

MILITARY LAW
REVIEW
VOL. 79

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AN EFFECTIVE PUNISHMENT?**

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MILITARY LAW REVIEW

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A CRIMINAL PUNITIVE DISCHARGE—AN EFFECTIVE PUNISHMENT?*

Captain Charles E. Lance**

In this article Captain Lance reviews various justifications traditionally advanced for imposing punitive discharges and other punishments on offenders. He concludes that goals such as retribution and deterrence through fear are in conflict with the Army's current policy of rehabilitation and restoration to duty of the maximum possible number of offenders.

The author examines the legal effects of a punitive discharge on entitlement to veterans' benefits. Thereafter he presents statistics to show the extent to which an offender's economic opportunities may be curtailed by a punitive discharge. Examined are opportunities to obtain higher education, occupational licensing, union membership, and employment in general, among others.

In conclusion Captain Lance recommends greater use of administrative discharges as an alternative to the slow, costly, uncertain, and perhaps ultimately ineffective route of trial by court-martial with imposition of punitive discharges on offenders.

I. INTRODUCTION

At Adobe Wells, Texas in 1876, on a typically hot dry day the garrison troops at this tiny western cavalry post are assembled to witness what any man "with honor" prays will never happen to him. The men of the troop stand rigid in a solemn formation while a "dirt devil" whirls dust on their freshly polished boots and the noonday

*This article is an adaptation of a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Twenty-Fourth Judge Advocate Officer Advanced Class. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. A summary of the thesis has been previously published under the same title in *THE ARMY LAWYER*, July 1976, at 25.

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sun continues to beat down upon them. Sweat beads begin to pop out from underneath their wide brimmed hats before the post commander briskly steps into the center of their vision and calls for attention to orders.

The accused, under guard, is marched into his place of infamy as all eyes first center upon him and then upon the Colonel as his words cut through the hush. Private Doake has been found guilty by a court-martial and has been sentenced to be discharged from the Army with a Dishonorable Discharge. Everyone at the formation knows it but nonetheless strains to capture every word as the Colonel reads the general court-martial order which recapitulates the crimes of the accused and his ignominious conduct.

As the commander virtually spits out the words "dishonorable discharge" the Sergeant Major steps forward and strips off Doake's buttons, facings, ribbons, and all other distinctions and identifying insignia from his now shabby clothing. His coat is taken from him and is torn in two and deposited at his feet. An aide brings Doake's enlistment and it is torn into pieces in his face and is left to be blown to the ground and trampled into the dirt. The Sergeant Major then grasps Doake's sword in both hands, raises it high above his head for all to see, and in one swift deliberate motion breaks it over Doake's head.

The now humbled renegade is marched past his former comrades-in-arms as the drums beat out the "rogues march." The little procession heads inevitably toward the main gate where representatives of his troop, unable to conceal their contempt, physically eject him from the stockade. The Colonel then steps forward and orders Doake never to return to the post upon penalty of death and issues a somber order to those assembled to have no future contact with him upon fear of court-martial.¹

Contrast the above scene with a letter received by the author from a Dean of Admissions at a major university who states, "I am pleased to say that we do not discriminate against a person formerly mistreated by the military," when replying to a questionnaire concerning the effects of a criminal punitive discharge upon educational opportunities.²

Clearly times have changed greatly. However, despite the passage of an entire century punitive discharges remain in general mili-

¹ S. BENET, *A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* 200 (5th ed. 1866).

² Letter from Richard L. Davison to Charles Lance (March 4, 1975).

tary use. While the offender sentenced to a bad conduct or dishonorable discharge is seldom, if ever, ceremonially removed from the ranks of the armed services, the punitive discharge itself remains as a theoretically essential form of military punishment.

The fact that the punitive discharge has survived into the latter part of the 20th Century may be strong evidence of its utility, but then again it may well be that it has not only outlived its usefulness but is even harmful to military discipline and efficiency. The punitive discharge is maintained probably because most military officers, including senior judge advocates, believe that such discharges are major deterrents to criminal misconduct. It is likely that the basis of such belief is the widely held view that punitive discharges carry with them grave economic consequences. Indeed, this opinion finds ample support from contemporary court opinions³ and from our national leaders.⁴ The simple truth is, however, that no one really knows (including the judge advocate defense attorney counseling a criminal accused on the subject) what the economic effects of a punitive discharge are.

The purpose of this article then is to re-examine the punitive discharge; to analyze its philosophical underpinnings and then to weigh the consequences to the individual who receives it against whatever utility it may have for the armed services.

The format of this article is not that of the typical statistical analysis commonly used for presentation of descriptive data.⁵ A narrative style is used for the comfort of readers who do not deal with statistical data on a daily basis.

There is a vital need for empirical research to determine what are the practical results of various means of separating from the Army those who cannot adapt to military life. The author believes that many unexamined assumptions play an important role in the decision process followed by commanders and their legal advisors when considering whether to refer a case to trial before a court-martial empowered to impose a dishonorable or bad conduct discharge. The

³ *Stapp v. Resor*, 314 F. Supp. 475 (S.D.N.Y. 1970); accord, *United States ex rel. Roberson v. Keating*, 121 F. Supp. 477, 479 (N.D. Ill. 1949).

⁴ U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 119 (1972).

⁵ A more formal analysis might have the following structure: statement of the problem; variables to be measured; techniques of measurement; population to be measured; instrument to be used; sampling technique employed; summary and analysis of results; and conclusions and recommendations.

same is surely true of judges and court members confronted with the necessity to decide whether to impose such a sentence.

These assumptions should be compared against objective reality in order to determine whether the means chosen, i.e., punitive discharges, are effective for achieving the ends desired, i.e., to punish malefactors and discourage others from imitating them, among other more abstract goals set forth below.

At the same time, it must be recognized that this article represents the merest beginning of an attempt to answer the question raised above. A total of **2,032** questionnaires were sent to various organizations, and **1,339** were received back in useable form, a rate of response of approximately 65.8%. It was not practical for the author to increase the rate of response by persistently contacting the nonresponding addressees. As a result the conclusions reached in this article are only tentative, and the project as a whole does no more than indicate lines along which more formal research efforts should proceed in the future. The data presented are not intended to be used to “prove” the conclusions suggested, as evidence in a court-martial or in any other similar context.

11. CAPSULE HISTORY OF THE PUNITIVE DISCHARGE

The punitive discharge like so many of our western institutions, customs and mores originated with the Greeks, was passed to the Romans, spread through the European continent, and came to us via Britain.⁶

The early Greeks borrowed a practice of the surrounding primitive peoples when they adopted the sanction of exile for their military and civil undesirables.⁷ While this practice was labeled “ostracism”—stemming from the fact that the early Greeks wrote the name of the individual to be purged from the society on a sea shell*—rather than “discharge,” the similarities in practice and effect are striking.

The Greeks continued their practice of ostracism until their empire was replaced with that of the Romans who instituted a separate

⁶ G. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 13 (1898).

⁷ H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 339 (2d ed. 1951).

⁸ *Id.* “Ostracism” stems from the Greek work “ostrakismos,” meaning oyster shell.

military tribunal to administer military justice.⁹ The tribunal could, for particular crimes, adjudge a sentence of exile upon an erring Roman soldier.

The Teutonic leaders borrowed the Roman system of jurisprudence and after the fall of the Roman Empire began to adapt it to fit the peculiar conditions of the feudal system.¹⁰

The "court-martial system" or the separate military tribunal had become completely established upon the European continent by 1066 when William the Conqueror carried it to England."¹¹

While the system of exile was present in all these early civilizations¹² and was one of the punishments available to a military tribunal, the first recorded authorization for a punitive discharge as such is found in the *Code of Articles of King Gustavus Adolphus of Sweden* written in 1621.¹³ Interestingly, however, it only authorized this as a punishment for officers,¹⁴ and specifically stated in Article 126 that no soldier could be cashiered.¹⁵

In England after 1066 the court-martial was maintained by successive sovereigns who established rules for the governance of their armed forces¹⁶ but did not codify those rules until 1686 when James II issued his Articles of War.¹⁷ The reign of James II was interrupted by the Glorious Revolution which ultimately resulted in a reallocation of power to parliament. In 1688 parliament passed an act which gave the sovereign the power to enforce and maintain discipline in the armed forces.¹⁸

The English practice concerning punitive discharges was unclear until 1688 when the Articles of War of James II specifically and for the first time in recorded English history provided in writing for a punitive discharge for officers.¹⁹ Article 34 of the articles states, ". . . and whoever shall offend . . . if it be an officer, he shall be

⁹ DAVIS, *supra* note 6, at 13.

¹⁰ *Id.*

¹¹ *Id.*

¹² BARNES & TEETERS, *supra* note 7, at 339.

¹³ Reproduced in 2 W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 907-918 (2d ed. 1920).

¹⁴ *Id.* at 914.

¹⁵ *Id.* at 915.

¹⁶ DAVIS, *supra* note 6, at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ Articles of War of James II (1688), reproduced in 2 WINTHROP, *supra* note 13, at 920-930.

cashiered; and if a private soldier, he shall ride the wooden horse, and be further punished as a court-martial shall think fit.”

The Articles of War were updated from time to time and maintained the punitive discharge provision for officers.²⁰ The latest British Articles that influenced the American punitive discharge were the British Articles of War of 1769²¹ which were in effect when the American Revolution broke out in 1775.

At the outbreak of violence the Revolutionary Congress found itself with the immediate need both to establish an army and navy and to provide for discipline for them. Time being of the essence, and because the British Articles of War were known to most of the colonists, the Congress adopted them almost verbatim by resolution on 30 June 1775.²² The American Articles of War provided under Article 51 the punishment of a punitive discharge (styled cashiering) for officers.²³ Several offenses are listed which carried the punitive discharge penalty, but again this punishment was reserved for officers only.²⁴

Enlisted men did not fit into the punitive discharge picture until Congress, under the Articles of Confederation, passed the American Articles of War of 1786.²⁵ Article 13 provided that,

No commissioned officer shall be cashiered, or dismissed from the service, excepting by order of Congress, or by the sentence of a general court-martial; and no non-commissioned officer or soldier shall be discharged from the service, but by the order of Congress, the secretary at (sic) war, the commander-in-chief, or commanding officer of a department, or by the sentence of a general court-martial.²⁶

The dishonorable discharge was the only punitive discharge authorized in the United States from 1786 until after World War II when Congress, under the Articles of War of 1948, provided for two punitive discharges. The discharges were labeled “Dishonorable” and “Bad Conduct” and were to be imposed by sentence of a court-

²⁰ See generally 2 WINTHROP, *supra* note 13, at 930 et seq.

²¹ 1 W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 777 (1st ed. 1886).

²² DAVIS, *supra* note 6, at 4. It should be noted that the American Articles of War, while virtually identical with those of the British, were passed by the Congress, rather than issued by any executive or military leader as was the contemporary British practice.

²³ American Articles of War of 1776, reproduced in 2 WINTHROP, *supra* note 13, at 953-960.

²⁴ *Id.*

²⁵ American Articles of War of 1786, reproduced in 2 WINTHROP, *supra* note 13, at 972-975.

²⁶ *Id.* at 973.

martial only.²⁷ A general court-martial could adjudge both discharges while a special court-martial could only adjudge a bad conduct discharge. It is noteworthy that the Articles of War of 1948, for the first time, granted inferior courts in the Army the power to adjudge a punitive discharge.²⁸ Congress created a distinction between a bad conduct discharge adjudged by a general court-martial and one adjudged by a special court-martial. The distinction is important primarily because of its effect upon entitlements to veterans' benefits under the United States Code.²⁹ That is, a bad conduct discharge adjudged by a special court-martial carries less impact and causes the loss of fewer benefits than does a bad conduct discharge adjudged by a general court-martial. The dual punitive discharges were maintained by Congress under the newly styled Uniform Code of Military Justice of 1950³⁰ and exist in this dual state today.³¹

A brief note should be added for those unfamiliar with the military legal system concerning the distinction between a punitive discharge and an administrative discharge. While certain administrative discharges may have adverse effects upon a former servicemember³² they are not primarily designed as punishment and have as their goal the elimination of undesirable, unfit, medically unsound, and various other categories of persons unable to complete their military service for varied and numerous reasons. An administrative discharge is entitled an Honorable Discharge, General Discharge, or Discharge Under Other Than Honorable Conditions (formerly called Undesirable Discharge).

Administrative discharges are generally recommended by a board of officers, while a punitive discharge is adjudged by a military court as part or all of a sentence for criminal conduct, and is styled a "Dismissal" for a commissioned officer or a Dishonorable or Bad Conduct Discharge for an enlisted person.

²⁷ Act of 24 June 1948, ch. 625, §§ 209-10, 62 Stat. 629, 630 (Revision of the Articles of War).

²⁸ H.R. Rep. No. 1034, 80th Cong., 1st Sess. 7 (1947).

²⁹ *E.g.*, 10 U.S.C. 1553 (1970).

³⁰ Act of 5 May 1950, § 1, 64 Stat. 108. This provision contains articles 18 and 19 of the Uniform Code of Military Justice.

³¹ Uniform Code of Military Justice arts. 18, 19, 10 U.S.C. 818, 819 (1970).

³² Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 MIL. L. REV. 1 (1973); Comment, *Administrative Discharges*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 227 (1974).

The procedural rules and safeguards are, therefore, quite different for the two categories of discharges, i.e., punitive and administrative. An administrative discharge board is not bound by the rules of evidence and lacks many of the procedural safeguards of a trial. Only a summarized record of the proceedings is made and the record is reviewed by a local judge advocate lawyer for legal and factual sufficiency before the convening authority approves the discharge. The respondent (as the administrative dischargee is styled) has the right to have his case reviewed by the appropriate Discharge Review Board and the Board for Correction of Military Records. Should the respondent be unsuccessful in these administrative remedies he then has the option of attempting to obtain some relief from the federal courts.

On the other hand, before a punitive discharge may be adjudged and executed the defendant must have received a fair trial and afforded all the rights guaranteed by the United States Constitution plus additional rights guaranteed to armed services' personnel by the Uniform Code of Military Justice and the Manual for Courts-Martial. Should a punitive discharge be adjudged the defendant then has the right to an automatic appeal to the Court of Military Review and the option of representation before that appellate court by military lawyers at no expense to the accused. Should the accused lose at the Court of Military Review he may then appeal to the Court of Military Appeals again with the option to use the free services of qualified military lawyers. Should the sentence to a punitive discharge be affirmed at the appellate level, then and only then may it be executed by the appropriate convening authority who may still reduce a dishonorable discharge to a bad conduct discharge or may suspend or set aside the punitive discharge entirely.

111. HOW DOES THE PUNITIVE DISCHARGE FIT INTO TODAY'S PENAL PHILOSOPHY?

If the premise is accepted that the military should mirror the society it was created to defend, it logically follows that the military's rationale for imposing a punitive discharge should rest upon a contemporary, widely accepted, rational philosophical basis.

A. BASIC PHILOSOPHIES OF PUNISHMENT

There are six basic philosophies of punishment generally accepted

by writers in the fields of criminology and penology: ³³ retribution, deterrence, social defense, prevention, maintenance of respect for law, and rehabilitation.³⁴

1. Retribution

The oldest philosophy of punishment is that of retribution. Probably the most ancient though well known recorded reference to it is found in Deuteronomy 19:21 which exhorts punishment to be eye for eye, tooth for tooth. Among the leading philosophers that advocated retribution as the reason for punishment were Aristotle,³⁵ St. Thomas Aquinas³⁶ and Immanuel Kant.³⁷

Among the more contemporary philosophers and writers on the subject of retributive punishment is F. H. Bradley, who in his book *Ethical Studies* states the case for retribution quite strongly, as follows:

If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connection of punishment and guilt. Punishment is punishment only where it is deserved. We pay the penalty because we owe it and for no other reason; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is gross immorality³⁸

In summary, the theory of retribution is that punishment should focus primarily upon the offender rather than society at large; that the gravity of the offense should roughly dictate the extent of the sanction; and that the offender must suffer because he is responsible for his evildoing, i.e., he could have done otherwise but chose not to.³⁹

2. Deterrence

Deterrence as a philosophy of punishment can be defined as the restraint which fear of criminal punishment imposes on those likely to commit a crime.⁴⁰ In former times, emphasis was placed on the physical exhibition of punishment as a deterrent influence.⁴¹ Execu-

³³ McGee, *A New Look at Sentencing*, 38 *FED. PROBATION* 3 (June 1974).

³⁴ *Id.* See also P. TAPPAN, *CRIME, JUSTICE AND CORRECTION* at 240-61 (1960).

³⁵ *CONTEMPORARY PUNISHMENT* 40 (R. Gerber & P. McAnony ed. 1972).

³⁶ *Id.*

³⁷ *Id.*

³⁸ F. BRADLEY, *ETHICAL STUDIES: SELECTED ESSAYS* (1951).

³⁹ *CONTEMPORARY PUNISHMENT*, *supra* note 35, at 40.

⁴⁰ *Id.* at 93.

⁴¹ *Id.* at 120.

tions were commonly performed in public as were lesser forms of punishment, and the picture of an early American colonist in the pillory for public display easily comes to mind. Today, it is customary to emphasize the threat of punishment as such. The modern theory concerning deterrence distinguishes other effects from the "mere frightening or deterrent effect of punishment."⁴² It may strengthen moral inhibitions which is a moralizing effect, and it may stimulate habitual law-abiding conduct.⁴³ The theorist views punishment as a consequence of the failure of the threat rather than the threat itself. That is, society punishes in order to threaten. What an individual suffers is unimportant to the system as long as the potential wrongdoers know of the punishment and the amount of suffering meted out to a past violator.⁴⁴

Some immediate problems with the theory of deterrence come to mind. It presupposes free will, a realistic threat, and knowledge of the threat. A major flaw in the theory is that the threat of punishment does not as a matter of fact appear to be effective to deter crime. A commonly cited example of the past failure is the old story of pick-pockets working the London crowds viewing a hanging of a person condemned for picking pockets. Another pragmatic difficulty with the deterrence theory is that, to be effective, the theory must rely on the rapid apprehension and punishment of a criminal. Many jurisdictions have sadly demonstrated that they cannot cope with that requirement. A theoretical problem with the deterrence philosophy is that it seems to justify the risk of punishing an innocent person to improve the threat that is inherent in the system.⁴⁵

3. *Social Defense*

The theory of social defense was first formulated and the label "social defense" first applied by Marc Ancel, a French writer, teacher, jurist and member of the Supreme Court of France. The theory is elaborated upon in his book, *Social Defense: A Modern Approach to Criminal Problems*, published in 1966. Social defense is largely based on the substitution of treatment for retributive punishment. According to Marc Ancel, "[S]ocial defense presup-

⁴² Comments, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

⁴³ Comment, *Punishment and Deterrence: The Educative, Moralizing, and Habitative Effects*, 1969 WIS. L. REV. 550.

⁴⁴ CONTEMPORARY PUNISHMENT, *supra* note 35, at 93.

⁴⁵ *Id.*

poses that the means of dealing with crime should be generally conceived as a system which aims not at punishing a fault and sanctioning by a penalty the conscious infringement of a legal rule, but at protecting society against criminal acts.”⁴⁶ The individual treatment and analysis of persons apprehended for criminal acts are fundamental to the social defense theory.⁴⁷

While deterrence also views society at large, as does social defense, its primary focus is on individual potential wrongdoers and *their* calculation of risk. Social defense is not really interested in the individual *per se* except insofar as he presents a danger to the community. The individual then is the focal point of study, treatment, and prevention of future misconduct. Prediction is the real key to understanding and to justifying social defense. The theory is not interested in what the individual did that was viewed by society as misconduct but is interested in using what he did to predict what he might do in the future.⁴⁸ To a social defense theorist, “preventive detention” is the primary method of protecting society.

A problem inherent in the social defense theory, when applied, is that the system could readily be misused by tyrants. Accompanying this difficulty are the problems created by the necessity to draft criminal statutes to fit the theory and yet maintain the necessary protection against misuse in a system that allows for criminal detention based upon what a person is apt to do in the future. Of prime concern is the current inability to predict accurately future criminal acts.⁴⁹ In a free society the social defense theory cannot safely be embraced until social science and the art of predicting human behavior make significant advances.⁵⁰

4. Prevention

A theory that has been partially assimilated within the social defense theory is that of prevention, also called the incapacitation or intimidation theory of punishment. Simply stated, under this

⁴⁶ M. ANCEL, SOCIAL DEFENSE: A MODERN APPROACH TO CRIMINAL PROBLEMS 24 (1966).

⁴⁷ *Id.* at 25.

⁴⁸ CONTEMPORARY PUNISHMENT, *supra* note 35, at 129.

⁴⁹ *Id.* at 131.

⁵⁰ Congress has acted in this area in passing the National Research Service Award Act of 1974 providing for the establishment of a national program of biomedical research and a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. Pub. L. 93-348, 88 Stat. 342 (1974) (to be codified in part at 42 U.S.C. 2892-1).

theory, a person is placed into a position where he literally cannot commit a crime.⁵¹ England and various other countries have recognized and accepted the incapacitation theory of punishment by employing a "dual-track system" whereby recidivists spend an initial term in punitive prison confinement and a second portion of "nonpunitive preventive detention," during which their privileges are considerably increased and during which, in theory, they are not being punished.⁵² In the United States nearly all states have recidivist laws providing for extended confinement and, in a number of jurisdictions,⁵³ for life terms for the third or fourth felony conviction.⁵⁴

Two problems with the prevention theory have been pointed out by Professor Paul Tappan. The problems are, first, the lack of use of the recidivist statutes; and second, the shortage of resources available for institutional and post-institutional maintenance of the offender. The recidivist laws have proven ineffectual in their general impact mainly because the courts have displayed a great reluctance to apply the life sentences that have been established by such statute. Should the courts apply the recidivist statutes it would, of course, create an even greater burden on the nation's prison systems and parole organizations because incapacitation (prevention) requires not only a sufficiently prolonged institutional custody but the partial and gradually diminishing constraint of parole regulation upon discharge.⁵⁶

5. *Maintenance of Respect for Law*

Maintenance of respect for the law as a philosophical justification for punishment is perhaps incorporated to some extent in all the other theories of punishment but nonetheless deserving of comment. "Maintenance of respect" theorists believe that if society could convince all people that it is in their own best interest to uphold the law, punishment would not be necessary. As this utopian ideal is not foreseeably attainable, the imposition of punishment for

⁵¹ MCGEE, *supra* note 33.

⁵² TAPPAN, *supra* note 34, at 255.

⁵³ California, Kentucky, Texas, Washington, West Virginia, Idaho (discretionary), Colorado, Florida, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, Ohio, Wyoming, North Dakota, Oregon, Pennsylvania, South Dakota.

⁵⁴ TAPPAN, *supra* note 34, at 255.

⁵⁵ *Id.* at 258.

⁵⁶ *Id.* at 256.

infractions of society's rules enforces respect for the law based first upon fear, and hopefully, at maturation of the society, upon interest in self-preservation. The preferred methodology of these theorists is the educational process and a vigilant striving to assure that the law is swiftly and uniformly applied.⁵⁷

6. *Rehabilitation*

Rehabilitation as a philosophy of punishment is the theory most widely accepted, frequently discussed and optimistically "applied" in modern society. The rehabilitative theory has developed under the impetus of the modern clinical movement,⁵⁸ whose original emphasis was on humanism. The humanists have since been joined by the psychologists and sociologists, especially those who emphasize the external determinants of behavior, and foremost among whom are the behaviorists and psychoanalysts.

The behavioral school, which is the leader in this area, views criminal behavior as stemming from an imbalance between paired pleasures and pains.⁵⁹ In addition, many behavioral psychologists believe that there is a deterministic relationship between a person's external environment and his actions. It is increasingly common to hear that adverse social conditions such as poverty, ghetto housing, and unemployment are the responsible factors for criminality. The rehabilitative theory therefore postulates two causal agents, mental disease and environmental determinism, both of which lead to the same conclusion, i.e., that an individual's conduct is a product of factors that are beyond his or her control. Since the person's conduct is beyond his control, under both causes, the same legal ramification is suggested by the rehabilitative theorists: lack of criminal responsibility for one's acts.⁶⁰

The rehabilitative theorist, viewing criminal conduct as a result of mental disease or environment, often labels punishment as "treatment." The rehabilitative treatment varies from institution to institution from ". . . pragmatic, trial and error, penological and correctional techniques to institutional routine, vocational training, guided recreation, individual psychological and psychiatric treatment, group therapy and group counseling." ⁶¹

⁵⁷ MCGEE, *supra* note 33, at 6.

⁵⁸ P. TAPPAN, *CONTEMPORARY CORRECTION* 10 (1951).

⁵⁹ *CONTEMPORARY PUNISHMENT*, *supra* note 35, at 176.

⁶⁰ *Id.*

⁶¹ S. SHOHAM, *CRIME AND SOCIAL DEVIATION* 200-01 (1966).

Problems with the rehabilitative theory stem directly from the fact that it tends to encourage longer and longer periods of confinement for crimes that often are far less severe than the disease they reflect.⁶² For example, it may take longer to cure a kleptomaniac than one who kills another human being, but it is hard to justify depriving the former of freedom for a greater period of time, considering the way society views the comparative seriousness of the two offenses. The rehabilitative theory is also deficient in its failure to provide a solution or answer to the question: What does society do with those offenders who refuse to be rehabilitated, cannot be rehabilitated, or simply do not need to be rehabilitated?

B. AVOWED ARMED FORCES PHILOSOPHY OF PUNISHMENT

Of the six basic philosophies of punishment, the armed forces of the United States have officially adopted the rehabilitative theory of punishment. In the volume *Task Force Report: Corrections*,⁶³ the President's Commission on Law Enforcement and Administration of Justice adopts rehabilitation as the federal government's choice for the purpose of corrections in stating that "[t]he ultimate goal of correction under any theory is to make the community safer by reducing the incidence of crime. Rehabilitation of offenders to prevent their return to crime is in general the most promising way to achieve this end."⁶⁴

The federal government through the Federal Bureau of Prisons has been intensely interested in developing new methods of successfully rehabilitating inmates.⁶⁵ In this regard, the Bureau of Prisons is developing a new Federal Correctional Center in Butner, North Carolina, which according to the Bureau will house the first concentrated and systematic effort towards development of effective rehabilitative programs, involving study of criminal behavior patterns.⁶⁶

⁶² CONTEMPORARY PUNISHMENT, *supra* note 34, at 133.

⁶³ THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (N. Katzenbach, Chairman), at 16 (1967) [hereinafter cited as TASK FORCE REPORT: CORRECTIONS].

⁶⁴ *Id.* The Commission did not, however, denounce all other theories of punishment and did in fact state that deterrence remained a "legitimate correction function." *Id.*

⁶⁵ 13 AM. CRIM. L. REV. 3 (1976).

⁶⁶ *Id.* at 5.

Through the "Report of the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army," the Department of the Army adopted rehabilitation in 1960 as a goal of military justice in stating, "The military justice system must foster good order and discipline at all times and places; [and] it must provide for rehabilitation of usable military manpower." ^m

The Department of the Army has also stated that it is the objective of the Army correctional program to

[r]eturn to military duty the maximum possible number of military prisoners . . . as morally responsible and well trained soldiers with improved attitudes and motivation . . . and to return to civil life or restore to duty, as appropriate, the maximum possible number of military prisoners whose sentences include a punitive discharge . . . who are capable of assuming responsibilities associated with their return to civil life or military duty.⁶⁸

Thus, by regulation, the Army confinement facilities are operated on a corrective, rehabilitative basis rather than a punitive one;⁶⁹ and by using the Disciplinary Barracks⁷⁰ the armed services have maintained an admirable performance record in their rehabilitative efforts. Fiscal year 1975 was no exception although the record does not look as glittering as did most past years, due primarily to the large influx of prisoners and prison population turnover resulting from the Presidential Amnesty Program.

In fiscal year 1975 the Disciplinary Barracks had an average daily population of 1152 prisoners.⁷¹ During the relevant period (1 July 1974-30 June 1975) 387 prisoners were restored to duty⁷² and 212

⁶⁷ U.S. DEP'T OF ARMY, REPORT OF THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY 129 (1960). Also known as the "Powell Report."

⁶⁸ Army Reg. No. 190-1, The Army Correction Program, para. 5 (12 Jan. 1967) [hereinafter cited as AR 190-1].

⁶⁹ *Id.*, para. 6.

⁷⁰ All branches of the armed forces of the United States except the Navy send their prisoners having a punitive discharge and/or a sentence to confinement in excess of six months to the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas. The Navy sends such prisoners to the federal prison system.

⁷¹ ANNUAL HISTORICAL SUMMARY OF THE UNITED STATES DISCIPLINARY BARRACKS 32 [hereinafter cited as ANNUAL SUMMARY]. This issue covers the period from 1 July 1974 through 30 June 1975. On a typical day in March 1977, there were 1,043 prisoners in the Disciplinary Barracks; 384 out on parole; 113 in the federal prison system; and 544 out on excess leave, awaiting final disposition of their cases. Address by LTC Maynard Eaves of the Law Enforcement Division, Office of the Deputy Chief of Staff for Personnel, Headquarters, Department of the Army (undated).

⁷² ANNUAL SUMMARY, *supra* note 71.

were released on parole.⁷³ An additional **21** prisoners had paroles authorized with release depending upon completion of acceptable release plan. Of those on parole only **2.2** percent had their parole revoked during FY 75. Although the 2.2 figure is favorable it actually represents a **57** percent increase in parole revocations from fiscal year 1974.⁷⁵ This **97.8** percent success rate is still far superior to the national average which varies by region from 60 to **90** percent.⁷⁶ A survey of probation effectiveness in the states of Massachusetts, New York, and California showed a success rate of 75 percent for Massachusetts and New York and **72** percent for California.⁷⁷

The armed forces have also manifested their intention to emphasize rehabilitation through the programs instituted at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. The Disciplinary Barracks maintains 68 different programs to train or retrain military prisoners in diverse fields ranging from farming to data processing.⁷⁸ The armed forces employ psychiatrists, psychologists, social workers, vocational counselors, drug and alcohol counselors, lawyers, and chaplains⁷⁹ in an extensive effort to effectuate their goal to treat each person according to his or her individual needs, to solve his or her problems, and to correct his or her behavior.⁸⁰ The armed services also attempt rehabilitation of prisoners by reintegrating them into everyday economic life in the geographic and vocational area of their choice. Army Regulation **19047** governing the Army's correctional system mandates that, "Every effort will be made to insure that prisoners have suitable employment awaiting them at the time of release from the U.S. Disciplinary Barracks."⁸¹ In fiscal year **1975**, **1,281** prisoners received employment placement assistance; and employment placement counselors assisted by preparing **4,631** pieces of correspondence for prisoners and **1,173** resumes for those desiring that service.⁸²

⁷³ *Id.* at 38.

⁷⁴ *Id.*

⁷⁵ *Id.* at 40.

⁷⁶ TASK FORCE REPORT: CORRECTIONS, at 28.

⁷⁷ *Id.*

⁷⁸ ANNUAL SUMMARY, *supra* note 71.

⁷⁹ *Id.*

⁸⁰ AR 190-1, para. 6.

⁸¹ Army Reg. No. 190-47, The United States Army Correctional System, para. 6-4b(5) (15 Dec. 1975).

⁸² ANNUAL SUMMARY, *supra* note 71, at 36.

Although the armed forces' goal of rehabilitation is apparently working, or at least working better than anything else currently being tried, nevertheless a question remains as to the role the punitive discharge plays in this scheme of corrections. Is it compatible with the rehabilitative philosophy?

C. PUNITIVE DISCHARGE CONTRARY TO ADOPTED PHILOSOPHY

The punitive discharge was never intended to be a rehabilitative punishment. Historically the punitive discharge came into being at a time when retribution and deterrence were the chief, if not the only, reasons for inflicting punishment. The punitive discharge was designed to sever a servicemember from the military community and to put a mark upon him which would make it difficult for him to reenter the civilian society and economy. The punitive discharge thus had two effects by design: first, it punished by ejection from a familiar society and by imposing social and economic hardships; and, second, it deterred others by its visible, swift, effective and harsh character.

Although the punitive discharge may not have the same harsh effects it once had, it has to be said that it still attempts to isolate an individual within the society into which, according to the rehabilitative philosophy, he is supposed to be reintegrated. In actual practice a punitive discharge permits almost all former offenders to return to the civilian society, in the physical sense. The socioeconomic segregation which the discharge seeks to affect is diametrically opposed to the rehabilitative theory that postulates, "If they are to be turned into law-abiding citizens they must assimilate the culture of the group, or the group must assimilate them."⁸³

The possibility of a punitive discharge may create a fear in the offender. Likewise, a suspended discharge may produce the same fear which may have a deterrent effect and thus produce symptoms of rehabilitation. Fear, however, may generate a "punitive reaction" that fosters a lack of respect for the law, lack of patriotism, and lack of willingness to sacrifice for the state.⁸⁴ To "rehabilitate" a person, more than fear is required.

For an alteration of character, personality, and behavior [to be achieved], one must have stimulations, patterns, suggestions, senti-

⁸³ E. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 317 (5th ed. 1955).

⁸⁴ *Id.* at 319.

ments, and ideals presented to him. And the individual must develop his definitions and attitudes by practice, generally in a slow and gradual manner, in association with other human beings. One must have an appreciation of the values which are conserved by the law, and this can be produced only by assimilating the culture of the group which passed the law, that is, only if the group which passed the law assimilates the criminal.⁸⁵

The punitive discharge acts neither to assimilate the offender into military society or into civilian society. By design, the punitive discharge, historically and philosophically, does not fit into the rehabilitative mold but is a relic of retribution and deterrence. Although the punitive discharge does not fit the armed forces' current philosophy of punishment, does it nonetheless maintain its utility as a punishment under another philosophy? That is, do the actual results of a punitive discharge lend themselves to the forging of an effective tool of retribution and deterrence? Heretofore, the answer to this question was based upon mere conjecture, and it is now the subject of much speculation.

IV. PUNITIVE DISCHARGE — AN EFFECTIVE TOOL OF RETRIBUTION AND DETERRENCE?

A bad conduct or dishonorable discharge has a punitive impact in two areas of prime concern for a former servicemember: entitlement to veterans' benefits, and economic opportunities in the civilian sector.

A. *EFFECTS OF DISCHARGE ON VETERANS' BENEFITS*

In passing social legislation that was designed to ease the re-entry into civilian life of returning war veterans, Congress made eligibility for the entitlements dependent on the type of discharge a person received. By providing a scheme for denying government benefits to a punitively discharged serviceperson, Congress did not enhance his or her rehabilitation, but may have, intentionally or unintentionally, given extra retributive or deterrent effect to the punitive discharge.

In this regard, Congress provided for two main categories of entitlements: those administered by the armed services themselves and

⁸⁵ *Id.*

those administered by the Veterans' Administration and other government agencies. The entitlements to benefits under either area of administration hinge on the statutory definition of a "veteran." Title 38 of the United States Code, Section 101(2) defines a "veteran" as ". . . a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." The key phrase is, of course, "under conditions other than dishonorable." The Code of Federal Regulations⁸⁶ defines this important phrase. A discharge or release is considered to have been issued under dishonorable conditions if based upon a conviction (or convictions) for mutiny or spying, an offense involving moral turpitude (which generally means a civilian equivalent felony conviction) or willful and persistent misconduct. Under the latter category, a discharge "because of a minor offense will not, however, be considered willful and persistent misconduct if the person's service was otherwise honest, faithful and meritorious."⁸⁷

The entitlements to veteran's benefits administered by the armed forces themselves are fairly clear cut and defined by statute. It is the entitlements to those benefits administered by the Veterans' Administration and other government agencies that are less than clear.

By statute a punitive discharge leaves a former servicemember ineligible to receive pay for accrued leave;⁸⁸ get transportation of dependents and household goods to a home of record;⁸⁹ gain admission to the Soldiers' Home;⁹⁰ be buried in a national cemetery;⁹¹ and receive a headstone marker.⁹² An enlisted person with a dishonorable discharge or an officer with a dismissal is not entitled to have his or her dependents receive the death gratuity⁹³ or to have

⁸⁶ 38 C.F.R. 3.12(d) (1974).

⁸⁷ 38 C.F.R. 3.12(d)(4) (1976).

⁸⁸ 37 U.S.C. 501(e) (1970).

