Andrews was deprived of his *Miranda* warnings and that the statement used against him was in violation of his constitutional right against self-incrimination.[32] The court indicated that Andrews' situation was analogous to that of a grand jury investigation:

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29. Counsel for the appellant had wanted to depose the Board members on that precise question, but was precluded from doing so when the complaint was dismissed.

30. The Board reviews the findings of the Honor Committee when determining whether or not a cadet should be separated from the Academy.

31. Andrews' written report was used against him at both the Board and Honor Committee hearings. The following analysis of the court's opinion deals only with the use of the statement by the Board.

32. If this had been a court martial situation, Andrews would have been informed of his right to be free from self-incrimination. *See* Uniform Code of Military Justice, 10 U.S.C. § 831 (1970).

> The government analogizes the situation at bar to that where a person suspected of a crime perjures himself before a grand jury in the absence of Miranda warnings, and then seeks to prevent prosecution for perjury (by invoking the exclusionary rule) on the basis of absence of warnings. Such failure to warn does not require exclusion of the perjurous statement in subsequent perjury prosecution.[33]

There is a rational basis for the limited use of the right against self-incrimination in reference to a grand jury investigation. Widespread use of such an exclusionary rule would yield a "license to lie".[34] The conclusion drawn by the court, therefore, was that no constitutional infirmities existed in the non-suppression of the second report. The court used impeccable reasoning to draw their conclusion by extrapolation of the grand jury analogy. However, if this was not a proper analogy to draw the court's conclusion was incorrect.

As argued by counsel for the appellant, the analogy should have been drawn between Andrews' situation and that of a criminal investigation. Andrews did not make his statement to a constitutionally endowed, quasi-judicial body. His report was submitted to Captain Stillwell. Andrews was the sole focus of the investigation conducted by Stillwell in conjunction with the military police similar to a suspected criminal. Furthermore, in conjunction with the last point, Andrews was not given the opportunity to decline to testify.

Although Andrews' situation was not in fact a criminal prosecution, he should have been afforded the use of a constitutionally guaranteed safeguard in order to protect himself and his interests.[35] According to a 1967 Supreme Court decision:

> [t]he availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.[36]

Thus whether or not a criminal trial took place is irrelevant.

Assuming arguendo the court of appeals was correct in rejecting the criminal prosecution analogy, the Board of Officers hearing was convened pursuant to Army Regulation 15-6. According to paragraph 10 of that regulation, any relevant and material ". . . oral or written matter . . ." is proper evidence for introduction at the

33. 509 F.2d at 908.

34. United States v. Winter, 348 F.2d 204 (2d Cir. 1965).

35. U.S. Const. amend. V provides:

No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

36. In re Gault, 387 U.S. 1, 49 (1967).

hearing. However, this does not mean that the regulation should be strictly interpreted and applied without regard to the fifth amendment, for paragraph 13(a) provides that:

> No witness shall be compelled to incriminate himself or to answer any question the answer to which might tend to incriminate him.

The Academy seems to have an unfair advantage over a cadet by being able to order him to submit a written statement concerning events in controversy and then using that statement against him. Alternatively, if cadet Andrews would have refused to prepare the report requested, he would have been subjected to disciplinary actions for insubordination.

The court of appeals in this decision seems to have ignored the basic ideas of equity, justice, and fair play. Because the Constitution applies to all persons regardless of their status, students at military institutions should be entitled to the same rights.

IV. Lack of Effective Remedy

Neither the district court nor the court of appeals addressed themselves to the issue of remedies, but it is important that this issue be fully explored. Assuming arguendo that there was a violation of Andrews' due process rights, what type of relief would be appropriate? The appellant prayed for both declaratory and injunctive relief, as well as for costs and disbursements for the action.

