

A PRAYER FOR RELIEF

THE CONSTITUTIONAL INFIRMITIES OF THE MILITARY
ACADEMIES' CONDUCT, HONOR AND
ETHICS SYSTEMS

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The military service academies are influential American institutions. They shape the character and attitudes of the vast majority of our highest ranking military leaders. These leaders in turn influence some of our most basic national policies. Nevertheless, the methods by which their character and attitudes are shaped remain for the most part obscured from public view.

The purpose of this project is to present the results of an investigation into one aspect of these methods—the academy adjudicatory procedures. It examines academy regulations in detail, focusing on the impact they have on the lives and viewpoints of cadets. Interviews conducted with the officials and cadets who are subject to them are used to trace these effects. In addition, the project outlines broad issues of law and justice raised by the administration of academy regulations.

The project was written and researched in large part by an associate editor of the New York University Law Review, who was assisted in preparing it for publication by other members of the Law Review, as well as by numerous other interested persons, who volunteered their time.

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THE CONSTITUTIONAL INFIRMITIES OF THE MILITARY ACADEMIES'

CONDUCT, HONOR AND ETHICS SYSTEMS*

[C]ulture [is the] pursuit of our total perfection by means of getting to know, on all the matters which most concern us, the best which has been thought and said in the world; and through this knowledge, turning a stream of fresh and free thought upon our stock notions and habits, which we now follow staunchly but mechanically, vainly imagining that there is a virtue in following them staunchly which makes up for the mischief of following them mechanically.'

* Michael T. Rose is a captain in the Air Force, a 1969 graduate of the United States Air Force Academy and a 1973 graduate of New York University School of Law. In the preparation of this project, the financial assistance of the Norman Foundation and the Fund for Tomorrow, Inc., was invaluable, as was the aid of the Law Students Civil Rights Research Council in managing these funds.

This project incorporates empirical information, in the form of documents and personal interviews

with cadets and military officials, obtained during visits to the five federal academies and to the office training school of each military service. The federal academies are the United States Military Academy, West Point, New York; the United States Naval Academy, Annapolis, Maryland; the United States Coast Guard Academy, New London, Connecticut; the United States Merchant Marine Academy, Kings Point, Long Island, New York; and the United States Air Force Academy, Colorado Springs, Colorado. Also included are interviews and information obtained at the Military College of South Carolina and the Virginia Military Institute, both state-supported military schools; The Marion Institute, a private military school at Marion, Alabama; and the University of Virginia, a civilian state-supported institution. Most interviews were tape-recorded and are on file at the New York University Law School Library. To insure accurate quotation of those interviews not tape-recorded, handwritten notes were taken of each interview by the interviewer and a summary of the portions of the interviews used in this project was sent to each interviewee sufficiently prior to publication to permit a corrective reply to be received. Where such a reply contradicted records of the interview without supplying sufficient information to either correct a possible error or reconcile an apparent inconsistency, the citation has been italicized.

Due to the large number of interviews, regulations, letters and other documents to which reference is made, shortened forms are used throughout. Full citations for abbreviated regulations and documents referred to in the footnotes may be found in the Appendix. All letters referred to by date and sender only are addressed to Captain Rose, persons who assisted him with this project, or to the New York University Law Review. All regulations, letters and other primary resource documents are on file at the New York University Law School Library. Written inquiries regarding information on file at the Library should refer to the "Service Academy Project"; requests will be honored to the extent possible. It should be stressed that, unless otherwise indicated, regulations, interviews, documents or other authority obtained from a given academy verify information or practices with regard to that academy only.

¹ M. Arnold, *Culture and Anarchy* 6 (W. Knickerbocker ed. 1925).

INTRODUCTION

Within the military, the higher ranking "elite positions are mainly reserved for the graduates of the military academies."² Central to the training

received by these graduates are the rules and principles governing the day-to-day activities of academy life. These are embodied at each academy in two or more adjudicatory systems: (1) the conduct system, (2) the honor system and (3) the ethics system.³

During recent years, courts⁴ and legal commentators' have shown considerable interest in the due process standards required in adjudicating student offenses at civilian educational institutions. Lit-

² M. Janowitz, *Sociology and the Military Establishment* 70 (rev. ed. 1965). The disproportionate influence of academy graduates in the Army, Navy and Air Force is evident from the fact that although they constitute only about 5% of all officers in these branches, they comprise about 90% of the officers in the highest ranks. See *Anderson v. Laird*, 466 F.2d 283, 306 n.3 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972). The General of the Army and 11 of the 14 Army generals are academy graduates. *Army General Officers Alphabetically by Grade, at I* (1971); *Register of Graduates of U.S.M.A.* (1966). All Navy admirals and 91% of the vice admirals are academy graduates. Letter from Public Information Division, Department of the Navy, Jan. 21, 1972. In 1964, 100% of the top two Army ranks and of the top three Navy ranks were filled by academy graduates. Janowitz, *supra* at 71. This influence is not as disproportionate for the Air Force; only six of 14 Air Force generals and nine of its 40 lieutenant generals are academy graduates. Letter from Public Information Division, Office of Information, Department of the Air Force, Mar. 17, 1972. Also, the influence of academy graduates is less pronounced in the Marine Corps, where only 8% of general officers are graduates of an academy. Letter from Division of Information, Headquarters, U.S. Marine Corps, Department of the Navy, Oct. 6, 1972. All Coast Guard admirals are Coast Guard Academy graduates. Letter from Public Information Officer, U.S.C.G.A., Dec. 8, 1971.

³ Each academy has a conduct and an honor system. Only the Air Force and the Coast Guard Academies adjudicate ethics offenses. Until the summer of 1972, the Air Force Academy had a fourth adjudicatory body: the Cadet Wing Safety Board. Interview with 1971-72 Group Safety Officer, U.S.A.F.A., Nov. 4, 1972; see U.S.A.F.C.R. 35-6(33)(9) (1969).

⁴ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

⁵ See, e.g., *Beaney & Cox, Fairness in University Disciplinary Proceedings*, 22 *Case W. Res. L. Rev.* 390 (1971); *Buss, Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 *U. Pa. L. Rev.* 545 (1971). For bibliographical materials, see *Student Rights and Campus Rules: Bibliography*, 54 *Calif. L. Rev.* 175 (1966); *Selected Bibliography on Student Rights*, 45 *Denver L.J.* 612 (1968).

tie has been written, however, on what is required in academy adjudicatory proceedings.⁶ Legal considerations arising from the academies' adjudicatory systems constitute the subject of this report.

Preceding an analysis of the military academies' adjudicatory processes, the sources of the academies' disciplinary powers are identified and some general limitations on these powers are discussed. Next is a detailed description of salient aspects of the adjudicatory systems. Throughout the text the academies are treated generally as a group. Minor variations are noted in footnotes, major differences in the text. Analysis of legal problems arising from the systems comprises the heart of the study. Then follows an outline of administrative and judicial remedies available to cadets seeking vindication of their rights. The subsequent sections discuss policy considerations which suggest that changes in the systems are necessary. The study concludes with recommendations as to how some of these alterations might best be accomplished.

The analysis is focused on problem areas detected during several months of field investigation.⁷ As a result of this research, it has become evident that the academies have been and are continuing to violate a number of statutory provisions and constitutional principles in administering their adjudicatory systems. Increased public concern with regard to these violations hopefully will stimulate Congress,⁸ the

⁶ The legal propriety of academy adjudicatory actions has been questioned from the time the academies were created. In 1819, for example, five expelled West Point cadets appealed to the President for relief, claiming that they had been under arrest for 12 months before trial and had been tried without being permitted a defense. H.R. Doc. No. 14, 16th Cong., 1st Sess. 1-5, 52-54 (1819), reprinted in 17 American State Papers (2 Military Affairs) 5-8, 23 (W. Lowrie & W. Franklin eds. 1834). There was also considerable criticism of the procedures used in summarily dismissing three West Point freshmen in 1871, see, e.g., S. Forman, *West Point: A History of the United States Military Academy* 154-55 (1950); 91 *Military Academy*

honor code violators in 1951, see, e.g., S. Ambrose, *Duty, Honor, Country: A History of West Point* 320 (1966); The Honor Committee of West Point Graduates, *Minority Group* 1,9,13-16(1952) [hereinafter *Minority Report*]; and 39 Air Force Academy honor code violators in 1972, see, e.g., Heise, *Farwell to Duty, Honor, Country, The Humanist*, Sept.-Oct. 1972, at 20 [hereinafter *Heise, Farwell to Duty, Honor, Country*]. See also note 8 infra.