⁸⁹ However, dependents and household goods overseas may be returned to the United States, "if the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States." 37 U.S.C. 406(h) (1970), implemented by Joint Travel Regs. for the Uniformed Services, para. M7103-2-8 (1 Aug. 1977) for dependents, and para. M8015-2 and M-8261-8 (1 Sept. 1977) for household goods.

⁹⁰ 24 U.S.C. 49, 50 (1970).

⁹¹ 38 U.S.C. 1002 (Supp. V 1975). For purposes of all the Title 38 benefits, "[t]he term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. 101(2) (1970).

⁹² 38 U.S.C. 906, 1003 (Supp. V 1975).

⁹³ 10 U.S.C. 1480(b) (1970).

the appropriate Discharge Review Board review his or her military records for possible upgrading of his or her discharge certificate.⁹⁴ A punitive dischargee is entitled to transportation to his or her home of record;⁹⁵ and to have a Board for Correction of Military Records review his or her records for errors and correct them.⁹⁶ A person with a bad conduct discharge is eligible to have a designated beneficiary receive a death gratuity⁹⁷ (which is six months' pay) and if the discharge was adjudged by a special court-martial he or she is entitled to the services of the appropriate Discharge Review Board.⁹⁸

In the area administered by the Veterans' Administration or other federal governmental agencies those benefits clearly lost by a punitive discharge are entitlements to dependency and indemnity compensation,⁹⁹ and unemployment compensation.¹⁰⁰

A person with a dishonorable discharge is not eligible for compensation for service-connected disability or death;¹⁰¹ a pension for a nonservice connected disability, or death benefits for the same;¹⁰² vocational rehabilitation;¹⁰³ educational assistance;¹⁰⁴ hospitalization and/or domiciliary care;¹⁰⁵ medical and dental services;¹⁰⁶ prosthetic appliances;¹⁰⁷ seeing eye dogs;¹⁰⁸ special housing for disabled veterans in amounts up to \$17,500;¹⁰⁹ an automobile for disabled veterans;¹¹⁰ funeral and burial expenses;¹¹¹ veteran's preference for farm loans;¹¹² veteran's preference for farm and/or rural

⁹⁴ 10 U.S.C. 1553(a) (1970).

⁹⁵ 37 U.S.C. 404(a) (1970).

⁹⁶ 10 U.S.C. 1552(a) (1970).

⁹⁷ 10 U.S.C. 1476(a), 1480(b) (1970).

⁹⁸ 10 U.S.C. 1553(a) (1970).

⁹⁹ 10 U.S.C. 410(b) (1970).

¹⁰⁰ 5 U.S.C. 8521(a)(1)(B) and (b) (1976).

¹⁰¹ 38 U.S.C. 310, 321, 331, 351 (1970). *See also* n. 91 *supra*

¹⁰² 38 U.S.C. 521, 541-544 (1970).

¹⁰³ 38 U.S.C. 1502(a) (1970), in conjunction with 38 U.S.C. 310, 331, and 351 (1970).

¹⁰⁴ 38 U.S.C. 1651 and 1652(a)(1) (1970).

¹⁰⁵ 38 U.S.C. 610 (1970).

¹⁰⁶ 38 U.S.C. 612 (1970).

¹⁰⁷ 38 U.S.C. 613 (1970).

¹⁰⁸ 38 U.S.C. 614 (1970).

¹⁰⁹ 38 U.S.C. 801 (1970).

¹¹⁰ 38 U.S.C. 1901-03 (1970 & Supp. V 1976)

¹¹¹ 38 U.S.C. 902(a) (1970).

¹¹² 7 U.S.C. 1983(e) (1976). This provision requires that applicants for farm loans have been discharged or released from the armed forces "under conditions other than dishonorable." It is a special condition for or limitation on the availability of

housing loans;¹¹³ civil service preference;¹¹⁴ civil service retirement credit for military service;¹¹⁵ civilian reemployment rights to a former job;¹¹⁶ old age and disability insurance;¹¹⁷ or credit for military service for naturalization purposes.¹¹⁸

Job counseling and employment placement are supposedly lost by statute ¹¹⁹ for a servicemember receiving a dishonorable discharge, but this is not in fact the practice of the state employment agencies. All states give job counseling and employment placement for persons with a dishonorable discharge or bad conduct discharge. Those persons with the latter are even given veterans' preference frequently. The state agencies have uniformly interpreted the words "discharge other than dishonorable" to include all discharges except the dishonorable discharge.¹²⁰ Additionally, persons holding a dishonorable discharge or bad conduct discharge are eligible for the Medal of Honor Roll Pension as the result of a 1961 amendment to the United States Code.¹²¹ They are also eligible for National Service Life Insurance ¹²² or Serviceman's Group Life Insurance ¹²³ un-

farm loans. In general, eligibility of individuals for loans for purchase of farm real estate is specified by 7 U.S.C. 1922 (1976), and for farm operating loans, by 7 U.S.C. 1941 (1976).

¹¹³ 42 U.S.C. 1477 (Supp. V 1975). This provision establishes preferences for veterans and for families of deceased servicemembers for the farm housing loans described at 42 U.S.C. 1471-74 (1970 & Supp. V 1975).

¹¹⁴ 5 U.S.C. 2108 (1976). This statute refers to separation from the armed forces or loss of life "under honorable conditions."

¹¹⁵ 5 U.S.C. 8331(13) and 8332 (1976).

¹¹⁶ 50 U.S.C. 459 (1970).

¹¹⁷ 42 U.S.C. 417 (1970).

¹¹⁸ 8 U.S.C. 1439, 1440 (1970). Section 1439 provides for naturalization after three years of peacetime service "under honorable conditions." Section 1440 provides for naturalization for wartime service under the same conditions but with no minimum required time period. In addition, subsection 1440(c) provides for revocation of citizenship for subsequent separation from military service "under other than honorable conditions."

¹¹⁹ 38 U.S.C. 2001 (1970 & Supp. V 1975). See also n. 91 *supra*.

¹²⁰ This conclusion of the author is based upon returns of letters or questionnaires from the state employment agencies.

¹²¹ Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1139, as amended by Act of Aug. 14, 1961, Pub. L. No. 87-138, § 1(a), 75 Stat. 338. The earlier act created all of Title 38, substantially as it is, out of numerous provisions concerning veterans' benefits scattered throughout the 1952 edition of the United States Code. The later act deleted language in 38 U.S.C. 560(b) (1958) that required pension recipients to have been "honorably discharged from service by muster out, resignation, or otherwise." The provision currently effective is 38 U.S.C. 560(b) (1970).

¹²² 38 U.S.C. 711 (1970).

¹²³ 38 U.S.C. 773 (1970).

less they were convicted of mutiny, treason, spying or desertion.¹²⁴ The punitive dischargee is also eligible to apply for a veteran's home loan under 38 U.S.C. section 1802(c). To apply for a VA home loan, a punitively discharged person must first apply to the administrator of the Veterans' Administration for a certificate of eligibility.

Similarly, a person having a bad conduct discharge is not precluded from, and may apply for, the following benefits: compensation for service-connected disability or death; pension for nonservice connected disability or death; special housing and an automobile for a disabled veteran; funeral and burial expenses; old age and disability insurance; vocational rehabilitation for a disabled veteran; educational assistance; hospitalization; medical and dental services; prosthetic appliances and seeing eye or guide dog; veteran's preference for farm and farm or rural housing loans; civil service preference; civil service retirement credit for military service; civilian reemployment rights; and naturalization benefits. These benefits are conditionally available upon application because of the statements granting each benefit, which define "veteran" as a person who served ". . . and was discharged . . . under conditions other than dishonorable."¹²⁵ It was apparently the intent of Congress to have the maximum number of servicemembers eligible for these benefits by defining "veteran" in such sweeping terms.

Most agencies have acted consistently with this broad Congressional intent concerning veterans' eligibility for benefits. At least four state personnel agencies now give veterans' preference of five points on civil service examinations for state employment for those persons having a bad conduct discharge.¹²⁶ (This is not to be confused with the aforementioned preference for employment placement.) The State of Washington gives this veterans' preference even to those with a dishonorable discharge!¹²⁷

Those persons with a punitive discharge not precluded by statute from eligibility for veterans' benefits may apply to the Veterans' Administration for benefits or for a certificate of eligibility (depending on the type of benefit sought). The application is then subject to the rules and regulations promulgated by the veterans' adminis-

¹²⁴ *Id.* and n. 122 *supra*.

¹²⁵ 38 U.S.C. 101(2) (1970); and *see generally* all statutes cited *supra* notes 88-119.

¹²⁶ The four agencies are located in New Mexico, Illinois, New Jersey and Washington.

¹²⁷ Letter from William R. Wright, State Personnel Director, State of Washington, to Charles Lance, 7 March 1975.

trator and the applicant is entirely at the mercy of the administrator or of an official designated by him. The administrator has the statutory authority to make all rules and regulations which are necessary or appropriate to carry out the numerous laws administered by the Veterans' Administration.¹²⁸ He or she also has the absolute authority by statute to issue binding regulations with respect to the nature and extent of the proof that is necessary to establish a right to veterans' benefits. The administrator determines what evidence will be heard on an issue, how it will be heard, and the form required for its submission.¹²⁹

The decision of the administrator is final and absolute and is not subject to court review. The federal statute in this regard states that,

. . . the decisions of the administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.¹³⁰

Several unhappy former servicemembers have attempted to challenge this statute by trying to attack a decision of the Veterans' Administration but all have been unsuccessful. The courts have all been uniform in their decisions,

. . . that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint. Courts before which the constitutionality of predecessor provisions or counterparts of new Section 211(a) has been questioned have uniformly upheld those provisions. The array of decisions doing so prominently includes several of our own, and we are not disposed to discard them even if we were free to do so.¹³¹

All the cases that have been adjudicated on this issue have running through them the common thread first spun by the Supreme Court in the case of *Lynch v. United States*¹³² that rationalizes, "veterans' benefits are gratuities and establish no vested right in the re-

¹²⁸ 38 U.S.C. 211(c) (1970).

¹²⁹ *Id.*

¹³⁰ 38 U.S.C. 211(a) (1970).

¹³¹ *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972).

¹³² *Lynch v. United States*, 292 U.S. 571 (1934).

ipients so that they may be withdrawn by Congress at any time and under such conditions as Congress may impose.”¹³³

The courts also rely for their stance on the issue of judicial non-reviewability in part on the long-standing principle announced years ago by the Supreme Court in the cases of *United States v. Babcock*¹³⁴ and *Dismarke v. United States*.¹³⁵ The Supreme Court declared in these cases that “the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts; it may, instead, provide an administrative remedy and make it exclusive. . . .”¹³⁶ Thus, a ruling on an application for a veterans’ benefit by the administrator is final in the broadest sense of the word, and courts do not have the power to review those decisions even if they are arbitrary and capricious.

Although this result may be difficult for a legal mind to accept today, it is nonetheless the decision of the court in the case of *Steinmasel v. United States*¹³⁷ that, “It is therefore apparent that Congress has expressly denied the courts any power to review the decision of the Veterans’ Administrator. (Citations omitted.) Even if the Veterans’ Administration’s action was arbitrary and capricious, Congress has given us no jurisdiction to review it.”

It can be concluded from the foregoing discussion that many veterans’ benefits are lost or potentially lost for a person holding a punitive discharge from the military. For many significant veterans’ benefits the punitive discharge is still an effective tool of retribution certainly, and deterrence possibly, and thus counterproductive to rehabilitation. Most ex-service personnel with a punitive discharge may never feel the sting of this retribution, however, because many could care less about headstone markers or a preference for a farm loan. What most are probably concerned with is getting a job or continuing their education so that they can get suitable employment later. In seeking employment aid and counseling, a person with a punitive discharge has not lost very much in the way of veterans’ benefits. The bite that a “retributionist” might wish to apply no longer materializes. The holder of a bad conduct discharge almost universally gets preference in job counseling and employment

¹³³ *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1964), *cert. denied*, 379 U.S. 1002 (1965).

¹³⁴ *United States v. Babcock*, 250 U.S. 328, 331 (1919).

¹³⁵ *Dismuke v. United States*, 297 U.S. 167, 171–72 (1936).

¹³⁶ *United States v. Babcock*, 250 U.S. 328, 331 (1919); *Dismuke v. United States*, 297 U.S. 167, 171–72 (1936).

¹³⁷ *Steinmasel v. United States*, 202 F. Supp. 335, 337 (D.C.S.D. 1962).

placement over a person who never was in the military. The holder of a dishonorable discharge gets counseling and placement on an equal footing with all others in the job market.

B. IMPACT OF PUNITIVE DISCHARGE ON ECONOMIC OPPORTUNITIES

1. Survey Technique

Aside from veterans' benefits, a "BCD" or "DD" has at least a potential impact on economic opportunities in civilian life for a former servicemember. Whether this impact is in fact enough to vitalize the punitive discharge and give it utility as an instrument of retribution or deterrence is unknown.

In order to obtain information concerning the effect a punitive discharge has on contemporary economic opportunities, and thereby measure the discharges' utility as punishments, two thousand and thirty two questionnaires were mailed to various groups in the civilian economic sector. The issues that were of primary interest were whether the respondents to the questionnaires cared if an applicant had a punitive discharge, to what extent they cared, and if the conviction itself or type of crime for which convicted was the discriminating factor, if any, rather than the sentence, i.e., the punitive discharge.

A thousand questionnaires were sent to business firms located throughout the United States. The firms were selected at random but care was taken to assure that all geographic regions and towns and cities of all sizes were fairly represented according to their proportional representation in the general population, and that virtually all types of business concerns were included. Nine hundred (900) of the thousand (1000) questionnaires were sent to large businesses and one hundred (100) were sent to small businesses. Large businesses were defined as those with incomes in excess of one million dollars per year and having more than one thousand employees. The greater number of questionnaires was sent to the large business concerns in order to touch the largest possible number of employees. The nine hundred (900) employers selected employ a total of **22,043,320** employees. The small business selected had one hundred (100) or fewer employees each and had incomes less than one million dollars each. The small businesses concerned were from all over the United States and in towns or cities of greatly varied size. The

small businesses contacted employed a total of 4,611 persons for an average of approximately forty-six (46) employees per firm.

Three hundred (300) questionnaires were sent to colleges and universities in every state in the United States. Two hundred (200) of the questionnaires were sent to private institutions and one hundred (100) were sent to state supported institutions of higher learning. In addition, fifty-one (51) questionnaires were sent to each state's¹³⁸ college and university coordinating system to balance out the number of questionnaires sent to each type of college or university and to provide a check or control on the responses received from each state institution. The colleges and universities were further sub-categorized by size. The large schools were defined as those enrolling five thousand (5,000) or more students and the small ones were, of course, defined as those having from one (1) to four thousand nine hundred and ninety-nine (4,999) students enrolled.

One hundred and fifty (150) questionnaires were sent to unions, both large and small, and both independent and affiliated with the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). Care was taken to include virtually every trade, skill or job type that is unionized and once again effort was made to insure that all geographic regions were surveyed. Naturally, however, the largest number of unions are located in the more heavily industrialized areas of the country. A total number of 18,793,557 union members are represented by those unions surveyed.

Physicians, attorneys, and teachers were selected to represent the area of professional licensing or certification, and each state board or agency concerned was surveyed. Barbers, plumbers, and retail liquor vendors were selected to represent the field of state occupational licensing requirements, and each state board or agency concerned received a questionnaire. Thus, three hundred and six (306) questionnaires were sent directly to the licensing boards themselves. Another fifty-one (51) questionnaires were sent to the states' composite coordinating licensing boards to gain an overview of each state's overall license/certification policy and to establish a control for comparison of results from the separate boards or agencies.

Fifty-one (51) questionnaires were sent to each state personnel agency to check on employment practices of the states as employers. The states' employment agencies (or employment security officers) were surveyed to ascertain what effect a punitive dis-

¹³⁸ Puerto Rico was treated as a state for purposes of this survey.

charge had upon an applicant's chances of securing employment services from that state agency. The office of the attorney general of each state was surveyed to see if state law limited a punitively discharged person's ability to secure a license or employment in that state.

Because a fidelity bond is frequently required as a prerequisite to obtaining employment, an additional twenty-one (21) questionnaires were sent to all "directory listed" national companies that issue surety or fidelity bonds to see what effect a punitive discharge has upon a person's ability to be bonded.

Of the two thousand thirty-two (2,032) questionnaires sent out, one thousand three hundred and thirty nine (1,339) questionnaires or letters were received in usable form. Forty-three (43) questionnaires were returned unanswered with letters of explanation and the remaining six hundred and fifty-two (652) addressees did not reply. Five hundred and twenty-six (526) large companies and forty-six (46) small businesses responded to the survey. A total of one hundred and ninety-six (196) colleges and universities returned the questionnaire. Seventy (70) unions participated by returning the questionnaires and the state agencies were almost unanimous in their assistance. Nine of the twenty-one bonding firms replied.

2. Answers to Common Questions

Although diverse groups were surveyed, all questionnaires contained seven identical questions. The first question asked of all groups was: Do you inquire into the type of discharge a former servicemember received? Forty-two (42%) percent did inquire, fifty-four (54%) percent did not and four (4%) percent stated that it depended on various factors such as whether the person was seeking veteran's preference, job type, et cetera.

When asked if they required proof of the type of discharge twenty-four (24%) percent of all respondents did require evidence and seventy-two (72%) percent were either satisfied to accept the person's word or had been frustrated in past attempts to gain such information and, in effect, took what they could get. Several persons commented that they had experienced very unsatisfactory results in attempts to get discharge information from military sources. (This would appear to be another side effect of the military's retention of a vestige of the retributive philosophy in an otherwise rehabilitative framework. Paradoxical as it may be, the military services seem to adjudge punitive discharges at great ex-

pense, to work either as a deterrent or for retribution, and then guard such information from public view, perhaps to further rehabilitation. The system is literally working against itself.)

All groups were asked if a punitive discharge would cause them to automatically reject an application from an ex-servicemember. Only five (5%) percent of all those surveyed would do so and ninety-one (91%) percent would not automatically reject an applicant with a punitive discharge. Fifty-two (52%) percent of all those responding made a distinction in the processing of an application or in their acceptance practices based upon the type or seriousness of the offense of which the former servicemember was convicted, rather than the fact that he had a punitive discharge. Forty-two (42%) percent did not make the crime-versus-punitive-discharge distinction in their acceptance practice. Eleven (11%) percent stated that a court-martial conviction could result in nonacceptance, but a decision would be based on other factors as well.

Very interestingly, eight-four (84%) percent of all respondents felt that there would be no difference in their opinion concerning an application from a person with a court-martial conviction based upon whether or not a punitive discharge was adjudged by the court.

Eight (8%) percent felt that a punitive discharge gave the conviction added weight and eight (8%) percent either did not answer the question or had no opinion or policy on the issue. Thirty (30%) percent of all those responding felt that a court-martial conviction equated to a federal or state conviction for acceptance purposes, forty-seven (47%) percent felt it did not, and twenty-three (23%) percent felt that either it did not matter (as their policy ignored forum distinctions) or did not answer the question.

3. Effect on College Admission

If a person decides to go to a post-secondary school after getting a punitive discharge, and he or she is otherwise qualified, the discharge itself will have little effect. This result varies slightly among the different categories of colleges and universities, with the small colleges generally being more concerned with the type of discharge and the crime leading to it than are the large universities. The small private universities led in this area, in that fifteen (15%) percent would deny admission on the basis of a court-martial conviction, and sixteen (16%) percent would deny admission if the conviction was coupled with a punitive discharge. The small state colleges were next in this category, with six (6%) percent denying admission to an

individual convicted by court-martial and thirteen (13%) percent denying admission if the conviction resulted in a punitive discharge.

Overall, only two (2%) percent of all colleges and universities automatically reject an application from a person having a punitive discharge, and this two (2%) percent is made up exclusively of small colleges. In fact, only thirty-four (34%) percent of all colleges and universities even asked about a former servicemember's discharge status and then, generally speaking, only to ascertain if he or she was entitled to an exemption from the physical education requirements or was eligible for credit for ROTC.

Another surprising statistic is that seventy-eight (78%) percent of all colleges and universities responding to the survey stated that a person's ability to secure an educational loan, scholarship, or other tuition assistance would not be affected by having a punitive discharge. Added to this figure is the comment that many were referring to loss of veteran's benefits when they responded that a punitive discharge had an effect on tuition assistance.

4. Effect on Private Employment Opportunities

The road back to civilian life gets just a bit rougher when the punitively discharged person begins to seek employment within the private business sector. Seven (7%) percent of all businesses responding automatically reject an application from one with a punitive discharge of either type. There was, however, an interesting crossover in several responses, in that some would automatically reject one with a dishonorable discharge and not a bad conduct discharge, which seemed logical, yet others did just the opposite and carried out the biggest discrimination against the holder of a bad conduct discharge. (This is probably due to a misunderstanding of the comparative seriousness of the two discharge types.) It happened that they all cancelled each other out, but absent some explanation the figures could be deceiving.

Two (2%) percent of those small businesses responding automatically rejected the application of a punitively discharged person. While only seven (7%) percent of all businesses responding automatically rejected a person with a punitive discharge, thirty (30%) percent stated that a person's ability to secure employment with the firm was seriously affected by his having a punitive discharge from the military. Only seventeen (17%) percent of the small businesses felt that a punitive discharge would seriously affect employment opportunities with their companies.

Analyzing these results according to geographic location and

business types proved interesting. The small businesses that stated that a punitive discharge would have a serious impact were widely spread throughout the United States and were likewise highly diversified business types. The large businesses that automatically rejected an application from a punitively discharged person were disproportionately concentrated in Illinois and Texas geographically and were disproportionately represented by the trucking industry. Those large business concerns that stated a punitive discharge had serious impact on an applicant's chances for employment with them were disproportionately located in New York, Illinois, Michigan, and California and were statistically over-concentrated in their representation of food store chains, the food industry, the trucking industry, and public utilities. Those industries that were only slightly over-represented in this category were drug companies, insurance companies, and oil companies.¹³⁹

While thirty (30%) percent of all business concerns stated that a punitive discharge seriously affected one's ability to secure employment, fifty-seven (57%) percent stated that it did not, six (6%) percent stated that it depended on the ability of such persons to get a security clearance or depended on the position and seven (7%) percent did not answer.

By far the most serious discriminating factor appeared to be the type of crime the person was convicted of rather than whether or not he received a punitive discharge as a part of this sentence. Seventy-three (73%) percent of all businesses made distinctions in their hiring practice based upon the type and seriousness of the offense rather than the discharge type. Nineteen (19%) percent of the businesses stated that a court-martial conviction could result in a denial of employment, particularly if for a felony, as compared to the seven (7%) percent that would automatically deny employment due to a punitive discharge.

Only nine (9%) percent of the businesses stated that a punitive discharge would have any influence over and beyond a conviction itself on a decision whether or not to offer employment. If the person with a DD or BCD were employed very few employers would assign him to a lower position (than he would ordinarily obtain) within the firm because of the bad discharge. Six (6%) percent of the employers would assign a lower position to the recipient of a dis-

¹³⁹ The survey results were determined to be statistically significant by Dr. Robert Dyer, George Washington University, Department of Marketing and Statistics.

honorable discharge and five (5%) percent would do so when dealing with the recipient of a bad conduct discharge.

5. *Consequences of Discharge on State Employment Aid*

Any punitively discharged person may seek and obtain the services of the state employment agencies, frequently called employment security commissions, in all areas of the United States except the Commonwealth of Puerto Rico.¹⁴⁰ With that exception, no state employment agency refused assistance or made any distinction in the availability of employment assistance for those having a punitive discharge, except that they did not give the holder of a dishonorable discharge veteran's preference when referring applicants to job openings. Seventy-six (76%) percent of the agencies did, however, give such preference to one having a bad conduct discharge. At least three states give recipients of a bad conduct discharge state unemployment compensation for the statutory period or until they find suitable employment.¹⁴¹ It is a certainty that a punitive discharge, while surely not a plus in the employment market, offers no barrier to a person in receiving assistance in getting a job.

6. *Results of Discharge on State Employment Opportunities*

Moving away from the private employment sector to state government employment, it is important to note that no state or federal statute exists that bars employment of a person having a punitive discharge from the military.¹⁴² This is not to say, however, that there are not statutes that seriously restrict a convicted person's

¹⁴⁰ Letter from Ivan Melendez, Director, Employment Service Division, Bureau of Employment Security, Hato Rey, Puerto Rico, to Charles Lance (April 4, 1975).

¹⁴¹ The three states are Indiana, Nebraska, and North Carolina.

¹⁴² This conclusion is based upon the author's research and upon responses from states' attorneys-general. There are federal statutes, however, that preclude federal or District of Columbia employment for five years upon conviction of certain crimes. One convicted by any federal, state, or local court of inciting riot or civil disorder, or of organizing, promoting, or participating in a riot or civil disorder, if felonious, is ineligible for five years to accept or hold any position in the government of the United States or the District of Columbia. 5 U.S.C. 7313 (1976). Anyone convicted of advocating the overthrow of the government shall be ineligible for federal employment for five years. 18 U.S.C. 2385 (1970). Any person convicted of advising or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty, or who distributes printed matter urging such action shall be ineligible for federal employment for five years. 18 U.S.C. 2387 (1970).

ability to work for a state government. Fifteen states,¹⁴³ for example, have statutory provisions that specifically restrict or exclude from government employment any person who has a criminal record or who has been guilty of “notorious” or “disgraceful” conduct. The laws in eleven of these fifteen states provide that the state *may* refuse or reject such persons. In the other four states, New Jersey, Kentucky, Delaware, and Massachusetts, the law provides that such persons *shall* be rejected.

Twenty-one states have statutory provisions which condition public employment on such factors as character, reputation, or personality. The effect is to leave broad discretion to the individual doing the actual hiring to reject former offenders because they do not meet these character or reputation requirements.

A survey conducted in 1971 by the National Civil Service League of state and local governments¹⁴⁴ reported that seventy-six (76%) percent of the states would hire persons if they had been convicted of a felony. Forty-five (45%) percent of the cities and forty-two (42%) percent of the counties surveyed indicated a willingness to hire ex-felons. These statistics are very similar to those gathered for this project although the cities and counties were not surveyed.

The state personnel directors responding to this survey indicated that sixty-seven (67%) percent would hire an ex-offender having a court-martial conviction and twenty (20%) percent stated that they might hire the person but that it depended upon the job in question. Forty-seven (47%) percent made a distinction in employment practice based upon the type of crime, seventeen (17%) percent made no such distinction, and thirty (30%) percent stated that it depended on the job position sought in determining if the type of crime was important.

All those statistics, however, concern a criminal conviction in relation to state employment. What effect does a punitive discharge have upon a state personnel director's employment decision? No personnel director of any state automatically rejected an application from a punitively discharged person and ninety (90%) percent stated that a punitive discharge standing alone would not cause a loss of

¹⁴³ The states are Alabama, California, Connecticut, Delaware, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, Ohio, Rhode Island, and Tennessee.

¹⁴⁴ H. MILLER, *THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES* (1974). This was a study conducted for Georgetown University Law Center Institute on Criminal Law and Procedure.

state employment opportunity. As for those personnel directors concerned about past misconduct, all were concerned either with the fact that the person had a conviction and/or the type of crime involved rather than any factor concerning the sentence. In fact, only thirteen (13%) percent inquired about the type of discharge held if the person did not claim the veteran's preference.

While no questionnaires were sent to the federal Civil Service Commission or its regional directors, the Civil Service Commission through the Bureau of Recruiting and Examining has been a leader in employing the ex-offender. The "Recruiting Bureau" has established a rehabilitated offender program that extends to those with a punitive discharge and offers federal civil service employment if the applicant is otherwise qualified.¹⁴⁵ In addition, an effort to expand employment opportunities for ex-offenders with the federal government has been initiated by the federal Inter-Agency Council on Corrections.¹⁴⁶

According to the American Bar Association, both the U.S. Civil Service Commission and the District of Columbia government encourage consideration of rehabilitated offenders for employment. Both the Commission and the District government support the program by providing for training courses for government officials having responsibility for employment of the handicapped, as well as employment of the rehabilitated offender.¹⁴⁷

7. Effects of Discharge on Licensing Opportunities

Apart from the hurdle of getting hired, there are additional burdens to overcome before a person in a profession or occupation may be employed. Among those added factors are state license requirements, union membership and fidelity bond requirements. There are at least three hundred and seven different occupations that require a license as a prerequisite to engaging in the particular trade or skill.¹⁴⁸ The person having a punitive discharge is, of course, subject to these licensing requirements.

¹⁴⁵ BUREAU OF RECRUITING AND EXAMINING, U.S. CIVIL SERV. COMM'N, EMPLOYMENT OF THE REHABILITATED OFFENDER IN THE FEDERAL SERVICE (1973).

¹⁴⁶ ABA NATIONAL CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, EXPANDING GOVERNMENT JOB OPPORTUNITIES OF EX-OFFENDERS (1975).

¹⁴⁷ *Id.*

¹⁴⁸ See Appendix F, *infra*.

There are no statutes among the total of 1,948 different statutory provisions that affect licensing of an ex-offender¹⁴⁹ that *per se* prevent a person that has been punitively discharged from the military from being licensed. There are, however, one hundred and thirty-four statutory provisions that refer to the commission of a criminal offense as grounds for denial of a license, and seven hundred and seven require, as a condition of receiving a license, that the applicant not have committed a criminal offense and that he also possess good moral character.¹⁵⁰

The term "good moral character" has an inherent vagueness about it, but the licensing agencies have generally interpreted it to mean that if a person has a criminal record, he lacks the requisite character for a license.¹⁵¹ There is also evidence that licensing agencies apply the good moral character requirement almost exclusively to persons with an arrest or criminal record. For example, a California legislative study concluded that "licensing agencies have been extremely reluctant to deny licenses based on the lack of good moral character unless the applicant has had an arrest or criminal record. . . ." ¹⁵²

a. Lawyers. Among the groups surveyed, the legal profession is the most encumbered by statutes and rules. Moreover, a convicted felon will find it more difficult to be licensed as a lawyer than as any other type of professional. But surprisingly a punitive discharge has less impact on the potential attorney than on would-be members of the other professions surveyed. All states require that persons seeking a license to practice law possess good moral character. In some states this is a statutory requirement, while in others it is required by the rules governing the practice of law promulgated by the highest court of the state.¹⁵³

In most states, an applicant seeking a license to practice law must be a graduate of a law school. Many law schools, however, will not accept a person with a criminal record. A survey of law schools conducted in 1970 revealed that thirteen (13%) percent of the law

¹⁴⁹ J. HUNT, J. BOWERS, & N. MILLER, *LAW, LICENSES AND THE OFFENDER'S RIGHT TO WORK* 5 (1974).

¹⁵⁰ *Id.*

¹⁵¹ Grant, LeCornu, Pickens, Rivkin & Vinson, *Special Project - The Collateral Consequences of Criminal Conviction*, 23 *VAND. L. REV.* 1002, 1010 (1970).

¹⁵² CALIFORNIA SENATE COMMITTEE ON BUSINESS AND PROFESSIONS, *GOOD MORAL CHARACTER REQUIREMENTS FOR LICENSURE IN BUSINESS AND PROFESSIONS* (1972).

¹⁵³ Comment, 15 *STAN. L. REV.* 500 (1963).

schools responding to the survey would automatically reject an applicant who had been convicted of a felony, and another forty (40%) percent would reject such an applicant unless there was “mitigating evidence.” Only ten percent said they would not disqualify an applicant with a felony conviction.¹⁵⁴

Sixty-four (64%) percent of the licensing bodies stated that a court-martial if for a felony would result in the denial of a license to practice law in that state. Ninety-three (93%) percent stated, however, that the imposition of a dishonorable or bad conduct discharge would have no bearing on their decision to license. Thirty-two (32%) percent stated that a court-martial conviction did not equate to either a federal or state conviction for licensing determinations.

The greatest impact caused by a punitive discharge was that discovery of such a discharge would cause seventy-one (71%) percent of the licensing bodies to make additional inquiry and further investigation to determine the basis for the discharge. Such adverse information might not come to light if the applicant did not reveal it. Eight-two (82%) percent of the licensing boards did inquire about the type of discharge received, but only fifty (50%) percent required any proof.

b. Physicians. An almost universal requirement for doctors (all states except Kentucky) is that they possess “good moral character” as a prerequisite for a license to practice medicine. This is interesting from the standpoint that fifty-eight (58%) percent do not inquire as to the type of discharge received by a former servicemember and only thirty-two (32%) percent require proof of the discharge type.

A punitive discharge causes only two (2%) percent of the medical boards to reject automatically an application for a license to practice medicine while twenty (20%) percent will deny a license based upon a court-martial conviction alone. Forty-two (42%) percent may deny the applicant a license depending on the type of crime leading to the conviction. Seventy (70%) percent of all medical licensing boards make no distinction in their licensing policy if the conviction is accompanied by a punitive discharge.

c. Teachers. A survey was conducted in 1972¹⁵⁵ to determine the extent to which an ex-felon may be granted a teaching certificate, which is generally a prerequisite for employment by accredited

¹⁵⁴ J. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law*, THE BAR EXAMINER, Vol. 40, Nos. 1-2, (1971).

¹⁵⁵ J. MARSH, TEACHER/COUNSELOR CERTIFICATION AND THE FELONY CONVICTION: A SURVEY OF SELECTED PRACTICES (1973). This is a mimeographed report.

schools. Nine states would not grant a certificate to a person convicted of a felony, seven would grant an ex-felon a certificate, and thirty-three responded by saying that they would grant an ex-felon a certificate under "some circumstances."¹⁵⁶

The 1972 survey and the current survey on punitive discharges complement one another in that fifteen (15%) percent of the states today deny teacher certification based upon a court-martial conviction, thirty-eight (38%) percent might deny certification based upon the type or seriousness of the crime on which the conviction is based, and forty-seven (47%) percent do not deny certification as a result of a court-martial conviction. Only three (3%) percent automatically reject an application for a teaching certificate due to a punitive discharge, ninety-one (91%) percent do not, and six (6%) percent did not answer the question. Only eighteen (18%) percent made any distinction in the handling of an application based upon a punitive discharge. Eight-five (85%) percent of the states did not even inquire about the type of discharge received by a former servicemember and only nine (9%) percent required any proof of the type of discharge.

d. Barbers. Barbering is one of the most restricted occupations. Forty-six states and the District of Columbia have statutory provisions containing restrictions on the licensing of former offenders. Forty-five of these jurisdictions deny a license to an applicant convicted of a felony or a crime involving moral turpitude. In twenty-two states, the applicant has to satisfy both conditions for a license; that is, have no conviction for a criminal offense and possess good moral character. (Somewhat ironically, the Disciplinary Barracks offers a training program in barbering for inmates as part of the rehabilitation program.)

Only four states, Alabama, Massachusetts, New Hampshire, and South Carolina, have no statutory provisions on the licensing of ex-offenders as barbers. While only three (3%) percent of the states will automatically reject an application from a punitively discharged person, forty-nine (49%) percent will refuse a barber's license to a person convicted of felony in a court-martial. Ten (10%) percent will withhold such a license notwithstanding the gravity of the offense upon which the court-martial was based. Eighty-one (81%) percent of the licensing agencies for barbers stated that their treatment of

¹⁵⁶ *Id.* at 4.

an applicant or his application does not vary because of a punitive discharge.

e. Alcoholic Beverage Distributors. Ten states, by statute, place restrictions on the manufacturing, retailing, wholesaling or distribution of alcoholic beverages by convicted persons.¹⁵⁷ New York prohibits the employment of ex-offenders in establishments where alcohol is sold for on-premise consumption. Florida and Texas refuse alcoholic beverage licenses to persons with a court-martial conviction and thirty-eight (38%) percent of the states say that they might refuse an alcoholic beverage dealer's license to one convicted by a court-martial depending on the seriousness of the offense and related matters.