The declaratory relief sought by the appellant was very broad.[37] If any or all of the relief prayed for had been granted, it would have affected not only Andrews' case but would have had a resounding effect on the United States Military Adademy. The entire policy making process of West Point would undergo a drastic change. Infractions such as those allegedly committed by cadet Andrews

37. In the complaint seven separate declarations were prayed for:
1. that Andrews was deprived of his constitutional rights of due process by the actions of both the Honor Committee and the Board of Officers;
2. that the compulsory written statement obtained from the appellant prejudicially deprived him of his rights to be free from self-incrimination;
3. that the application of the Academy's Honor Code is arbitrary and therefore is unconstitutional;
4. that the punishment stipulated by the Honor Code was cruel and unusual punishment, in violation of the appellant's rights under the 8th amendment;
5. that the Honor Code was void on its face because it was unconstitutionally vague in violation of the due process of the fifth amendment;
6. that the proceedings of both the Committee and Board hearings were not in conformance with the Uniform Code of Military Justice, *i.e.*, without Federal jurisdiction, therefore were null and void;
7. that the order of separation was null and void.

might draw the penalty of demerits rather than expulsion from the Academy. No longer would the single penalty of separation suffice as the punishment for all Honor Code violations. In other words, a new disciplinary system might have to be established on the theory that the punishment is only just when it fits the violation. It appears that this is the most equitable premise from which to prescribe punishment, but this is not the only problem that might be created by a declaratory judgment being granted in favor of Andrews.

The federal courts are not too eager to upset the delicate balance which exists between themselves and the executive branch of government. If the declaratory relief prayed for by Andrews had been granted, a good deal of tension between these two branches of government might have resulted. The military seems to have retained its autonomy from the judiciary partly because it is considered to be part of the executive branch of government. Encroachment by the courts into the domain of the armed services, which in theory are under the guidance of the President,[38] may have severe and unwanted repercussions.

Assuming arguendo that the court did grant the declaratory relief prayed for, it might have had to face an even greater problem. If the military (as part of the executive branch of government) would refuse to comply with the court's ruling, an impasse would have been reached. The judicial branch of government would be virtually powerless to enforce its decision. As a result of their incapacity, the courts, as well as the military, could lose a great deal of prestige. Considering the possible implications of such a decision, the courts might not readily grant such a prayer.

The injunctive relief sought was temporary, preliminary, permanent, and mandatory in nature. Even if separated from the Academy, Andrews would be required to serve two years of active duty. The temporary and preliminary injunctions would stave off the call to active duty for Andrews.

The permanent and mandatory relief is directed to the reinstatement of the cadet. If this relief were granted, Andrews would be reinstated into the Academy in good standing. But is reinstatement sufficient to satisfy the needs of the appellant?

As the district court held, any cadet found guilty of an Honor Code violation by the Honor Committee suffers from limitations of his freedom, damage to character, and harm to potential career.[39] A guilty verdict by the Honor Committee results in immediate con-

38. U.S. Const. art II, § 2, cl. 1.

39. Andrews v. Knowlton, 367 F. Supp. 1263 (S.D.N.Y. 1973).

finement in a special area known as the *Borders Ward*. There are numerous personal restrictions which go along with this isolation. Similarly, one's character is questioned by the mere fact of confinement in such quarters. Even if the court were to grant the relief prayed for, upon returning to the Academy, Andrews could be subjected to various forms of harassment. Silencing is an unofficial but traditional form of Academy discipline. It would prevent Andrews from having normal social and personal relations with members of the Academy or its alumni. As a result, it is possible that because of this incident, Andrews would not achieve his potential advancement in rank.

Deputy Commandant, Colonel Burke W. Lee summed up the situation aptly:

> If the Committee determines that the Cadet has violated the Code he can no longer be accepted as a member of the corps . . . . [40]

The granting of injunctive relief would supply a general solution to the problems presented in this case, but it appears that no complete remedy exists which would repair all of the injury done cadet Albert E. Andrews III.

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40. Brief for Appellant at 12, White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1973).