Only six cases and one article have even cursorily discussed the legal propriety of the academies' adjudicatory systems. See *Wasson v. Trowbridge*, 269 F. Supp. 900 (E.D.N.Y.), rev'd and remanded, 382 F.2d 807 (2d Cir. 1967), complaint dismissed, 285 F. Supp. 936 (E.D.N.Y. 1968); *Dunmar v. Ailes*, 230 F. Supp. 87 (D.D.C. 1964), aff'd, 348 F.2d 51 (D.C. Cir. 1965); cases cited in note 9 infra; Zbar & Mazza, *Legal Status of Cadets*, 7 A.F. JAG L. Rev., Nov.-Dec. 1965, at 31.

⁷ The study does not purport to examine fully all problems arising in the academies' adjudicatory systems. The analyses of problems at the Military and Air Force Academies may be incomplete, for these academies have failed to provide a great deal of relevant information.

⁸ Public pressure has, on at least two occasions, inspired Congress to pass legislation

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courts,⁹ and the military services¹⁰ themselves to rectify the defects which plague the current systems. Such changes are required not only to protect rights now being infringed but, perhaps more importantly, to insure that the nation's future "military elite"¹¹ properly appreciates the role of the military and of the law in a democratic society. For, as Vice Admiral Hyman G. Rickover has observed, "The poor habits of professional development instilled in the young men at the academies are carried with them throughout their careers."¹²

II

SOURCES AND LIMITATIONS ON THE ACADEMIES' ADJUDICATORY POWERS

In order to analyze the academies' administrative adjudicatory¹³ systems

it is useful at the outset to determine the sources of

protecting cadets. An anti-hazing statute was passed in 1901 as a result of the public outcry resulting from various hazing incidents at the Military Academy. See 34 Cong. Rec. 2625 (1901) (remarks of Senator Sewell, denouncing death of a cadet by hazing); Ambrose, *supra* note 6, at 222-31; Forman, *supra* note 6, at 168-72. Similarly, public outrage at hazing incidents at the Military and Naval Academies led to promulgation of another anti-hazing statute in 1906. See 40 Cong. Rec. 4233 (1906) (remarks of Representative Vseeland); *id.* at 2836 (remarks of Senator Hale); Barry, *Men and Affairs at Washington*, *New England Magazine*, Sept. 1907, at 79, 83-84. Presently pending enactment is H.R. 10471, 93d Cong., 2d Sess. (Sept. 24, 1973), a bill to abolish the "silence" at the Military Academy, see text accompanying notes 213-20 & 853-940 *infra*, a bill introduced as a result of public criticism precipitated by a description of the "silence" in Greenhouse, *Silent Agony Ends for Cadet at Point*, *N.Y. Times*, June 7, 1973, at I, cols. 1-3.

⁹ In a few instances, courts have intervened in academy affairs to vindicate cadet rights. See, e.g., *Jaremko v. Knowlton*, Civil No. 72-3419 (S.D.N.Y. Aug. 11, 1972); *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y. Aug. 3, 1972); *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *af'd*, 470 F.2d 201 (2d Cir. 1972); *Krawez v. Stans*, 306 F. Supp. 1230 (E.D.N.Y. 1969)

¹⁰ The academies frequently change their adjudicatory procedures. Since this study began in August 1971, for example, the Air Force Academy has changed its conduct system by informally reducing the amount of restriction normally given cadets to conform generally to the maximum punishment provisions of 10 U.S.C. § 815 (1970). Compare U.S.A.F.C.R. 356(VII) (1969), with *id.* (1971). During this same period, moreover, both the Merchant Marine and Naval Academies have significantly modified their honor systems. Interview with 1972-73 Honor Comm. Chairman and Vice-Chairman, U.S.M.M.A., Aug. 10, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972. In addition, the Air Force Academy has abolished its Cadet Wing Safety Board. See note 3 *supra*.

¹¹ See *Brown v. Knowlton*, Civil No. 72-3184, at 7 (S.D.N.Y. Aug. 3, 1972) ("[G]overnment characterizes [cadets] as a 'military elite'").

¹² Hearings on Dep't of Defense Appropriations for 1966 Before a Subcomm. of the House Comm. on Appropriations, 89th Cong., 1st Sess. 35 (1965) (Testimony of Vice Adm. Hyman G. Rickover, U.S.N.) [hereinafter *DoD House Appropriations Hearings*, 1966].

¹³ For the purposes of this study the term "adjudicatory" has been chosen to refer to the processes of substantively defining as well as procedurally deciding cadet conduct, honor and

and general limitations on the academies' power over cadets.¹⁴ This requires

an understanding of the current legal status of cadets and of the powers possessed by the academies both as military and as educational institutions. In delimiting those powers which arise from the academies' military status, it is first necessary to identify the powers vested in Congress and in the President by the Constitution and the manner in which these powers must be shared. This section will then examine possible nonconstitutional sources of academy authority. Finally, the applicability to the academies of limitations intrinsic to the sources of academy power, of constitutional jurisdictional limitations and of the limitations imposed by the Bill of Rights, particularly due process of law, will be discussed.

A. General Sources of Authority

The Legal Status of Cadets

The legal status of cadets was undetermined until 1819, nearly 20 years after the founding of the Military Academy, when Attorney General Wirt opined that West Point cadets were "enlisted soldiers" and were a part of the United States Army.¹⁵ The status of the West Point cadet was redefined in 1855 by Attorney General Cushing as that of an "inchoate," "quasi commissioned," "future officer."¹⁶ Cadets were considered to "constitute a peculiar corps, the legal condition of whose members is to be gathered from the status and the regulations specially providing for the creation and government of the Military Academy."¹⁷ Today, except at the Merchant Marine

ethics offenses. "Adjudicatory" is used rather than "disciplinary" because the academies consider this latter term to include only conduct offenses.

¹⁴ "'Cadet' means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy." 10 U.S.C. § 801(6) (1970). "'Midshipman' means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service." *Id.* § 801(7). Throughout this study, "cadet" refers to an appointee of any of the five federal

academies unless otherwise indicated.

¹⁵ The Attorney General's opinion states, in pertinent part, that cadets are enlisted soldiers; they engage, like soldiers, to serve five years, unless sooner discharged; they receive the pay, rations, and emoluments of sergeants; they are hound to perform military duty in such places and on such service as the commander in chief of the army of the United States shall order. . . .

I Op. Att'y Gen. 276, 290 (1819).

¹⁶ 7 Op. Att'y Gen. 323, 331-32 (1855). See generally *Hoeppel v. United States*, 85 F.2d 237 (D.C. Cir. 1936); *Babbitt v. United States*, 16 Ct. Cl. 202 (1880); *United States v. Ellman*, 9 U.S.C.M.A. 549, 26 C.M.R. 329 (1958); 16 Op. Att'y Gen. 611 (1878).

¹⁷ 7 Op. Att'y Gen. 323, 332 (1855).

Academy,¹⁸ cadets belong to a unique military class¹⁹ and are members of the Regular Armed Force denoted in the name of their academy.²⁰

2. Cadets as Members of the Military

Certain adjudicatory powers are vested in the academies by virtue of cadet membership in the military. These powers flow from direct congressional delegation of authority to the academies; from Presidential delegation both of powers possessed by him as Commander-in-Chief and of those received by him from Congress; and, possibly, from congressional ratification of past academy rule-making, from the disciplinary authority endemic to military institutions and from the powers possessed by a corps of cadets as an institution.