No state automatically rejects an application from a person with a punitive discharge for an alcoholic beverage retail dealer's license. Thirty-one (31%) percent of the states do give additional attention or require added background investigation on persons having a punitive discharge. Sixty-six (66%) percent of the states' alcoholic beverage agencies make no distinction in their handling of an application for a license from a person with a dishonorable or bad conduct discharge.

f. Plumbers. Plumbers are the least restricted occupation surveyed concerning license impediments for former offenders. Nine states¹⁵⁸ have statutory provisions that condition the granting of a plumbing license on a showing that the applicant possesses good moral character. Only Indiana conditions the granting of such a license on lack of past criminal offenses. No state agency for the licensing of plumbers inquires as to the type of discharge possessed by a former servicemember, nor did any such body require proof of the discharge type. No state plumbing board automatically rejects an application for a plumbing license from one with a punitive discharge and none vary their handling of an application should they discover such information.

8. *Impact on Union Membership Opportunity*

A factor that could have a significant influence on employment, particularly in the states that do not have "right to work laws," is the opportunity for a person to become a union member. A punitive discharge, however, has little bearing on a person's ability to gain

¹⁵⁷ The ten states are Arkansas, California, Connecticut, Indiana, Iowa, Louisiana, Missouri, New Jersey, New York, and Pennsylvania.

¹⁵⁸ The nine states are Alabama, Connecticut, District of Columbia, Kentucky, Maryland, Michigan, New Mexico, Texas, and Utah.

union membership status. Only eight (8%) percent of the unions inquired into the type of discharge a former servicemember had and a mere five (5%) percent required proof of the type of discharge. No union rejected an application for union membership because of a punitive discharge.

Only five (5%) percent made any distinction in the processing of an application for membership based upon the type of crime involved that resulted in the punitive discharge. No union denied membership based on a court-martial conviction. Perhaps the largest, if not the only, effect a court-martial conviction has on union eligibility is determined under the Landrum-Griffiths Act¹⁵⁹ that prohibits anyone convicted of a specified felony from holding an elected union office or other nonclerical or noncustodial job for five years following the conviction.

9. *Effect of Discharge on Fidelity Bonding*

Another possibility that could preclude employment for one having a dishonorable or bad conduct discharge is the inability of that person to qualify for a fidelity or surety bond. While fifty-six (56%) percent of those companies responding stated that a person's ability to secure a bond was affected by having a court-martial conviction, only eleven (11%) percent thought that a punitive discharge would add any greater burden. No bonding company automatically refused to bond a person because of a court-martial conviction and none automatically refused to do so because of a punitive discharge.

Because of the Bonding Assistance Program administered by the U.S. Department of Labor, bonding requirements are no longer the concern they once were for an ex-offender. In this project, fidelity bonds are posted by the federal government in order to protect the prospective employer from loss due to theft or acts of dishonesty. The Department of Labor has provided bonding assistance to more than 3,400 persons, most of whom are ex-offenders.¹⁶⁰ Bonding assistance is now available at any local office of the various state employment services in amounts up to \$10,000 per month.¹⁶¹

¹⁵⁹ 29 U.S.C. 504(a) (1970).

¹⁶⁰ AMERICAN CORRECTIONAL ASSOCIATION, MARSHALING CITIZEN POWER TO MODERNIZE CORRECTIONS 14-15 (1975).

¹⁶¹ MANPOWER ADMINISTRATION, U.S. DEP'T OF LABOR, THE FEDERAL BONDING PROGRAM (1971).

C. MISCONCEPTIONS AND OPINIONS REVEALED BY SURVEY

Tabulation of the results of the survey revealed two common threads running through many responses, which merit comment.

1. *Equal Employment Opportunity Commission*

The first reaction of interest is that “provisions of the Equal Employment Opportunity Commission (EEOC) regulations prohibit employers from inquiring into the type of military discharge received by an applicant.” Several companies understand the law to be that an EEOC decision “held that to require an honorable discharge as a prerequisite to employment is discriminatory.” These responses came from various different states and regions, including New York, Michigan, Nevada, and Washington. These rulings must be the coincidental declarations of regional EEOC officers, as the national EEOC office in Washington, D.C. had no knowledge of any such rule or regulation.¹⁶² If such a rule were imposed nationwide it could, of course, considerably alter the future effects a punitive discharge might have.

2. *Security Clearance*

Another response received concerned an opinion held by many employers that Department of Defense contractors cannot hire ex-offenders or persons with punitive discharges because of the security aspects of the work. Such is not the case. According to Joseph L. Liebling, Deputy Assistant Secretary of Defense for Security Policy, a directive issued by the Department of Defense in 1966, which remains in effect, does not preclude contractors from hiring individuals with criminal records (to include military convictions). The directive reads in part as follows:

It has come to the attention of the Department of Defense that some applicants for employment have been advised by cleared contractors that they are not eligible for hire because DOD security regulations prohibit such contractors from hiring people with criminal records. DOD security regulations do not preclude contractors from hiring individuals with criminal records It has also come to the attention of the Department of Defense that some contractors are of the erroneous opinion that a criminal record is an automatic and absolute bar to the issuance of a security clearance [for those having access to

¹⁶² Interview via telephone with M. Hodge, Office of Chief Counsel, Equal Employment Opportunity Commission, Washington, D.C. (December 17, 1975).

classified information]. This, of course, is not true. The company is clearly entitled to employ persons with a past criminal record. When processing a request for a clearance the DOD evaluates the complete record on its own merits. A clearance is denied only when all of the circumstances in a particular case, in the judgment of the Department of Defense, warrant such a conclusion

The directive goes on to remind contractors that, when security clearance investigations are concluded, due process procedures will be observed—which includes an applicant’s right to appeal any adverse decision.¹⁶³

Should the above DOD position be more widely disseminated nearly six (6%) percent of the employers surveyed would change their position on whether or not to hire a person with a court-martial conviction and punitive discharge.

3. *Public Opinion*

Other interesting and thought-provoking opinions flowed from the survey responses.¹⁶⁴ Many such opinions were emotional responses stemming from the Vietnam conflict or an attitude about the military in general. Other responses concerning military justice seemed to be derived from personal experiences while in the armed forces. Many civilians seemed unaware that the system of military justice has changed since World War II, expressed a dim view of court-martial proceedings, and had doubts about their fundamental fairness. That may explain why forty-seven (47%) percent of those surveyed did not feel that a court-martial conviction equated to either a federal or state conviction.

Several respondents, particularly among the educators, expressed “shock” that a person (apparently that they had met) had received a punitive discharge for what they consider “minor infractions.” Some of these adverse opinions can be sloughed off as unin-

¹⁶³ ABA National Clearinghouse on Offender Employment Restrictions, *OFFENDER EMPLOYMENT REVIEW*, No. 10, October 1974. This is an American Bar Association section newsletter.

¹⁶⁴ Most of the opinions were typed onto the questionnaire or were included as inclosures, indicating a strong communicative desire. An excerpt from one serves to illustrate the point.

We, as civilians, have a certain [unfavorable] attitude towards military discharges and court-martial proceedings. Some of it is due to publicity and the press and personal observations while serving in the military. I don't think a dishonorable discharge or bad conduct discharge necessarily should affect an individual. . . . There are other industries where discharges of this type *could* have an effect because of the type of individuals that own and operate these businesses I do believe that a man can obtain a [dishonorable] discharge from the service and still be a responsible and acceptable citizen

formed or as failure to recognize the military's special need for discipline, but others, nonetheless, raise the issue that perhaps the armed forces have been too anxious to give an offending servicemember a "kick." Another fact that may point to a too frequent imposition of punitive discharges is the high rate of restoration to duty of those with punitive discharges. In fiscal 1975 thirty-four persons had their punitive discharges suspended by the convening authority at the Disciplinary Barracks and were restored to duty. Three hundred and eighty-seven persons were returned to duty pending completion of the appellate process.

D. CONVICT DISABILITY STATUTES AND PUNITIVE DISCHARGE

As previously discussed, there are numerous statutes and hiring practices that may prevent or delay a convicted ex-servicemember, with or without a punitive discharge, from completely returning to the civilian society. The convicted former servicemember may even lose his means of engaging in a livelihood for which he has been trained by the Disciplinary Barracks as part of the military's rehabilitation program. These statutes, chief among which are the licensing provisions, are often unnecessary measures that may contribute to a lack of meaningful employment opportunities and thus hinder the former servicemember's efforts at reintegration into the civilian society,

If the purpose of a punitive discharge is to punish by restricting the recipient's economic opportunities, this is already sufficiently accomplished by the criminal conviction that precedes it. Thus the discharge is rendered redundant and wasteful. If the situation were to change, however, the punitive discharge might be revitalized. In the last five years there has been a growing legislative trend to remove statutory obstacles to employment opportunities for all former offenders.¹⁶⁵ There has also been a significant increase in

¹⁶⁵ In 1971, Florida passed a general and inclusive law relating to all occupations that eased employment restrictions placed on ex-offenders. Illinois has passed some thirty-five bills to achieve substantially the same result with respect to trade licensing restrictions. In New York, the 1971 session of its legislature enacted amendments to the Vehicle and Traffic Law and the Election Law that restore driver's license privileges and the right to vote to a convicted felon. In 1972, the California legislature passed a bill establishing standards for determining good moral character, the lack of which is a ground for denial of a license by many licensing agencies. In 1972, the Governor of Maine issued Executive Order No. 8 which makes it official state policy that ex-offenders be given the opportunity to compete for state jobs on an equal footing with all other candidates.

decisions by courts limiting the authority of a governmental agency to impose arbitrary job restrictions.

The due process clause of the fourteenth amendment to the United States Constitution has provided the most flexible means of attacking disability statutes. Generally, a due process violation may exist if a law or administrative action unreasonably infringes upon basic liberties. This may be so although the state has acted to protect a legitimate public interest.

Most civil disabilities statutes create a conclusive statutory presumption that a convicted criminal is unfit to exercise certain rights or privileges or to perform numerous other functions. Although not specifically stated, this presumption is implicit in those laws which specify conviction of a felony as grounds for denying a license or employment.¹⁶⁶

An interesting decision by the United States Court of Appeals for the Second Circuit, *Pordum v. Board of Regents*,¹⁶⁷ provides some guidance on irrebuttable presumption about ex-offenders. In *Pordum* a teacher convicted of a felony sought immediate restoration to his job. The court held that before the Commissioner of Education must reinstate him, a hearing to determine fitness and competency could be held. But the court cautioned that, if the purpose of the hearing was only to determine that the teacher had committed a crime, the state would create the irrebuttable presumption,

. . . that a person who has been convicted of committing a crime and who is on probation is unfit to teach in public schools. [and] it might raise serious constitutional difficulties. The Commissioner's view that [conviction of a crime] is evidence of unfitness to teach is at odds with modern correctional theory. Such thinking bars persons with criminal records from many employment opportunities.¹⁶⁸

A due process objection is also presented by administrative licensing boards which lack objective criteria to determine an offender's ability to perform the regulated functions. Standards are very often either nonexistent, or so vague as to make it impossible for applicants and licensors to apply them. When taken in conjunction with the irrebuttable presumptions created by statutes, these standard-

¹⁶⁶ *Hawker v. New York*, 170 U.S. 189 (1898). The Supreme Court stated, "the record of a conviction [may be] conclusive evidence of . . . the absence of the requisite good character." This, the Court said, "is only appealing to a well recognized fact of human experience." See also Note, *The irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

¹⁶⁷ *Pordum v. Board of Regents*, 491 F.2d 1281 (2d Cir. 1974).

¹⁶⁸ *Id.* at 1287 n. 14.

less decisions present formidable obstacles to the ex-convict—military or civilian.

In *Miller v. D. C. Board of Appeals and Review*,¹⁶⁹ the court recognized “. . . the need to clarify the requirements for business licenses by adopting appropriate regulations. . . so that the danger of arbitrary administrative action based upon unarticulated and unannounced standards is removed. . . .” The *Miller* decision dealt with an agency’s refusal to issue a street vendor’s license to an ex-felon who had presented unchallenged evidence of his rehabilitation. The court said: “Unless there are some standards relating the prior conduct of an applicant to the particular business activity for which he seeks a license, the power to deny a license inevitably becomes an arbitrary, and therefore unlawful, exercise of judgment by one official. . . .”¹⁷⁰

The Court in *Miller* thus adopted a “relationship” test; it urged that standards be designed for each particular license which actually measure an applicant’s ability and trustworthiness in relation to that license. The judicial trend has been to look to the reasonable relationship of individual decisions to the purposes of the regulation in order to determine the constitutionality of the regulation. In *Schwartz v. Board of Bar Examiners*,¹⁷¹ the Supreme Court reversed New Mexico’s refusal to admit Schwartz to the bar because of a past arrest record. The Court held that, before an individual could be denied a license, there must be a rational connection between the occupational disqualification and the applicant’s fitness to perform the particular job.

The “relationship” test has recently been used by the Supreme Court in a related context, racial discrimination in employment, when it held that an employer has “the burden of showing that any given requirement must have a manifest relationship to the employment in question.”¹⁷² Also, the use of arrest records to bar potential employees has been held to be “irrelevant to (their) suitability or qualification for employment.”¹⁷³

This rationale has also had impact among the federal courts concerning honorable discharge requirements as a prerequisite for the

¹⁶⁹ *Miller v. D. C. Board of Appeals and Review*, 294 A.2d 365, 369 (D.C. App. 1972).

¹⁷⁰ *Id.* at 369.

¹⁷¹ *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1956).

¹⁷² *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

¹⁷³ *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff’d*, 472 F.2d 631 (9th Cir. 1972).

veteran to obtain government employment. In *Thompson v. Gallagher*,¹⁷⁴ the city of Plaquemine, Louisiana had an ordinance that forbade city employment for military veterans with less than an honorable discharge. The Fifth Circuit, while admitting the city's "very strong interest" in the integrity of its employees, said that such a broad, general category of persons, "is too broad to be 'responsible' when it leads to automatic dismissal from . . . employment."¹⁷⁵ The ordinance was thrown out on the grounds that the city could not prove that honorable discharges were necessary to maintain the quality of the workforce.

Most professionals in the criminal justice field of corrections view the employment disability statutes as remnants of an archaic philosophy of punishment. While there has been some significant movement in liberalization of legislation in this area and apparently some concurrent shift in public opinion, there remains a vast body of undisturbed law and practice that a former servicemember with a conviction has to overcome. Arguably, the punitive discharge, therefore, remains as a superfluous instrument of retribution and deterrence.

V. ALTERNATIVES TO CONTEMPORARY PRACTICE

It is clear that, on the basis of the philosophy adopted by the armed forces concerning the rehabilitative role of punishment, a punitive discharge is an aberration in the military justice system. A somewhat less lucid but nonetheless probable fact is that a punitive discharge is no longer the effective sanction in our society that it once was. It has little independent impact and is redundant with the conviction from which it flows.

Faced with these facts the military can choose among three basic options. It can leave the military justice system and the punitive discharge as they are today; it could press Congress to eliminate the punitive discharge entirely; or it could opt for revitalizing the punitive discharge as a more effective penalty.

Maintaining the status quo really needs no discussion, but the other alternatives merit investigation. A decision to eliminate the punitive discharge entirely as a choice of punishment appeals to logic. Such a decision would be in keeping with all published objec-

¹⁷⁴ *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973).

¹⁷⁵ *Id.* at 449.

tives of the military corrections system, and would be in step with modern professional opinion; and it comports favorably with the thoughts expressed by the former Commander-in-Chief, President Ford.¹⁷⁶ A strong argument for the total elimination of the punitive discharge is a simple restatement of logic: The justification of a particular punishment should rest within the purpose in philosophy of the institution which imposes it. Although the punitive discharge is not philosophically contradictory when only the military community is considered, it becomes so when the military community is viewed as a part of and responsible to the entire American society. Elimination of the punitive discharge would, therefore, resolve the contradiction of philosophies which currently afflicts the system. The system intentionally attempts to stigmatize with one hand and to rehabilitate with the other. The scheme is, at best, counterproductive.

Quite naturally, substantial obstacles stand in the way of the statutory dismantling of the punitive discharge system. Chief among such obstacles would likely be time and human temperament. Legislation would be required to accomplish the abolition of the punitive discharge, which would consume a great deal of time and energy. Such action, while not impossible, is certainly not immediately available. Another encumbrance is the propensity of people to oppose change; generally, the greater the change, the greater the opposition to it. This natural resistance to change would almost certainly be strongly voiced by the various veterans' groups which historically have a good "track record" of influencing Congressional action.

From a traditional point of view, a potent consideration must be that elimination of the punitive discharge, while desirable in time of peace, arguably may not be feasible in time of war. Something must be kept in reserve, so goes the argument, that distinguishes one who bravely and honorably serves his or her country in time of confrontation and peril from one who would choose personal safety over the welfare of the rest of society. For motivation in combat, and as a matter of fundamental fairness as perceived by other soldiers, an offender in time of war should not be allowed the easy way out. To

¹⁷⁶ President Ford in his June 1975 "Crime Message" specifically called for fair hiring practices toward former felons and directed the U.S. Civil Service Commission to insure that it is not unjustly discriminating against ex-felons. **ABA National Clearinghouse on Offender Employment Restrictions, OFFENDER EMPLOYMENT REVIEW, No. 13, July 1975.**

pamper such persons with the comparative luxury of prison, to grant them a "passport" discharge, and to send them back to safety, civilian status, and home would be the height of folly. As another writer stated, ". . . soldiers are entitled to the assurance that no soldier can dodge the perils of battle without paying a heavy price."¹⁷⁷ To preserve combat effectiveness the military system arguably needs the punitive discharge, particularly the dishonorable discharge, to label the "combat criminal" as dishonorable and to maintain the social distinction between the warrior and the coward or the "crafty quitter."

The military services and Congress could decide to live with the conflict between practice and philosophy, or to ignore the conflict all together and opt for an increased retributive system in punitive discharges. The armed forces could reinforce the punitive discharge as a penalty by reviving the formal elimination ceremonies as previously described above. Such public "drumming out" would be highly visible to a military unit and could have beneficial deterrent effects.

The punitive discharge could also be "beefed up" by merely calling greater public attention to the cause-effect relationship of the discharges. That is, the nature of the punitive discharge could be advertised and directly tied to major criminal acts. Public attention could be focused directly on the discharged person by publishing the court-martial results not only in the post or base newspaper, but in the accused's local home town newspaper as well. Previous advertisement of a policy of ready disclosure of punitive discharge information to the most casual inquiry, with or without any requisite need to know, could act as a deterrent.

Putting such policies into actual practice would have a real retributive effect, in addition to probable enhancement of the deterrent aspect of the discharge. Congress could, if it worked itself up to a retributive glow, pass new legislation that would reduce or eliminate any discretion in granting any veteran's benefit to the recipient of a punitive discharge. Additionally, new employment disabilities statutes, like those previously discussed, could be passed which would focus on discharges, rather than on felony convictions as at present. This would certainly reinforce the penalty aspect of a punitive discharge.

The fault with such a program is not that it would prove ineffec-

¹⁷⁷ Patterson, *Military Justice*, 19 TENN. L. REV. 12 (1945).

tive, but that it moves further away from the philosophy embraced by our society and would violate the mood of the times.

VI. CONCLUSION

Taking into consideration all aspects previously reviewed, the best solution to the problem confronting the military justice system concerning punitive discharges is to retain the court-imposed discharge but to discourage its peacetime use.

Basing this judgment upon the statistics previously presented, one perceives that the effects of a punitive discharge, while not nearly as serious as many people had perhaps envisioned, can vary radically from one recipient to another. The economic sanctions imposed by our society are unequally applied, and the actual effect of a punitive discharge on a particular individual depends in large measure upon happenstance. The wide range of possible results places the individual involved and our society in a quandary as to the repercussions a punitive discharge will have in a particular case. The consequences of the discharge are seen to be uncertain and unpredictable, which severely hampers its utility as a force for deterrence, and which makes escape from its retributive effects possible, if not likely.

As the punitive discharge is at cross purposes with the rehabilitative theory, the Department of Defense would be warranted in severely limiting the frequency of its imposition. Not only are the punitive discharges diametrically opposed to adopted philosophy but, because they are not truly effective for retribution or for deterrence, they are simply not worth the effort expended on them. Stated another way, the peacetime punitive discharge is more trouble than it is worth.

To fill the vacuum created by the diminished use of the DD and BCD, the regulations which provide for administrative discharge of a person convicted of a felony by the civilian courts,¹⁷⁸ should be expanded to allow for an administrative discharge of incorrigible military felony offenders.¹⁷⁹

¹⁷⁸ At present, discharge on this basis is covered by chapter 14 of Army Reg. No. 635-200, Personnel Separations: Enlisted Personnel (21 Nov. 1977), effective 1 February 1978. This regulation supercedes Army Reg. No. 635-206, Misconduct (Fraudulent Entry, Conviction by Civil Court, and Absence Without Leave or Desertion) (15 July 1966 and all changes).

¹⁷⁹ Such discharge is of course possible now; the discharge under other than honorable conditions, formerly called undesirable discharge, is designed in part for such use. However, this remedy generally may not be coupled with trial before court-martial not empowered to grant a punitive discharge.

The benefits of the proposal would be immediate and far reaching. Not only would philosophy be reconciled with practice, but economically pragmatic and legally palatable advantages would be gained.

If a military court does not adjudge a discharge and the sentence is not in excess of that which can be given by a special court-martial, and does not effect a general or flag officer, the record of trial need not be verbatim but may be merely summarized.¹⁸⁰ Many cases arising under the proposal would meet these criteria, and the savings to the commands concerned both in man-hours and in tax dollars expended would be significant.

A post-trial review by the general court-martial convening authority's judge advocate is required before the convening authority may act upon a record of trial by general court-martial, or a record of trial by special court-martial which involves a bad conduct discharge.¹⁸¹ If the punitive discharges had been severely curtailed in fiscal year 1975 pursuant to the above proposal, the need for one thousand one hundred and twenty-five (1,125) post-trial reviews would have been eliminated in the Army alone.¹⁸²

The Judge Advocate General has to refer to a Court of Military Review the record in every case in which the sentence as approved affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, midshipman, dishonorable or bad conduct discharge, or confinement for one year or more.¹⁸³ Furthermore, no sentence to a dishonorable or bad conduct discharge can be executed until affirmed by a Court of Military Review, and, in cases reviewed by it, the Court of Military Appeals.¹⁸⁴

Had the above proposal been in effect in fiscal year 1975, one thousand six hundred and thirty-five (1,635) cases would not have burdened the Army Court of Military Review. The total of 1,635 is composed of general court cases in which seventy-eight (78) defendants received a dishonorable discharge and less than one year of confinement, and in which seven hundred and sixty-four (764) general court defendants were sentenced to a bad conduct discharge and less than one year's confinement. Also included in the total (1,635) are the one thousand one hundred and twenty-five (1,125)

¹⁸⁰ Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 28(b)1 [hereinafter cited as MCM, 1969].

¹⁸¹ *Id.* at para. 85(a).

¹⁸² Interview via telephone with Mrs. Coleman, Clerk, United States Army Judiciary, Nassif Building, Washington, D.C. (November 26, 1975).

¹⁸³ MCM, 1969, para. 100.

¹⁸⁴ *Id.* at para. 98.

special court-martial cases that resulted in a bad conduct discharge. Right on the brink are an additional two hundred and thirty-nine (239) cases in which the sentences were exactly one year and a punitive discharge. These figures are for the Army alone, and such statistics would surely swell to far greater proportions if statistics for the Navy, Marine Corps, and Air Force were included.

The 1,635 fewer cases could not only have spared the judges on the Army Courts of Military Review but appellate counsel as well. Vast savings in labor and money, not to mention a mountain of appellate briefs, could have been achieved by a simple and logical shift in policy.

Not all costs in time and money would be saved, of course, because some resources would have to be devoted to additional administrative proceedings. This administrative elimination process, however, requires far less in expenditures of time, personnel, and money than do the punitive discharge proceedings. No estimates or data are available on costs directly attributable to either discharge cases or proceedings under civil conviction administrative eliminations. There are, however, statistics available that conclusively show that administrative eliminations under Army Reg. No. 635-206 (civil convictions) (now chapter 14, Army Reg. No. 235-200) are considerably more efficient and less time-consuming than are punitive discharges. The average processing time for a general court-martial case involving a punitive discharge is five hundred and eleven (511) days.¹⁸⁵ The average processing time for a special court-martial involving a bad conduct discharge is four hundred and eighty (480) days. The total processing time for an elimination proceeding for a civil conviction under AR 235-200 is one hundred and forty-five (145) days when a board is demanded by the respondent and fifty (50) days without a board.¹⁸⁶

The administrative processes are not only more efficient¹⁸⁷ but require expenditure of far fewer resources of "high priced help." The pressure on appellate personnel in the armed forces could be

¹⁸⁵ Telephonic interview with Mr. Kemper, Clerk of the Army Court of Military Review, Nassif Bldg., Washington, D.C. (November 24, 1975).

¹⁸⁶ Telephonic interview with LTC McGinn, Military Personnel Center, Headquarters, Dep't of the Army, Washington, D.C. (November 24, 1975).

¹⁸⁷ While logistically more efficient, the administrative discharge process is alleged by some to violate a person's right to constitutional due process. See Ervin, *Military Administrative Discharges: Due Process in the Doldrums*, 10 SAN DIEGO L. REV. 9 (1972); Comment, *Administrative Discharges*, 9 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 227 (1974).

curtailed or alleviated and some appellate attorney positions could probably be shifted to the field to further reduce the post staff judge advocate's increasing burdens.

Another area for savings that could be easily overlooked is to halt the arguably wasteful process in which the armed forces engage of imposing upon a servicemember a punitive discharge, writing a post-trial review, filing appellate briefs on both sides, and then restoring him or her to duty. As previously cited, this process was repeated no fewer than four hundred and twenty-one (421) times in fiscal year 1975.¹⁸⁸

The proposal would have more than economy of time and personnel to speak for it. Veterans' benefits could be more fairly determined, as the total record of a former servicemember would have to be reviewed by the Veterans' Administrator, in place of passive reliance upon the label on a discharge certificate. As anyone who has sat through numerous criminal court cases can verify, sentences for the same or similar offenses can vary widely from jury to jury, from judge to judge, and from day to day.

There is an increasing trend to view military service and its resulting discharge in terms of economics rather than in terms of honor, duty and respectability. The administrative discharge for serious offenses would have an economic effect by immediately taking the offender off the payroll and would, of course, achieve the desired result of getting rid of him or her. The punitive discharge could thus be reserved primarily for wartime offenses that dealt with serious infringements on discipline, duty and honor.

The rare use of a punitive discharge would give added weight to such discharge when actually imposed. To paraphrase a quotation from Thomas Paine that is applicable in this context: "What we achieve too easily, we esteem too lightly." Too frequent imposition of a discharge makes it commonplace and causes a loss of significance. If the punitive discharge were reserved for very serious offenses in peacetime, and otherwise for imposition only during time of war, the full weight of its mantle of disgrace might be felt. Thus, an effective implement of deterrence could be created and the discharge could be added to the commander's arsenal of effective disciplinary tools.

¹⁸⁸ ANNUAL SUMMARY, *supra* note 71, at 32. This statistic does not include Navy personnel. The waste consists not in restoring a reformed offender to duty, but in going through the lengthy military judicial process only to achieve a result that might have been more simply achieved by administrative means.

Economy, efficiency and increased utility are certainly desirable attributes to be achieved, but the proposal would also have the effect of enhancing the image of the armed forces. This result would be felt on two fronts, that is, increased civilian respect for the armed forces' system of military justice, and improvement of the armed services' image as an employer. The Department of Defense is presently dedicated to the theory of an all-volunteer force. This volunteer concept could be strengthened by, in effect, "firing" a person for criminal misconduct, as is frequently done in the civilian sector, rather than making the costly effort to stigmatize permanently.

APPENDIX A

FY - 75

1 July 74 - 30 June 75

U.S.D.B. - CHART

RECEIPT AND RELEASE OF PRISONERS

L I N E	RECEIPT AND RELEASE OF PRISONERS	Total	Army Force	Marines
1	Total prisoners last date of preceding period	1383	1044	75	264
2	Total gained during period (3 thru 7)	2076	1523	97	456
3	Initially gained by court-martial order	429	290	62	77
4	Others received:				
	a. Returned from federal institutions	2	2	0	0
	b. Post and base stockades	0	5	0	5
	c. Retraining centers	4	0	0	0
5	Escaped prisoners returned	0	0	0	0
6	Parole violators returned	3	3	0	0
7	Detained prisoners received	1628	1223	31	374
8	Total officers and warrant officers confined (included in 2 above)	7	6	1	0
9	Total removed during period (10 thru 20)	299	1699	87	513
10	Restored to duty (By DA action)	0	0	0	0

L I N E	RECEIPT AND RELEASE OF PRISONERS	Total	Army	Air Force	Marines
11	Restored to duty (punitive discharge [P.D.] suspended)	34	10	0	24
12	Restored to duty (confinement in excess of six months and a punitive discharge)	4	1	1	2
13	Returned to duty pending completion of appellate review: a. Placed on excess leave b. Placed on duty status	900 387	638 299	12 0	250 88
14	Removed To: a. Federal institutions b. Post and base stockades c. Retraining centers	13 1 160	10 1 153	3 0 7	0 0 0
15	Expiration or remission of confinement (punitive discharge [P.D.] executed)	457	307	39	111
16	Expiration or remission of confinement (administrative discharge substituted for P.D.)	1	1	0	0
17	Expiration or remission of confinement (administrative discharge executed on prisoners sentenced to more than 6 months confinement no P.D.)	3	2	0	1
18	Escaped	0	0	0	0

LINE	RECEIPT AND RELEASE OF PRISONERS	Total	Army	Air Force	Marines
20	All other releases: a. Hearings ordered b. Charges dismissed c. Presidential amnesty program d. Released to military hospitals (confinement having been served) e. Released on bail f. Discharged for the good of the service g. Released from active duty (assign to USMCR) h. Released from custody and control of the Army due to minority	151 6 6 132 2 1 1 2 1	116 2 6 105 0 1 1 0 1	5 2 0 2 1 0 0 0 0	30 2 0 25 1 0 0 2 0
21	Total officers and warrant officers removed	3	1	2	0
22	Total prisoners last day of period	1160	868	85	207
23	Average daily prisoner population for period	1152	869	77	206

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PUNITIVE DISCHARGE—EFFECTIVE?

APPENDIX B

U.S.D. B.

Employment of Inmates During Fiscal Year

<u>Detail</u>	<u>Average Number Assigned</u>	<u>Detailed Description</u>
1 - Health Clinic	7	Assist doctors in routine medical work and clerical work
2 - Stray Shots	3	Assist in the preparation of the inmate periodicals
3 - Dental Clinic	4	Assist dentist in routine dental work and clerical work
4 - Mental Hygiene Clerks	2	Clerical and janitorial duties
5 - Upholstery Shop	35	Training to teach the total skill of furniture upholstery
6 - Academic Day School	35*	High School studies
7 - Vocational Garage	27	Training in all phases of automotive repair
8 - Shoe Repair	16	Training in all phases of shoe repair, to include orthopedic correction shoes
9 - Sheet Metal Shop	12	Training in the trade of sheet metal work and fabricating and repairing
10 - Barber Shop	23	Teaches all phases of barbering
11 - Print Shop	19	Training in the technical aspects of printing, offset, letterpress, process photography, bookbinding, and engraving
12 - Screen Print Shop	35	Training in screen process printing and related functions

*Average attendance

<u>Detail</u>	<u>Average Number Assigned</u>	<u>Detailed Description</u>
13 - Vocational Warehouse	2	General warehouse and stock records work
14 - Vocational Office Clerks	6	Sales, clerical and janitorial duties
15 - Academic Division	20	Instructors, clerical and janitorial duties
16 - TV & Radio Repair	14	Training in all phases of TV and radio repair
17 - Vocational Greenhouse	26	Training in all phases of florist work
18 - Welding Shop	24	Training in the skill of acetylene and electric arc welding
19 - Vocational Farm	25	Training in general farm work, including operation and maintenance of farm machinery
20 - Electrical Appliance Repair	22	Training in repair of household appliances, to include air conditioners and house wiring
21 - Furniture Repair	18	Training in cabinet and furniture making
22 - Technical Drafting	14	Training in the procedures and work of a draftsman, including basic technical work, advanced machines and architectural work
23 - Learning Lab	4	Educational program designed to operate at an individual's own pace
24 - Preventive Maintenance	12	Training in basic carpentry, plumbing, electrical work, and building maintenance skills
25 - Masonry Shop	17	Training in masonry work
26 - Carpenter Shop	22	Training in carpentry work

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PUNITIVE DISCHARGE—EFFECTIVE?

<u>Detail</u>	<u>Average Number Assigned</u>	<u>Detailed Description</u>
27 - Laundry	55	Training in the operation of various laundry and pressing equipment
28 - Laundry Control Point	16	Control and distribution of inmate laundry
29 - Dry Cleaning Plant	19	Training in the operation and maintenance of dry cleaning equipment
30 - Training Aids	20	Training in the operation of woodworking tools and construction of training aids
31 - Electric Shop	11	Training in theory and skills in general electrical work
32 - Plumbing Shop	10	Training in all phases of plumbing
33 - Machine Shop	15	Training in general machine work and locksmithing
34 - Paint Shop	10	Training in surface preparation and the craft of painting
35 - USDB Supply	21	General clerical, stock and records work
36 - Jaycees	1	General clerical work for Inmate Jaycee Chapter and leadership training
37 - Auto Body Shop	16	Training in all phases of auto body repair
38 - Photo Lab	6	Photographing and processing of cadre and inmate ID badges and special DB functions and photography training
39 - USDB Band	22	Music education
40 - Data Processing	12	Training in the skill of ADPS programming and machine operation
41 - Chaplain Section	3	Assist chaplain in various programs, clerical work, and janitorial duties

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<u>Detail</u>	<u>Average Number Assigned</u>	<u>Detailed Description</u>
42 - HQ Clerks & Janitors	16	Clerical and janitorial work
43 - Domicile Janitors	60	Domicile maintenance
44k- Food Service	157	Training in the cleaning and maintenance of food service facilities and food
44KL - Food Service (LPU)	8	Training in food preparation and baking
44KF - Food Service (Farm)	5	Training in the cleaning and maintenance of food service facilities and food
45 - Special Services	30	Training in operation and management of recreational facilities, including the operation of a radio station
46 - DC Padmin Clerks	6	Clerical and janitorial duties
47 - Inside Police	19	Training in janitorial work and limited institutional maintenance
48 - Interior Grounds	9	Same as 47
49 - (Reserved)		
50 - Job Placement	5	Assists in preparing inmates for release by helping them secure employment
51 - Right Path Program	3	Conducts orientation classes; an educational program regarding drugs, their use and abuse; counseling sessions; and prerelease classes regarding resources in the civilian community
52 - 7th Step Program	2	Conducts orientation classes, also group and individual counseling sessions for behavior modification
53 - Work Release	6	Civilian positions being filled by inmates
54 - Staff Judge Advocate Clerk	1	Clerk typist and routine janitorial duties

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PUNITIVE DISCHARGE—EFFECTIVE?

<u>Detail</u>	<u>Average Number Assigned</u>	<u>Detailed Description</u>
58 - Car Wash	17	Exterior preparation and upkeep of automobiles
60 - Guides for Better Living	1	Perform clerical work, research materials, class teaching and interviewing duties
61 - LPU Overhead	21	Routine maintenance and landscaping at LPU
62 - Post Stables and Kennels	6	Training in the care of horses and dogs
67E - Post Engineers	8	Training with the post engineers in routine maintenance of grounds and facilities on post
67M - Museum	2	Draft plans for, build, and set up displays
68 - Commissary	24	Stocking shelves and bagging of groceries
TOTAL	<u>1,102</u>	average daily assigned

7	Burial in Nat Cemetery	E	≠	NE	NE	24 USC 281; AR 290 5 para. 24
8.	Mc ne Nrk r	E	≠	NE	NE	24 USC 279A; AR 290 5, para. B
9.	Army Board for Correction of Military Records	E	≠	E	E	10 USC 1552, AR 15-485
0	Army Discharge Review Board	E	≠	E	NE	0 4 C 1553, Ap 45 180
BENEFITS ADMINISTERED BY THE VETERANS ADMINISTRATION ⁶						
1	Depend ce ann Inde it y Comp sa ion	≠	E	ED	NE	8 U B C 0 17 DA am 03 para 9, 3.1
2	Compensation for Service-Connected Disability or Death	E	E	TBD	NE	8 EC 30, 321, 31, 51; B 3m 08-2, par 109
3	Pension for Non-Service-Connected Disability or Death	≠	≠	T B	NE	B 06 51 54 DA am 68 2 a B.1 0, 1 2.
4	Medal of Honor Roll Pension	≠	≠	T B	NE	38 06 560-562

5. Insurance	E	TBD ⁷	TBD ⁷	TBD ⁷	38 USC 711, 773; AR 608-2; DA Pam 608-2, para. 122
6. Vocational Rehabilitation (DV)	E	TBD	NE	NE	38 USC 1502; DA Pam 608-2, para. 121(b)(1)
7. Educational assistance (Including Flight Training and Apprentice Training)	E	TBD	NE	NE	38 USC 1501-1507 DA Pam 608-2, para. 121
8. War Orphans' Educational Assistance	E	TBD	NE	NE	38 USC 1701-1766; DA Pam 608-2, para. 121(c)
9. Home and other Loans	E	TQ	NE	NE	38 USC 1802, 1818; DA Pam 608-2, para. 78
10. Hospitalization and Domiciliary Care	E	TBD	NE	NE	38 USC 610
11. Medical and Dental Services	E	TBD	NE	NE	38 USC 612; DA Pam 608-2, para. 123
12. Prosthetic Appliances (DV)	F	TBD	NE	NE	38 USC 613
13. Guide Dogs and Equipment for Blindness (DV)	F	TBD	NE	NE	38 USC 614
14. Special Housing (DV)	F	TBD	NE	NE	38 USC 801
15. Automobiles (DV)	F	TBD	NE	NE	38 USC 1901

16. Funeral and Expenses	E	TBD	NE	38 USC 502; DA Pam 608-2 para. 10
17. Burial Flag	E	TBD	NE	38 USC 501; DA Pam 608-2 para. 18
BENEFITS ADMINISTERED BY OTHER FEDERAL AGENCIES				
1. Preference for Farm Loans (Dept. of Agriculture)	E	E	E	7 USC 1683(e); DA Pam 608-2 a 3 17
2. Preference for Farm and other Rural Housing Loans (Dept of Agriculture)	E	E	E	4 5 4 7
3. Civil Service Preference (Civil Service Commission)	E	E	E	5 USC 2108, 3309-3316, 3502, 304 DA Pam 608-2, para. 111
4. Civil Service Retirement Credit (Civil Service Commission)	E	E	E	5 6 51 33
5. Reemployment Rights (Dept. of Labor)	E	E	E	5 USC 5504 DA Pam 608-2, para. 13
6. Job Counseling and Employment Preference (Dept. of Labor)	E	T D	E	5 USC 5201 DA Pam 608-2
7. Unemployment Compensation for Ex-Servicemen (UCX) (Dept. of Labor)	E	T D	E	5 USC 5201 DA Pam 608-2

38 CFR 3.12. A discharge under dishonorable conditions from one period of service does not bar payment if there is another period of eligible service on which the claim may be predicated (Administrator's Decision, Veterans Admin. No. 655, 20 June 1945).

7. Any person guilty of mutiny, spying, or desertion, or who because of conscientious objection, refuses to perform service in the Armed Forces or refuses to wear the uniform shall forfeit all rights to National Service Life Insurance and Servicemen's Group Life Insurance. 38 USC 711, 773.

E Eligible

TBD To Be Determined by agency administering the benefit

NE Not Eligible

DV Eligibility for those benefits depend upon specific disabilities of the veteran

APPENDIX D

VETERANS' BENEFITS'

1. Payment for Accrued Leave
 - BCD PIE 37 U.S.C. 501-504
 - DD NE 37 U.S.C. 501-504
2. Transportation Home
 - BCD E 37 U.S.C. 404(a)
 - DD E 37 U.S.C. 404(a)
3. Death Gratuity (Six months pay)
 - BCD E 10 U.S.C. 1475-1488
 - DD NE 10 U.S.C. 1475-1488
4. Transportation of Dependents and Household Goods to Home²
 - BCD NE 37 U.S.C. 406(h)
 - DD NE 37 U.S.C. 406(h)
5. Admission to Soldiers Home
 - BCD NE 24 U.S.C. 49, 50
 - DD NE 24 U.S.C. 49, 50
6. Burial in National Cemetary
 - BCD NE *38 U.S.C. 1002
 - DD NE *38 U.S.C. 1002
7. Headstone Marker
 - BCD NE *38 U.S.C. 906 & 1003
 - DD NE *38 U.S.C. 906 & 1003
8. Army Board for Correction of Military Records
 - BCD E 10 U.S.C. 1552
 - DD E 10 U.S.C. 1552

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PUNITIVE DISCHARGE—EFFECTIVE?

9. Army Discharge Review Board

BCD E*⁵ 10 U.S.C. 1553

DD NE 10 U.S.C. 1553

Veterans' Administration Benefits

1. Dependency and Indemnity Compensation

BCD NE 38 U.S.C. 410-417

DD NE 38 U.S.C. 410-417

2. Compensation for Service-Connected Disability or Death

BCD E*⁴ 38 U.S.C. 310, 321, 331, 351

DD NE 38 U.S.C. 310, 321, 331, 351

3. Pension for Nonservice-Connected Disability or Death

BCD E*⁵ 38 U.S.C. 521, 541-544

DD NE 38 U.S.C. 521, 541-544

4. Medal of Honor Roll Pension^a

BCD E* 38 U.S.C. 560-562

DD E* 38 U.S.C. 560-562

5. National Service Life Insurance-Serviceman's Group Life Insurance⁷

BCD E* 38 U.S.C. 711, 773

DD E* 38 U.S.C. 711, 773

6. Vocational Rehabilitation for Disabled Veteran

BCD E*⁸ 38 U.S.C. 1502

DD NE 38 U.S.C. 1502

7. Educational Assistance

BCD E*⁹ 38 U.S.C. 1652

DD NE 38 U.S.C. 1652

- 8. Home Loans¹⁰
 - BCD TBD* 38 U.S.C. 1802(c)
 - DD TBD* 38 U.S.C. 1802(c)

- 9. Hospitalization and Domiciliary Care
 - BCD E*¹¹ 38 U.S.C. 610
 - DD NE 38 U.S.C. 610

- 10. Medical and Dental Services
 - BCD E*¹² 38 C.S.C. 612 and 38 U.S.C. 101(2)
 - DD YE 38 U.S.C. 612

- 11. Prosthetic Appliances and Seeing Eye or Guide Dogs
 - BCD E* 38 U.S.C. 614 and 38 U.S.C. 101(2)
 - DD NE 38 U.S.C. 614

- 12. Special Housing for Disabled Veterans
 - BCD E* 38 U.S.C. 801 and 38 C.S.C. 101(2)
 - DD NE 38 U.S.C. 801

- 13. Automobile for Disabled Veteran
 - BCD E* 38 U.S.C. 1901-1903 and 38 U.S.C. 101(2)
 - DD NE 38 U.S.C. 1901-1903

- 14. Funeral and Burial Expenses
 - BCD E* 38 U.S.C. 902 and 38 U.S.C. 101(2)
 - DD NE 38 U.S.C. 902

- Benefits Administered by Other Agencies
 - 1. Preference for Farm Loans
 - BCD E 7 U.S.C. 1983
 - DD NE 7 U.S.C. 1983

2. Preference for Farm and Rural Housing Loans

BCD	E	42 U.S.C.	1477
DD	NE	42 U.S.C.	1477

3. Civil Service Preference

RCD	E* ¹⁵	5 U.S.C.	2108
DD	NE	5 U.S.C.	2108

4. Civil Service Retirement

BCD	TBD* ¹⁴	5 U.S.C.	8331, 8332
DD	NE	5 U.S.C.	8331, 8332

5. Reemployment Rights

BCD	E ¹⁶	50 U.S.C.	459
DD	NE	50 U.S.C.	459

6. Job Counseling and Employment Placement

BCD	E* ¹⁶	38 U.S.C.	2001
DD	NE ¹⁷	38 U.S.C.	2001

7. Unemployment Compensation

BCD	NE ¹⁸	5 U.S.C.	8521
DD	NE	5 U.S.C.	8521

8. Old Age and Disability Insurance

BCD	E ¹⁹	42 U.S.C.	417
DD	NE	42 U.S.C.	417

9. Naturalization Benefits

BCD	TBD* ²⁰	8 U.S.C.	1439, 1440
DD	NE	8 U.S.C.	1439, 1440

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PUNITIVE DISCHARGE—EFFECTIVE?

12. Supra n.¹¹

13. The benefit is available if one was discharged under "honorable conditions." It is given by many state governments.

14. The statute requires "honorable service."

15. The statute requires discharge under "honorable conditions."

16. Most states give veterans' preference.

17. But the benefit is given anyway everywhere except Puerto Rico.

18. Some states give unemployment compensation anyway.

19. Supra n.4.

20. The statute requires that the applicant for the benefit have served "honorablely" and have been discharged "under honorable conditions."

APPENDIX E
 SURVEY QUESTIONS¹

1. COMMON QUESTIONS

QUESTION	YES	NO	DEPENDS ON VARIOUS FACTORS
1. When dealing with an ex-servicemember do you inquire into the type of discharge he or she received?	42%	54%	4%
2. Do you require proof of the type of discharge?	24%	72%	4%
3. Do you automatically reject an applicant with a punitive discharge?	5%	91%	4%
4. Do you make a distinction in your acceptance practice based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	52%	42%	6%
5. Does a court-martial conviction result in a denial (of employment, services, enrollment, etc.) to an applicant?	11%	78%	11%
6. Is there any difference in your response to question five (above) based upon whether a punitive discharge is adjudged?	8%	84%	8%
7. Does a military court-martial conviction equate to a federal or state conviction for the purposes of your acceptance determinations?	30%	47%	23%

PUNITIVE DISCHARGE—EFFECTIVE?

2. UNIVERSITIES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to acceptance into your college or university, do you inquire into the type of discharge a former servicemember received?	34%	66%	
2. Do you require proof of the type of discharge?	22%	71%	1%
3. Do you automatically reject a person's application who has received a punitive discharge?	2%	96%	2%
4. Do you make a distinction in your handling of an application for admission based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	31%	66%	3%
5. Does a court-martial conviction result in a denial of admission to your institution of higher learning?	1%	91%	2%
6. Is there any difference in the response to question five (above) based upon whether a punitive discharge (DD, BCD) is adjudged?	9%	87%	4%

QUESTION	YES	SO	NOT ANSWERED
7. Does a military court-martial conviction equate to a federal or state conviction for admission determinations?	28%	66%	6%
8. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a court-martial conviction?	11%	78%	11%
9. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a punitive discharge (DD, BCD)?	11%	78%	11%

PUNITIVE DISCHARGE—EFFECTIVE?

3. SMALL PRIVATE UNIVERSITIES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to acceptance into your college or university, do you inquire into the type of discharge a former servicemember received?	43%	57%	
2. Do you require proof of the type of discharge?	26%	14%	
3. Do you automatically reject a person's application who has received a punitive discharge?	4%	96%	
4. Do you make a distinction in your handling of an application for admission based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	41%	48%	11%
5. Does a court-martial conviction result in a denial of admission to your institution of higher learning?	15%	85%	
6. Is there any difference in the response to question five (above) based upon whether a punitive discharge (DD, BCD) is adjudged?	16%	81%	3%

QUESTION	YES	NO	NOT ANSWERED
7. Does a military court-martial conviction equate to a federal or state conviction for admission determinations?	31%	66%	3%
8. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a court-martial conviction?	16%	76%	7%
9. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a punitive discharge (DD, BCD)?	16%	76%	7%

4. SMALL STATE UNIVERSITIES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to acceptance into your college or university, do you inquire into the type of discharge a former servicemember received?	44%	56%	
2. Do you require proof of the type of discharge?	31%	69%	
3. Do you automatically reject a person's application who has received a punitive discharge?	6%	88%	6%
4. Do you make a distinction in your handling of an application for admission based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	31%	63%	6%
5. Does a court-martial conviction result in a denial of admission to your institution of higher learning?	6%	88%	6%
6. Is there any difference in the response to question five (above) based upon whether a punitive discharge (DD, BCD) is adjudged?	13%	81%	6%

QUESTION	YES	NO	NOT ANSWERED
7. Does a military court-martial conviction equate to a federal or state conviction for admission determinations?	25%	63%	13%
8. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a court-martial conviction?	19%	69%	13%
9. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a punitive discharge (DD, BCD)?	19%	69%	13%

PUNITIVE DISCHARGE—EFFECTIVE?

5. LARGE STATE UNIVERSITIES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to acceptance into your college or university, do you inquire into the type of discharge a former servicemember received?	21%	79%	
2. Do you require proof of the type of discharge?	18%	82%	
3. Do you automatically reject a person's application who has received a punitive discharge?	0%	98%	2%
4. Do you make a distinction in your handling of an application for admission based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	19%	78%	3%
5. Does a court-martial conviction result in a denial of admission to your institution of higher learning?	2%	96%	2%
6. Is there any difference in the response to question five (above) based upon whether a punitive discharge (DD, BCD) is adjudged?	4%	94%	2%

QUESTION	YES	NO	NOT ANSWERED
7. Does a military court-martial conviction equate to a federal or state conviction for admission determinations?	27%	69%	4%
8. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a court-martial conviction?	4%	80%	16%
9. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a punitive discharge (DD, BCD)?	5%	81%	14%

PUNITIVE DISCHARGE — EFFECTIVE?

6. LARGE PRIVATE UNIVERSITIES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to acceptance into your college or university, do you inquire into the type of discharge a former servicemember received?	44%	56%	
2. Do you require proof of the type of discharge?	22%	74%	4%
3. Do you automatically reject a person's application who has received a punitive discharge?	0%	100%	
4. Do you make a distinction in your handling of an application for admission based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	37%	63%	
5. Does a court-martial conviction result in a denial of admission to your institution of higher learning?	4%	96%	
6. Is there any difference in the response to question five (above) based upon whether a punitive discharge (DD, BCD) is adjudged?	4%	85%	11%
7. Does a military court-martial conviction equate to a federal or state conviction for admission determinations?	26%	59%	15%

QUESTION	YES	NO	SOT ANSWFRER
8. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a court-martial conviction?	19%	78%	3%
9. Is a person's ability to secure an educational loan, scholarship, or other tuition assistance affected by having a punitive discharge (DD, BCD)?	15%	81%	4%

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PUNITIVE DISCHARGE — EFFECTIVE?

7. BUSINESSES

QUESTION	YES	NO	DEPENDS ON CLEARANCE OR JOB	NOT ANSWERED
1. Before offering employment to a former servicemember, do you inquire into the type of discharge he received?	64%	33%	2%	1%
2. Do you require proof of the type of discharge?	31%	67%	0.3%	2%
3. Does your firm automatically reject a person's application for employment who has received a:				
a. Dishonorable Discharge?	7%	90%		3%
b. Bad-Conduct Discharge?	7%	89%		4%
4. If the answer was "no" to question 3 (a or b), is a person's ability to secure employment with your firm seriously affected by having a punitive discharge from the military?	30%	57%	6%	7%
5. If hired, would your firm assign the punitively discharged person to a lower position than he would otherwise have been given?				
a. Dishonorable Discharge?	6%	86%		8%
b. Bad-Conduct Discharge?	5%	87%		8%

QUESTION	YES	NO	DEPENDS ON CLEARANCE OR JOB	NOT ANSWERED
6. Do you make a distinction in your hiring practice based upon the type of crime the former service-member was convicted of rather than the fact that he or she has a punitive discharge adjudged?	73%	22%		5%
7. Does a court-martial conviction result in a denial of employment with your firm?	5%	76%	14%	5%
8. Is there any difference in your response to question 7 (above) based upon whether a punitive discharge is adjudged?	9%	81%	1%	8%
9. Does a court-martial conviction equate to a federal conviction for employment determinations?	40%	44%	2%	14%
10. Does a court-martial conviction equate to a state conviction for employment determinations?	39%	44%	2%	15%

PUNITIVE DISCHARGE — EFFECTIVE?

8. STATE PERSONNEL AGENCIES

QUESTION	YES	NO	ONLY IF	
			DEPENDS ON JOB	SEEKING VET. PREF. NOT ANSWERED
1. Before offering state employment, do you inquire into the type of discharge received by a former service-member?	13%	10%		77%
2. Do you automatically reject an employment application from one with a punitive discharge?	0%	80%		20%
3. Do you make a distinction in your handling of an employment application or applicant based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	47%	17%	30%	6%
4. Does a court-martial result in a loss of state employment opportunity?	0%	67%	20%	13%
5. Does a punitive discharge generally result in loss of state employment opportunity?	0%	90%		10%

QUESTION	YES	NO	ONLY IF		ANSWERED
			DEPENDS ON JOB	SEEKING VET PREF.	
6. Does a court-martial conviction equate to a federal or state conviction for employment determination?	27%	34			70%
7. Are you bound by any state law concerning the hiring of one with a punitive discharge?	0%	73%			27%

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PUNITIVE DISCHARGE — EFFECTIVE?

QUESTION	9. STATE EMPLOYMENT SERVICES		ONLY FOR VET. PREF.	NOT ANSWERED
	YFS	NO		
1. Do you inquire into the type of discharge an ex-servicemember received?	4%	4%	91%	
2. Do you require proof of the type of discharge?	2%	9%	89%	
3. Do you automatically reject an applicant with a punitive discharge?	.196% ^a	99.8%		
4. Do you make a distinction in your handling of an application for employment services based upon the type of crime a person was convicted of rather than the fact that he or she has a punitive discharge?	0%	100%		
5. Does a court-martial conviction result in the loss of employment aid?	0%	100%		
6. Does a punitive discharge (DD, BCD) result in a loss of employment aid?	0%	100%		
7. Does a court-martial conviction equate to a federal or state conviction for employment aid determinations?	4%	7%		89%
8. Are you bound by state law in this matter--other than the veterans' preference statutes?	0%	100%		

10. LAW LICENSES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate) do you inquire into the type of discharge he received?	82%	18%	
2. Do you require proof of the type of discharge?	50%	50%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	0%	100%	
4. Does your handling of a person having a punitive discharge (DD, BCD) or your handling of his/her application for a license (or certificate) vary in any way from others not having such a discharge?	71%	25%	4%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	86%	7%	7%
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	64%	25%	11%

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PUNITIVE DISCHARGE—EFFECTIVE?

QUESTION	YFS	NO	NOT ANSWERED
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	0%	93%	7%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	32%	36%	32%

11. MEDICAL LICENSES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate), do you inquire into the type of discharge he received?	42%	58%	
2. Do you require proof of the type of discharge?	32%	68%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	2%	92%	6%
4. Does your handling of a person having a punitive discharge (DD, BCD) or your handling of his or her application for a license (or certificate) vary in any way from others not having such a discharge?	50%	40%	10%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact the he or she has a punitive discharge?	70%	27%	8%

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PUNITIVE DISCHARGE — EFFECTIVE?

QUESTION	YES	NO	NOT ANSWERED
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	20%	38%	42%
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	14%	70%	16%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	32%	34%	34%

12. TEACHING CERTIFICATE

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate) do you inquire into the type of discharge he or she received?	15%	85%	
2. Do you require proof of the type of discharge?	9%	91%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	3%	91%	6%
4. Does your handling of a person having a punitive discharge (DD, BCD) or your handling of his/ ^{or her} application for/ ^a license (or certificate) vary in any way from others not having such a discharge?	18%	74%	8%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	41%	52%	7%
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	15%	47%	38%

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PUNITIVE DISCHARGE—EFFECTIVE?

QUESTION	YES	NO	NOT ANSWERED
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	0%	79%	21%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	18%	41%	41%

13. BARBER LICENSES

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate) do you inquire into the type of discharge he or she received?	19%	81%	
2. Do you require proof of the type of discharge?	16%	84%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	3%	97%	
4. Does your handling of a person having a punitive discharge (DD, BCD) or your handling of his/ ^{or her} application for ^a license (or certificate) vary in any way from others not having such a discharge?	16%	81%	3%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	55%	45%	
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	10%	49% ^b	41%

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PUNITIVE DISCHARGE — EFFECTIVE?

QUESTION	YES	NO	NOT ANSWERED
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	16%	81%	3%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	29%	45x	26X

14. RETAIL LIQUOR LICENSE

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate) do you inquire into the type of discharge he or she received?	38%	63%	
2. Do you require proof of the type of discharge?	16%	84%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	0%	97%	3%
4. Does your handling of a person having a punitive discharge (DD, BCD) or your handling of his / or her application for a license (or certificate) vary in any way from others not having such a discharge?	31%	66%	3%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	81%	16%	3%
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	6% 38% ⁴	53%	3x

QUESTION	YES	NO	NOT ANSWERED
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	22%	72%	6%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	34%	38%	28%

15. PLUMBERS' LICENSE

QUESTION	YES	NO	NOT ANSWERED
1. Prior to granting a former servicemember a license (or a certificate) do you inquire into the type of discharge he or she received?	0%	100%	
2. Do you require proof of the type of discharge?	0%	100%	
3. Do you automatically reject the application of a person who has received a punitive discharge?	0%	100%	
4. Does your handling of a person having a punitive discharge (DD, ECD) or your handling of his ^{or her} /application for ^a license (or certificate) vary in any way from others not having such a discharge?	0%	95%	5%
5. Do you make a distinction in your handling of an application for a license (or certificate) based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	9%	82%	9%
6. Does a court-martial conviction result in loss of license opportunities administered by the state?	5%	86%	9%

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PUNITIVE DISCHARGE — EFFECTIVE?

QUESTION	YES	NO	NOT ANSWERED
7. Is there any difference in your response to the above question (6) based upon whether a punitive discharge (DD, BCD) is adjudged?	0%	95%	5%
8. Regardless of whether a punitive discharge (DD, BCD) is adjudged, does a military court-martial conviction equate to a federal conviction or state conviction for license determinations?	5%	86%	9%

16. LABOR UNIONS

QUESTION	YES	NO	DEPENDS ON VARIOUS FACTORS	NOT ANSWERED
1. Prior to accepting a former servicemember as a union member, do you inquire into the type of discharge he or she received?	8%	93%		
2. Do you require proof of the type of discharge?	5%	95%		
3. Does your union automatically reject a person's application for union membership who has received a punitive discharge?	0%	98%		2%
4. Do you make a distinction in your handling of an application for union membership based upon the type of crime the former servicemember was convicted of rather than the fact that he or she has a punitive discharge?	5%	95%		
5. Does a court-martial conviction result in a denial of union membership?	0%	98%		2%

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PUNITIVE DISCHARGE—EFFECTIVE?

QUESTION	YES	NO	DEPENDS ON VARIOUS FACTORS	NOT ANSWERED
6. Is there any difference in your response to the above question (5) based upon whether a punitive discharge is adjudged?	5%	90%		5%
7. Regardless of whether a punitive discharge is adjudged, does a court-martial conviction equate to a federal or state conviction for union membership determinations?	8%	75%		17%
8. In your opinion, is a person's ability to secure employment affected by his or her having a court-martial conviction?	20%	30%	3%	47%
9. In your opinion, is a person's ability to secure employment affected by having a punitive discharge from the military?	18%	30%	3%	50%

17. BONDS

QUESTION	YES	NO	NOT ANSWERED
1. Before you issue a fidelity or surety bond to a former servicemember do you inquire into the type of discharge he or she received?	22%	78%	
2. Do you require proof of the type of discharge?	22%	78%	
3. Do you make a distinction in your decision on whether or not to issue a bond based upon the type of crime the servicemember was convicted of rather than the fact that he or she has a punitive discharge?	67X	22%	11%
4. Does a court-martial conviction result in an automatic denial of a bond?	0%	89%	11%
5. Is there any difference in your response to question four (above) if a punitive discharge is adjudged?	0%	89%	11%
6. Does a court-martial conviction equate to a federal or state conviction for bonding determinations?	0%	67%	33%

19781

PUNITIVE DISCHARGE—EFFECTIVE?

QUESTION	YES	NO	NOT ANSWERED
7. Is the former servicemember's ability to secure a bond affected by having a court-martial conviction?	56%	33%	11%
8. Is a former servicemember's ability to secure a bond affected by having a punitive discharge?	11%	78%	11%

FOOTNOTES

1. Some of the sets of figures presented do not add **up** to 100% because of rounding error.
2. Puerto Rico.
3. If felony.
4. Depending on seriousness of offense.

APPENDIX F

STATUTORY CONDITIONS AFFECTING THE
LICENSING OF EX-OFFENDERS*

The following is a list of occupations from which former offenders might be excluded by licensing restrictions. The nature of the restriction is indicated by the numbers 1, 2, and 3, according to the nature of a state's statutory provision. Type 1 is a statutory provision that refers to a criminal offense as grounds for denying a license. Type 2 is a statutory provision that conditions the granting of a license on such grounds as possession by the applicant of a good moral character. Type 3 is a statutory provision that conditions the granting of a license not only on possession by the applicant of a good moral character, but also on his or her lack of a criminal record.

*From publications of the American Bar Association's Commission on Correctional Facilities and Services and Criminal Law Section.

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	NE	
1. Actor	3			2									2									
2. Accountant (or CPA)	48	2	2	2	2	2	2	2	2	2	2	2	2	3	3	2			2	2	2	2
3. Agricultural Chemical Dealer	1					1																
4. Agricultural Produce--Broker	1												2									
5. Agricultural Produce--Dealer	2					3							2									
6. Agricultural Processor	1												2									
7. Agricultural Produce--Manufacturer	1												2									
8. Aircraft Broker	1	2																				
9. Aircraft Pilot	2																					
10. Alcoholic Beverage--Dealer	9			2	1	3										1	3					
11. Alcoholic Beverage--Wholesale	7			1		1										1						
12. Alcoholic Beverage--Manufacturer	6			3	1	3																
13. Alcoholic Beverage--Retailer	8			3	1	3										1	3					
14. Alcoholic Beverage--Transporter	1																					
15. Amusement Operator	1																					2
16. Animal Dealer	1																					
17. Architect	1					2																
18. Architect	42	2	2	3	2	2	2	2	2	2	2	2	2	3	3	2						2

PUNITIVE DISCHARGE—EFFECTIVE?

No.	ND	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NK	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY				
1.							2																												
2.	3	2	2	2	2	2	2	2	2	2	3	2	2	2	2	2	2	2	2	2	2	2	2	2	3	2	3	2	2	2	2	2			
3.																																			
4.																																			
5.																																			
6.																																			
7.																																			
8.																																			
9.							2																												
10.					3						1	1							3																
11.					1						1	1						1																	
12.					3						1	1																							
13.					3						1	1																							
14.						3																													
15.																																			
16.																																			
17.																																			
18.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	Y	LA	ME	
19. Artificial Inseminator	2																					3
20. Artist Manager	1				2																	
21. Astrologer	1					2																
22. Attorney	51	2	2	2	2	2	2	2	2	2	3	2	2	2	2	2	2	2	2	2	2	3
23. Auctioneer	10					2		2													2	2
24. Auctioneer--Livestock	1																					
25. Automobile Dismantler	1				3																	
26. Book Teller	1							2														
27. Barber	47	2	3	3	2	2	2	2	2	2	3	3	3	3	3	2	3	2	3	3	3	2
28. Book Printer	8					2		2		2	3											3
29. Bookkeeper	6	2				1		3														3
30. Book Manager/Owner	12				2		2															3
31. Book Seller	1											3										
32. Beautician	29	3	2	3	3	3	3	3	3	3	3	3	3	3	3	3	3	2	3	3	2	2
33. Book Collector	1																					
34. Book Seller	2																					
35. Book Shop Owner	12											2									3	2
36. Barber	1																					3
37. Bookbird	3	3	3			2																

PUNITIVE DISCHARGE — EFFECTIVE?

No.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY				
19.							2																												
20.																																			
21.																																			
22.	Z	Z	Z	Z	3	Z	Z	Z	0	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z			
23.									0				Z			Z		Z																	
24.																																			
25.																																			
26.																																			
27.	Z	Z	3	2	3	2	1	3	3	3	2	Z	Z	3	3	3	Z	3	2	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z	Z		
28.									3				Z		0										Z										
29.	Z	Z																																	
30.								Z		3	3	2						3																	
31.																																			
32.			3					b	Z	0						Z	2		Z	Z	1	Z	3	Z	3		2	3	3						
33.																																			
34.									2																										
35.		Z	3							3	Z								3				1		?	2							Z		
36.																																			
37.																																			

PUNITIVE DISCHARGE — EFFECTIVE?

NO.	ND	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY		
38.													3																				
39.											3																						
40.				Z																													
41.			Z																														
42.							1				3	3					3															2	
43.												2																				0	
44.																																2	
45.																																	
46.	2	Z	2												2			3															
47.																																1	
48.																																	
49.	2			3	3	3	2		3	2	3	3		3	3	3	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
50.																																	
51.																																	
52.																																	
53.																																	
54.																																	
55.																																	
56.																																	

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	
57. Chauffeur	12				1										3		2					
58. Book Binder	9				2																	2
59. Candy Caster	3																					
60. Carpenter	36				2	3	2				3	2		2	3	2	3		3	3		3
61. Carpenter	4		1	3	1	3	2	3	2	2	3	3	3	2	3	3	1	3	2			3
62. Cigarette Dealer	1																					
63. Electrician	1																					
64. Civil Engineer	1																					2
65. Elementary Teacher	1																					
66. Electrician	1																					
67. Clinical Lab Director	1																					
68. Clinical Lab Technologist	2																					
69. Coal Mine Examiner	1																					
70. Collection Agent	15		3	3		3	3	3						1	1							
71. Commercial Photographer	1																					
72. Commission Merchant	1																					
73. Carpenter (Builder)	0																					
74. Correspondence School Rep.	1																					
75. Cosmetologist	24	3	2		2	2	2	2	3	2				2	3						2	3
76. Sociology Instructor	3																					2

PUNITIVE DISCHARGE — EFFECTIVE?

	NO.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY						
77.																																						
78.																																						
79.																																						
80.																																						
81.																																						
82.																																						
83.																																						
84.																																						
85.2																																						
86.																																						
87.2																																						
88.																																						
89.																																						
90.																																						
91.																																						
92.																																						
93.																																						
94.																																						
95.2																																						

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME		
08. Dressmaker	2																					2	
09. Retailer	3																						1
98. Dry Cleaning	1																						1
99. Egg Dealer	1																						
100. Electrician	2						2																
101. Electrician	1						2																
102. Electrologists	10				2	2											3						
103. Electrology Instructor	1				2																		
04. Electrician	1																						
105. Elevator Inspector	1																						
06. Embalmer	6				3	2	2				3	3	2	3	3	3	3	3	3	3	3	3	1
07. Embalmer	2																						
18. Importer	1				2	2																	
09. Engineer	4				2	2	3				0	2	2	3	3	1	2	2	2	3	2	2	2
10. Engineer	2																						
111. Agent	1																						
112. Explosive Dealer	2																						
113. Explosives Manufacturer/Distributor	2																						
114. Explosives Handlers	1																						

	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	
115 Exterminator	5			2						2	1	2									1	
116. Farm Product Dealer	1																					
117. Farrier	1																					
118 Feeder Store Dealer	2														1	3						
119. Financial Planner	1														3							
120 Finger Weaver	1			2																		
121 Firearms Dealer	1																					
122 Fishing Boat Dealer	1												1									
123. Florist	1																					
124. Furniture Dealer	1														2							
125 Forester	3																					
126. Fortune Teller	1																					
127 Fraternal Society Agent	1															2						
128. Frozen Food Dealer	1																					
129 Fumigator	1																					
130. Fund Raiser	1																					2
131. Furniture Dealer	45			2	3	2	1	3	1		3	3	2	1	3	3					3	3
132. Fur Dealer/Breeder	1																					
133.	1																					

PUNITIVE DISCHARGE—EFFECTIVE?

NO.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY						
115.																																					
116.																																					
117.							6																														
118.																																					
119.																																					
120.																																					
121.													3																								
122.																																					
123.																																					
124.																																					
125.																		2																			
126.																																					
127.																																					
128.																																					
129.																																					
130.																																					
131.	3	3				3	3	2	2	2	2	2	2	3	3	3	3	3	3	3	2	3	3	3	3	2	3	3	2	3	2	3	2	3	2	2	
132.																																					
133.																																					

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME		
153. Horse Racing	6														3							3	
154. Horse Racing Personnel	2																						
155. Horse Shoer	1														2								
156. Horse Trainer	1																						
157. Hospital Operator	1				2																		
158. Hunting Guide	1				2																		
159. Hypertrichologist	1						3																
160. Motor Common Carrier	1							2															
161. Motor Vehicle Dealer	12				3				2		2		1	1								2	2
162. Motor Vehicle Operator	1											3	1										2
163. Motor Vehicle Salesman	5												1										2
164. Motor Vehicle Used Parts Dealer	1								3														
165. Naturopath	7				3		2	1		2													
166. Nurse--Practical/Vocational	48	2	3	3	3	2	2	2	2	3	2	2	3	3	2							3	2
167. Nurse--Professional/Registered	49	2	3	3	3	3	2	2	2	2	2	2	3	3	2							3	2
168. Nurse--Psychiatric	1																						
169. Nurse--Psychiatric Technician	2																						
170. Nursing Home Administrator	14	2					2			3	2		2	3									2
171. Nursing Home Operator	1																						2

No.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY				
153.								2			1	3																							
154.								Z																											
155.																																			
156.																																			
157.																																			
158.																																			
159.																																			
160.																																			
161.								ω	1			2																							
162.								β			3	2	Z		1																				
163.																																			
164.																																			
165.																																			
166.	3	Z	β	3	Z			Z	3	Z	3	0	2	3	2	3	3	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
167.	3	2	3	3	2			0	3	0	3	β	2	3	2	3	3	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	
168.																																			
169.																																			
170.								2	Z			3																							
171.																																			

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	
172. Newsyman	3			2	2																	
173. Nurse	1																					2
174. Veterinarian	1																					
175. Operating Engineer	1							2														
176. Ophthalmologist	1																					2
177. Optician	1			3	3			2			2	3	3									
178. Optician - Assistant	1							2														
179. Optician - Assistant Mechanical	1							2														
180. Optician - Mechanical	1							2														
181. Optometrist	4	2	2	2	2	0	1	2	2	2	2	2	2	2	3	2	2	2	2	3	3	1
182. Orthopedist	1																					
183. Orthopedist	4	2	2	2	1	3	3	2	2	2	2	2	2	1	3	3	2	2	2	3	3	3
184. Painter	1							2	2	2	2											2
185. Peddler	1																					
186. Pediatrician	1										3											
187. Pest Control	7			2	2						2	2	2									1
188. Petshop Owner/Dog Dealer	1																					1
189. Pharmacist	47	2	3	2	3	3	3	2	3	2	2	2	2	2	3	3	3	2	2	2	2	2
190. Photographer	2																					2

OCCUPATION	TOTAL																			
	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME
191. Physical Therapist	47	3	3	3	3	3	2	3	3	3	3	2	2	3	?		3	3	3	3
192. Physician	50	2	2	3	3	1	3	2	3	2	3	2	3	3	3	3	2			3
193. Pilot - Ship	2																			
194. Plumber	10	2					2								1					2
195. Podiatrist	27			3						2	3				3	2	3	3		2
196. Polygraph Examiner	3																			
197. Poultry Technician	1																			
198. Priest (for marriage)	1																			2
199. Private Investigator	25			3	3	2	3	3				3			3	3	2			
200. Producer Wholesaler	1																			
201. Public Adjustor	1																			
202. Psychiatric Technician	1																			
203. Public Adjustor	0	3	2	3	3	3	2	2	3	1	3	3	3	3			2	2	3	3
204. Public Adjustor	1																			
205. Public Service Operator (Motor Veh.)	1						2													
206. Public Weigher	2						2													
207. Radiologist	1																			
208. Real Estate Salesman/Broker	45	3	3	2	2	2	3	2	2	2	2	3	3	3	3	3	2	2	2	3
209. Real Estate Salesman/Broker	1																			

PUNITIVE DISCHARGE — EFFECTIVE?

NO.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY		
210.																																	
211.																																	
212.																																	
213.																																	
214.			Z																														
215.																																	
216.																																	
217.			Z																														
218 I																																	
219.																																	
220.																																	
221.																																	
222.																																	
223.																																	
224.																																	
225.																																	
226.2																																	
227.																																	
228.																																	