Of these, the principal source of authority is congressional, as would be expected from the Constitution's grant of power to the national legislature "[t]o raise and support Armies, . . . to provide

¹⁸ Because Merchant Marine Academy cadets receive benefits and assume obligations similar to those

mentioned in Attorney General Cushing's opinion, they may be considered, as are cadets of the other academies, to be members of a unique class. However, since they are not members of the Armed Forces, see, e.g., 10 U.S.C. § 101(4) (1970); 38 U.S.C. §§ 101(10), 101(21) (1970), and are not included among those subject to the Uniform Code of Military Justice, see 10 U.S.C. § 802 (1970), it is uncertain whether they should be considered members of a military class. For evidence that the training and responsibilities of Merchant Marine Academy cadets and graduates are military in nature, however, see *Wasson v. Trowbridge*, 382 F.2d 807, 809 (2d Cir. 1967); Memorandum of Law for Defendants, *O'Neill v. Dent*, Civil No. 71-1480 (E.D.N.Y. July 16, 1973); Hearings on Administration of the Service Academies Before the Special Subcomm. on Service Academies of the House Armed Services Comm., 90th Cong., 1st & 2nd Sess. 10,232, 10,683 (1967-68) [hereinafter *Hearings on Service Academies*]; U.S.M.M.A.M.R. 01103, 03101(1) (1971).

¹⁹ *United States v. Ellman*, 9 U.S.C.M.A. 549, 551, 26 C.M.R. 329, 331 (1958); *Zbar & Mazza*, supra note 6, at 32; see *Hoeppel v. United States*, 85 F.2d 237 (D.C. Cir. 1936); *Babbitt v. United States*, 16 Ct. Cl. 202 (1880). Cadets have military rank above that of enlisted personnel but below that of commissioned or warrant officers. E.g., U.S.A.F.R. 35-54, attach. (1970); U.S.A.R. 600-20, 1 1-7 (1962).

²⁰ See, e.g., 10 U.S.C. § 3075(b)(2) (1970) (Army); id. § 8075(a)(2) (Air Force); *Anderson v. Laird*, 466 F.2d 283, 308 (D.C. Cir. 1972) (MacKinnon, J., dissenting), cert. denied, 409 U.S. 1076 (1972). See generally *United States v. Ellman*, 9 U.S.C.M.A. 549, 550-53, 26 C.M.R. 329, 330-33 (1958); F. Lough & A. DePaul, *A Legal Review and Analysis of the Relevant Federal Laws, Regulations, Judicial and Executive Opinions Pertaining to the United States Military Academy, Its Faculty and Cadet Student Body* 9-11 (1967); *Zbar & Mazza*, supra note 6, at 31-33.

The "Armed Forces" include the Army, Navy, Air Force, Marine Corps and Coast Guard, 10 U.S.C. § 101(4) (1970), and the term "military" applies to any or all of the Armed Forces, id. § 801(8). For purposes of this study, "Armed Forces" and "military" will include the United States Maritime Administration, Department of Commerce, unless otherwise differentiated.

and maintain a Navy [and] to make Rules for the Government and Regulation of the land and naval Forces."²¹ "These enumerated powers necessarily . . . include the power and authority to specially train a select group of officers [to be] qualified military leaders."²² And both Congress' enumerated powers and its additional constitutional power to make all laws necessary and proper for the exercise of its enumerated powers provide authority to govern and regulate cadet activities in order to conduct this

training.

The single most important exercise of Congress' authority over military discipline is its 1950 enactment of the Uniform Code of Military Justice (UCMJ or Uniform Code)²³ which details and codifies the general military disciplinary system. Unless excluded by statute, cadets are subject to all statutory provisions applicable to other members of the military, including the UCMJ.²⁴ Thus, under the Uniform Code, cadets may be subject to general or special courtsmartial,²⁵ as well as to the administrative "Commanding Officer's non-judicial punishment."²⁶ Military officials apparently read in authority for some academy adjudicatory rules, "particularly the punitive aspects of the cadets [sic] honor code,"²⁷ from the UCMJ.

²¹ U.S. Const. art I, § 8, cls. 12, 13, 14.

²² See *Anderson v. Laird*, 466 F.2d 283, 307-08 (D.C. Cir.) (MacKinnon, J., dissenting), cert. denied, 409 U.S. 1076 (1972).

²³ Act of May 5, 1950, ch. 169, 64 Stat. 107, as amended 10 U.S.C. §§ 801-940 (1970). Congress promulgated the UCMJ as an attempt to reform and modernize the military justice system in response to severe post-World War II criticism. See *Burns v. Wilson*, 346 U.S. 137 (1953). See also Mullally, *Military Justice: The Uniform Code in Action*, 53 *Colum. L. Rev.* 1 (1953).

²⁴ *United States v. Ellman*, 9 U.S.C.M.A. 549, 26 C.M.R. 329 (1958); 10 U.S.C. § 802(2) (1970). Merchant Marine cadets, however, are not normally subject to the UCMJ. 10 U.S.C. 802(2) (1970). Application of the UCMJ requires that cadets be treated as officers. *United States v. Ellman*, *supra* at 552, 26 C.M.R. at 332; see *id.* at 553, 26 C.M.R. 333; Zbar & Mazza, *supra* note 6, at 32. Cadets must be given all the protections of the Uniform Code as well as its burdens. *United States v. Ellman*, *supra* at 552, 26 C.M.R. at 332; see *id.* at 553, 26 C.M.R. 333; Zbar & Mazza, *supra* note 6, at 32.

²⁵ There are three types of courts-martial: summary, special and general. 10 U.S.C. § 816 (1970). Cadets and midshipmen are specifically exempt from summary courts-martial. *Id.* § 820.

²⁶ See U.C.M.J. art. 15, 10 U.S.C. § 815 (1970). Article 15 defines the types and sets the maximum amounts of administrative, nonjudicial punishment that a "commanding officer" may impose upon "officers" and "other military personnel of his command" for "minor offenses."

²⁷ The legal basis, particularly [for] the punitive aspects of the cadets [sic] honor code is the Uniform Code of Military Justice. In general, all four aspects of the Cadet Honor Code (lying, cheating, stealing, or tolerating any of those acts), are punishable under military law. Specific articles of the UCMJ which could apply vary with the circumstances, but include Articles 80, 92, 107, 122,

A considerable measure of congressional power over the military has been delegated to the President and his subordinates. The legislature has given the Chief Executive general authority to prescribe regulations for the governing of the Armed Forces.²⁸ Congress has specifically vested the various armed services themselves with the responsibility for training qualified military officers²⁹ and has given the academies specific powers to do so.³⁰ In addition, by classifying each academy as a military institution³¹ and by designating each academy superintendent as the "Commanding Officer" of his academy,³² Congress may have impliedly delegated to each³³ further power to do whatever is reasonably necessary to accomplish his "mission."³⁴

Cadets are also subject to the powers of the President as Commander-in-Chief of the Armed Forces. This Constitutional designation impliedly vests the President with power, in addition to that delegated by Congress, to prescribe rules governing the military.³⁵ The President may, of course, delegate some of this disciplinary power to subordinate military authorities.³⁶

One possible nonconsti-

E.g., U.S.A.F.C.W.M. 30-1(16) (1966), reprinted in *Hearings on Service Academies*, supra note 18, at 10,823.

²⁸ See, e.g., 10 U.S.C. § 121 (1970) (Presidential authority to prescribe regulations for the Armed Forces); id. § 3061 (Army); id. §§ 280, 6011 (Navy); id. § 6012 (Marines); id. § 8061 (Air Force); 14 U.S.C. §§ 632, 633 (1970) (Coast Guard); 46 U.S.C. § 1126(b)(2) (1970) (Merchant Marine Academy).

²⁹ See, e.g., 10 U.S.C. § 3012 (1970) (Army); id. § 5012 (Navy); id. § 8012 (Air Force).

³⁰ See, e.g., id. §* 933, 6961-64.