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME		
229. Stevedore	1										2												
230. Structural Pest Controller	2				1																		
231. Surveyor	2																				2		
232. Tattoo Artist	1												2										
233. Taxidermist	1																						
234. Taxi Driver	1						2																
235. Teacher	28	2			3	2					2			1	2						2	2	
236. Television Repairman	1																					3	
237. Television Repairman	1																						
238. Ticket Broker	1																						
239. Transportation Broker	1																						
240. Tree Expert	1																					3	
241. Tree Surgeon	2																						
242. Undertaker	1																				3		
243. Used Car Dealer	1																						
244. Vendor	4					2					2		2										
245. Veterinarian	47	2	2	2	3	3	2		2	2	3	2	2	2	3	3	2	2	2	3	2	2	
246. Warehouseman	1	2																					
247. Watchmaker	11																				3	2	2

PUNITIVE DISCHARGE—EFFECTIVE?

No.	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY			
229.																																		
230.																																		
231.			Z																															
232.																																		
233.																																		
234.																																		
235.	2	3	Z	Z	Z	Z	Z	Z				1				2	1	3	2	1	3	2	2	2	2	3					2			
236.																																		
237.																																		
238.																																		
239.																																		
240.																																		
241.																																		
242.																																		
243.																																		
244.																																		
245.	3	3	Z	2	2	3	3	3	3	Z	3	Z	Z	3	3	3	Z	Z	Z	1	3	2	3	3	Z	Z	2	2	2	1	2			
246.																																		
247.			Z	2																														

OCCUPATION	TOTAL	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	CA	HI	ID	IL	IN	IA	KS	KY	LA	ME	
248. Watchman	5																					
249. Water Maker	1																					2
250. Water Treatment Plant Operator	1																					
251. Weather Contractor	1																					
252. Weatherman	2																					
253. Weighmaster	5																					2
254. Well Driller/Contractor	2																					3
255. X-Ray Technician	3																					

PUNITIVE DISCHARGE—EFFECTIVE?

NO.	MD	EA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY		
248.													3								Z			3							Z		
249.																																	
250.																																Z	
251.							2																										
252.																																	
253.													2		Z																	2	
254.																																	2
255.																																	2

THE EFFECT OF THE PRIVACY ACT ON CORRECTION OF MILITARY RECORDS*

Captain James R. Russell**

This article reviews the remedies available to individuals who for whatever reason are unable to obtain correction of their military records through normal administrative channels.

Captain Russell discusses first the Privacy Act of 1974 as a tool for securing amendment of records. Described are the types of records which are subject to amendment, and the standards to be applied and procedures to be followed in effecting amendment. The author concludes that amendment under the Privacy Act is in general a narrowly technical remedy which by itself gains an individual little. Further proceedings based upon the amended records are generally necessary to secure whatever benefit is sought.

Comparison is made between Privacy Act procedures and determinations, and the wide-ranging authority of the Army Board for Correction of Military Records. In general, one seeking relief may be required to exhaust his Privacy Act remedy before going to the Board; but once he leaps that hurdle, he might obtain much more effective relief from the Board. Judicial review of agency decisions under the Privacy Act includes a trial de novo, but review of Board decisions is narrow, generally limited to the administrative record.

Captain Russell concludes that the Board continues to offer the most effective remedy in the area of records correction.

* The opinions and conclusions presented in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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I. INTRODUCTION

Considering the present size and degree of computerization of the Army's records, it necessarily follows that correction of errors in records can be a serious problem. Often an individual finds himself in a position of detriment due to an erroneous entry in one or more of the multitudinous records maintained by the Army. There is, of course, inherent authority vested in the commander, the records custodian, and a number of boards and activities to correct military records. Usually an individual may secure correction of his records through simple administrative procedures which are often set out by regulation.¹ When the individual seeks correction of a record, and the official having authority to correct agrees, no problem arises. If the official does not agree to the correction, the individual must pursue specific correction remedies provided by law.

Traditionally, the individual who was unable to secure administrative correction of his records by the Army had to resort to Congress for relief. These private bills became burdensome to Congress and often resulted in delay and inequity in result. Therefore, in the legislative Reorganization Act of 1946,² Congress established the legislative foundation for the Army Board for Correction of Military Records (ABCMR).³

¹ See Joint Travel Regs. for the Uniformed Services, appendix J (C290, 1 Apr. 1977), for definition of "home of record," and procedures for correction; Army Reg. No. 635-5, Personnel Separations—Separation Documents, para. 2-4 (20 Aug. 1973), for correction of DD Form 214, Report of Separation from Active Duty; and Army Reg. No. 600-2, Personnel—General—Name and Birth Data, Social Security Number, and Temporary Identification Number, chs. 2 and 3 (16 Apr. 1973), for correction of name, date of birth, and social security number. Procedures for appeal and correction of officer and enlisted evaluation reports are set out, respectively, in Army Reg. No. 623-105, Personnel Evaluation: Officer Evaluation Reporting System, ch. 8 (11 June 1976), and Army Reg. No. 600-200, Personnel—General—Enlisted Personnel Management System, para. 8-14 (C58, 4 Mar. 1977).

² Legislative Reorganization Act of 1946, § 207, 10 U.S.C. § 1552 (1970).

³ The Army Board for Correction of Military Records [hereinafter referred to as ABCMR] and comparable boards of other services were designed to relieve Congress of the burden of correcting errors and injustices in military records. *Ogden v. Zuckert*, 298 F.2d 312, 314 (D.C. Cir. 1961). The ABCMR is established in the Office of the Secretary of the Army who appoints the members and their chairman. The ABCMR must consist of not less than three members, who must be civilians, and three members constitute a quorum. Army Reg. No. 15-185, Boards, Commissions, and Committees—Army Board for Correction of Military Records, para. 3a, 3b (18 May 1977) [hereinafter cited as AR 15-185]. The

Even with the remedy provided by Congress in the ABCMR, the individual faced a serious problem in determining whether there was a record pertaining to him and whether such record contained an error or perpetrated an injustice. It is reasonable to assume that many individuals did not discover an error until an adverse determination was made and the individual notified thereof.

The enactment of the Freedom of Information Act (FOIA)⁴ enabled the individual to obtain copies of his records unless such records were exempt from release under that Act.⁵ While FOIA partially removed an obstacle to the discovery of certain records by the individual, it offered no device for correction. The individual who had discovered an error through FOIA request was bound to seek correction by traditional means.

The Privacy Act of 1974⁶ effected a major overhaul of the entire federal government record keeping system. The Act was designed to promote governmental respect for the privacy of the citizen by requiring departments and agencies to observe certain restrictions on the collection, management, use and disclosure of personal information.⁷ The Act attempts to strike a balance between the right of the individual to personal privacy and the need of the government for information to perform its functions.⁸ The Act requires that records kept for the purpose of making determinations pertaining to an individual be maintained with such accuracy, completeness, and attention to relevance and timeliness, as to ensure fairness to the individual in such determination~.~

ABCMR considers applications from individuals for the purpose of determining the existence of error **or** injustice. *Id.*, para. 4. However, the ABCMR will deny an application without hearing if there is not sufficient relevant evidence to demonstrate the existence of a probable material error **or** injustice. *Id.*, para. 10b. It may be assumed that a nonmaterial error will not be corrected. Although 10 U.S.C. § 1552(a) used the term "error," the courts have accepted the limitation to "probable material error" as stated in AR 15-185. *Newman v. United States*, 185 Ct. Cl. 269, 276 (1968); *Nichols v. United States*, 158 Ct. Cl. 412 (1962).

⁴ Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 383, *as amended*, codified as 5 U.S.C. § 552 (1976).

⁵ Army Reg. No. 340-17, Office Management—Release of Information and Records from Army Files, para. 2-12 (Cl, 24 Jan. 1975).

⁶ Act of December 31, 1974, Pub. L. No. 93-579, § 3, 88 Stat. 1897, *as amended*, codified as 5 U.S.C. § 552a (1976).

⁷ Privacy Act of 1974, S. Rep. No. 93-1183, 93d Cong., 2d Sess. —, *reprinted in* [1974] U.S. Code Cong. & Ad. News 6916.

⁸ *Id.* at 6930.

⁹ 5 U.S.C. § 552a(e)(5).

11. AMENDMENT OF RECORDS UNDER THE PRIVACY ACT

In the area of correction of military records, the Privacy Act offers a new, separate and distinct remedy for the individual. Under the Act, the individual has the right to determine if a record pertinent to him exists,¹⁰ to request access to his records,¹¹ to request an accounting of disclosures of records pertaining to him,¹² to request amendment of his records, and to file a statement of disagreement if the department refuses to amend his records.¹³ Each of the foregoing is an indispensable part of the record amending process offered by the Privacy Act.

A. PROCEDURES

The Act offers a broad means whereby an individual may learn of the existence of a record pertaining to him within a system of records. If the individual determines that a record pertaining to him

¹⁰ 5 U.S.C. § 552a(d)(1). The ABCMR implementing regulation contains no procedure facilitating the discovery of an error or injustice before the jurisdiction of the ABCMR attaches. *See generally* AR 15-185.

¹¹ 5 U.S.C. § 552a(d)(1).

¹² 5 U.S.C. § 552a(c)(3).

¹³ 5 U.S.C. § 552a(d)(2) and (3).

¹⁴ 5 U.S.C. § 552a(d)(1); Army Reg. No. 340-21, Office Management—The Army Privacy Program, para. 2-2 (27 Aug. 1975) [hereinafter cited as AR 340-21]. Upon request, the individual or his representative will be informed whether a particular system of records contains any record pertaining to him. AR 340-21, para. 2-2. "System of Records" is defined as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). A system of records for purposes of the Act must meet three criteria: (1) it must consist of records, (2) be under the control of an agency, and (3) must consist of records retrieved by reference to an individual name or some other personal identifier. The phrase "under the control of any agency" is used to determine possession and establish accountability and to separate records which are maintained personally by employees of any agency but which are not agency records. Guidelines for Implementation of the Privacy Act of 1974, Office of Management and Budget Circular No. A-108 (9 Jul. 1975), 40 Fed. Reg. 28,952 (1975) [hereinafter cited as OMB Cir. A-108]. The individual should ascertain the proper system of records by reference to the notices of record systems which are published annually in the Federal Register. 5 U.S.C. § 552a(e)(4) and (11). System notices are also set out in AR 340-21, Appendix B. Although some specificity is required in describing the system of records, the individual need only reasonably identify the system he desires searched. AR 340-21, para. 2-2. A request for access will normally not be denied for failure to cite the proper system or direction to the wrong agency. AR 340-21, para. 2-1b, 2-1c, and 2-3b.

"Record" is defined as

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol,

exists within a system of records, he may request access to such records.¹⁵ If the individual obtains access to records within a sys-

or other identifying particular assigned to the individual, such as a finger or voiceprint or a photograph.

5 U.S.C. § 552a(a)(4). The language of the Act suggests that Congress did not intend that an individual have access to records which are not retrieved by reference to his name or personal identifier. OMB Cir. A-108, 40 Fed. Reg. 28,957. The request will be submitted to the official identified in the system notice and the official must respond to the request within ten working days after receipt and inform the individual how to request access to his records or that no record pertaining to him exists. AR 340-21, para. 2-2.

Unless the individual consents, the time limitations may be extended only for good cause and with the approval of the Army General Counsel on behalf of the Secretary of the Army. *Id.*, para. 2-1d. In the event the agency refuses to comply with the request to determine the existence of records, or the agency erroneously reports that the system does not contain a record pertaining to the individual, no administrative appeal is provided. *Id.*, para. 2-2. The only recourse for the individual is to commence a civil action alleging noncompliance with the Act. 5 U.S.C. § 552a(g)(1).

¹⁵ 5 U.S.C. § 552a(d)(1). The individual must submit a written request pursuant to the applicable system notice which reasonably identifies the record sought within the system of records. He must pay a fee for reproduction of the record and provide any information or documentation required by the agency in accordance with regulation. AR 340-21, para. 2-4. The official who receives the request for access must acknowledge receipt thereof within ten working days after receipt. AR 340-21, para. 2-5a. Time limits in the access area are prescribed not by the Act but by regulation. Further, the official will determine whether access can be granted. If the official determines that access will be granted, he will advise the individual within thirty working days after receipt of request of the procedures to be used to accomplish access. *Id.*, para. 2-5b. If the official determines that access should be denied, he must, within ten days after receipt, forward a copy of the request, the record sought, and his reasons for recommending denial to the appropriate Access and Amendment Refusal Authority (AARA) and so advise the individual. *Id.*, para. 2-5d(1).

"Access and Amendment Refusal Authority" (AARA) is defined as "The Army Staff Agency head or major Army Commander designated sole authority by this regulation to deny access to, or refuse amendment of records in his assigned area of proponency or functional specialization." *Id.*, para. 1-5a. A complete list of AARA's with a description of record subject matter within their authority is set out in para. 1-7b. The AARA, as to matters determined accessible, will notify the individual of the procedures to obtain access. As to matters where access is denied, the AARA must, within thirty working days after initial receipt, inform the individual in writing of the reasons for denial, including a statement of the exemptions of the Privacy Act and FOIA upon which the agency relied and the significant and legitimate governmental purpose served by nondisclosure. *Id.*, para. 2-5e.

The Army has taken the position that access will be denied only if the information is exempt both under the Privacy Act and the FOIA and there exists a significant and legitimate purpose served by nondisclosure. *Id.*, para. 2-6b. The individual must be advised of his right to appeal to the Secretary of the Army. *Id.*, para. 2-5e(2). The Office of General Counsel, on behalf of the Secretary of the Army, decides the appeal. *Id.*, para. 2-5g. It is significant that the implementing regulation allows commanders and custodians to grant access to records; however, only the appropriate AARA or the Secretary of the Army, acting through the General Counsel, may deny access. *Id.*, para. 2-6a.

tem of records and discovers that such records are inaccurate, irrelevant, incomplete, or untimely, he may request amendment of such records.¹⁶

¹⁶ 5 U.S.C. § 552a(d)(2); and AR 340-21, para. 2-8 (27 Aug. 1975). Upon request, an individual will have any record pertaining to him amended by correction, deletion, addition, or otherwise, regardless of whether it is a part of a system of records, if such record is not accurate, relevant, complete, or timely within the meaning of the Act. 5 U.S.C. § 552a(d)(2)(B)(i); and AR 340-21, para. 2-8. To obtain amendment, the individual must submit a request in writing which must include sufficient information to permit identification and location of records and a description of the item or portion for which amendment is sought. An oral request that can be accepted will not result in a demand for a written request.

The request must also state the reasons why amendment is requested and be accompanied by appropriate documentary evidence. AR 340-21, para. 2-9a(1).

In the administrative procedures under the Act, the burden is on the individual to show the propriety of the desired amendment. *Id.*, OMB Cir. 1-108, 40 Fed. Reg. 28,958. When the individual requests amendment of his records, the custodian receiving the request must acknowledge receipt of the request within ten working days. AR 340-21, para. 2-9a(1). If the custodian determines the request is proper because the record is inaccurate, irrelevant, untimely or incomplete, he must make the correction and so notify the individual within thirty working days after receipt of the request. *Id.*, para. 2-9a(3).

The custodian may amend, but only the Access and Amendment Refusal Authority or the Privacy Review Board may refuse to amend. If the custodian believes the request is not proper because the records are exempt or otherwise, he must, within five working days after receipt of the request, forward the request, the record, and his recommendations to the appropriate AARA. He notifies the individual of his action in the acknowledgment of receipt. *Id.*, para. 2-9a(4). The AARA may request further information and may amend the record even if it is exempt from the Privacy Act. *Id.*, para. 2-9c. If the AARA determines that amendment is not proper, he must explain to the individual, in writing, his reasons for not amending the record. He must advise the individual of his right to appeal to the Department of the Army Privacy Review Board and furnish copies of the request and denial to the Privacy Review Board. *Id.*, para. 2-9c(1), (2), and (3).

The Army Privacy Review Board acts on behalf of the Secretary of the Army in appeals involving amendment. *Id.*, para. 1-8(1).

If the individual appeals the initial refusal, whether his request was denied wholly or in part, the AARA must forward the assembled case to the Privacy Review Board within five working days after receipt of request for review. *Id.*, para. 2-9d. The Privacy Review Board must complete its review within thirty working days after receipt of the request for review by the AARA. *Id.*, para. 2-9e.

It is noteworthy that no time limits are imposed upon the ABCMR to complete review. *See generally* AR 15-185. The Privacy Review Board may amend a record even if it is exempt from the amendment procedures of the Act. AR 340-21, para. 2-9e. The Privacy Act contains general and specific exemptions for certain systems of records from certain portions of the Act. 5 U.S.C. § 552a(j) and (k). The Act requires the agency to promulgate rules to exempt a system of records and a promulgated rule is an absolute prerequisite for the agency to take advantage of an exemption. *Mervin v. Bonfanti*, 410 F. Supp. 1205, 1207 (D.C. 1976). The general and specific exemptions together with 5 U.S.C. § 552a(d)(5) which excepts information compiled in reasonable anticipation of a civil action or proceeding constitute all of the exemptions of the Privacy Act. However, the Army has taken the

It is significant that under the Privacy Act procedures no formal hearing pursuant to the Administrative Procedures Act is required; however, the agency, but not the individual, may elect such a hearing.¹⁷ Under the ABCMR procedure, the individual has no guarantee that he will ever be heard. The ABCMR may deny an application without hearing if the record does not demonstrate a probable material error or injustice.¹⁸ The denial without hearing will not be reversed by the courts unless it is arbitrary, capricious, or contrary to law. The courts have required hearings before the ABCMR where there exists a probable material error or injustice as determined by the court, where there are differing conclusions by the lower boards, or where the lower proceedings are so defective as to preclude reliance on their advice.¹⁹

The individual may at any time request an accounting of certain disclosures by addressing his request to the custodian of the records.²⁰

B. MATTERS SUBJECT TO AMENDMENT

Under the Privacy Act, the individual is authorized to seek

position that as few records as possible should be exempt from the amendment procedures of the Act. AR 340-21, para. 7-lb. While the regulation specifies that exempt systems are not the proper subject of a request for amendment, it further allows amendment even if the records are exempt. *Id.*, para. 2-9c and e.

If the Privacy Review Board decides not to amend the record as requested, it will notify the individual in writing and inform him of his right to file a statement of disagreement with the custodian of his record. 5 U.S.C. § 552a(d)(3) and AR 340-21, para. 2-9e. This must be a concise statement setting forth the individual's reasons for disagreeing with the agency's refusal to amend. AR 340-21, para. 2-9e(1). The custodian must clearly annotate that the record is disputed so that anyone who subsequently sees the record will have notice thereof. AR 340-21, para. 2-10a. Any subsequent disclosure of this record must include the statement of disagreement. *Id.*, para. 2-10d. There is no flagging instrument provided in AR 15-185 during pendency of the ABCMR proceeding.

The disclosing authority may rebut the statement of disagreement by including a brief statement of the Privacy Review Board's reasons for refusing amendment. 5 U.S.C. § 552a(d)(4) and AR 340-21, para. 2-10e. This summary is treated as a part of the individual's records for access but not for amendment. AR 340-21, para. 2-10e. The Privacy Review Board must advise the individual that this statement of disagreement will be provided to those who subsequently receive the record and to prior recipients to the extent that a disclosure accounting was maintained. AR 340-21, para. 2-9e. The statement of disagreement effectively "flags" portions of the record which are disputed and there appears to be no procedure to remove a statement of disagreement once filed.

¹⁷ 5 U.S.C. § 556 and OMB Cir. A-108, 40 Fed. Reg. 28,959.

¹⁸ AR 15-185, para. 10b.

¹⁹ *Amato v. Chaffee*, 337 F. Supp. 1214, 1219 (D.C. 1972); *Newman v. United States*, 185 Ct. Cl. 269, 276 (1968); *Harris v. United States*, 177 Ct. Cl. 538, 548 (1966).

²⁰ 5 U.S.C. § 552a(e)(3) and AR 340-21, para. 2-7. The records custodian must be

amendment of records that are inaccurate, irrelevant, incomplete or untimely.²¹ While there is no clear guidance on the standards for accuracy, relevance, completeness or timeliness, it is clear that records used in determinations about an individual must be maintained with such accuracy, relevance, completeness and timeliness as is reasonably necessary to ensure fairness to the individual in those determinations.²² Under the Army Regulation, the individual may request amendment by correction, addition, deletion or other physical changes to his records.²³

Under the Act, the individual may seek amendment of records alleged to be inaccurate only if the amendment is sought as to a matter of fact as opposed to judgment.²⁴ The Army Regulation has

able to provide such accounting when requested by the individual or when necessary to inform previous recipients of the records of amendments thereto or statements of disagreement. AR 340-21, para. 3-3.

If a disclosure accounting is made, notification of amendment of records will be submitted to all previous recipients with instructions that they notify anyone to whom they have disclosed the record. *Id.*, para. 2-9a(3).

Statements of disagreement will be furnished previous recipients of the record if a disclosure accounting has been made. *Id.*, para. 2-9e(3) and 3-3(b)(2). By requesting a disclosure accounting, the individual may assure that prior recipients of the record receive any amendment thereto. If his records are not amended as requested, he may assure that previous recipients receive his statement of disagreement.

²¹ 5 U.S.C. § 552a(d)(2)(B)(i) and AR 340-21, para. 2-8.

²² 5 U.S.C. § 552a(e)(5) and AR 340-21, para. 5-3.

²³ AR 340-21, para. 2-8. Amendment is accomplished by addition, annotation, alteration, obliteration, deletion, or destruction. *Id.*, para. 2-9a(3).

²⁴ *Id.*, para. 2-8c; Determination 4 of Department of Defense Privacy Board Decision Memorandum 76-1 (March 12, 1976).

The Privacy Act cannot be used to challenge the judgment of a court-martial, the recommendation of a promotion board, or the character of a discharge certificate. However, the erroneous entry of a court-martial conviction, recommendation of a promotion board, or the character of a discharge could be amended pursuant to the Act. OMB Cir. A-108, 40 Fed. Reg. 28,958. Further, certain circumstances may arise where a purely judgmental matter may so change its character to permit amendment pursuant to the Act.

For example, if an individual is convicted by a court-martial and a record of conviction is entered in his records, this entry clearly cannot be attacked under the Privacy Act. However, if the Court of Military Review reversed the conviction after entry in the individual's records, the matter is quite different. Under these circumstances, the request for amendment would not be a purported collateral attack on the judgment of the court but rather a request for amendment of an inaccurate record. The reversal renders the entry of conviction factually inaccurate.

However, the rationale used here is not so easily applied where the record of conviction is merely used as evidence in the course of a quasi-judicial proceeding such as a discharge proceeding. The Privacy Act was not intended to amend evidence presented in such a proceeding. *Id.* There is some authority, however, that the character of a discharge which is based upon essentially nondiscretionary

not attached the fact-judgment distinction to records that are alleged to be irrelevant, incomplete, or untimely.²⁵ There is little guidance as to what records are judgmental or factual. The logical conclusion is that records which directly result from the exercise of discretion or analytical mental processes or application of professional expertise of the preparer are judgmental. For example, the election of a physical evaluation board to enter a finding of 40% disability based on medical records is judgmental as is the determination of a rater on an OER to select one numerical rating as opposed to another. On the other hand, entries which are the mere ministerial recording of data or the application of a regulatory scheme or formula to obtain data for recording are best described as factual. For example, the personnel clerk who enters an individual's home of record on personnel records exercises no judgment nor does a finance clerk who calculates a medical officer's pay entry basic date based upon a regulatory formula. While the finance clerk may make a mathematical error or misapply the formula set out by regulation, such is nevertheless an entry of fact and does not reflect the exercise of judgment.

Generally the fact-judgment dichotomy must be resolved by determining if the preparer of the record is vested with discretion by regulation or some other proper authority and the exercise of this discretion directly results in the preparation of a record of entry on existing records. If so, the matter is judgmental. For example, if an enlisted man requested authority to mess separately alleging that rations in kind are unavailable to him at his duty station, the denial of such request by the commander would not be subject to amendment pursuant to the Privacy Act. The commander is vested by regulations with authority to make such a determination based upon the facts and circumstances of the situation.²⁶ Therefore, the denial is judgmental and not within the amendment procedures of the Privacy Act.

judgments, such as the imposition of a general discharge because the individual was convicted by a court-martial as prescribed by regulation, may be subject to amendment pursuant to the Privacy Act upon the subsequent reversal of the conviction. See Stichman, *Developments in the Military Discharge Review Process*, 4 MIL. L. REP. 6001, 6008-09 (1976).

²⁵ *Id.* The regulation specifically states, "Requests for amendment in accordance with this regulation may be sought only where the record is alleged to be inaccurate (as a determination of fact rather than judgment), irrelevant, untimely or incomplete."

²⁶ See DEPARTMENT OF DEFENSE PAY AND ALLOWANCES ENTITLEMENTS MANUAL, para. 30113a (C45, 22 Oct. 1976) [hereinafter cited as DODPM].

Another prime consideration in the fact-judgment dichotomy is whether amendment of the record would result in substitution of the judgment of one individual for another. In simplest terms, it should be ascertained whether it is alleged that the record is inaccurate, or that the person who made the entry was wrong. If the individual alleges that the record is inaccurate because the preparer reached the wrong conclusions, such is judgmental. For example, if company commanders in a training unit entered on the records of trainees leadership potential based on a scale of "0 to 5" which was used in recommending trainees for special training, such would be judgmental and not subject to amendment through Privacy Act procedures. If a trainee sought amendment of a "2" leadership potential rating to a higher rating, he is essentially alleging that the company commander was wrong in reaching this conclusion. To correct the record to show higher leadership potential would be to substitute the judgment of another for the judgment of the company commander.

The concept that judgmental entries may be established by considering if the preparer had discretion and if the amendment sought would result in substitution of judgment does not remove the danger that factual errors may be made in the entry of matters best described as judgmental.²⁷ For example, if a company commander entered a "5" leadership potential rating on a memorandum to the records custodian but the custodian misread the information and entered a "2" on the individual's records, the trainee could seek amendment of such entry pursuant to the Privacy Act. He does so by establishing the error of the person making the entry as opposed to alleging that his company commander was wrong in his conclusion.²⁸

The question arises as to whether an individual who has no authority to make judgments in a specific area may nevertheless make entries on the records of an individual which are judgmental so as to preclude Privacy Act amendment remedies. For example, if an enlisted man who is entitled to basic allowance for quarters (BAQ) at the "without dependents" rate marries, the appropriate regulation specifies that BAQ at the "with dependents" rate commences on the day the dependent is acquired. The individual submits an applica-

²⁷ OMB Cir. A-108, 40 Fed. Reg. 28,958. This recognizes that even the erroneous entry of a court-martial conviction may be amended. It is contemplated that there was a ministerial error in recording which would support amendment; however, if amendment is sought as a means of collaterally attacking the judgment of the court, the Act cannot be used.

²⁸ *Id.*

tion for BAQ at the "with dependents" rate together with a true copy of his marriage license; however, his finance officer, after reading a portion of a state statute which stated, "Either party may request a decree of invalidity at any time within six months after the marriage if either of the parties lacked capacity to consent," denies his application. The finance officer entered upon the individual's finance records the statement "Marriage not final for six months" and the symbol to effectuate BAQ at the "without dependents" rate. Assuming that the appropriate regulation vests authority to make such a determination in the Commander of the Army Finance and Accounting Center and that the individual has no administrative appeal,²⁹ the question of viability of Privacy Act amendment arises. While there may be circumstances under which the finance officer may deny an application for BAQ, it is clear that he cannot make a valid legal judgment as to the finality of a marriage. The logical conclusion is that a judgmental entry entered by one who has no authority or expertise to enter such a judgment is a nullity and that the record is subject to amendment pursuant to the Act.

When an individual seeks amendment by addition to, annotation of, striking, obliteration or deletion of, or other physical changes to his records and such request alleges irrelevance, incompleteness or untimeliness, the Privacy Act provides a procedure for correction regardless of whether the records are judgmental or factual.³⁰

C. STANDARDS FOR AMENDMENT

The individual may seek amendment of records that are inaccurate, irrelevant, incomplete or untimely.³¹ In the administrative procedures, the burden is on the individual to demonstrate the propriety of the amendment³² by a preponderance of the evidence.³³ While the Privacy Act recognized that the concepts of accuracy, relevance, completeness, and timeliness must be judgmental,³⁴ the object is to insure fairness to the individual in determinations based upon such records.³⁵

²⁹ See DODPM para. 30233(e)(3) (C42, 19 Mar. 1976).

³⁰ AR 340-21, para. 2-8.

³¹ 5 U.S.C. § 552a(e)(5); OMB Cir. A-108, 40 Fed. Reg. 28,958; & AR 340-21, para. 2-8.

³² OMB Cir. A-108, 40 Fed. Reg. 28,958; AR 340-21, para. 2-8a.

³³ OMB Cir. A-108, 40 Fed. Reg. 28,959.

³⁴ *Id.*, at 28,960.

³⁵ 5 U.S.C. § 552a(e)(5); OMB Cir. A-108, 40 Fed. Reg. 28,958; AR 340-21, para. 5-3.

To secure amendment of records based on inaccuracy, the individual must demonstrate the propriety of the desired amendment to one having authority to amend the record.³⁶ Although the concept of accuracy may include elements of relevance, completeness and timeliness, it largely depends on conformity with truth and freedom from error.³⁷ This common definition of accuracy may explain why the Army regulation limits amendment of inaccurate records under the Privacy Act to those which are factual as opposed to judgmental. A judgmental entry is not subject to the ready ascertainment of conformity with truth and freedom from error as in a factual entry. For example, an applicant for appointment as a chaplain who had discovered on his records an entry showing he had earned a Master of Urban Planning degree and who in fact had earned a Master of Divinity degree could seek amendment pursuant to the Privacy Act. The entry of degree earned on records is purely factual and the individual could readily establish nonconformity with truth by producing evidence of the degree he had earned. However, if the same applicant sought to have amended statements entered in his records by a board of officers which was convened to pass on the character and fitness of chaplaincy candidates, he could not do so under the Privacy Act. Thus, conformity with truth and freedom from error are not readily determinable and attempting such would be merely substituting another's judgment for the judgment of the board of officers.

If an individual seeks amendment of records based on irrelevance he establishes propriety of the desired amendment by showing that the records of entries therein do not bear on the determinations for which the records are kept.³⁸ For example, if an enlisted man found in his records the following statement, "This man is a political radical. Rumor has it he drives a foreign car, dates an Oriental girl, and hangs around with the dopers of Boulder," he may request deletion of the statement as irrelevant. It is noted that we are not concerned with whether the statement is true but rather whether the statement bears on the determinations for which the record is main-

³⁶ AR 340-21, para. 2-8a(1).

³⁷ The emphasis is placed on assuring the quality of a record used in making decisions affecting rights, benefits, entitlements or opportunities of the individual. OMB Cir. A-108, 40 Fed. Reg. 28,964. Accuracy is commonly defined as "conformity with truth" and "freedom from mistake or error." See *Globe v. Cohen*, 106 F.2d 687, 690 (3d Cir. 1939) and WEBSTER'S THIRD INTERNATIONAL DICTIONARY 13(1966).

³⁸ 5 U.S.C. § 552a(e)(5); OMB Cir. A-108, 40 Fed. Reg. 28,964.

tained. It is difficult to conceive how such a statement could bear on any bona fide military purpose. Further, it invades the area of information prohibited from collection and maintenance by the Act.³⁹ Consequently, such is precisely the type of information the Act was designed to remedy.⁴⁰

Completeness is a concept difficult to distinguish from accuracy and relevance.⁴¹ The absence of information which clearly bears on the determinations for which the records are kept renders the records incomplete and subject to the remedy of addition pursuant to the Act.⁴² Likewise, a record which omits material information is inaccurate as it does not substantially conform to truth; however, overzealous adherence to the concept of completeness may abrogate the concept of relevance.⁴³ To demonstrate the concept of completeness, assume that a reserve officer reaches his mandatory consideration date for promotion to captain and receives a copy of the personal information data form which will be submitted to the promotion board. The appropriate regulation states that an officer must have completed an officer basic course to be educationally qualified for promotion to captain. The data form included the following: "Military Education Completed—None." The officer had in fact completed an officer basic course. The officer is entitled pursuant to the Act to secure an addition to his records upon proper proof that he had completed the officer basic course.

Timeliness bears close resemblance to relevance and accuracy. A record or entry therein which is so stale that it no longer bears on the determinations for which it is maintained is subject to deletion for untimeliness;⁴⁴ however, from a purely archival point of view, old records may be important. Thus, it necessarily follows that age itself is not sufficient grounds to secure deletion pursuant to the Act. However, if age is coupled with irrelevance or inaccuracy, the Act may be used to secure deletion of the entry. In effect, the age of the record must have rendered it inaccurate or irrelevant. Again, conformity with the truth has no bearing. For example, if a master sergeant who was due to be considered by a 1977 E-9 promotion

³⁹ 5 U.S.C. § 552a(e)(7); AR 340-21, para. 5-4.

⁴⁰ OMB Cir. A-108, 40 Fed. Reg. 28,964. The object is to minimize, if not eliminate, the risk of an adverse determination about an individual being made on the basis of inaccurate, incomplete, irrelevant and out-of-date records.

⁴¹ OMB Cir. A-108, 40 Fed. Reg. 28,965.

⁴² *Id.*; AR 340-21, para. 2-8.

⁴³ OMB Cir. A-108, 40 Fed. Reg. 28,965.

⁴⁴ *Id.*, at 28,964.

board discovered in his records the following entry, "1 Jun 52-EM was counseled reference the notice from Clerk of the Court that he was two months delinquent in his child support payments," the individual could seek deletion of this entry pursuant to the Act. While it may have been correct at the time it was entered, it no longer bears on the individual's fitness for promotion. Still the information may result in an adverse determination by the promotion board. The deletion of this stale material would be well within the spirit and tenor of the Privacy Act. This would carry out the purpose of the amendment provisions of the Privacy Act by eliminating the risk of an adverse determination on the basis of out-of-date information.⁴⁵

111. THE INTERRELATIONSHIP OF THE ABCMR AND PRIVACY ACT

A. RELIEF AVAILABLE

Except for the provision allowing actual damages, it is clear that the Privacy Act offers only the remedy of technical amendment. The individual may secure correction of, deletion of, addition to, or other types of physical changes to his records; however, he secures little else. For example, if an officer seeks and secures correction of his promotion eligibility date pursuant to the Privacy Act, he secures nothing else through this remedy. This is not to say that he may not secure prompt promotion upon having the corrected record considered by the appropriate promotion board; however, such is a separate administrative procedure. The enlisted man who secures a correction of his pay entry basic date receives no back pay by virtue of the Privacy Act. Again, this is not to say that the corrected record would not support a claim against the United States for retroactive pay; however, the individual again must pursue a separate administrative or judicial remedy to secure the relief he actually desires. At any stage in the Privacy Act procedure, the individual may secure only amendment of his records. The Privacy Act offers no affirmative relief, that is, promotion, retirement, retroactive pay, etc.

While there is little precedent in the area, the federal courts have recognized the limitation of the Act to a vehicle of amendment.⁴⁶ In

⁴⁵ *Id.*

⁴⁶ The statute specifically states, "the court may order the agency to amend the individual's record in accordance with the request or in such other way as the court may direct." 5 U.S.C. § 552a(g)(2)(A).

The Department of Defense Privacy Board has specifically recognized that an

Churchwell v. United States,⁴⁷ the court recognized the limitations of the Privacy Act. In this case a dismissed civil service employee sought to challenge her dismissal pursuant to the Privacy Act. The court found that the Privacy Act conferred no power to order reinstatement, back pay, or compensatory damages. In *Blevins v. Secretary of the Air Force*,⁴⁸ the court entered summary judgment for the defendant on the basis that it had no power under the Privacy Act to grant a retroactive promotion to complainant, a "passed-over" Air Force officer.

On the other hand, the ABCMR may offer such relief as is necessary to remove an error or injustice. It may correct both factual and legal conclusions⁴⁹ and it may grant any relief that could have been granted by private bill.⁵⁰ The ABCMR may grant affirmative relief⁵¹ as well as physical correction of the record and the department concerned may pay a claim resulting from the correction of a record from current appropriations.⁵²

B. EXHAUSTION OF PRIVACY ACT REMEDIES

It is clear that the ABCMR may refuse to consider an application for correction until the applicant has exhausted all effective administrative remedies available to him under existing law or regulation. As a practical matter, "effective" is the operative word in this provision. Effective connotes that other administrative remedies offer adequate relief to the individual. Second, the administrative remedy must be available to the individual under existing law

individual who secures factual correction pursuant to the Privacy Act must seek relief before the ABCMR as to judgmental matters which may have been affected by the factual correction. Determination 4 of Department of Defense Privacy Board Decision Memorandum 76-1 (March 12, 1976).

⁴⁷ 414 F. Supp. 499, 501 (D.C. S.D. 1976).

⁴⁸ No. CV 75-4336-F (D.C. Cal. 28 Oct. 1976).

⁴⁹ *Oleson v. United States*, 172 Ct. Cl. 9, 18 (1965).

⁵⁰ *Id.*

⁵¹ Affirmative relief is a term that has been used to describe the power of the ABCMR to make an applicant whole after correcting a record. It contemplates granting a substantial right or benefit to the applicant as a result of the correction of a record as opposed to the mere physical change of the record. It includes granting retroactive pay, conversion of discharge type, promotion and retroactive promotion, reinstatement, and retirement for years of service or disability. See *Gearing v. United States*, 412 F.2d 862 (Ct. Cl. 1969); *Oleson v. United States*, 172 Ct. Cl. 9 (1965); *Unger v. United States*, 326 F.2d 996 (Ct. Cl. 1964); *Jackson v. United States*, 297 F.2d 939 (Ct. Cl. 1962); *Darby v. United States*, 173 F. Supp. 619 (Ct. Cl. 1959).

⁵² 10 U.S.C. § 1552(c) (1970).

⁵³ AR 15-185, para. 8.

or regulation. It necessarily follows that refusal of an application for failure to exhaust administrative remedies that did not offer the relief the individual sought, or which were denied to the individual by law or regulation, would be improper.⁵⁴ Accordingly, before the ABCMR may properly refuse to consider an application for failure to exhaust other administrative remedies, it must consider the case in terms of relief sought and the availability of other remedies. Within these limitations, the ABCMR may require exhaustion of Privacy Act remedies before considering an application for correction.

The ABCMR may refuse an application for failure to exhaust Privacy Act remedies if the remedies offer the relief sought. For example, if an officer submitted an application to the Board requesting correction of his promotion eligibility date from "27 Apr 78," as stated on his personnel records, to "27 Apr 77," which he alleges is the correct date, this officer seeks mere amendment of his records. He asks that one date be stricken and another entered in its place. He does not request promotion or retroactive pay. The officer in this instance could have proceeded under the Privacy Act and secured amendment of the date based on inaccuracy. Accordingly, the Privacy Act is an effective remedy to grant the relief sought.⁵⁵ Therefore, a determination by the ABCMR to refuse to hear the application until Privacy Act remedies are exhausted would not be arbitrary and capricious.⁵⁶ The ABCMR has strong support in making such a determination in that the Army Privacy Program contemplates that all requests for amendment by physical change to the record will be processed under the Privacy Act.⁵⁷

On the other hand, if the officer requested the ABCMR to correct his promotion eligibility date from "27 Apr 77," as stated, to "27 Apr 74," the date alleged as correct, and further, to correct his records showing he was promoted on 27 Apr 74, the ramifications are entirely different. The Privacy Act remedy could afford only the physical amendment of the date,⁵⁸ not retroactive promotion as a re-

⁵⁴ In the Army privacy regulation, certain types of correction are denied the individual. AR 340-21, para. 2-8c.

⁵⁵ AR 340-21, para. 2-9a(3).

⁵⁶ *Sherengos v. Seamans*, 449 F.2d 333, 334 (4th Cir. 1971). The courts will not reverse the decision of the ABCMR to refuse to consider an application for failure to exhaust all other administrative remedies unless such decision is arbitrary and capricious.

⁵⁷ AR 340-21, para. 2-8.

⁵⁸ *See* note 76. The Army Regulation is specific as to the physical accomplishment of amendment of records. AR 340-21, para. 2-9a(3).

sult of the amendment. If the officer secures amendment under the Act, he must seek his retroactive promotion elsewhere, likely from the ABCMR. Thus, it can hardly be said that the Privacy Act offers an effective administrative remedy to secure the relief sought. Under these circumstances, a determination by the ABCMR refusing to consider the application for failure to exhaust Privacy Act remedies may be arbitrary and capricious in that it requires the individual to pursue a remedy that is illusory.⁵⁹

The ABCMR may refuse an application for failure to exhaust Privacy Act remedies only if such remedies are available to the individual. The Privacy Act, by implementing regulation, specifically excludes certain types of correction from its scope. Further, if the individual alleges his records are inaccurate, the Act offers amendment only as to matters of fact and not judgment.⁶⁰ Therefore, the ABCMR must consider whether the remedies of the Act are available to the individual. If not, the application for correction should not be refused for failure to exhaust Privacy Act remedies. For example, if an officer requested the ABCMR to correct an OER, the ABCMR could not refuse the application based on failure to exhaust Privacy Act remedies. Such type of correction is excluded from the scope of the Privacy Act procedures.⁶¹ Similarly, if an individual requested correction of a judgmental matter, the ABCMR could not refuse the application for failure to exhaust Privacy Act remedies.⁶²

C. FINALITY OF ADMINISTRATIVE DETERMINATIONS

While the relationship between the ABCMR and Privacy Act procedures is still unclear, certain conclusions may be reached. The Privacy Act may not be used to amend a decision of the ABCMR nor may it be used to correct evidence presented before the ABCMR.⁶³ It might, however, be used to correct an erroneous recording of a decision of the ABCMR.⁶⁴ The ABCMR has broad remedial powers; consequently, any decision pertinent to amendment of records made

⁵⁹ It is reasonable to assume that to require an applicant to exhaust a remedy that is illusory, or at best only partly effective, would be arbitrary and capricious.

⁶⁰ AR 340-21, para. 2-8c.

⁶¹ *Id.*

⁶² *Id.* Such correction is excluded from the Privacy Act by regulation.

⁶³ AR 340-21, para. 2-8c; OMB Cir. A-108, 40 Fed. Reg. 28,958.

⁶⁴ OMB Cir. A-108, 40 Fed. Reg. 28,958.

pursuant to the Privacy Act is not binding on the ABCMR.⁶⁵ On the other hand, decisions of the ABCMR when approved by the Secretary are conclusive on all officers of the United States.⁶⁶ It follows that the Privacy Act could not be used to amend a record which the ABCMR had previously determined did not contain an error or injustice. This would not extend to records which, although not in error or resulting in injustice, were subject to deletion for irrelevancy or untimeliness or subject to addition for incompleteness.

The Army has attempted to strike a delicate balance between the two procedures by specifying that requests for amendment based upon factual inaccuracy, irrelevance, incompleteness and untimeliness will be processed under the Privacy Act,⁶⁷ and all other types of amendment or correction will be processed under established procedures.⁶⁸

IV. JUDICIAL REVIEW

A. REVIEW PURSUANT TO THE PRIVACY ACT

The Privacy Act provides that an individual may bring a civil action in the United States District Court in the district where he resides, or has his principal place of business, or in which the agency records are located, or in the District of Columbia within two years from the date the cause of action arose.⁶⁹

If the agency makes a determination not to amend an individual's record in accordance with his request, or fails to make such review in conformity with the Act, the individual may commence a civil action by alleging in his complaint that he has exhausted his administrative remedies and the reviewing official has also refused to amend.⁷⁰ Or he may commence his action by contending that the agency has not acted upon his request for review in a timely manner or has not acted in a manner consistent with the Act.⁷¹ The indi-

⁶⁵ Congress intended that the ABCMR to be the Army's "body of last resort." *Sherengos v. Seamans*, 449 F.2d 333, 334 (4th Cir. 1971).

⁶⁶ 10 U.S.C. § 1552(a) (1970).

⁶⁷ AR 340-21, para. 2-8, states, "All such requests will be processed in accordance with this regulation, whether or not the Privacy Act or this regulation is cited by the individual."

⁶⁸ *Id.*, para. 2-8c.

⁶⁹ 5 U.S.C. § 552a(g)(5). It should be noted the Act is not retroactive.

⁷⁰ OMB Cir. A-108, 40 Fed. Reg. 28,969. The cause of action for amendment evidently accrues when the agency makes a final decision not to amend. Thus, the time spent in the administrative process of discovering the error and seeking administrative correction is not within the period of limitation specified in the Act.

⁷¹ OMB Cir. A-108, 40 Fed. Reg. 28,968.

vidual need not establish any injury before commencing an action for refusal to amend.⁷²

In an action for refusal to amend, the court considers the matter de novo.⁷³ The court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct.⁷⁴ In judicial review for refusal to amend a record, the burden to challenge the accuracy of the record is on the individual.⁷⁵

If the agency fails to maintain any record concerning any individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, and opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual, that individual may bring a civil action.⁷⁶ The individual may also bring a civil action if the agency fails to comply with any other provision of the Privacy Act or rules promulgated thereunder in such a manner as to have an adverse effect on the individual.⁷⁷

In all judicial actions under the Privacy Act, causes will be determined upon a preponderance of the evidence. ▀

B. REVIEW OF DECISIONS OF THE ABCMR

The individual who seeks judicial review of a decision of the ABCMR does not have such an easy recourse. If the individual exhausts his remedy before the ABCMR, the reviewing court is

⁷² *Id.*

⁷³ 5 U.S.C. § 552a(g)(2)(A).

⁷⁴ *Id.* The court may assess in favor of the prevailing party a reasonable attorney's fee and costs. 5 U.S.C. § 552a(g)(2)(B). Attorneys' fees and costs are not allowed under the ABCMR procedure. AR 15-185, para. 28.

In areas where technical correction is sought, the judicial remedies of the Privacy Act appear more favorable than the ABCMR remedy. AR 15-185 demonstrates that the ABCMR procedure offers no compulsory process, no discovery procedures, and no right to a hearing. If affirmative relief is sought, the ABCMR remedy is more favorable than the Privacy Act judicial remedies which offer only amendment of records.

⁷⁵ OMB Cir. A-108, 40 Fed. Reg. 28,969.

⁷⁶ 5 U.S.C. § 552a(g)(1)(C). An adverse determination has been defined as the denial of a right, benefit or opportunity. OMB Cir. A-108, 40 Fed. Reg. 28,969.

⁷⁷ 5 U.S.C. § 552a(g)(1)(D). The latter two actions require a showing of injury. In an action brought under (g)(1)(C) and (D), the court may award actual damages, not less than \$1,000, if the agency acted in a manner which was intentional or willful. The individual must establish the inaccuracy in actions under (g)(1)(C) and (D) and he must establish a causal relationship between the inaccurate record and the adverse determination. OMB Cir. A-108, 40 Fed. Reg. 28,969.

⁷⁸ OMB Cir. A-108, 40 Fed. Reg. 28,959.

normally restricted to the record of the ABCMR proceeding.⁷⁹ The courts are normally reluctant to substitute their judgment for that of the ABCMR.⁸⁰ The plaintiff must show by cogent and clearly convincing evidence that the decision of the ABCMR is arbitrary, capricious, unlawful, or not supported by substantial evidence.⁸¹ It is only upon such showing that the court will reverse the decision of the ABCMR.⁸²

C. THE DISPARITY OF JUDICIAL REMEDIES

Judicial review under the Privacy Act is codified and is essentially simple. Upon certain agency action or inaction, the individual is able to secure judicial review. The court considers the matter *de novo* and the individual is able to use the subpoena power of the court to obtain witnesses and documents. The court considers all relevant evidence consistent with the applicable Rules of Evidence.

In review of the ABCMR decisions, the inquiry is normally limited to the administrative record and, absent extraordinary circumstances, the individual may not present any new evidence at the hearing. In the ABCMR procedures, the individual faces the danger of having no compulsory process during the entire administrative and judicial process.⁸³ In Privacy Act review, the individual is able to secure the judgment of a federal judge; however, in review of a decision of the ABCMR, he must overcome the traditional reluctance of courts to interfere with military affairs,⁸⁴ and further he must overcome the presumption that administrative decisions are final unless arbitrary and capricious, unlawful or not supported by substantial evidence.

V. CONCLUSION

The Privacy Act and the ABCMR offer two separate and distinct remedies for correction of military records. The ABCMR offers

⁷⁹ *Peppers v. United States Army*, 479 F.2d 79, 82 n.5 (4th Cir. 1973); *Haines v. United States*, 453 F.2d 233, 236 (3d Cir. 1971).

⁸⁰ *Newman v. United States*, 185 Ct. Cl. 269, 276 (1968); *Wesolowski v. United States*, 174 Ct. Cl. 682, 693 (1966).

⁸¹ *Peppers v. United States*, 479 F.2d 79, 83 (4th Cir. 1973); *Haines v. United States*, 453 F.2d 233, 237 (3d Cir. 1971); *Dorl v. United States*, 200 Ct. Cl. 626, 633 (1973); *Clinton v. United States*, 191 Ct. Cl. 604, 606 (1970).

⁸² *Id.*

⁸³ There is no compulsory process in proceedings before the ABCMR. *See generally* AR 15-185.

⁸⁴ *Hayes v. Secretary of Defense*, 515 F.2d 668, 675 (D.C. Cir. 1975); *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

broad equitable powers in the type of correction it can make and effectuate through a grant of affirmative relief based on such correction. The Privacy Act offers limited, technical correction. It provides a means whereby an individual may seek a physical change to the fact of his records. The Act offers a strong preventive type of relief in that it allows the individual a method to ensure the quality of his records before a determination is made thereon. The ABCMR may correct records that contain errors or injustice while the Privacy Act offers amendment only for records that are inaccurate, irrelevant, incomplete or untimely. While these standards may be largely coextensive, the Privacy Act may not be used to amend judgmental matters and certain other types of records. The ABCMR is not so limited.

The Army has carefully delineated the role of the ABCMR and the Privacy Act in the amendment of military records. Where the individual requests a physical change to his records based upon the quality thereof, with certain limitations, the Privacy Act is the proper means of amendment. In all other types of correction, traditional methods of correction must be used. The net result is that the ABCMR retains its role at the apex of all amendment and correction procedures as the Army's "court of last resort" with authority to grant correction even after denied pursuant to the Act.

THE LAW OF UNILATERAL HUMANITARIAN INTERVENTION BY ARMED FORCE: A LEGAL SURVEY*

Captain Thomas E. Behuniak**

Humanitarian intervention is the use of force by a State to protect the inhabitants of another State from mistreatment. Captain Behuniak reviews past and present law governing such action, using as a historical dividing line the coining of the United Nations Charter.

The author reviews various interventions of the nineteenth and early twentieth century. He discusses the evolution of the traditional doctrine of humanitarian intervention against that backdrop, and the norms of customary international law used in the past to determine the legality of a particular intervention.

Examined next are several recent conflicts. The author discusses the application of the Charter to these conflicts and the effect of the Charter on prior law. Consideration is given to the widely accepted argument that the Charter has replaced traditional law in this area, and that forcible intervention is entirely prohibited. The inadequacies of this view are discussed and alternatives are presented.

Captain Behuniak concludes that, in the absence of effective international enforcement machinery under the Charter, the traditional law necessarily remains viable. He recommends that the nations of the world accept a treaty which would resolve the problem.

* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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I. INTRODUCTION

Two major goals of the world community appear to be in conflict: that of peace and that of justice. The former objective is set forth in the provisions of the U.N. Charter which supposedly prohibit the use of force by States except in self-defense.¹ The latter goal is found in several Charter provisions and in various U.N. resolutions, declarations, and conventions relating to the recognition and protection of human rights.²

The basic question for lawyers is whether or not the law accords a priority to human rights protection over other norms of international conduct, including legal restraints on the use of armed force by States. This article surveys the law and practice of unilateral humanitarian intervention by armed force in an attempt to reach some conclusion as to the present state of the law in this area, and further, to set forth alternatives in some outstanding conflicts of opinion on the subject. This study will cover customary as well as post-U.N. Charter practice and doctrine.

Throughout this article, the term "unilateral" will be used to denote intervention by a single State (individual intervention) or by a group of States (collective intervention). Unilateral intervention is characterized by the absence of formal authorization by any international body and collective intervention by the noninstitutionalized nature of the group of states conducting the intervention.

"Humanitarian intervention" has been defined as "[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and consistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice."³ The primary purpose of the doctrine of humanitarian intervention was the protection of individuals and groups of individuals against their own States, or even against the nationals of a third State.⁴ The doctrine goes well beyond the institution of the protection of nationals abroad,⁵ a traditionally

¹ U.N. CHARTER art. 2, para. 4, and art. 51.

² *Id.*, art. 1, paras. 1, 2, and 3; art. 13, para. 1(b); arts. 55, 56, 62, 68, 73 and 76. For documentation of U.N. resolutions, declarations and conventions in this area see L. SOHN, INTERNATIONAL PROTECTION OF HUMAN RIGHTS, CASES AND MATERIALS: BASIC DOCUMENTS (1973).

³ E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 348 (1931).

⁴ Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 333 (1967).

⁵ Traditional international law has recognized the right of a state to employ its armed forces for the protection of the lives and property of its nationals abroad in situations where the state of

recognized measure of self-help based upon the inherent right of self-defense,⁶ in that invocation of the doctrine of humanitarian intervention did not depend upon a link between the injured individuals and the intervening State.’

For purposes of this article, the term “intervention” is defined as “the dictatorial interference by a State or group of States in the affairs of another State for the purposes of maintaining or altering the actual conditions for things” therein.⁸ While the term “dictatorial” does not necessarily require the actual use or threat of force for an interference to be considered an intervention,⁹ this study will focus primarily on armed intervention.

II. PRE-CHARTER PRECEDENTS

The leading instances of unilateral humanitarian intervention, reflecting world community expectations concerning its lawfulness, are considered in two periods: (1) the cumulative practice before the framing of the U.N. Charter; and (2) the practice subsequent to the Charter.

Grotius traced the practice of humanitarian intervention to ancient times.¹⁰ However, modern practice has been charted from the 19th Century. In addition, the analysis of modern pre-Charter practice focuses on the notorious cases in Eastern Europe because of their seemingly genuine humanitarian motives and highly coercive character.¹¹

their residence, because of revolutionary disturbances or other reasons, is unable or unwilling to grant them the protection to which they are entitled.

P. JESSUP, *A MODERN LAW OF NATIONS* 169 (1949).

⁶ A noted scholar observes that the protection of nationals is an integral part of the more general right of self-defense and further that this view

receives support both from the writings of jurists in which the interest of a state in the safety of its nationals is identified with the state's interest in its own security, and from the identity of the conditions imposed upon the exercise of the right of self-defense in general.

Bowett, *The Use of Force in the Protection of Nationals*, 43 *TRANSACTIONS OF THE GROTIUS SOC'Y* 116 (1957). See also *infra* notes 98, 99 & 100 and text at notes 149–153.

⁷ Lillich, *supra* note 4, at 333.

⁸ L. OPPENHEIM, *INTERNATIONAL LAW* 305 (8th ed. H. Lauterpacht 1955).

⁹ M. GANJI, *PROTECTION OF HUMAN RIGHTS* 14–15 (1962).

¹⁰ H. GROTIUS, *THE RIGHT OF WAR AND PEACE* 285–89 (1901). See also G. MOORE, *DIGEST OF INTERNATIONAL LAW* 211 (1906).

¹¹ Fonteyne, *The Customary International Law Doctrine Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 *CALIF. W. INT'L L.J.* 205–207 (Spring 1974).

A. THE GREEK INTERVENTION OF 1829¹²

As a result of numerous massacres perpetrated in prior years by the Porte, France, Great Britain and Russia concluded the Treaty of London on 6 July 1827. In this Treaty, they agreed unilaterally to combine their efforts to put an end to the appalling treatment suffered by the Greeks at the hands of the Porte and proposed a limited local autonomy for the region within the Ottoman Empire.¹³ The Turkish government rejected the London proposal, insisting that the case was a matter of domestic jurisdiction.¹⁴

With no alternative, the three major powers conducted an armed intervention in Greece, which resulted in the acceptance by the Porte of the provisions of the 1827 London Treaty on 14 September 1829, and in the independence of Greece in 1830.¹⁵ In the London Treaty, the major powers themselves indicated that their action was dictated "no less by sentiments of humanity, than by interest for the tranquility of Europe,"¹⁶ thus invoking, for the first time in history, humanitarian concern as a justification for intervention.¹⁷ It has been stated that "the vast majority of scholars have appraised this intervention as a lawful action, based as it was on exigent humanitarian considerations."¹⁸

B. THE SYRIAN INTERVENTIONS OF 1860

Following the massacre of thousands of Christians in Syria by the local Moslem population with the complicity of the Turkish authorities, Austria, France, Great Britain, Prussia and Russia met with Turkey at the Conference of Paris in 1860.¹⁹ The Conference produced a protocol authorizing France, on behalf of the powers, to intervene militarily in Syria to restore order. Six thousand French troops were dispatched to Syria, and on 5 October 1860, an International Commission consisting of the six powers was created to investigate the nature and extent of the problem. This Commission adopted a set of rules regulating French presence in Syria and

¹² The European cases are treated in detail in M. GANJI, *supra* note 9.

¹³ 14 BRITISH AND FOREIGN STATE PAPERS 633 (1827) [hereinafter cited as B.F.S.P.].

¹⁴ *Id.* at 1045.

¹⁵ 16 *id.* at 647.

¹⁶ 14 *id.* at 333.

¹⁷ Fonteyne, *supra* note 11, at 208.

¹⁸ See Reisman, *Humanitarian Intervention to Protect The Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 180 (R. Lillich, ed. 1973).

¹⁹ 51 B.F.S.P. 293.

drafted a new constitution for the Lebanese region, which provided for a Christian governor who was responsible to the Porte. Thereafter, the French force, having completed its mission, withdrew in 1861.²⁰

Although the Sultan was a formal party to the Syrian intervention through adherence to the protocol of Paris, his participation and consent were less than voluntary. It is clear that Turkey assented to the French expedition "only through constraint and a desire to avoid worse."²¹ The constraint was deemed lawful by virtue of the humanitarian considerations of the case. Moreover, the disinterestedness of the powers was clearly written into the Paris Protocol.²² This case has been viewed by most scholars as one of lawful humanitarian intervention.²³

C. INTERVENTION IN BOSNIA, HERZEGOVINA AND BULGARIA (1876-1878)

Following harsh Turkish treatment of the Christian populations in these countries in breach of obligations assumed by the powers, and a formal declaration of war in June 1876 by Serbia and Montenegro against the Porte in support of the oppressed people, Austria-Hungary, France, Germany, Great Britain, Italy and Russia insisted upon a conference with Turkey at Constantinople.²⁴ When the Porte refused to agree to the establishment of an International Commission to control the implementation of reforms they proposed to carry out in the Balkan area, Austria-Hungary, France, Germany, Great Britain, Italy, and Russia met separately and agreed upon the London Protocol of March 1877. In this Protocol, the European powers reaffirmed their concern for the oppressed people in the Balkans and declared their intention to oversee the fulfillment of the reform promised by the Porte in the 1856 Treaty of Paris. They also reserved to themselves a right of action should the Porte fail to maintain the minimum conditions demanded in Bosnia, Herzegovina and Bulgaria.²⁵

After rejection of the Protocol by Turkey on the grounds of domestic jurisdiction in general, and of the restrictive terms of Ar-

²⁰ *Id.* at 288-92.

²¹ See E. STOWELL, *supra* note 3, at 66.

²² 51 B.F.S.P. 279.

²³ See Fonteyne, *supra* note 11, at 209; Reisman, *supra* note 18, at 181.

²⁴ 68 B.F.S.P. 823

²⁵ *Id.* at 824.

ticle IX, paragraph 2, of the 1856 Treaty of Paris in particular,²⁶ Russia declared war on Turkey. The other major powers declared their neutrality, and, on 19 February 1878, the war came to an end with the signing of the Treaty of San Stefano.²⁷

Following negotiations between the European powers and Turkey at the Congress of Berlin, the 1878 Treaty of Berlin was adopted. It provided for limited local autonomy of a Christian government under Turkish suzerainty in Bulgaria, and for the occupation of Bosnia and Herzegovina by Austria-Hungary. It further reaffirmed the independence of Montenegro, Rumania, and Serbia, and imposed specific obligations regarding religious and racial nondiscrimination on Turkey, both in the Empire itself and in the autonomous region of Bulgaria.²⁸

While the declarations of war by Serbia and Montenegro were officially justified by humanitarian solidarity with the oppressed populations in neighboring countries, the demands by the European powers and the war waged by Russia were based on an invocation of Article IX of the 1856 Treaty of Paris. It is argued though that the provision so invoked could not provide a valid ground for armed intervention.²⁹ Nevertheless, it seems that the case can be justified by the overriding humanitarian concerns of the major European powers.

As indicated by Professor Reisman,³⁰ this case also points out the inherent risks in permitting humanitarian intervention. Here, there was a lack of inclusive supervision in implementation. This, in turn, facilitated abuse by one of the intervening powers, Russia, and only partial relief for the victims of the oppression.³¹ Thus, the case clearly illustrates the need for substantive and procedural controls upon an armed humanitarian intervention so as to anticipate and prevent the possibility of abuse as well as to insure the maximum fulfillment of humanitarian objectives.

D. THE MACEDONIAN INTERVENTION

After several serious insurrections in Macedonia beginning in 1893 and in response to the atrocities committed by Turkish troops upon the civilian population, whereby scores of villages were de-

²⁶ *Id.*

²⁷ 69 B.F.S.P. 749.

²⁸ *Id.* at 653.

²⁹ See Fonteyne, *supra* note 11, at 209 and 212.

³⁰ Reisman, *supra* note 18.

³¹ Fonteyne, *supra* note 11, at 212; Reisman, *supra* note 18, at 182

stroyed with a considerable loss of life, Austria-Hungary and Russia, acting on behalf of the Concert of Europe, demanded that the Porte provide in various ways for future protection for the Macedonian people, and that taxes be remitted for a year by way of reparation for the loss and destruction suffered by the local population.³²

The Porte assented to the demands but a subsequent revolution in Turkey led to new atrocities in Macedonia, part of the basis for the declaration of war on Turkey by Greece, Bulgaria and Serbia.³³ In May 1913, after some seven months of fighting, the war ended with the signing of the 1913 Treaty of London, wherein Turkey ceded the greater part of Macedonia for partition among the Balkan allies.

Although the Balkan allies were not able to invoke treaty commitments of the 1878 Berlin Treaty (since they were only subjects of and not parties to the Treaty), it is significant that they did not hesitate to resort to armed force. They justified their action on grounds of humanitarian concern for the continuing atrocities that were being inflicted upon the Macedonian population.³⁴

E. UNITED STATES INTERVENTION IN CUBA

Following the rebellion of the Cubans against Spanish rule, the President of the United States of America reserved to the United States the right of humanitarian intervention.³⁵ Soon thereafter, a joint resolution of Congress authorized an armed intervention in Cuba for altruistic motives.³⁶ After Spanish forces were defeated, a general election was held on the Island under United States authority, a constitutional convention was convened and, within two years, the Republic of Cuba was established.³⁷

³² M. GANJI, *supra* note 9, at 36-7.

³³ *Id.* at 37.

³⁴ 106 B.F.S.P. 1059-60.

³⁵ G. MOORE, *supra* note 10, at 222. President McKinley declared:

If it shall hereafter appear to be a duty imposed by our obligations to ourselves, to civilization and humanity to intervene with force, it shall be without fault on our part and only because the necessity for such action will be so clear as to command the support and approval of the civilized world.

[1898] FOREIGN REL. U.S. 759.

³⁶ The Joint Resolution stated, in part: "The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people." G. MOORE, *supra* note 10, at 244.

³⁷ *Id.* at 236-39.

F. NOTE ON LEAGUE OF NATIONS PRACTICE

It has been submitted that many of the policies of humanitarian intervention were institutionalized by the League in minority treaties and specific third-party procedures for the resolution of disputes. These treaties and procedures created expectations about the lawfulness of, and additional support for, protecting human rights.³⁸

III. TRADITIONAL DOCTRINE

Grotius believed in general that a sovereign was entitled to intervene in the internal affairs of another State and lend lawful assistance to individuals struggling against tyranny.³⁹ Vattel, while seeming somewhat contradictory in his comments on the subject,⁴⁰ stated that "If the prince, attacking the fundamental laws, gives his people a legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested its assistance."⁴¹

In the middle of the 19th Century, the rising of the opposing values of nationalism, sovereign independence and nonintervention on the one side, and humanitarianism on the other side, influenced thought on the subject to the extent that a natural schism developed between the proponents of an expanded norm of nonintervention and those favoring a more flexible rule permitting intervention in certain limited circumstances.

The former position is exemplified in the following observation:

This [humanitarian] intervention is illegal because it constitutes

³⁸ J. STONE, *GUARANTEES OF MINORITY RIGHTS* (1932); H. CALDERWOOD, *THE PROTECTION OF MINORITIES* (1931).

³⁹ Grotius states:

There is also another question whether a war for the subjects of another be just. for the purpose of defending them from injuries by their rulers. Certainly it is undoubted that ever since civil societies were formed. the ruler of each claimed some special rights over his own subjects . . . But if a tyrant . . . practises atrocities toward his subjects. which no just man can approve. the right of human social connexion is not cut off in such case.

2 H. GROTIUS, *OF WAR AND PEACE* 438 (Whewell transl. 1853).

⁴⁰ Vattel first observes:

The sovereign is the one to whom the Nation has entrusted the empire and the care of government; it has endowed him with his rights; it alone is directly interested in the manner in which the leader it has chosen for itself uses his power. No foreign power, accordingly, is entitled to take notice of the administration by that sovereign, to stand up in judgment of his conduct and to force him to alter it in any way. If he buries his subjects under taxes, if he treats them harshly, it is the Nation's business: no one else is called upon to admonish him, to force him to apply wiser and more equitable principles.

2 E. DE VATTEL, *LE DROIT DES GENS* § 55 (Pradier-Fodiere ed. 1863).

⁴¹ *Id.*, at § 56.

an infringement upon the independence of States, because the powers that are not directly immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity, however condemnable they may be, so long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no state can stand up in judgment of conduct of others. As long as they do not infringe upon the rights of the other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed.⁴²

More commonly, however, a substantial number of scholars took a two-tier position on the subject by refusing to give formal recognition to humanitarian motives as a legally justified basis for intervention, but recognizing that a breach of the principle of nonintervention, though technically a violation of the law of nations, might in certain cases be not only excusable but commendable. For example, it was argued that, "intervention is a question rather of policy than of law and when wisely and equitably handled . . . may be the higher policy of justice and humanity."⁴³

Another position taken by some writers during this period was to accept a restricted right of humanitarian intervention. Its lawful application was limited either to very specific circumstances or to situations involving certain categories of States. For example, where a racial factor dominates and transcends a systematic and grievous maltreatment of subjects by a sovereign, unilateral armed intervention was legally justified.⁴⁴ Also, intervention by "civilized nations" in the affairs of "noncivilized nations" was considered to be lawful when Christian populations in the latter countries were exposed to persecution or were massacred. In such cases, intervention was justified by common religious interests as well as humanitarian motives. These motives, though, had no application in the relations between civilized nations.⁴⁵ Similar views, but without the religious connotations, were likewise held by other jurists of this period.⁴⁶

By the second half of the 19th Century, writers were increasingly

⁴² P. PRADIER-FODERE, *TRAITE DE DROIT INTERNATIONAL EUROPEEN ET AMERICAIN* 663 (1883) cited and quoted in Fonteyne, *supra* note 11, at 216. For further views in support of this position *see id.*, at 215-17, and the authorities cited therein.

⁴³ V. HARCOURT, *LETTERS ON SOME QUESTIONS OF INTERNATIONAL LAW* 14 (1863).

⁴⁴ E. CREASY, *FIRST PLATFORM OF INTERNATIONAL LAW* 303-05 (1876).

⁴⁵ I F. DE MARTENS, *TRAITE DE DROIT INTERNATIONAL* 398 (Leo transl. 1883).

⁴⁶ See E. STOWELL, *supra* note 3, at 65.

accepting the idea of the lawfulness of the institution.⁴⁷ In commenting on the U.S. intervention in Cuba, one scholar stated: "Whereas it is true that States are sovereign, sovereignty has its limits in international law in the fundamental rights of humanity."⁴⁸

By the turn of the 20th Century, the principle of unilateral armed humanitarian intervention had won wide acceptance over the rigid doctrine of nonintervention.⁴⁹ The precedents set by State practice primarily in Eastern Europe, and the refusal of a great many scholars to allot to State sovereignty the character of an absolute principle, were most influential in the development and acceptance of the institution.⁵⁰ The principle of nonintervention thus became flexible in character and could lawfully be disregarded for the protection of higher human values in certain limited situations.

Prior to the First World War, only a few scholars continued to reject the validity of the doctrine of humanitarian intervention. This small minority did so on the basis of doubt as to whether the theory could successfully be incorporated into the generally accepted body of customary international law, rather than because of fundamental philosophical, ideological or political beliefs regarding absolute sovereignty and nonintervention.⁵¹ They seemed troubled by the alleged contradiction between these basic ideas and their deep personal humanitarian feelings. One scholar attempted to reconcile this difficulty by stressing the difference between law and policy, giving the latter priority in exceptional circumstances in order to put an end to "barbarous and abominable cruelty."⁵² Another tried to circumvent the problem by requiring a transnational racial nexus between the intervenor and the victims.⁵³

Between the First World War and the creation of the U.N. Charter the dichotomy still persisted, with scholars such as Stowell,⁵⁴ Mandelstam,⁵⁵ and Mosler⁵⁶ asserting that the theory of human-

⁴⁷ See H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 113 (8th ed. 1866); T. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 73 (1876).

⁴⁸ See MOORE, *supra* note 10, at 211.

⁴⁹ Mandelstam, *The Protection of Minorities*, I. RECUEIL DES COURS 367, 391 (1923).

⁵⁰ Rougier, *The Theory of Humanitarian Intervention*, 17 REV. GEN. DR. INT'L PUBL. 480-89 (1910) [hereinafter cited as Rougier].

⁵¹ H. HODGES, *THE DOCTRINE OF INTERVENTION* 87-91 (1915).

⁵² T. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 129 (4th ed. 1910).

⁵³ Hyde, *Intervention in Theory and Practice*, 6 ILL. L. REV. 1, 6 (1911).

⁵⁴ See Stowell, *supra* note 3, at 52.

⁵⁵ See Mandelstam, *supra* note 49.

⁵⁶ H. MOSLER, *DIE INTERVENTION IM VOLKERRECHT* 63 (1938), cited in Fonteyne, *supra* note 11, at 218.

itarian intervention has been incorporated into customary international law. Others, like Roxburgh,⁵⁷ Higgins,⁵⁸ and Winfield,⁵⁹ expressed doubts as to whether this incorporation had taken place. Nevertheless, the vast majority of scholars seemed to believe that the doctrine had become so clearly established under customary international law that most criticism had come to be directed toward the fact that the right to use unilateral humanitarian intervention was not exercised enough.⁶⁰

IV. CUSTOMARY NORMS FOR APPRAISAL OF LEGALITY

While focusing on the philosophical, ideological and political foundations of their respective positions regarding the principle of unilateral humanitarian intervention, the 19th and early 20th Century scholars generally failed to supplement their choice with a comprehensive set of standards for decision-making or evaluation of actual cases. Some loosely articulated criteria were developed by some scholars.⁶¹ These included a preference for collective action,⁶² the insistence on disinterestedness of the intervenor,⁶³ and a restriction of the applicability of the doctrine to certain situations, such as "civilized" versus "noncivilized" nations,⁶⁴ rebellion against tyranny,⁶⁵ extreme atrocities,⁶⁶ and deprivations of specific fundamental human rights.⁶⁷

However, it appears that the only comprehensive list of criteria developed during this period was set out in 1910 by Rougier.⁶⁸ In this work, the author rejects the legality of individual intervention and opts instead for collective action on various policy and legal

⁵⁷ I. OPPENHEIM, INTERNATIONAL LAW 229 (3d ed. R. Roxburgh 1920).

⁵⁸ W. HALL, A TREATISE ON INTERNATIONAL LAW 344 (8th ed. P. Higgins 1924).