³¹ See, e.g., id. § 9331(a) (Air Force Academy).

³² See, e.g., id. § 4334(b) (Army); id. § 9334(a) (Air Force).

³³ See *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965). Although it has not done so for the other academies, Congress has specifically provided that the Commandant of the Coast Guard may prescribe disciplinary rules for Coast Guard cadets. See 14 U.S.C. § 182 (1970).

³⁴ In determining the powers impliedly delegated by Congress to an organization, only those reasonably related to accomplishing its expressed purpose will be implied. There appears to be only one statutory expression of the purpose of an academy: 10 U.S.C. § 933I(a) (1970). The purpose of all academies is obvious, however: "to prepare [officers] for military service." Hearings on Service Academies, *supra* note 18, at 10,877; see 10 U.S.C. § 9331(a) (1970). The purpose of each academy is also expressed in the statement of its "mission," all of which are substantially similar. See Hearings on Service Academies, *supra* at 10,907. The mission of the Air Force Academy is to provide "instruction and experience to each cadet so that he graduates with the knowledge and character essential to leadership and with the motivation to become a career officer in the United States Air Force." U.S. Air Force Academy Catalog 10 (1972); see R.C.C.U.S.C.G.A. 1-1-03 (1971); U.S.M.M.A.M.R. 01103 (1971); Hearings on Service Academies, *supra* at 10,226-27, 10,546-47 (Army); *id.* at 10,877, 10,907 (Air Force).

³⁵ See *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885); cf. *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886, 889-92 (1961).

³⁶ See *French v. Weeks*, 259 U.S. 326, 334 (1922); K. Davis, *Administrative Law Text* § 9.01 (3d ed. 1972). See also *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965).

tutional source of power is indirect congressional approval, by ratification, of past academy rulemaking. Adherents of this doctrine would contend that in permitting regulations to be formulated, published and enforced year after year, Congress impliedly ratifies the academies' administrative rulemaking activities.³⁷ Ratification is predicated upon periodic reporting, the theory being that once Congress is officially informed of the rules promulgated by an agency, its failure to explicitly repeal those regulations is tantamount to congressional approval.³⁸

The military also claims for the superintendents of the academies further "inherent" powers common to all commanding officers. Thus, according to military officials, the academies' superintendents have the "inherent authority . . . to take nonpunitive corrective measures to further the efficiency of [their]

command[s]." ³⁹ This disciplinary authority of academy officials is augmented at a number of academies by an implicit delegation of power to the congressionally created position of Commandant of Cadets.⁴⁰

According to academy officials,⁴¹ at least one federal court of appeals has acknowledged an additional basis for the academies' adjudicatory authority. Called upon to decide whether the Military Academy's Honor Code was unconstitutionally vague, the Court of Appeals for the District of Columbia Circuit described the Code as

³⁷ See Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. Rev. 861 (1959); cf. *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *Maddux v. United States*, 20 Ct. Cl. 193 (1885).

³⁸ See Fratcher, *supra* note 37, at 865.

³⁹ Letter from Major General George S. Prugh, Judge Advocate General, U.S. Army, Dec. 14, 1971, citing *Manual for Courts-Martial, United States* ¶ 128(c) (rev. ed. 1969); accord, Letter from Colonel Hugh J. Clausen, Chief, Military Justice Division, U.S. Army, Jan. 6, 1972. This "inherent power" to "nonpunitively" discipline noncadet members of the military is claimed by all the Armed Forces. See, e.g., U.S.A.F.M. 110-3(15)(5), (6) (1969); U.S.A.R. 27-10(3-5) (1968).

The President apparently recognizes that aside from his constitutional power as Commander-in-Chief, he has the "inherent" powers of a military commander to intervene in the military's judicial process. See Transcript of Press Conference of John D. Ehrlichman, Ass't to the President for Domestic Affairs, Apr. 3, 1971, which announced President Nixon's "decision that before any final sentence is carried out in the case of Lt. [William] Calley, the President will personally review the case and finally decide it," thereby adding an "extralegal ingredient to the review process." *Id.* at 1, 3.

⁴⁰ See, e.g., 10 U.S.C. § 4331(a)(3) (1970) (Army); *id.* § 9331(b)(3) (Air Force). "The Commandant of Cadets is the immediate commander of the Corps of Cadets" at the Military Academy. *Id.* § 4334(c).

⁴¹ See, e.g., Letter from Assistant Staff Judge Advocate, U.S.M.A., April 8, 1973; Letter from Former Assistant Staff Judge Advocate, U.S.M.A., May 9, 1973; Letter from Another Former Assistant Staff Judge Advocate, U.S.M.A., April 10, 1973.

"the 'common law' of the Corps of Cadets—a creature of the cadets themselves,"⁴² and held that the scope of the proscriptions of the Honor Code was not, therefore, subject to judicial review.⁴³ Academy officials believe the

court, in so holding, implied that the Honor Code was promulgated by the Cadet Corps as an independent jurisdiction.

3. The Cadet as a Student

The service academy's authority over the cadet by virtue of his military status, extensive as it may be, is not the exclusive source of academy disciplinary power. By their very nature, academies are colleges, as well as military institutions,"⁴⁴ and thereby possess the same authority as civilian institutions performing educational functions. Some of this power flows from explicit and implicit delegation by Congress,⁴⁵ much as school boards or state institutions of higher learning function under implied or explicit grants of authority from state legislatures.⁴⁶ Delegations of congressional authority aside, the academies may claim two additional sources of power which arise from their status as educational institutions.

First, academy officials might be considered to act, as have civilian educational officials historically, in loco parentis, and therefore to possess plenary power to discipline cadets at the academies.⁴⁷ Indeed, it appears that the academies have always regarded them-

⁴² Dunmar v. Ailes, 348 F.2d 51, 55 (D.C. Cir. 1965).

⁴³ Id. at 55, citing Carter v. McClaghry, 183 U.S. 365 (1902).

⁴⁴ Annual Report of the Superintendent, U.S. Air Force Academy 1 (1965); see U.S.A.F.M. 110-3(13-1)(b) (1969) (U.S.A.F.A. is "a service university"). While the academies are neither statutorily nor judicially defined as "educational institutions," the facts that their curricula are dominated by traditional academic coursework and that they award each cadet a Bachelor of Science degree give them the status of an educational institution. See Hearings on Service Academies, supra note 18, at 10,289, 10,331, 10,333, 10,554.

⁴⁵ For statutes granting academies power to do specific acts, see, e.g., 10 U.S.C. §* 696164 (1970). For statutes impliedly delegating congressional authority to the academies, see notes 29, 31, 32, 34 & 40 supra. For a general enabling act applicable to the academies, see text accompanying note 28 supra.

⁴⁶ Commentators have noted, for example, that some school powers are derived from the compulsory attendance laws. E.g., Buss, supra note 5, at 559. Only a few of the powers given civilian school boards are

delegated specifically. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 375 n.8 (1969). Rather, most civilian school board authority derives from general enabling acts which permit school boards to carry out the purposes for which they were created. See, e.g., Iowa Code Ann. § 279.8 (1972).

⁴⁷ See Goldstein, *supra* note 46, at 377-84.

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selves as standing in loco parentis vis-a-vis their cadets.⁴⁸ Historically, the in loco parentis power was predicated on a constructive delegation to school officials of authority possessed by parents over their children.⁴⁹ Since many cadets are emancipated upon entering the academies and their parents therefore retain no authority which could conceivably be delegated,⁵⁰ the academies have no in loco parentis power over many cadets. In addition, since the in loco parentis doctrine appears to be dead at civilian educational institutions generally,⁵¹ it is unlikely that courts would permit the academies to continue to invoke the doctrine as a source of authority.

Second, as educational institutions, the academies undoubtedly have the inherent general power to maintain order and to formulate and enforce reasonable rules of student conduct.⁵² This power author-

⁴⁸ For example, an 1826 Board of Visitors Report states that [t]he discipline of the academy depends upon . . . rules which place the superintendent and academic staff in the delicate and responsible situation of a parent, with power to ask no more of a cadet than a father ought to require, or an obedient son to perform.