⁵⁹ Winfield, *The Sounds of Intervention In International Law*, 5 BRIT. Y.B. INT'L L. 149, 161-62 (1924).

⁶⁰ Stowell, Comment, 35 AMER. SOC'Y INT'L L. PROC. 66 (1941). See also De-Schutter, Humanitarian Intervention: A United Nations Task, 3 CALIF. W. INT'L L. J. 23-26 (Dec. 1972); R. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 326-334 (1967); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. REV. 207-210 (1969).

⁶¹ See Fonteyne, *supra* note 11, at 220-21.

⁶² S. AMOS, POLITICAL AND LEGAL REMEDIES FOR WAR 159 (1880).

⁶³ *Id.*

⁶⁴ Stowell, *supra* note 3, at 65.

⁶⁵ CREASY, *supra* note 44, at 303, 305.

⁶⁶ HALL, *supra* note 58, at 344.

⁶⁷ I. P. FAUCILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 570 (8th ed. 1922).

⁶⁸ Rougier, *supra* note 50, at 497-525.

grounds.⁶⁹ Continuing, he points out that the scholars only required “collegiality” in order to insure among the intervenors two conditions, i.e., disinterestedness and the widest possible authority. Rougier concludes that the disinterestedness and the authority of the intervening States, and not necessarily the number of the intervenors, provide legitimacy for humanitarian intervention.⁷⁰ Noting that these two basic requirements are, in general, fulfilled in the case of collective intervention, and further noting that these requirements are not necessarily controlling in any given case, he formulates his own theory, “the system of disinterested and authorized intervention.”⁷¹

Rougier begins by acknowledging the de facto inequality of States and refuses to ascribe to the traditional principle of equality the character of a fundamental right of every state.⁷² He then claims that “the law can only acknowledge the natural hierarchy of power, moral authority or civilization that occurs between nations,” and that “protection of the collective interests requires the existence of rulers and ruled.”⁷³

He concludes after considering the actual power distribution in the world that certain States, such as the United States, as exemplified by the Monroe Doctrine, and the major powers in Europe, as developed in almost a century of State practice, assume control of the direction of general affairs and acquire over others a legitimate authority.⁷⁴ Provided their actions are disinterested in that they tend to “ensure respect for the general rule of law and not to pursue the realization of an individual advantage,” this authority, he argues, will allow these States to lawfully intervene in their capacity as guardians and defenders of humanitarian law whenever it is violated in another state.⁷⁵

The author then lists three substantive requirements for legality: “(1) that the event which motivates intervention be an action of the public authorities, and not merely of private individuals; (2) that this action constitutes a violation of the law of humanity and not merely a violation of national positive law; and (3) that the intervention fulfills certain requirements.”⁷⁶

⁶⁹ *Id.* at 498–501.

⁷⁰ *Id.* at 502.

⁷¹ *Id.*

⁷² *Id.* at 504.

⁷³ *Id.*

⁷⁴ *Id.* at 506–07.

⁷⁵ *Id.* at 502.

⁷⁶ *Id.* at 512.

Regarding the first condition, the author states:

The fault of the government can consist either of a positive action, or of an abstention. In the former case, the tyrannical measures are carried out or ordered by the very agencies of the State, with whom the sovereign rests, or by agents of the public service . . . In the later case, the abuses are committed by private individuals, but they are tolerated by the government whereas it had the duty and the capability of preventing them.⁷⁷

Regarding the second requirement, the author distinguishes between human rights, which the individual “possesses in capacity as man even before his membership of a political society, and which he could continue to possess if he ceased to be a member of such society . . . ,”⁷⁸ and citizen rights, which the individual has because of his membership in a political society.⁷⁹ Only the former, he submits, could, if infringed upon, provide a sufficient ground for intervention.⁸⁰ These rights, he concludes, only include the right of life, freedom and justice.⁸¹

Regarding the third condition, he mentions as factors relevant for this process “the extent of the scandal,” “a pressing appeal from the victims,” “the very constitution of the guilty State,” and “certain favorable conditions relating to the political balance, economic rivalries and the financial interests of the intervenors.”⁸²

V. CONCLUSION AS TO CUSTOMARY LAW

The above survey demonstrates that while there has never been complete agreement regarding the assimilation of the doctrine of humanitarian intervention into customary international law, there has at least been some consistency in views on the subject since the latter part of the nineteenth century. Lauterpacht has often been quoted as stating:

A substantial body of opinions and practice is in support of the view that there are limits to the discretion of States in the treatment of their own nationals and that when a State renders itself guilty of cruelties against and persecutions of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of

⁷⁷ *Id.* at 513.

⁷⁸ *Id.* at 516.

⁷⁹ *Id.*

⁸⁰ *Id.* at 517.

⁸¹ *Id.* at 514–21.

⁸² *Id.* at 524–25.

mankind, intervention in the interest of humanity is legally permissible.⁸³

While the extent of State practice necessary to create a rule of customary international law is debatable, and while one must further acknowledge that pre-Charter precedents are not numerous, it nevertheless seems clear that the major underlying concern of the intervening States in the cases discussed above was the oppressive conditions and inhuman treatment suffered by the non-Moslem populations at the hands of the Ottoman government. It also should be noted that, although the precedents are not numerous, armed intervention, by its nature, ramifications and consequences, lends itself to relatively infrequent use.

Customary international law is not created solely by State practice. The opinions of leading scholars also have a significant impact upon the development of legal norms.⁸⁴ It is certain that in the matter under consideration the majority opinion confirms the incorporation of the principle of unilateral humanitarian intervention by armed force in customary international law.

Some scholars, while seeming to acknowledge the existence of the doctrine of humanitarian intervention as a principle of customary international law, contend that the failure to invoke the doctrine in several situations prior to the advent of World War II, where it was genuinely demanded, provides sufficient basis for the conclusion that the principle has fallen into disuse and, consequently, has lost any relevance or validity in the twentieth century.⁸⁵ This writer submits that such an argument is highly questionable. International law does not appear to require constant and faultless utilization of a customary rule to avoid its abolition as such. If otherwise, then many rarely used but just doctrines of customary international law

⁸³ OPPENHEIM, *supra* note 8, at 312. *See also* H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 120 (1950).

⁸⁴ *See* I.C.J. STAT., art. 38, para. 1(d).

⁸⁵ The Thomases contend that:

Since under the theory that to protest to a government would be to intervene in the internal political systems which recognize terror as a legitimate method of government, the democracies failed (prior to the advent of WW II) to protest the Nazi persecutions in Germany, the Franco persecutions in Spain and the Russian persecutions in Russia and satellite countries . . . humanitarian intervention in the 20th Century . . . retains but little vigor.

ANN V. W. THOMAS & A. J. THOMAS JR., *NON-INTERVENTION* 373-74 (1965). *See also* I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 340-41 (1963). *Compare* Reisman, *supra* note 18, at 178, referring to the allied effort against the Axis powers in WW II as an extreme example of inclusive participation in forceful humanitarian intervention.

would have to be declared invalid for lack of sufficient application.⁸⁶

Regarding the question of customary norms for appraising the legality of an alleged case of humanitarian intervention, some widely accepted criteria can be found in writings on the subject. These criteria include: first, the relative disinterestedness of the intervenor; second, the restriction of the institution to grave cases of atrocity and breakdown of order; third, active or passive participation, or complicity in or condonation of the violations, by the target State; and fourth, a partiality for collective action.

In conclusion, differences of opinion do exist with respect to the circumstances in which unilateral humanitarian intervention by armed force may be effected, and further concerning the manner in which such action may be conducted. Nevertheless, it is substantiated that the doctrine is widely accepted as an integral part of customary international law. In this regard, it has been stated that "the doctrine of humanitarian intervention appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate."⁸⁷

VI. POST-CHARTER PRACTICE

Given the broad authority in the United Nations Charter regarding human rights matters and the specific pronouncements contained therein regarding the regulation of the use of force by States, the present legal validity of the customary doctrine of humanitarian intervention by armed force has been subject to considerable debate among contemporary scholars. The focus of their inquiry centers generally on and around the following question: In view of pertinent Charter provisions and other related documents, under what circumstances, if any, will a non-United Nations unilateral humanitarian intervention be deemed lawful?

The leading cases on this critical question are the Congo case, the Dominican intervention and the Bangladesh intervention. The Biafra situation also has been included by writers although armed intervention was not employed in this case.

A. THE CONGO INTERVENTION OF 1964

In the latter part of 1964, the rebels in the Congo seized

⁸⁶ See Fonteyne, *supra* note 11, at 234.

⁸⁷ INTERNATIONAL LAW ASSN., THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS BY GENERAL INTERNATIONAL LAW, INTERIM REPORT OF THE SUBCOMMITTEE, INTERNATIONAL COMMITTEE ON HUMAN RIGHTS 11 (1970).

thousands of nonbelligerents and held them as hostages for concessions from the central government. This seizure itself was contrary to international law. When rebel demands were not met, forty-five of the hostages were slaughtered and threats were made that the rest would be massacred.⁸⁸ A Belgian paratroop battalion, transported in American planes and through British facilities, was moved to the Ascension Islands. After further negotiations for the release of the hostages collapsed, the paratroopers were dropped in an emergency rescue operation in which two thousand persons were rescued in four days.⁸⁹

The mission was undertaken with the consent of the central Congo government, with the understanding that the troops would be withdrawn as soon as the operation was completed.⁹⁰ The intervenors complied with these conditions.⁹¹ However, the operation was attacked in the Security Council by several African States and, naturally, the Soviets. The charges raised were based on factual distortions, however, and are not relevant as precedent.⁹²

The claim of domestic jurisdiction was raised, also. However, the Africans were estopped from claiming the immunity of domestic jurisdiction in human rights matters in view of previous declarations made by them on this point before the United Nations.⁹³

Most significant was that those who objected to the operation did not raise as an issue the fact that the action was carried out by non-United Nations forces. Moreover, the action was not condemned by the Security Council and has been determined to be lawful by the vast majority of scholars who have examined the case.⁹⁴

B. THE DOMINICAN INTERVENTION OF 1965

An interim military junta, which had replaced the constitutional government in 1963, was challenged by a revolt in 1965. The United States landed a marine force to save the lives of foreign nationals within the Republic. However, after the nationals were removed, the U.S. forces stayed on, ostensibly to maintain order. Its action

⁸⁸ Lillich, *supra* note 4, at 338. See also 52 STATE DEP'T BULL. 18 (1964).

⁸⁹ Lillich, *supra* note 4, at 338.

⁹⁰ *Id.* at 348.

⁹¹ *Id.* at 342.

⁹² Nanda, *The United States Action In The Dominican Crisis: Impact on World Order*, 42 DEN. L. J. 439, 475-77 (1966).

⁹³ Reisman, *supra* note 18, at 186.

⁹⁴ Lillich, *supra* note 4, at 340.

was subsequently legitimized by the Organization of American States, which replaced the U.S. force with an O.A.S. force.⁹⁵

The difficulty with the intervention was that the U.S. remained after the foreign nationals had been evacuated. Most of the subsequent criticism was directed at this aspect of the operation.⁹⁶ It is significant that critics of this operation did not challenge the lawfulness of the intervention per se. Conceding that there was imminent danger to foreign nationals, these critics argued that the U.S. should not have remained after the initial humanitarian action was concluded.⁹⁷

Another difficulty stems from labeling the action as a humanitarian intervention. Although cited by some writers as an example of the doctrine's application in post-Charter practice,⁹⁸ others have downplayed the humanitarian intervention rationale and instead have justified the Dominican action on the basis of self-defense to protect nationals abroad,⁹⁹ a justification subsequently advanced for

⁹⁵ Factual accounts may be found in R. BARNET, *INTERVENTION AND REVOLUTION* 249-51 (1968); ANN V. W. THOMAS & A. J. THOMAS, JR., *THE DOMINICAN CRISIS* 1965 (1976); and Nanda, *supra* note 92.

⁹⁶ 53 STATE DEP'T BULL. 730-33, 760-64.

⁹⁷ See comments of Senators Clark, Morse and Fulbright in 111 CONG. REC. 23, 24, 27, 155, 858 (1965).

⁹⁸ See for example, Lillich, *supra* note 4, at 343-45 and footnotes therein.

⁹⁹ See for instance, ANN V. W. THOMAS & A. J. THOMAS, JR., *DOMINICAN CRISIS*, *supra* note 95, at 4; Nanda, *supra*, note 92 at 478-80; Meeker, *The Dominican Situation in the Perspective of International Law*, 53 DEP'T STATE BULL. 60-63 (1965); and Fenwick, *The Dominican Republic: Intervention or Collective Self-Defense*, 60 AM. J. INT'L L. 64 (1966).

The claim of self-defense to protect nationals has also been criticized. For instance, Professor Lillich argues that the claim is less satisfactory than the humanitarian intervention rationale for two reasons:

First, it would permit forcible self-help only where nationals of the acting state were the objects of protection: humanitarian intervention in its full scope would not be available under a self-defense rationale. Second, it undoubtedly would encourage the use of a greater degree of force by the acting state. In view of the magnitude of the response by the United States in Southeast Asia today, a response nevertheless compatible with article 51 of the United Nations Charter, it appears preferable, if one is looking for a theoretical justification of forcible self-help in human rights cases, to select a theory which requires the state exercising the right to use the barest minimum of force required by the particular situation.

Lillich, *supra* note 4, at 338.

On the other hand, Dr. Bowett, an advocate of the defense of nationals rationale, anticipated in part this criticism.

The fear which lies behind a refusal to recognize the defense of nationals abroad as within the concept of self-defence is that this recognition would permit large-scale intervention totally unrelated to the danger to which the nationals are exposed. This cannot be so if the requirement of proportionality is complied with, and this requirement is essentially part of the lawful exercise of a right of self-defence.

D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 105 (1958) [hereinafter cited as BOWETT].

For detailed discussion of the question whether the concept of self-defense in-

both the use of self-help by the United States in the Mayaguez incident of 1975,¹⁰⁰ and the Israeli raid on Entebbe in 1976.¹⁰¹

The Dominican case, no matter what conclusions are drawn about the entire operation, confirms the lawfulness of the principle of humanitarian intervention, and indicates further the conditions and limitations of the doctrine.¹⁰²

C. THE BANGLADESH INTERVENTION OF 1971

The transformation of Pakistan into two independent nations has a long history. Innumerable conflicts and periods of hostility between Moslems and Hindus have raked South Asia for centuries. In 1971, however, the elastic band holding together East and West Pakistan, which were separated by almost 1,000 miles, finally snapped.

cludes the defense of nationals abroad, particularly under post-Charter doctrine and practice. *see* I. BROWNLIE, *supra* note 85, at 255-56, 262, 265, 289, 294-97, 299-300, 345, 430 & 432-33; BOWETT, *supra* at 87-105; and Gordon, *Use of Force for the Protection of Nationals Abroad: The Enfebbe Incident*, 9 CASE W. RES. J. INT'L L. 117, 118-27.

Under the self-defense rationale Dr. Bowett equates the defense of nationals with the defense of the state itself.

It has been contended that an injury to the nationals of a state constitutes an injury to the state itself, and that the protection of nationals is an essential function of the state. On this reasoning, it is feasible to argue that the defence of nationals, whether within or without the territorial jurisdiction of the State, is in effect the defence of the state itself

BOWETT, *supra* at 92. *But see* BROWNLIE, *supra* note 85 at 429.

¹⁰⁰ Following the seizure on May 12, 1975, by Cambodian forces of the American merchant ship S.S. Mayaguez with a crew of 40 aboard, and the failure of diplomatic efforts to obtain the release of the ship and crew, President Ford ordered U.S. military forces to board the illegally seized ship and land on a Cambodian island for the purpose of rescuing the crew and the ship, and to conduct supporting strikes against nearby Cambodian military installations. 1975 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 777-83. For a detailed legal analysis of U.S. claims, *see* Behuniak, *The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of U.S. Claims* (unpublished LL.M. thesis, National Law Center, The George Washington University, Washington, D.C.) (December 1976). An excellent factual account of the case is contained in R. ROWAN, *THE FOUR DAYS OF THE MAYAGUEZ* (1975).

¹⁰¹ On June 27, 1976, an Air France jetliner with 256 passengers and a crew of 12, en route from Tel Aviv to Paris via Athens, was hijacked after taking off from Athens. After refueling in Libya, the hijackers, claiming to be members of the Popular Front for the Liberation of Palestine, ordered the plane to Entebbe Airport in Uganda, where it was given permission to land. The act of piracy ended 7 days later on July 4, 1976, with a successful Israeli airborne commando raid on Entebbe Airport freeing 105 hostages held by the hijackers. All of the 105 hostages were Israeli nationals or dual nationals. N.Y. Times, June 28, 1976, at 1, cols. 2-4 and July 4, 1976, at 1, cols. 7-8. For a legal analysis of the incident and the claim to use force to protect nationals abroad *see* Gordon, *supra* note 99.

¹⁰² Nanda, *supra* note 92, at 458.

In the election of December 1970, the Awami League won all but two of the National Assembly seats in East Pakistan, giving it an overall majority in the Pakistan Assembly.¹⁰³ The League had won the election on a program calling for provincial autonomy and self-rule in East Pakistan.¹⁰⁴ The President of Pakistan had proposed that a National Assembly meeting take place in Dacca on 3 March 1971 to draft a new constitution for Pakistan. However, a few days before the scheduled meeting, it was indefinitely postponed.¹⁰⁵ East Pakistan exhibited its indignation by exploding with protests, riots and demonstrations.¹⁰⁶ West Pakistan reacted by replacing East Pakistan governmental leaders with a government of martial law.¹⁰⁷ Despite this heavy control, Awami League supporters seized de facto control of East Bengal.¹⁰⁸ On 25 March, while negotiations were being conducted between the two opposing factions, the Pakistani Army moved into Dacca with little or no warning. In the days immediately following, tanks, rockets and other heavy weapons took a toll of a largely unarmed civilian population.¹⁰⁹ The Awami League was outlawed, and many of its leaders were arrested.

At the end of March, after 10,000 East Bengalis had been killed, the refugee movement to India began.¹¹⁰ Protests and accusations by both Pakistan and India also started at this time.¹¹¹ In April, a stronghold of East Bangali resistance leaders appeared along the India-Pakistan border,¹¹² and the refugee movement mushroomed into an endless nightmare for India. By the end of November, there were some nine million refugees in the State of West Bengal.¹¹³

While disease, scarcity of food and housing, and increasing costs caused by the mass flight of refugees were taking their toll on India's economy and political security,¹¹⁴ it seemed that Pakistan was

¹⁰³ Dunbar, *Pakistan: The Failure of Political Negotiations*, 12 *ASIAN SURVEY* 444 (1972).

¹⁰⁴ *Id.* at 446.

¹⁰⁵ N.Y. Times, Mar. 2, 1971, § 1, at 1, col. 7.

¹⁰⁶ N.Y. Times, Mar. 3, 1971, § 1, at 7, col. 1.

¹⁰⁷ *Id.*

¹⁰⁸ N.Y. Times, Mar. 10, 1971, § 1, at 1, col. 1.

¹⁰⁹ N.Y. Times, Mar. 27, 1971, § 1, at 1, col. 8; *id.*, March 28, 1971, § 1, at 1, col. 7-8; *id.*, Mar. 29, 1971, at 1, cols. 5, 8; *id.*, Mar. 30, 1971, at 1, col. 1.

¹¹⁰ Nanda *The Tragic Tale of Two Cities—Islamabad (West Pakistan) & Dacca (East Pakistan)*, 66 *AM. J. INT'L L.* 321-23 (1972).

¹¹¹ N.Y. Times, Mar. 27, 1971, § 3, at 3, col. 5; *id.*, Mar. 29, 1971, at 1, col. 8; *id.*, Mar. 31, 1971, at 2, col. 6; *id.*, Apr. 1, 1971, at 1, col. 6.

¹¹² N.Y. Times, Apr. 6, 1971, § 1, at 5, col. 1.

¹¹³ N.Y. Times, Nov. 21, 1971, § 1, at 7, col. 1.

¹¹⁴ N.Y. Times, June 1, 1971, at 14, col. 3; *id.*, Sept. 30, 1971, at 3, col. 1; *id.*, Nov. 21, 1971, § 1, at 7, col. 1.

violating minimal standards of human rights in East Bengal by massacring unarmed civilians, destroying villages, raping women, torturing and intimidating prisoners, taking and killing hostages, conducting frequent executions without trial and failing to tend to the sick and wounded.¹¹⁵ As the violence spread in East Pakistan and in view of the intrusion of refugees into India, the Indian government adopted a policy whose impact was decisive on the events in East Pakistan. From April through November 1971, India provided direct and indirect assistance to the insurgents. This included increased military assistance which finally led to frontier incidents and engagements between Indian and Pakistani troops.¹¹⁶

Finally, on 3 December, as a result of a Pakistani air attack on Indian air bases hundreds of miles from the frontier, India conducted an armed intervention in East Pakistan, which led to the surrender of Pakistani forces therein, the release of political prisoners, the return of refugees, the creation of Bangladesh and the termination of widespread deprivation of human rights in East Bengal.”

During the crisis, the U.N. and its peacekeeping machinery floundered badly, unable to take any effective action to bring to an end the gross violations of human rights in East Pakistan.¹¹⁸

Although the validity of India's armed intervention has been the subject of substantial debate in recent years,¹¹⁹ the majority of writers take a position somewhat similar to the following viewpoint of the East Pakistan Staff Study:

In our view the circumstances were wholly exceptional; it was becoming more and more urgent to find a solution, both for humanitarian reasons and because the refugee burden which India was bearing had become intolerable with no solution in sight. Events having been allowed to reach this point, it is difficult to see what other choice India could have made.

¹¹⁵ East Pakistan Staff Study, *THE REVIEW*, INTERNATIONAL COMMITTEE OF JURISTS, No. 8, 1972, at 31, 33, 38, 58, 59, 62 [hereinafter cited as *THE REVIEW*].

¹¹⁶ *Id.* at 53.

¹¹⁷ *Id.* at 53, 56; Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 *AM. J. INT'L L.* 275 (1973); Williams, *Defining "Aggression" in Light of the India-Pakistan Conflict of 1971*, 18 *ST. LOUIS U. L. J.* 134-35 (1973).

¹¹⁸ *Id.* at 135-37; *THE REVIEW*, *supra* note 115, at 62.

¹¹⁹ See Williams, *supra* note 117, at 129; Franck & Rodley, *supra* note 117, at 275; DeSchutter, *Humanitarian Intervention: A United Nations Task*, 3 *CALIF. W. INT'L L.J.* 21 (Dec. 1972). See generally Fonteyne, *Forcible Self-Help to Protect Human Rights: Recent Views From The U.N.*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197-222* (Lillich ed. 1973) [hereinafter cited as *U.N. Views on Self-Help*].

It must be emphasized that humanitarian intervention is not the ground of justification which India has herself put forward. As we have seen, India claims to have acted first in self-defense, and secondly, in giving support to the new government of Bangladesh which she recognized when the hostilities began. We have given our reasons for not accepting the validity of these claims. If India had wished to justify her action on the principle of humanitarian intervention she should have first made a preemptory demand to Pakistan insisting that positive action be taken to rectify the violations of human rights. As far as we are aware no such demand was made.

In conclusion, therefore, we consider that India's armed intervention would have been justified if she had acted under the doctrine of humanitarian intervention, and further that India would have been entitled to act unilaterally under this doctrine in view of the growing and intolerable burden which the refugees were casting upon India and in view of the inability of international organizations to take any effective action to bring to an end the massive violations of human rights in East Pakistan which were causing the flow of refugees. We also consider that the degree of force used was no greater than was necessary in order to bring to an end these violations of human rights.¹²⁰

D. THE BIAFRA CASE

Starvation, lack of medical care, and various other types of human suffering were predominant in the Biafran secession movement. After the massacre of Ibo tribe members which the central government of Nigeria was unable to prevent, the Ibo tribe revolted and sought the establishment of a separate Biafran Republic in the eastern region of Nigeria. The central government opposed the insurrection, and, as a consequence, a bloody war was fought primarily in the Biafran region. Several millions of the Ibo population and most of the Biafran forces¹²¹ were completely encircled. There was an enormous shortage of food and medicine, and nonbelligerents suffered extreme starvation, epidemics and death.

Efforts by several nongovernmental organizations and ad hoc groups to deliver vital food and other supplies to the beleaguered civilian population were thwarted by military and political obstacles created by the Nigerian government. As a result, death and destruction in Biafra reached outrageous and shocking proportions.¹²¹

Professor Lillich has called the Biafran case "one that would have been ideal for collective humanitarian intervention of the nineteenth

¹²⁰ THE REVIEW, *supra* note 115, at 62.

¹²¹ Reisman, *supra* note 18, at 167-68; De Schutter, *supra* note 119, at 22.

century type.”¹²² Nevertheless the U.N., true to its form, was unable to act effectively in the conflict to prevent such a widespread man-made disaster. The Organization of African Unity, except for occasional lip service, also made no genuine effort to alleviate the plight of the Ibos.¹²³ As Professor Lillich further observed:

Apparently Articles 2(4) and 2(7) [of the U.N. Charter] are being used as handy excuses by all states . . . who wish to avoid becoming involved. The Biafran tragedy differs from the Congo and Dominican situations only in the fact that nationals of the offending state alone are involved and not foreigners. Nevertheless, . . . the doctrine of humanitarian intervention seems to be designed perfectly for this situation and it should have been invoked long before now.¹²⁴

VII. CHARTER DOCTRINE

In the last two decades, the U.N. General Assembly has adopted several international human rights instruments which define human rights standards.¹²⁵ However, much remains to be done in creating the machinery for their implementation and enforcement.¹²⁶ The U.N. and regional organizations have been paralyzed by major power disagreements and the reluctance of developing States to accept any infringement upon the principles of sovereignty and nonintervention. Thus, these international organizations have been unable or unwilling to take any significant action in those cases where fundamental human rights have been endangered in large degree and number.¹²⁷ Biafra and Bangladesh are but two of the more recent examples of the ineffectiveness of international organizations in this area.

The difficulty of establishing and operating the machinery and procedures necessary for the effective implementation and enforcement of human rights lies in the strict construction placed on Charter provisions relating to the use of force and the traditional domestic jurisdiction limitation. Professor Lillich points out:

Two provisions make it very doubtful . . . whether forcible self-help

¹²² Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. REV. 216 (1969) [hereinafter cited as Lillich, *Intervention*].

¹²³ *Id.*

¹²⁴ *Id.* Also see Reisman, *supra* note 18, at 47.

¹²⁵ For the various human rights conventions adopted by the U.N. see DEL RUSSO, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS, Appendices (1971), and BASIC DOCUMENTS ON HUMAN RIGHTS (Brownlie ed. 1971).

¹²⁶ See Proclamation of Teheran, U.N. Doc. A/Conf. 32/41, Art. 4 (1968). See also McDougal & Behr, *Human Rights in the United Nations*, 58 AM. J. INT'L L. 603, 629 (1968).

¹²⁷ U.N. *Views on Self-Help*, *supra* note 119, at 205-06, 209-11, & 215-16.

to protect human rights is still permissible under international law. In the first place, all states by Article 2(4) renounce "the threat or use of force against the territorial integrity or political independence of any state," subject of course to the self-defense provision contained in Article 51. Secondly, Article 2(7) prevents intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any state," except for the application of enforcement measures under Chapter VII.¹²⁸

Explicit provision is not made for the principle of nonintervention in the Charter articles regarding inter-state relations.¹²⁹ While Article 2(4) specifically prohibits the threat or use of force between states except in Article 51 situations, Article 2(7) explicitly refers to relations between the U.N. and its members. Thus, although the U.N. is foreclosed from intervening in matters essentially within the domestic jurisdiction of any State, except in situations where there are threats to the peace, breaches of the peace, or acts of aggression,¹³⁰ Article 2(7) does not expressly affect relations between States. Despite this fact, it seems that the references in Article 1(2) of the Charter, and the interpretation given to the principle of nonintervention, both by pre-U.N. doctrine and by the U.N., clearly establish that the basic obligation of nonintervention in the domestic affairs of a State is equally applicable in inter-state relations.¹³¹

Notwithstanding the above, there is a significant amount of authority which substantiates the conclusion that the scope of domestic jurisdiction in human rights matters is narrowing, and further that the protection of fundamental human rights in situations involving grievous infractions or a consistent pattern of infringement are no longer essentially within the domestic jurisdiction of States.¹³² These conclusions are based on, first, the variety of activities in the human rights area undertaken by the U.N. and other international organizations or agencies, as exemplified by the host of conventions, declarations and resolutions which have been adopted on the subject in recent years;¹³³ second, the daily involvement of the U.N. and other international agencies with human

¹²⁸ Lillich, *supra* note 122, at 210-11.

¹²⁹ Lillich, *supra* note 4, at 330.

¹³⁰ See Ch. VII, U.N. CHARTER.

¹³¹ See Fonteyne, *supra* note 11, at 239.

¹³² Reisman, *supra* note 18, at 171, 189, 190-91; Wright, *Domestic Jurisdiction As a Limit On National and Supra-National Action*, 56 *Nw. U. L. REV.* 11 (1961).

¹³³ See BASIC DOCUMENTS ON HUMAN RIGHTS (Brownlie ed. 1971), and DEL RUSSO, *supra* note 124.

rights matters;¹³⁴ third, the position of both the Security Council and the General Assembly that Article 2(7) does not bar consideration by the U.N. of serious cases of human rights violations;¹³⁵ and fourth, the world community's concern with such extreme cases of denial of human rights as Biafra, South Africa and Bangladesh.¹³⁶

Domestic jurisdiction has been viewed as a relative concept, variable in character.¹³⁷ As such, it is increasingly felt by many that the world-wide concern over the manner in which people are treated by their own State, combined with the activities of the U.N. in the human rights area, clearly demonstrates that human rights have been removed from the exclusive jurisdiction of States and placed in the domain of international responsibility and concern.¹³⁸ Consequently, human rights have been determined to be beyond the reach of Article 2(7) in so far as U.N. or State action is concerned, even in cases not amounting to a threat to the peace.¹³⁹

As referred to earlier, the prohibition against the threat or use of force contained in Article 2(4) of the Charter has been interpreted to cover the entire spectrum of possible situations. Proponents of this view emphasize that the qualifying terms in the provision "against the territorial integrity or political independence of any state" and "in any other manner inconsistent with the Purposes of the United Nations" should not restrict the absolute scope of the prohibition.¹⁴⁰ The proponents conclude that Article 2(4) prohibits entirely any threat or use of force between States except in self-defense under Article 51 or in the execution of institutionalized measures under the Charter for maintaining or restoring peace.¹⁴¹

This position, which is the most widely accepted in the U.N. at the present time, views the Charter as generally divorced from the

¹³⁴ See generally J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970) and DEL RUSSO, *supra* note 125.

¹³⁵ U.N. Views On Self-Help, *supra* note 119, at 206-09.

¹³⁶ ANN V.W. THOMAS & A.J. THOMAS, JR., *supra* note 95, at 375; Lillich, *supra* note 4, at 338; and McDougal & Behr, *supra* note 126, at 612.

¹³⁷ M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 57 (1958).

¹³⁸ Reisman, *supra* note 18, at 177.

¹³⁹ *Id.* at 189, 190-91.

¹⁴⁰ See generally I. Brownlie, Thoughts on Kind-Hearted Gunmen, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139-48 (Lillich ed. 1973). See also I. BROWNIE, *supra* note 85, at 340-41; and ANN V. W. THOMAS & A. J. THOMAS, JR., *supra* note 85, at 384. Art. 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

¹⁴¹ Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 493 (1952).

pre-existing body of rules under customary international law.¹⁴² It has been argued that "if nations had wished to exclude humanitarian intervention from these prohibitions . . . they would have done so explicitly."¹⁴³ Proponents of this view, such as Dr. Brownlie, conclude, "It is extremely doubtful if this form of intervention has survived the express condemnations of intervention which have occurred in recent times or the general prohibition of resort to force to be found in the U.N. Charter."¹⁴⁴

On the other hand, an increasing number of scholars affirm the continuing validity of unilateral humanitarian intervention by armed force.¹⁴⁵ In taking this approach, these scholars confront the problem of the inability or unwillingness of both the U.N. and regional organizations to take any effective measures, save humanitarian relief action, to rectify even extreme cases of human rights violations other than those involving apartheid or racial discrimination but even then only in a colonial or neocolonial context.¹⁴⁶ The arguments set forth to justify unilateral humanitarian intervention are, however, not uniform.

One approach accepts the so-called "classic" view of the charter prohibition against the threat or use of force as essential in maintaining international peace and security through the elimination of all forceful action between States unless explicitly excepted by the Charter. At the same time these proponents recognize that, in view of such situations as those in Biafra and Bangladesh, the "classic" interpretation of the Charter prohibition is often an unworkable impediment upon unilateral State action in cases of extreme deprivation of the most fundamental of human rights.

Yet the proponents of this set of views are unwilling to depart from the "classic" position or to legalize fully the doctrine of humanitarian intervention as an additional, necessary, and implicit exception to the Charter prohibition on the use of force. Instead, they direct their arguments to the lack of formal condemnation or criti-

¹⁴² *U.N. Views on Self-Help*, *supra* note 119, at 209-11.

¹⁴³ ANN V. W. THOMAS & A. J. THOMAS, JR., *supra* note 85, at 22.

¹⁴⁴ I. BROWNLIE, *supra* note 85, at 342.

¹⁴⁵ For example, see Fonteyne, *supra* note 11, at 245-46; Lillich, *supra* note 4; Lillich, *Intervention*, *supra* note 122; Reisman, *supra* note 18; and generally the debates of the Charlottesville Conference on Humanitarian Intervention and the United Nations, reprinted in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 3-135 (Lillich ed. 1973) [hereinafter cited as DEBATES].

¹⁴⁶ Fonteyne, *supra* note 11, at 245-46. See also C. W. JENKS, A NEW WORLD OF LAW? 30 (1969) and Farer, *Humanitarian Intervention: The View from Charlottesville*, in DEBATES, *supra* note 145, at 149-64.

cism in the U.N. and other international fora in such situations as the Congo operation or India's intervention in Bangladesh.

They conclude, finally, that "in circumstances of extreme gravity, the world community, by its lack of adverse reaction, in practice condones conduct which, although a formal breach of positive legal norms, appears 'acceptable' because of higher motives of a moral, political, humanitarian, or other nature."¹⁴⁷ They argue that the resultant legal effect is that the lack of express condemnation in a given case would confer on such intervention a sub-legal or quasi-legal character.¹⁴⁸

The principal arguments advanced in support of this approach seem to be, first, fear that a fully legalized doctrine of humanitarian intervention would increase the opportunities for abusive utilization; second, clarity, simplicity and predictability of the general rule of absolute prohibition of armed intervention would be preserved; third, the need for restraints upon the conduct of States by labeling it as at least a technical breach of the law; and fourth, the fear that an exception for humanitarian reasons may "erode the psychological constraints of the use of force for other purposes."¹⁴⁹

These arguments in support of a theory which attempts to balance sometimes seemingly opposite goals, i.e., the protection of fundamental human rights and the maintenance of a peaceful world order,¹⁵⁰ do raise significant questions, however.

First, condonation of specified illegal actions does not necessarily reduce the opportunities for abusive invocations of armed humanitarian intervention. Under such a system, an intervenor, knowing that, regardless of his motives, he has breached the law, can chance that the world community will acquiesce in his conduct because of apathy or political disagreement and thus implicitly condone his intervention. Such condonation may be available even though the intervenor's overriding motives may have been less than humanitarian in nature.

Second, it is difficult to perceive how such an alternative en-

¹⁴⁷ See DEBATES, *supra* note 145, at 64, 107-08, 114. See also I. Brownlie, *supra* note 140, at 139-48; and Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1973).

¹⁴⁸ See DEBATES, *supra* note 145, at 61-62, 68-69 & 118.

¹⁴⁹ See generally DEBATES, *supra* note 145, at 14, 64-65, 89, 104-05, 107-08, 152, 161; Farer, *supra* note 145, at 149, 152, 155-57; Gottlieb, *International Assistance to Civilian Populations in Armed Conflicts*, 4 N.Y.U. J. INT'L L. & POL. 415 (1971).

¹⁵⁰ DEBATES, *supra* note 145, at 120-21.

hances either clarity or predictability. An absolute prohibition on the use of force which implicitly allows "acceptable" breaches of the law hardly seems straightforward and open.