Report of the Board of Visitors, U.S. Military Academy (1826), reprinted in 18 American State Papers (3 Military Affairs) 380 (A. Dickins & J. Forney eds. 1860). As stated by one commentator. "[West Point] stands in loco parentis not only over the mental but the moral, physical, and, so to speak, the official man' ". C. Larned, *The Genius of West Point, I The Centennial of the United States Military Academy at West Point* 472 (1904) (Larned was an Army Colonel assigned to the Military Academy).

⁴⁹ See I W. Blackstone, *Commentaries* 453 (7th ed. 1775); Goldstein, *supra* note 46, at 379.

⁵⁰ See, e.g., *United States v. Williams*, 302 U.S. 46, 49 (1937); *Fausser v. Fausser*, 50 Misc. 2d 601, 602, 271 N.Y.S.2d 59, 61 (1966). Since one must be between 17 and 22 years old to enter an academy, see,

e.g., U.S. Air Force Academy Catalog 52 (1972), many cadets have reached the age of majority. The academies often assume, however, that parents retain some degree of authority over cadets. As evidence of this, at the Military and Air Force Academies parents are informed if their son is judged to have violated the cadet honor code. Honor Oper. Ins., U.S.A.F.A. 3(2)(c) (1970); Letter from Information Officer, U.S.M.A., Oct. 25, 1972, at 2. Cadets have been required, moreover, to receive parental permission to change the denomination of the religious services they are required to attend. See, e.g., *id.* But see Letter from Staff Judge Advocate, U.S. N.A., Oct. 12, 1972, at 2 (parental permission requirement discontinued). See also U.S.M.A.D.S.S.O.P. 16(e) (1968) (number of demerits cadets receive reported to each cadet's parents approximately every six weeks). Letter from Commandant of Cadets, U.S.A.F.A. to Parents of Air Force Cadet, May 24, 1971 (informing parents that their son will appear before officer board for consideration for expulsion for lack of aptitude).

⁵¹ See, e.g., *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968). Even if the *in loco parentis* doctrine is applied at the academies, it would give academy officials only that power which is reasonably related to accomplishing the academies' legitimate missions. See Goldstein, *supra* note 46, at 387.

⁵² See, e.g., *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *aff'd*, 397 U.S. 31 (1970). This inherent power of educational institutions has been reaffirmed recently by several federal courts. See, e.g., *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1088-89 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970);

izes, however, only the performance of those acts reasonably related to the accomplishment of the institution's lawful purposes.⁵³ This additional source of authority also appears illusory, since an academy as a military institution is already empowered to take those measures —not statutorily prohibited— which are reasonably related to accomplishing its legitimate goals.

In summary then, the authority of the President and his military subordinates to govern the academies must either arise (1) expressly or by implication from a congressional mandate or (2) from at least one of four extrastatutory sources: the constitutional power of the President as Commander-in-Chief, congressional ratification of past academy rulemaking, the inherent power of a commander to take actions reasonably related to accomplishing his mission, and the common law of the cadet corps. Any

power over cadets attributable to an academy's status as an educational institution would appear merely to parallel and in no case to exceed its military-related authority.

B. General Limitations on Authority

1. Limitations on the Sources of Power

Regulating the behavior of cadets is clearly necessary if the academies are to carry on successfully their day-to-day activities and accomplish their legitimate missions. The source and scope of this regulatory power is unclear, however, since many areas of military life require regulation not specifically authorized by statute.⁵⁴ A logical hypothesis is that through legislation creating and funding the service academies⁵⁵ Congress impliedly delegated authority to pro-

Schwartz v. Schuker, 298 F. Supp. 238, 240-42 (E.D.N.Y. 1969).

⁵³ See, e.g., *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1088-89 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Powe v. Miles*, 407 F.2d 73, 84-85 (2d Cir. 1968).

⁵⁴ For example, traffic regulations for military bases (see, e.g., United States Marine Corps Development and Education Command Order 5800.1 (1971)) are apparently promulgated by base commanders without specific statutory authorization. Traffic violations are similarly defined by the academies. See, e.g., U.S.A.F.C.R. 35-6 (VIII)(8) (1971).

⁵⁵ Legislation creating the academies includes Act of Mar. 16, 1802, ch. 9, § 27, 2 Stat. 137 (U.S.M.A.); Act of Aug. 10, 1846, ch. 176, § 4, 9 Stat. 100-01 (U.S.N.A.); Act of July 31, 1876, ch. 246, 19 Stat. 107 (U.S.C.G.A.); Act of June 23, 1938, ch. 600, § 44, 52 Stat. 965, as amended 46 U.S.C. § 1126 (1970) (U.S.M.M.A.); Act of Apr. 1, 1954, ch. 127, § 2, 68 Stat. 47 (U.S.A.F.A.). For legislation detailing the organization and responsibilities of the academies, see 10 U.S.C. §§ 4331-55 (1970) (U.S.M.A.); id. §* 6951-74 (U.S.N.A.); id. §§ 9331-55 (U.S.A.F.A.); 14 U.S.C. §t 181-95 (1970) (U.S.C.G.A.); 46 U.S.C. §§ 1126-26d (1970) (U.S.M.M.A.). See also 14 U.S.C. § 182 (1970).

mulgate those regulations reasonably necessary for the training of future officers.⁵⁶ A question thus arises as to whether other sources of authority confer upon the academies regulatory power of a broader scope. With this

question in mind, the following discussion will focus in turn upon the UCMJ, the ratification doctrine, the common law of the cadet corps, and the constitutional power of the President as possible bases for more extensive rulemaking authority.

As a general proposition, the Uniform Code of Military Justice validates disciplinary action taken by a military commander. The legitimate exercise of command power pursuant to the Uniform Code, however, is limited. For example, the academies' "punishment by analogy approach" of creating cadet offenses by analogizing them to offenses recognized under the UCMJ "[is] not compatible with our constitutional system."⁵⁷ Moreover, reliance on the UCMJ as a source of authority for many academy regulations is entirely misplaced. For, although the UCMJ authorizes the promulgation of codes proscribing "acts or omissions constituting offenses under the punitive articles,"⁵⁸ the academies go much farther by prohibiting conduct not made unlawful by the Uniform Code, e.g., "toleration" of lying, stealing and cheating.⁵⁹ Other acts, such as stealing, which are proscribed by the UCMJ, are successfully prosecuted as adjudicatory offenses even in the absence of essential elements of the corpus delicti as defined in the Uniform Code.⁶⁰ These provisions of the academy codes, therefore, must be supportable, if at all, on the basis of some source of regulatory authority outside the UCMJ.

Similarly, the ratification doctrine is an illusory source of additional rulemaking power. Since adjudicatory academy regulations are not officially reported to Congress or otherwise officially made available to the public,⁶¹ the "official knowledge"⁶² necessary to ratify specific practices is absent. Nor can other sources of congressional information gathering satisfy the reporting requirement which under-

⁵⁶ See text accompanying notes 31-34 & 40 supra.

⁵⁷ *Avrech v. Secretary*, No. 71-1841, at 8 (D.C. Cir. Mar. 20, 1973), quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972).

⁵⁸ *Manual for Courts-Martial, United States* ¶ 128(b) (rev. ed. 1969).

⁵⁹ The toleration clause of the Air Force and Military Academies' honor codes makes misprision of an honor violation another honor violation. See text accompanying note 171 *infra*.

⁶⁰ This practice may be prohibited by the preemption doctrine created in *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

⁶¹ Indeed, the only public regulation concerning any academy adjudicatory code appears to be 32 C.F.R. § 901.20 (1972) (U.S.A.F.A. honor code).

⁶² See, e.g., *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939).

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lies the ratification doctrine. Virtually the only formal congressional contact with the academies⁶³ is an annual visit to each by the seven congressmen who are members of the academies' Boards of Visitors.⁶⁴ The Boards of Visitors, however, report not to the Congress but rather to the President. Moreover, the academies make extensive preparations in order to give the Board of Visitors a selective and favorable view of academy life,⁶⁵ and the perception of the academies thus conveyed to the visiting congressmen, and in turn to the President, is often distorted and incomplete. In essence, Congress knows very little about the academies and their adjudicatory systems,⁶⁶ and cannot be considered to have ratified regulations which are not consistent with the implied congressional mandate to take those steps reasonably necessary to the fulfillment of an academy's mission. Thus, any purported power arising through ratification can at most be viewed as coextensive with implied delegations of congressional authority, and the doctrine cannot be invoked to validate specific academy conduct outside those bounds.

It is clear, moreover, that the District of Columbia Circuit Court of Appeals' characterization of the Military Academy's honor code as part of the "'common law' of the Corps of Cadets—a creature of

⁶³ Occasionally, a specialized congressional committee will receive information about the academies. E.g., Hearings on Service Academies, supra note 18 (Special Subcomm. on Service Academies of the House Comm. on Armed Services); DoD House Appropriations Hearings, 1966, supra note 12, at 35-50.

⁶⁴ Each academy is annually inspected by its own Board of Visitors, composed of selected Senators, Representatives and Presidential appointees. Three of these Boards are required by statute to submit an annual written report to the President about "the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy that the Board decides to consider." 10 U.S.C. § 4355 (1970) (Army); id. § 6968 (Navy); id. § 9355 (Air Force); See 14 U.S.C. § 194 (1970) (Coast Guard); 46 U.S.C. § 1126c (1970) (Merchant Marine); Hearings on Service Academies, supra note 18, at 10,514-16.

⁶⁵ See Hearings on Service Academies, supra note 18, at 10,678. As stated by Vice Admiral Hyman G. Rickover:

A Board of Visitors approaches one of the academies with little opportunity to discover what is really going on there. Three or four days spent at one of the service academies does not give enough time to ascertain and evaluate the serious problems. Visitors are subjected to "canned" presentations which, because of lack of time, they must accept. It is significant that each time a crisis arises at an academy you find that no Board of Visitors had discovered the facts ahead of time.

DoD House Appropriations Hearings, 1966, supra note 12, at 40. Similar complaints were voiced by an Air Force Academy Board of Visitors. See Report of the Board of Visitors, U.S. Air Force Academy 18, 26 (1965); J. Heise, *The Brass Factories* 172-74 (1969).

⁶⁶ See Hearings on Service Academies, supra note 18, at 10,510 (remarks of Representative Hebert). Examination of a dozen Board of Visitors' reports indicates that the visiting Congressmen rarely inquire into the propriety of the academies' adjudicatory bodies.

the cadets themselves"⁶⁷ provides cadets no substantive rulemaking authority. One reason is that the court simply addressed the propriety of judicial inquiry into the alleged vagueness of the honor code's proscriptions and in no way faced an issue of substantive rulemaking authority. Properly understood, the court's use of the phrase "common law" merely expressed the view that the cadets' experience of living under the honor system, as well as the Corps' historical input into its substantive prohibitions, justified a presumption of acquaintance with it sufficient to undercut the claim of vagueness.⁶⁸

The cadet honor codes simply do not fit into the conceptual framework of "common law" in the sense of ancient laws, customs and usages established and recognized from time immemorial. The code of the Military Academy, the oldest of the service academies, is of recent vintage when compared to the uncodified legal principles which have served as the basis for the development of Anglo-American jurisprudence.⁶⁹ More fundamentally, the assumptions upon which the existence of such cadet common law would necessarily be premised appear to be erroneous. Except at the Merchant Marine and, perhaps, the Coast Guard Academies,⁷⁰ the codes did not originate with cadets, but were either created by the academies' su-

⁶⁷ *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965).

⁶⁸ See *id.* Recent circuit court decisions have taken a different view of the constitutionally required specificity of military rules of conduct, holding that civilian standards of vagueness are applicable. See *Levy v. Parker*, Civil No. 71-1917, at 27 (M.D. Pa. Apr. 18, 1973); *Avrech v. Secretary*, No. 71-1841, at 10 (D.C. Cir. Mar. 20, 1973).

⁶⁹ The Military Academy's honor code was first established by Superintendent Sylvanus Thayer in 1817. *The Cadet Honor Code and System 2* (1970) (U.S.M.A.) [hereinafter *The Cadet Honor Code*, U.S.M.A.]. Organized participation by cadets in the administration of the code first occurred only with the organizing of the Vigilance Committee "sometime after 1871." *Id.* at 3. Cadets did not officially administer the code until 1923, when Superintendent Douglas MacArthur formalized and officially recognized the Vigilance Committee, renamed the Cadet Honor Committee, as being responsible for administering the code. See, e.g., *Hearings on Service Academies*, supra note 18, at 10,627; *The Cadet Honor Code*, U.S.M.A., supra at 3.

The honor codes at the other academies have been created much more recently than West Point's. The code was established at the Naval Academy in 1951 (*The Honor Concept of the Brigade of Midshipmen, Shipmate*, Feb. 1968, at 3 [hereinafter *Honor Concept*]); at the Air Force Academy in 1955 (Clelland, *The Honor Code of the Air Force Academy, The Airman*, Apr. 1962, at 26, 27); at the Coast Guard Academy on September 16, 1968 (Letter from Legal Officer, U.S.C.G.A., Aug. 31, 1972, at 2); and at the Merchant Marine Academy on August 9, 1972 (Interview with 1972-73 Honor Comm. Vice Chairman, U.S.M.M.A., Aug. 10, 1972).

⁷⁰ The honor code recently promulgated at the Merchant Marine Academy appears to have been established completely on the initiative of upperclass cadets without any prompting by academy officials. Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972. It appears uncertain

whether the Coast Guard Academy's honor code was established on the initiative of cadets or academy officials. Interview with Legal Officer, U.S.C.G.A., Dec. 18, 1972.

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perintendents and later accepted by cadets,⁷¹ or "created" by cadets after an extensive indoctrination as to the code's value by academy officials.⁷² Despite frequent academy insistence that the honor codes "belong" to and are administered solely by cadets,⁷³ academy offi-

⁷¹ W. Fowler, *Perfecting Character: An Honor System for the Air Force Academy?* 51-52 (1954) (unpublished thesis submitted to the faculty of the Air War College). The Air Force Academy's honor code was introduced by the academy's first superintendent, Lt. Gen. Hubert R. Harmon, who "laid the groundwork by preliminary planning . . . at least two years before the arrival of the first cadet." R. Calkins, *The Morality of the Air Force Academy Honor Code* 7 (1966) (dissertation submitted by an Air Force major to the faculty of the Religious Education Department, The Catholic University of America). Top academy officials were tasked with developing the complete honor system.

The first consideration of the group was whether it would be better to permit the cadets to establish their own code of honor or provide them with a framework within which they could work out the details after their arrival. A decision [was made] in favor of the latter approach. . . .
Id. at 8-9; see U.S.A.F.A. Honor Code (Draft, Apr. 3, 1958). Thus, the honor code had already been formulated before the academy began operations. Calkins, *supra* at 9.

Cadets had little choice but to accept the honor system presented them. Because of the importance attached to the honor code, it was decided that it "should be established whether or not there was complete acceptance. Those cadets who could not see fit to abide by its precepts would be eliminated." Id. at 9-10, citing U.S.A.F.A., *Honor Code* 3 (Historical Division, U.S.A.F.A. Library 1955). In fact, academy officials were willing to delay presentation of the code until they could be assured of its acceptance by cadets. Id. at 8. The honor system was never submitted to a formal vote, but was accepted by "informal cadet consensus" only after "careful presentation by junior officers." W. Charles, *Honor Codes: Can They Develop Integrity in Future Military Leaders?* 180-81 (1968) (unpublished thesis submitted to Army Command and General Staff College, Fort Leavenworth, Kansas by an Air Force major). For a description of the "step[s] in conditioning the air cadets for an honor system," see Fowler, *supra* at 50-52. See also Clelland, *supra* note 69, at 26-27. The "discretion" aspect of the Air Force Academy's honor code (whereby a violator may be retained at the Academy) was also created by academy officials, apparently against cadet wishes. See Calkins, *supra* at 25, citing Letter from Captain John J. Wolcott to Barry D. Watts, April 5, 1965, found in files of the Historical Division, U.S.A.F.A. Library.