Third, it is wrong to label conduct unlawful which is morally justified. It only encourages States to risk breaking the law and then cosmetically invoke some higher motive in the hope that the international community will be unable to condemn their activities. Furthermore, over a period of time, a "snowballing" effect could occur in which several permissible breaches of the law for other less acceptable motives would be tolerated. This trend could in turn eventually endanger the structure of international law in general.

In view of the drawbacks involved in the above approach, it seems more appropriate and advisable, in proposing what the law ought to be, to formulate a rule of law in such a manner that what is deemed "acceptable" or permissible is also deemed lawful.

Well aware that a revision of the Charter which expressly incorporates the use of force for humanitarian purposes is highly improbable at the present time, other scholars, in arguing for recognition of the continuing legal validity of unilateral humanitarian intervention, attempt to find a basis in the Charter itself to support their position.

One approach is expressed by the Thomases. Referring to Article 51 of the Charter, they contend that "a plea can be made that where it is legal to intervene to protect one's own nationals, it is an extension of this legality to protect the nationals of others. The so-called principle of nationality is not inflexible. . . ." ¹⁵¹ Their approach incorporates the argument that self-help to protect one's own nationals is included in the "inherent" right to self-defense preserved by Article 51. This notion is then extended to situations where the nationality link is missing.¹⁵² The argument is particularly applicable to those cases where a State intervenes in another State to protect its own nationals and while doing so avails itself of the opportunity to rescue other foreign nationals as well.

The Thomases' approach presents, however, some serious legal obstacles. First, it is questionable whether the protection of nationals abroad falls within the purview of Article 51.¹⁵³ Second, a potential danger exists that a State may disregard any element of propor-

¹⁵¹ ANN V. W. THOMAS & A. J. THOMAS, JR., *supra* note 85, at 20.

¹⁵² *Id.*

¹⁵³ I. BROWNLIE, *supra* note 84, at 429; C. JENKS, *supra* note 146, at 30; Lillich, *supra* note 4, at 336.

tionality or necessity and resort to force as soon as even a small number of its nationals is threatened. Alternatively, where the size of the threatened group calls for drastic measures, a State may use a quantum of force unrelated to the extent of actual harm to be prevented.¹⁵⁴ Third, the approach is not adaptable to those situations where the victims are nationals of the State committing the violations. It is in the latter instance that the most shocking deprivations have occurred.¹⁵⁵

In the more common approach, it is maintained that Article 2(4) of the Charter should be interpreted to prohibit the threat or use of force only when directed towards the territorial integrity or political independence of a State. It is argued that the prohibition is not against the use of force per se but rather the use of force for specific unlawful purposes.¹⁵⁶ This would mean that circumstances might arise in which armed force is unilaterally employed which does not infringe upon the political independence or territorial integrity of a State and is not in the exercise of the inherent right of individual or collective self-defense under Article 51 of the Charter.¹⁵⁷ It is further argued that the use of force for humanitarian motives is not only consistent with the purposes of the U.N. Charter but is in conformity with its most fundamental goals.¹⁵⁸

This view also is not free from question. Even in the most limited cases, such as the rescue of foreign nationals, where the intervening State can withdraw quickly without affecting permanently the territorial or political structure of the target State, armed intervention will inevitably constitute at least a temporary infringement upon the target State's territorial integrity and, if conducted without its consent or invitation, its political independence. Moreover, in most instances of human rights violations, the infringement can be expected to be more serious and probably will require a change in the governmental structure of the target State, or even secession of part of that State's territory. In such cases, the foreign intervention will inevitably have a fundamental impact on the political process of the State intervened in.

In pondering what the law ought to be, one discovers a need to balance the sometimes opposing goals of human rights protection and conflict-management.¹⁵⁹ This need is demonstrated when Arti-

¹⁵⁴ *Id.*, at 337.

¹⁵⁵ See *U.N. Views on Self-Help*, *supra* note 115, at 213-14.

¹⁵⁶ See Reisman, *supra* note 18, at 177.

¹⁵⁷ *Id.*; Lillich, *supra* note 4, at 336, and note 122, at 83.

¹⁵⁸ See Lillich, *supra* note 122, at 63; Reisman, *supra* note 18, at 177.

¹⁵⁹ Reisman, *supra* note 18, at 171.

cle 2(4) is considered in the broader perspective of the major purposes of the Charter and the final qualifying phrase of Article 2(4).¹⁶⁰

Professor Lillich contends that “a prohibition of violence is not an absolute virtue . . . it has to be weighed against other values as well.”¹⁶¹ Professors McDougal and Reisman submit that the lawfulness of the principle of humanitarian intervention is confirmed, in part, by “all the contemporary developments associated with the United Nations.” They argue that the persistent and demanding emphasis upon underlying policies of the U.N. can only be regarded as strengthening the customary doctrine of humanitarian intervention. They further argue that Articles 55 and 56 of the Charter commit U.N. members to pay attention to human rights matters and, in addition, place upon them “an active obligation for joint and separate action” in such matters.¹⁶² They submit that:

The cumulative effect of the Charter in regard to the basic policies of the customary institution of humanitarian intervention is to create a coordinate responsibility for the active protection of human rights; members may act jointly with the Organization . . . or singly or collectively in the customary or international common law humanitarian intervention. Any other interpretation would be suicidally destructive of the explicit major purposes for which the United Nations was established.¹⁶³

The post-U.N. practice of humanitarian intervention affirms the continuing validity of the institution and the conditions under which it will be deemed lawful. . . . Assuming compliance with these conditions, humanitarian intervention will be lawful under the Charter as well as under general international law.¹⁶⁴

And they concluded that:

Insofar as it is precipitated by intense human rights deprivations and conforms to the general international legal regulations governing the use of force—economy, timeliness, commensurance, lawfulness of purpose, and so on—humanitarian intervention represents a vindication of international law.¹⁶⁵

¹⁶⁰ See U.N. CHARTER, Preamble, para. 172; Art. 1, paras. 1 & 3; Art. 2(4), *supra* note 127.

¹⁶¹ Lillich, *supra* note 4, at 65.

¹⁶² McDougal & Reisman, *Response*, 3 INT'L LAWYER 438 & 444 (1969). Art. 55 provides: “The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Art. 56 provides: “All Members pledge themselves to take joint and separate action in cooperation with the Organization for achievement of the purposes set forth in Article 55.”

¹⁶³ McDougal & Reisman, *supra* note 162, at 438.

¹⁶⁴ Reisman, *supra* note 18, at 187.

¹⁶⁵ *Id.* at 177.

Since the expectations of the immediate post-war period have not materialized because the machinery for collective security and enforcement under the U.N. Charter has in fact been ineffective or not been established,¹⁶⁶ States should be entitled to take exception to the absolute validity of the Charter prohibition against the use of force and invoke the customary doctrine of humanitarian intervention, at least in those situations involving grievous, shocking and extreme violations of fundamental human rights.

Provided substantive and procedural conditions are formulated both for appraising the legality of alleged cases of humanitarian intervention and for guiding prospective intervenors in their actions, it seems not only reasonable but essential to recognize as a matter of law that in certain extreme situations calling for drastic and expeditious action, when neither the U.N. nor regional organizations can or want to assume their respective responsibilities with regard to the protection of human rights, a State or group of States may temporarily be legally exempt from their obligation of restraint under Article 2(4) of the Charter and may in consequence be free to provide an effective "back-up" vehicle for the enforcement and protection of international human rights.¹⁶⁷

VIII. CONTEMPORARY CRITERIA FOR THE APPRAISAL OF LEGALITY

Several scholars in recent years have formulated criteria for appraising an alleged case of humanitarian intervention.¹⁶⁸ The proposed criteria deal with substantive as well as procedural matters and are considered either essential or preferential in character.

The substantive criteria focus on: (1) the characteristics of the situation warranting humanitarian intervention; (2) the characteristics of the intervenor's motives; and (3) the characteristics of the intervention itself.

First, it is proposed that humanitarian intervention be limited only to situations where there is a threat to or deprivation of the most fundamental of human rights, such as the right to life and freedom from torture.¹⁶⁹ Here a balance must be maintained be-

¹⁶⁶ Lillich, *supra* note 4, at 335; DEBATES, *supra* note 145, at 53-54, 61.

¹⁶⁷ P. JESSUP, *THE MODERN LAW OF NATIONS* 169 (1949); and Reisman, *supra* note 18, at 178.

¹⁶⁸ See Lillich, *supra* note 4, at 347; Moore, *The Control of Foreign Intervention in Internal Conflicts*, 9 VA. J. INT'L. L. 205, 263-64 (1969); Nanda, *supra* note 92, at 144.

¹⁶⁹ DEBATES, *supra* note 144, at 49; Lillich, *supra* note 4, at 348; Moore, *supra* note 168, at 264.

tween the amount of destruction anticipated by the armed intervention and the importance of the human rights sought to be protected.¹⁷⁰

Next, armed intervention should be permissible only when a substantial violation of fundamental human rights is involved.¹⁷⁷ While the number of persons affected does not necessarily determine the legality of the intervention, it should not be completely irrelevant. There ought to be a correlation between the number of individuals affected and the seriousness of the human rights violated. That is, the larger the number of persons affected by the infractions, the more readily will the deprivation of human rights justify the intervention.

Last, humanitarian intervention should be justified only when a substantial deprivation of international human rights is threatened or is in progress.¹⁷² In this regard, the existence of an imminent and extensive danger would be sufficient for intervention since this type of intervention is preventive rather than punitive in character. In the final analysis, the test should be one of objective reasonableness, for it would be illogical and inconsistent with the purposes of the intervention to require a prospective intervenor to wait until a violation has been consummated.¹⁷³

As far as the motives of the intervenor are concerned, a requirement that intervention be totally disinterested and not motivated by other more selfish considerations¹⁷⁴ has been attacked as both naive and unrealistic where the decision to intervene falls upon a single State.¹⁷⁵ Only relative disinterestedness should be required, and concurrent considerations of national interest should not, alone, invalidate an armed intervention so long as the overriding motive of the action is the protection of the most fundamental human rights.¹⁷⁶

In the intervention itself, the principles of necessity and proportionality should be applicable.¹⁷⁷ If recourse to armed force is un-

¹⁷⁰ Fonteyne, *supra* note 11, at 259.

¹⁷¹ Lillich, *supra* note 4, at 348; Moore, *supra* note 168, at 264; Reisman, *supra* note 18, at 187.

¹⁷² Lillich, *supra* note 4, at 348; and Moore, *supra* note 168, at 264.

¹⁷³ Lillich, *supra* note 4, at 348.

¹⁷⁴ See Bogan, *The Law of Humanitarian Intervention*, 7 HARV. INT'L L.J. 311 (1965).

¹⁷⁵ Lillich, *supra* note 4, at 350.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 349-50; Moore, *supra* note 168, at 264; Reisman, *supra* note 18, at 177.

avoidable, the intervening State should employ only an amount of force that is reasonably necessary to accomplish its objectives. Furthermore, the territorial integrity and political independence of the target State should be respected and not unnecessarily affected.¹⁷⁸ This particular condition reflects a value choice, in that the protection of human rights justifies some degree of interference in the domestic political process and, if necessary, the territorial integrity of the target State.

At the same time, this condition restricts the alteration of the target State's governmental and political structure to those situations where removal of the authority in power or even secession clearly appears to be the only available avenue for eliminating gross violations of human rights or the imminent threat thereof.¹⁷⁹ The intervention should also be only of a duration that is necessary to achieve its humanitarian objectives.¹⁸⁰ In this connection, Professor Lillich observed that "the longer the troops remain in another country, the more their presence begins to look as a political intervention."¹⁸¹

Procedural criteria include: first, the exhaustion of remedies by peaceful means; second, the unlikelihood of timely and effective action by a competent international organization; and third, the immediate reporting and submission of the intervention and the case to a proper international forum for review, appraisal and further action, if necessary.

Noncoercive methods of persuasion should be employed in keeping with Article 2(3) of the Charter, which obligates members to seek a solution to international disputes by peaceful means, and with the U.N.'s primary goal of minimizing international armed conflict.¹⁸² In addition, priority of action should be given to the international organizations since they are in the most favorable position to represent the inclusive interests of the community at large.¹⁸³

However, where delay is inevitable and would prevent a timely response by an international body or where it is obvious that the likelihood of effective action by such body is small, then a State should be allowed to intervene with force.¹⁸⁴ Finally, to minimize

¹⁷⁸ McDougal & Reisman, *supra* note 162, at 442; DEBATES, *supra* note 145, at 27.

¹⁷⁹ *Id.* at 50, 53-54; Franck & Rodley, *supra* note 117, at 283.

¹⁸⁰ Lillich, *supra* note 4, at 350; Moore, *supra* note 168, at 264.

¹⁸¹ Lillich, *supra* note 4, at 350.

¹⁸² Reisman, *supra* note 18, at 179, and De Schutter, *supra* note 119, at 29-30.

¹⁸³ De Schutter, *supra* note 119, at 31.

¹⁸⁴ Reisman, *supra* note 18, at 178 & 193.

the abusive invocation of the institution, the motives of the intervening State should be submitted promptly to an appropriate international body for review, appraisal and world community reaction.¹⁸⁵

The last group of criteria consists of preferred conditions rather than absolute norms. First, in the absence of institutionalized community action, collective measures should be preferred over individual action.¹⁸⁶ Therefore, a prospective intervenor is expected to consult with other States and attempt to obtain their support for the intervention. While an intervention does not gain in legality by being collective rather than individual, there is a presumption that collective action is more likely to promote relative disinterestedness and genuine humanitarian concern.¹⁸⁷

Collectivity, however, cannot be made an absolute requirement. A lack of interest on the part of other States in the matter should not leave victims of offensive human rights violations hopelessly unprotected. Provided the criteria set out above are met, a State should not be precluded from taking measures that are necessary to rectify an existing deplorable state of affairs.¹⁸⁸

Second, invitation by or the consent of the target State should be sought by the prospective intervenor. While technically there is no intervention if the intervenor gains the consent or invitation of the de jure government of the target State, not every invitation or consent to intervention is valid. There always exists the possibility that such invitation or consent was given under duress or other pressure. Moreover, in certain instances where there are various factions struggling for power and control in the target State, the representative character of the inviting or consenting authority may be subject to question.¹⁸⁹ In view of the foregoing, the absence of consent or invitation in situations where fundamental human rights are in imminent danger of large scale destruction either by an unlawful element in the target State, or by the government of the target State itself, should not, standing alone, preclude an armed intervention from being lawful on humanitarian grounds, provided the other requirements of legality previously discussed are fulfilled.¹⁹⁰ This criterion should only be considered as evidence in support of an al-

¹⁸⁵ See *id.*, at 188 & 193.

¹⁸⁶ See DEBATES, *supra* note 145, at 88; Reisman, *supra* note 18, at 1%.

¹⁸⁷ *Id.* at 178-79 & 188; DEBATES, *supra* note 145, at 49.

¹⁸⁸ *Id.*

¹⁸⁹ See Lillich, *supra* note 4, at 349; Moore, *supra* note 168, at 264.

¹⁹⁰ *Id.*

leged act of humanitarian intervention and not as an essential prerequisite for such act.

IX. CONCLUSION

The absence of effective international machinery to protect human rights, coupled with the inability of the world community to respond promptly in an institutionalized manner to situations where the very lives of a considerable number of human beings are threatened, demonstrates the continuing need for, as well as the legal validity of, a limited right of unilateral humanitarian intervention by armed force.

Both the supposed absolute doctrine of nonintervention and the "classic," approach to the Charter's prohibition against the use of force leave the impression that individuals in many parts of the world today may have less protection than in previous times. It seems contrary to all that is decent, moral and logical to require a State to sit back and watch while the slaughter of innocent people takes place, in order to comply with some blanket or blackletter prohibition against the use of force at the expense of more fundamental human values. Even a minimum public order system demands a certain amount of justice, respect and protection for individuals.

While the banners of sovereignty and conflict-minimization should continue to fly high in the international arena, the colors of unilateral humanitarian intervention by armed force must also be allowed to be displayed in certain extreme situations for the sake of humanity and until such time as effective international enforcement machinery is established.

As this survey has attempted to show, the risk and fear of abusive invocation of the institution of humanitarian intervention are more apparent than real. In any event, they are minimal when considered in light of the fundamental human values at stake. It is, therefore, strongly recommended that prompt and serious consideration be given to the enactment of a convention or resolution providing for the authorization of intervention by the United Nations, a regional body, or a group of States, in any State where grievous violations of human rights are ongoing or imminently threatened.

Such a proposal has been drafted and provides for both authorization, strict control measures and other safeguards.¹⁹¹ The

¹⁹¹ See Note, A Proposed Resolution Providing for the Authorization of Intervention by the United Nations, A Regional Organization or a Group of States in a

International Commission of Jurists, in discussing India's recent intervention in Bangladesh, also provides additional support for an instrument allowing individual States the right of armed intervention to remedy gross violations of human rights.¹⁹² The question remains, however, whether this common sense will spread throughout the United Nations.

State Committing Gross Violations of Human Rights, 13 VA. J. INT'L. L. 340 (1973).

¹⁹² THE REVIEW, *supra* note 115, at 94-98.

THE AMERICAN JUDICIAL TRADITION

White, G. Edward, *The American Judicial Tradition*. New York, N.Y.: Oxford University Press, 1976. Pp. 375; 441 with Appendix, Bibliography, Notes and Index. Cost \$15.95.

*Reviewed by John L. Costello, Jr.**

The American Judicial Tradition presents a statement of one person's view of current conditions of and attitudes about American appellate judges and their courts. Based on his finding that Marshallian forces have shaped the tradition in each generation, Professor White traces the development of the American appellate judiciary from the time of John Marshall through the era of the Warren Court. He deals with the lives and careers of over two dozen appellate judges, state and federal, bringing to his book a pleasant blend of legal history and biography.

Another biographer of John Marshall said:

One way of gauging John Marshall's impact is to imagine how the United States might have developed without his decisions. One quickly would conclude that there could be no modern United States without a Supreme Court empowered with judicial review; without a Constitution allowing the United States to do what needed to be done to govern; without a central authority holding power over the states; no modern United States without business relationships that would be honored; and no modern United States of value without a defendant's being assured of certain precautions against the state. All these were products of John Marshall's tenure on the Supreme Court. He did not create them, but he did insist that they become irrevocably part of America.'

Professor White says as much and more. For him, the American judicial tradition is what American appellate judges have done in response to both the example of, and the forces conjured by John Marshall. American judges are different from others in the common law discipline, and "Marshall was the primary creator of this unique institutional role."²

For Professor White, the core elements of the tradition are:

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¹ L. BAKER, JOHN MARSHALL 769 (1974).

² G. WHITE, THE AMERICAN JUDICIAL TRADITION 9 (1976) [hereinafter cited as AJT].

A measure of true independence and autonomy for the appellate judiciary from the other branches of government;

The extension, within limits, of judicial authority to questions of politics in addition to technical questions of law;

The presence of a set of internalized constraints upon the office of judge that circumscribe judicial freedom of choice and give the office an identity discrete from the personalities of the individuals who occupy it at any special time.³

In the opinion of this reviewer, however, Marshall was not a beginning. From our recent Bicentennial perspective the grouping of such men as Hamilton, Jefferson, Wilson, Morris, Madison and Marshall seems natural and appropriate. Though there were differences among them and though the constitution with which they are all associated was a corporate effort containing both "something of Hobbes and something of Locke,"⁴ their stature is not to be denied. All, indeed, were Founding Fathers. However, we are not thereby restricted in making our own assessment of the kinds of contributions each made. With respect to the others with whom Marshall is grouped above, he was an implementor, not a creator.

If that is true, essential initial chapters are missing from this book. What influences moulded Marshall and the Constitution he espoused? Professor White showed the need for such chapters in his analysis of Friedman's *A History of American Law* which he criticized for its emphasis on an economic interpretation of legal history that caused the many true origins of legal institutions in political history and jurisprudence to be overlooked.⁵ Among the specific shortcomings White found in Friedman *History* were the author's failure to have more than "relatively little on the history of the Bill of Rights" and a failure to emphasize "the relationship between law and religion in colonial America."⁶ Later he also noted that Friedman gave no help ". . . in attempting to analyze such historical phenomena as the relationship between the social assumptions of the Enlightenment and the framing of the Constitution . . ." ⁷ There

³ AJT 9. See the same in chs. 7 and 15.

⁴ S. PADOVER, *TO SECURE THESE BLESSINGS* 32 (1962).

⁵ G. White, *Book Review*, 59 U. VA. L. REV. 1130 (1973).

⁶ *Id.* at 1134. The doctrine of judicial review, for example, had origins in the earlier English idea that a statute could be stricken if it contravened the common law. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 173 (H. Chase & C. Ducat, Eds., 1974).

⁷ *Id.* at 1135. (This reference is understood to mean the egalitarianism and revolutionary tendencies of the era. Its legal and political theory will be mentioned *infra.*)

are three other instances in White's list of defects, but these references show the types of influences seen to have been at work in the nascent American polity by this same author.⁸

Just as American legal history generally was influenced by its origins, so were parts of that history such as the judicial tradition as seen by this reviewer. Immediately influential on the judicial tradition were the constitution and structure of the new government. In fact, essential to the "true independence and autonomy for the appellate judiciary" which was identified by White, is the novel concept of a tripartite national government adopted for the United States. The implementation of this concept also tended to raise the "political questions" unique in American common law courts. Both the independence and the judicial activism developed by the juxtaposition of three separate branches of government were fostered by the Supremacy Clause, even though that clause was primarily related to the federal structure of the government in the minds of the framers. The structure and the Supremacy Clause came from a nationalistic consensus at the Constitutional Convention so strong that the decisions that a "national Government ought to be established consisting of a supreme Legislative, Executive and Judiciary" and to adopt the Supremacy Clause were both taken unanimously and without significant debate.⁹

The tripartite government adopted at Philadelphia was a concept derived from the theory of "mixed government" developed by Polybius and other classicists. Though in France, Jefferson contributed to the Convention by shipping to Madison and Wythe copies of their works.¹⁰ The Framers were familiar not only with these works, but also the important refinements thereon by Montesquieu and Locke, and the contrasting views of Hobbes.¹¹ These provided

⁸ The other three instances listed by White are:

the parallels between the early nineteenth century reform literature concept of an organic community and the emergence of a community welfare standard by which judges tested the validity of legislation: the connections between social Darwinism, a prevalent ideology of the late nineteenth century, and the doctrine of substantive due process, developed by judges after the Civil War; [and] the validity of the theory advanced by Alexander Bickel that Warren Court activism was stimulated by early twentieth century assumptions about the inevitability of progress.

Id. at 1135 (citations omitted).

⁹ L. LEVY, *JUDGEMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 6-13 (1972).

¹⁰ Jefferson contributed indirectly [to the Federal Convention of 1787] by shipping to Madison and Wythe from Paris sets of Polybius and other ancient publicists who discoursed on the theory of "mixed government" on which the Constitution was based. The political literature of Greece and Rome was a positive and quickening influence on the Convention debates.

S. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 305 (1965).

¹¹ S. PADOVER, *supra* at 23; Stearns, *PAGEANT OF EUROPE* ch. 21 (1947).

the theoretical bases for the concepts which we speak of today as separation of powers, checks and balances, and judicial review.

Given that the nationalistic consensus of 1787–1789 was not dissipated during the early 1800's, it may be said that the climate of Marshall's early years was conducive to pronouncements from the bench of a centrist, self-serving nature. The Constitution itself set the courts apart from the rest of the government, state and national, and set the national law above that of the states to the extent that judicial independence and autonomy were unavoidable.

Different assessments of the impact of Marshallian dicta or of the theory and structure of government on the development of the judicial tradition may be drawn from the same physical evidence. But such a choice would be unduly limited; there are other factors with a high potential for influencing such developments. These have been insufficiently identified and appraised. One is the subjective position of the judges, i.e., to what extent was either influence consciously and deliberately received? Secondly, if the preponderance of successor judges had the same view of the constitutional scheme as did John Marshall, were they his followers or Madison's? ¹² Or if some judges were ignorant of or rejected Marshallian dogma, was the "tradition" much affected? ¹³

Another potential is almost mechanical, but nonetheless significant. Professor A. E. Dick Howard has described the changing habits of those Americans who once spoke freely of the "Nixon Court." Now we speak of the "Burger Court." ¹⁴ This suggests that there is a process of public reaction to a strong court like the Warren Court such that the reaction may be manifested in political outcomes. As mentioned above, Marshall faced little of this in his early, productive years. Though there had been a change of administrations, the dominant forces in Jefferson's world were as moderate as the Federalists who supported Marshall on the issues relevant here. ¹⁵ Later justices have faced bitter public resistance to their

¹² Corwin relates that "On the eve of the Declaration of Independence, William Cushing, later one of Washington's appointments to the original bench of the Supreme Court, charged a Massachusetts jury to ignore certain Acts of Parliament as 'void and inoperative,' and was congratulated by John Adams for doing so." Corwin, *supra* at 173–74.

¹³ Some biographies of fine judges do not even have an index entry for Marshall. J. For example, V. COUNTRYMAN, *THE JUDICIAL RECORD OF JUSTICE WILLIAM O. DOUGLAS* 414 (1974); D. Danelski & J. Tulchin, eds., *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* (1973).

¹⁴ Howard, *The Burger Court: Not Without Roots*, *The Washington Star*, July 10, 1977, at E-1.

¹⁵ R. ELLIS, *THE JEFFERSONIAN CRISIS*, ch. 17 (1971).

view of the issues before them and were sustained in their views only by an abiding adherence to the charter documents of this nation.¹⁶ Before the ranges of the American judicial tradition may be said to have been fenced, somebody is going to have to explain how the same "abiding adherence" leads one Chief Justice to school desegregation and his immediate successor to significant limitation of the exclusionary rules.¹⁷ There is more to the matter than one man's influence.

Despite all of this wishing about what else Professor White might have discussed, the substantial content and contribution of *The American Judicial Tradition* are not to be overlooked. Book reviewers tend to describe virtuoso violin performances as the scraping of horsehair over taut cat-gut;¹⁸ such accuracy is often something we can well do without. Open credit here is fully justified. Practicing attorneys will enjoy this book and scholars will accept its challenges. The biographical method presents, in effect, a series of cases; all attorneys will be comfortable with that style. Both the trial and appellate bars want to know more about judges, and judges probably need more than anybody to learn about how they themselves do things. The *Tradition* will inform both groups. Professor White has served the profession well by this effort; I am pleased to have his book on my shelves.

¹⁶ E. Warren, *Inside the Supreme Court*, THE ATLANTIC MONTHLY (Vol. 239, April 1977).

¹⁷ That is to say, care must be taken to avoid falling into the trap of explaining the Court's decisions by reference to a single factor theory. It is questionable whether policies as diverse as desegregation and limitation of the exclusionary rules can be explained credibly by reference to any one judicial or political philosophy or style.

¹⁸ Used by Leonard Levy in JUDGEMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 13 (1972).

THE RESUME AS AUTOBIOGRAPHY

Warren, Earl, *The Memoirs of Chief Justice Earl Warren*. New York, N.Y.: Doubleday & Co., 1977, Pp. 372. Cost: \$12.95.

*Reviewed by Joseph A. Rehyansky**

The controversies surrounding Earl Warren and his court have not subsided appreciably in the three years since his death nor in the eight years since his retirement. This situation is a trap for the unwary reviewer of his memoirs, and for any other reader. I now proceed to fall into it.

A good autobiography by a public man as admired and despised as Warren would serve to confound his detractors, please his defenders and, perhaps, make a significant contribution to the social and judicial history of our age. But this inadequate little volume accomplishes none of these ends. Patched together by the editors at Doubleday from the incomplete first draft which Warren gave them before he died, it is as arid and undigestible as William Westmoreland's *A Soldier Reports*, as superficial as A. E. Hotchner's *Papa Hemingway*, and as illuminating as a statement on Watergate from Richard Nixon. And not all of the fault lies with the editors.

This book takes us on a perfunctory tour of the Chief Justice's life, and tourists, rather than participants, is precisely what we feel like. We see Warren as an industrious schoolboy with a part-time job on an ice wagon, as a frugal college student, a dutiful Army officer, an enthusiastic district attorney, a progressive governor, an energetic candidate for the Vice-presidency of the United States, and finally as Chief Justice. But seeing is all we do. This book is a printed newsreel, the stuff of which after-dinner speaker introductions are made. Rarely is there any hint of what made Earl Warren, the man, tick; and, sad to say, there are some indications that nothing did.

Of course, a public man's private thoughts and motivations are his own. He is free to reveal and explain them, or not, as he sees fit. But Warren denies that privilege to many of the other characters who move through his book, the most striking example of whom is Dwight Eisenhower.

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“What would you do with the Communists in America?”¹ Warren says he asked the former President in 1965.

“I would kill the S.O.B.s,”² was the reply.

Now that was an injudicious statement. Certainly not very Presidential. Not even very intelligent. But no one ever accused Earl Warren of being an intellectual, either, until he started wearing a black robe to work. Wouldn't it be satisfying to know what Warren *really* thought, what he may have said in an unguarded moment—assuming he had any in his 83 years on this earth? Apparently we'll never know. That kind of thing, coupled with his own obvious protectiveness in writing about himself, reveals not only a lack of candor, but a touch of mean-spiritedness as well.

Another of the many disappointments in this book is its proportion. In Westmoreland's *A Soldier Reports*, which purports to be an autobiography, 406 of 430 pages are spent on the Vietnam conflict. Warren's memoirs are similarly out of whack, but in the opposite direction: he devotes only 47 pages of 372 to his service as Chief Justice of the United States Supreme Court.³ Searching these 47 pages for a kernel of substantive philosophy is a frustrating task, but there is a reward of sorts on pages 306-308, wherein Warren graces us with what he feels must be a surprise: he tells us that, in his opinion, *Brown v. The Board of Education* was not the most significant decision handed down by his court; *Baker v. Carr*—the famous “one man, one vote” case—was his favorite. He goes on to regale the reader with those portions of the decision of which he was most proud, including the famous quotation, “Legislators represent people, not trees. . . .”

In this matter I defer to a better legal mind than my own. Irving Younger, the Samuel S. Leibowitz Professor of Trial Techniques at Cornell Law School, recently read this book. Of the section devoted to *Baker v. Carr*, he said:

. . . This is powerful stuff. . . . There is something more to it, though. . . . Is there some *a priori* reason why government of. . . the people means government one vote at a time. . . ? Is it wise to give all citizens an equal voice in government? Perhaps legislators should be regarded as representing trees and acres as well as people. Who else will look out for trees. . . ? Why does representative government re-

¹ E. Warren, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN*, Doubleday (Garden City, New York: 1977), p. 6.

² *Ibid.*, p. 6.

³ In fairness it should be noted that Doubleday, after examining this first draft, asked Warren to expand the section dealing with his years on the court in a subsequent revision. Warren agreed, but died shortly thereafter.

quire the leveling of those represented. . . ? Will a widely extended suffrage make it too easy for “basses” to take control. . . ? Might it be that the only certain consequence of “one man, one vote” is public bankruptcy. . . ? Is the Chief Justice ignorant of. . . Plato’s *Republic* . . . Shakespeare’s *Coriolanus* . . . Maine’s *Popular Government* . . . Hume’s *Essay on Civil Liberty*?

These considerations may well fall short of counterbalancing the simple appeal of “one man, one vote.” Warren seems oblivious to their very existence, however.⁴

Warren seems similarly oblivious to his own failings, if any there were. On pages 337 through 342 we are made privy to his shock and outrage at being approached *ex parte*, as Chief Justice, by an official of the Mitchell Justice Department concerning a pending case. Was this wrong? Probably so. But readers with a memory which can survive 245 pages of this book may be tempted to flip back to page 92, where we are treated to the story of a young Alameda County district attorney doing precisely the same thing with the Chief Justice of the California Supreme Court. The district attorney was Earl Warren, and it’s not that Warren was a hypocrite; his uncritical view of himself simply leads him into oversight.

Lovers of autobiography, beware of this one-dimensional book. Anyone who has found the pleasant company of a lively and animated human spirit in, for instance, Ben Franklin’s *Autobiography*, U.S. Grant’s *Memoirs*, Douglas MacArthur’s *Reminiscences*, or—so help me—even in David Niven’s *The Moon’s a Balloon*, will find this book mighty lonely going.

Also useful as a compendium of left-liberal clichés (c. 1960’s) on crime, drugs, youth, war. A must for Ramsey Clark’s book shelf.

⁴ Younger, *L’Eminence Plat*, NATIONAL REVIEW, Vol. XXIX, No. 42, 28 October 1977, pp. 12461247.

A POLYGRAPH HANDBOOK FOR ATTORNEYS

Abrams, Stanley, *A Polygraph Handbook for Attorneys*. Lexington, Massachusetts: D. C. Heath and Company, 1977. Pp. 257. Cost: \$16.95.

Reviewed by Ronald E. Decker and CW3 Frederick Link"

Military judges, trial counsel and defense counsel need a comprehensive and reliable source of information regarding polygraph techniques.¹ While for several years a number of books representing themselves as authoritative have been available, not until Dr. Abrams' present work has there appeared a book which will assist attorneys in understanding at the professional level the polygraphic techniques and standards taught to military polygraph examiners at the United States Military Police School (USAMPS) and maintained by the polygraph quality control officers of the various military departments.

Here in one convenient volume is a responsible and objective, yet critically written, survey of the art of polygraphy. The coverage of this work ranges from primitive lie detection methods of historical interest, through evolution of the scientific bases of the technique and all the significant points of procedure, to the present-day legal milieu in the civilian community and to a summary of the significant criticisms of polygraphy. While not a training guide for examiners, the book is thorough in its coverage and broad enough in scope to survey the entire field. In addition to discussion of critical areas, Psychologist Abrams has included a sample of polygraph foundation testimony from the transcript of the My Lai trial of Captain Medina, and has extensively footnoted the book.

From our point of view, one meaningful omission was made in Chapter 8 when the course length of the USAMPS polygraph examiner training course was not mentioned; with over 500 hours of classroom instruction, the USAMPS course is almost twice as long

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¹ At the present time, polygraph evidence is not admissible in a trial before a court-martial. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1969* (Rev. ed.), para. 142e; *United States v. Massey*, 5 C.M.A. 514, 18 C.M.R. 138 (1955). However, collateral uses of polygraph evidence are possible; such evidence may, for example, be considered by a convening authority. *United States v. Bras*, 3 M.J. 637 (N.C.M.R. 1977).

as most civilian courses. As with any work of this scope, errors were bound to creep in, but they are few and insignificant.

A Polygraph Handbook for Attorneys now sets the standard for books on the polygraph technique. Every military lawyer involved with criminal justice in any capacity should read this excellent and authoritative work to gain a clear understanding of the polygraph technique.

BOOKS RECEIVED*

1. Behrenfeld, William H., *Estate Planning Desk Book*. Englewood Cliffs, N.J.: Institute of Business Planning, Inc., 1977. Pp. 279. Cost: \$29.95.
2. Cottrell, Alvin J. & Thomas H. Moorer, *The Washington Papers: U.S. Overseas Bases*. Beverly Hills, CA: 1977. Pp. 68. Cost: \$3.00.
3. Defense Law Journal, Vol. 27, No. 1. Indianapolis, IN: 1977. Pp. 100. Cost: \$5.00 per issue.
4. Levitan, Sar A. & Karen Cleary Alderman, *Warriors at Work*. Beverly Hills, CA: 1977, Pp. 216. Cost: Hardbound \$14.00; Paper \$6.95.
5. Taylor, William J., Roger J. Arango & Robert S. Lockwood, *Military Unions: U.S. Trends and Issues*. Beverly Hills, CA: 1977. Pp. 336. Cost: Hardbound \$17.50; Paper \$7.50.
6. Wayzer, Michael, *Just and Unjust Wars*. New York, N.Y.: 1977. Pp. 384. Cost: \$15.00.
7. *Webster's American Military Biographies*, edited by Robert McHenry. Springfield, MA: 1978. Pp. 560. Cost: \$12.95.
8. Wexler, Dr. David B., *Criminal Commitments and Dangerous Mental Patients*. Rockville, MD: 1977. Pp. 94.

* Mention of the work in this section does not preclude later review in the *Military Law Review*.

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