⁷² A Naval Academy publication reports, for example, that on December 4, 1950, the Superintendent of

the Naval Academy told the assembled Brigade of Midshipmen that "the continued presence within the Brigade of those [few] midshipmen . . . not living up to . . . fundamental concepts of honor, personal integrity, and loyalty" was a matter causing him much concern and which "he was sure the Brigade would want to correct."

The Superintendent . . . asked that class groups discuss the matter . . . and that, if within a class it was agreed to report offenders to their class committees for violations of honor and to proctor their own examinations, the class president so inform him.

After the separate classes discussed his proposal in company groups, the Brigade Executive Committee formulated an honor concept. Since the "concept needed some guidelines to give it meaning . . . the . . . Committee went back time and again to the Superintendent for greater elucidation and definition [so that they would] be correct in their decisions." Honor Concept, supra note 69, at 3.

⁷³ Letter from Deputy Chief, Administrative Law Division, Office of Judge Advocate General, U.S.A.F., to Senator Charles H. Percy, Oct. 19, 1972; Charles, supra note 71, at 117;

cials have, in recent years, often taken positive steps to influence the administration of the codes⁷⁴ and their substantive content.⁷⁵ Equally

Clelland, supra note 69, at 27; T. Moorman, Report to the Chief of Staff USAF (1967) [hereinafter U.S.A.F.A. Superintendent's Report]; see Hearings on Service Academies, supra note 18, at 10,680, 10,799, 10,802.

⁷⁴ There is no evidence of interference by academy officials with the cadet administration of the honor concepts of the Naval, Coast Guard and Merchant Marine Academies. Officials of the Military and Air Force Academies have on numerous occasions, however, greatly influenced or assumed control of the cadet honor committees' administration of the codes. The Honor Committee of West Point Graduates, for example, revealed that during West Point's 1951 honor scandal, "the Cadet Honor Committee with the exception of three Cadets was not even informed of the Honor violations until a board of officers undertook the investigation." Minority Report, supra note 6, at 12. Indeed, "[t]he Cadet Honor Committee, with the exception of three members, never had anything to do with the cases of the 90 Cadets [dismissed]. The Cadet Honor Committee was not even officially informed that an inquiry was in progress until [two months after it began]." Id. at 13; accord, Report of the Honor Committee of West Point Graduates on the Honor Code Violations at the United States Military Academy 7 (1951) [hereinafter Majority Report]. Similarly, the Air Force's Office of Special Investigation exercised many of the functions of the Air Force Academy's cadet honor committee during that academy's 1965 cheating scandal. See Comments of Secretary of the Air Force and Secretary of Defense to the Recommendations of the 1965 Board of Visitors to the United States Air Force Academy 15 (1965). In addition, Air Force Academy officials participated in the handling of the

Academy's 1967 honor scandal. See Charles, *supra* note 71, at 224; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 16-17. This participation by Academy officials in the administration of an honor system which cadets strongly perceive "belongs" to them may well be resented by them as improper interference. See U.S.A.F.A. Superintendent's Report, *supra* at 13; Letter from Former 1971-72 Air Force Academy Honor Representative to Sen. Charles H. Percy, undated, at 2-3. See also Morgenstern, Report of TDY to USAF Academy 27 Jan '65 - 5 Feb '65, at 4 (Feb. 11, 1965).

The continuing overt influence exercised by Air Force officials over the cadet honor code is poignantly evidenced by the following letter:

After the decision by the Honor Committee [to grant the cadet discretion after his conviction of having violated the honor code by lying] . . . the Superintendent of the Academy . . . called in the Honor Committee representative and advised that the Honor Committee had made a 'serious mistake' in granting 'discretion' to Cadet [X] and directed that they either reconsider the case and arrive at the "right" decision or he would overrule them and see that the "right" decision was made. The Honor Committee did not back down; thereupon, the Commandant's of Cadets Board was convened last week and, today, the Academy Board. . . .

Letter from Father of Cadet [X] to the Deputy Assistant Secretary of Personnel Policy, Office of the Assistant Secretary of Manpower Reserve Affairs, Department of the Air Force, June 4, 1971. See also Letter from Honor Comm. Legal Advisor, U.S.A.F.A., Jan. 4, 1973. Similarly, a cadet elected by vote of 22-5 to be squadron honor representative was denied the position by the officer-in-charge of his squadron because he "was considered not military enough." Letter from 1970 Air Force Academy Graduate, June 27, 1972. See also Annual Report of the Superintendent, U.S. Air Force Academy 66 (1965).

⁷⁵ Air Force Academy officials have been especially overt in their control of the substantive content of the cadet honor code and have manifested a total unwillingness to permit meaningful change of the code by cadets. See Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 24, quoting interview with Vice Commandant of Cadets, U.S.A.F.A. For example, shortly before the Cadet Wing voted in the fall of 1971 on the retention of the code's toleration clause,

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important, it is virtually always the academy hierarchy—not the corps of cadets—which enforces the decisions of the cadet honor boards, pursuant to official academy regulations.⁷⁶ Thus, the honor codes would appear to be neither "common law" in the ancient sense nor, except perhaps at two academies, "creature[s] of the cadets themselves."⁷⁷

As previously noted, an academy superintendent may possess inherent

authority to maintain discipline within his command. It would violate both common sense and the nature of a chain-of-command to suggest that the scope of this power exceeds that of the

squadron honor representatives were instructed by Academy officers to inform cadets in their squadrons that if the toleration clause were voted out of the code, the Commandant of Cadets would either abolish the code or take it away from the cadets and have it administered by officers. Letter from Former 1971-72 Air Force Academy Honor Representative, June 29, 1972; see Heise, *Farewell to Duty, Honor, Country*, supra at 24. The following statement by a former Air Force Academy Honor Representative further indicates the Air Force Academy's attitude toward cadet administration of the honor code:

[The officer-in-charge of the honor committee] spoke to the Honor Committee during the fall semester of 1971 and said approximately the following: "The Honor Code, contrary to popular belief, is not a "Cadet" code but is a set standard which is here to stay. The Cadet Wing can vote out the Code and nothing would happen. The Code is stated in the regs (in so many words) and the only change that can occur is for the administration of the code to change from cadet control to totally officer control, in which case the committee would be composed of entirely officers. . . .

Letter from Former 1971-72 Air Force Academy Honor Representative, June 29, 1972; accord, Letter from Another 1971-72 Air Force Academy Honor Representative to Senator Charles H. Percy, undated, at 2-3. Cadets resent such participation in the administration of their honor code as improper interference, see *id.* Note that the official Academy report on its 1967 cheating scandal warned against this type of interference. See U.S.A.F.A. Superintendent's Report, supra note 73, at 13.

⁷⁶ See, e.g., R.U.S.M.A. 16.04 (1971).

⁷⁷ A 1949 Defense Department study recommended the creation of an honor system similar to that of West Point at the other federal service academies. See *N.Y. Times*, Aug. 7, 1951, at 17, col. 7. The very close supervision exercised by academy officers over the codes further refutes the notion that the honor codes belong to the cadets. At the Air Force Academy, for example, the "officer-in-charge" and the "assistant officer-in-charge" of the honor committee are "responsible directly to the Commandant for the supervision of the activities, instructional classes, and hearings of the Honor Representatives." *Annual Report of the Superintendent, U.S. Air Force Academy 66 (1965)*. In addition, at the Air Force Academy "[s]quadron nominees [for the cadet honor committee] are submitted to the Commandant of Cadets for his approval." *Id.*; see S. Beck, *Progress Report on the Work of the Honor Representatives Since the 1965 Cheating Incident 13 (1967)*.

Assertions that the honor codes "belong" to cadets must be further qualified by the fact that cadet honor committees have deliberately prevented other cadets from observing or even having knowledge of its hearing procedures. See Beck, supra at 16; *Denver Post*, Jan. 21, 1972, at 1, col. 4. Although a majority of

the wing specifically voted to have the Air Force Academy Honor Committee consider in every case whether to grant a cadet honor violator "discretion," the 1972-73 Honor Committee refused to make this its practice. Interview with Former 1972-73 Honor Representative, U.S.A.F.A., Aug. 21, 1972.

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Commander-in-Chief. Thus, without attempting to define the limits upon an academy superintendent's "inherent" authority, clearly it can be no broader than the corresponding sphere of Presidential power.

This conclusion leads to a more difficult, more fundamental question: what limits does the Constitution itself place upon the disciplinary rulemaking power of the Commander-in-Chief?⁷⁸ The Constitution quite explicitly gives Congress the authority to legislate for the governance of the military. While some courts have considered this power "plenary" and "exclusive,"⁷⁹ other courts have recognized that some rulemaking authority is also vested in the President.⁸⁰ But, the key issue—the extent to which this power may be exercised without infringing upon the legislative domain—remains unresolved by the judiciary.

There is one well-established constitutional limitation on executive authority to govern the military: as to matters other than the tactical direction of Armed Forces operations, a congressional statute prevails over a contrary military custom or Presidential regulation.⁸¹

⁷⁸ Determination of the proper allocation of powers between Congress and the President is also important in defining the limits of the military's authority in areas other than discipline. Congressman F. Edward Hebert, Chairman of the House Armed Services Committee, for example, has questioned the propriety of the Air Force and Military Academies' programs which send graduates to medical school with full salary, allowances and expenses, commenting that the authority on which they are based is "very thin." Hearings on Service Academies, *supra* note 18, at 10,872-73. It seems that the very establishment of the Naval Academy occurred independently of congressional authorization—in fact, it followed congressional resistance to frequent proposals and bills urging creation of another service academy. See Hearings on Service Academies, *supra* note 18, Appendix A, at III; W. Simons, *Liberal Education in the Service Academies* 45-46 (1965).

⁷⁹ See, e.g., *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 343 (1922); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871).

⁸⁰ See text accompanying note 34 *supra*. The Articles of Confederation provided that "the united states in congress assembled shall also have the sole and exclusive right and power of . . . making rules for the government and regulation of the said land and naval forces, and directing their operations." Articles of Confederation, art. IX (emphasis added). The present United States Constitution's deletion of the words "sole and exclusive" implies that Congress' power to govern and regulate the Armed Forces does not exclude regulation by the President. Fratcher, *supra* note 37, at 862.

⁸¹ This preemption doctrine is well expressed in *United States v. Symonds*, 120 U.S. 46, 49 (1887):
The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may . . . establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others.

The Court of Military Appeals has upheld this preemption doctrine by ruling on numerous occasions that the Uniform Code of Military Justice supersedes or substantially modifies conflicting military customs⁸² as well as provisions of the Manual for Courts-Martial.⁸³ Thus, while Presidential and congressional authority in this area is "correlative,"⁸⁴ the Commander-in-Chief must defer where the legislature has expressly acted upon matters involving military discipline.

Absent legislative preemption, the limitations on the President's exercise of military rulemaking authority which arise from the proper constitutional sharing of power over the military by the Congress and the Executive⁸⁵ are uncertain. The question has been clarified, however, by a well-reasoned, if somewhat obsolete, 1853 Attorney General's Opinion.⁸⁶ Attorney General Caleb Cushing was asked whether the President, or the Secretary of the Navy acting by his direction, had the constitutional power to adopt and enforce

rules of behavior to be followed by members of the Naval Service.⁸⁷ Cushing concluded that the

[s]ystem . . . under examination, being a code of laws, and an act of legislation, was in derogation as such of the constitutional powers of Congress, and, as the mere act of the President in a matter not within his executive jurisdiction, is destitute of legal validity or effect.⁸⁸

The Attorney General added that even when Congress fails to exercise its constitutional authority to promulgate rules concerning military discipline, the Executive may not do so.⁸⁹ To arrive at this conclusion, Cushing recognized that the Constitution vested legislative powers concerning the military solely in Congress and that "orders and directions, when issued by the President, must be within the range of purely executive or administrative action."⁹⁰

⁸² See, e.g., *United States v. Osborne*, 9 U.S.C.M.A. 455, 26 C.M.R. 235 (1958).

⁸³ See, e.g., *United States v. Johnson*, 7 U.S.C.M.A. 488, 492-93, 22 C.M.R. 278, 28283 (1957); *United States v. Wappler*, 2 U.S.C.M.A. 393, 9 C.M.R. 23 (1953). The Manual for Courts-Martial, United States (rev. ed. 1969) is promulgated by executive order. See Exec. Order No. 11,476, 3 C.F.R. 132 (1969).

⁸⁴ *Baldauf v. Nitze*, 261 F. Supp. 167, 172 (S.D. Cal. 1966).

⁸⁵ See text accompanying notes 21-36 & 78-80 *supra*.

⁸⁶ Op. Att'y Gen. 10 (1853).

⁸⁷ See *id.*

⁸⁸ *Id.* at 18-19.

⁸⁹ See *id.* at 14-15.

⁹⁰ *Id.* at 15 (emphasis added).

Although Cushing acknowledged that "it is not easy to draw the line between what is legislative and what is . . . administrative,"⁹¹ a number of the criteria he offered in determining whether the promulgation of the naval code was an act of legislation seem relevant in characterizing the academy conduct, honor and ethics systems. Like the naval rules in question, the modern codes are "a complete and connected system of rules for the government of "⁹² cadets, the scope and formal arrangement of which indicate their legislative nature. Moreover, the academy codes mirror—and, indeed, in some respects conflict with—the Uniform Code; as the latter is by

definition legislation, one is hard pressed to characterize the former as anything else. Finally, like the disputed naval codes, the adjudicatory codes not only cover the entire field of military discipline, already covered by congressional act, but also significantly amend and expand the proscriptions of the Uniform Code without expressly recognizing the existing statute as the authority for their promulgation.⁹³

In one sense, Cushing went too far, for his opinion suggests that the President is powerless in any situation, either as Commander-in-Chief or with implied Congressional authority, to issue wide-ranging regulations tantamount to acts of legislation. Rather it is generally conceded that as Commander-in-Chief, the President has some rule-making power in regulating the conduct of military affairs. It must be remembered, however, that as to disciplinary regulations, this authority arises in large measure out of necessity, and exists in a sphere over which the Constitution expressly gives Congress jurisdiction. Logically then the exercise of rulemaking power by the President or his delegates must be grounded to a significant degree in military necessity⁹⁴—the requisite degree of necessity increasing as the rulemaking in question approaches in form and in substance a legislative act.

Applying these principles in the academy context, it seems clear at the outset that the substantive proscriptions of the UCMJ cannot be deemed to preempt academy rulemaking. These institutions must serve broader functions than the mere maintenance of order among

⁹¹ *Id.*

⁹² *Id.* at 16.

⁹³ See text accompanying notes 57-60 *supra*. None of the academy conduct regulations purport to be promulgated pursuant to the Uniform Code. See, e.g., Letter of Promulgation, R.C.C.U.S.C.G.A., July I, 1971. But see text accompanying note 27 *supra* (U.S.A.F.A. honor code).

⁹⁴ See generally *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943); *Ex parte Quinn*, 317 U.S. 1, 28-29 (1942).

cadets. The prohibitions of the Uniform Code are not comprehensive enough to inculcate in cadets the sense of discipline and the intangible qualities which will be expected of them as military officers. Thus, the situation at the academies is one in which the exercise of the correlative rulemaking power of the Chief Executive has not been statutorily precluded.⁹⁵

The extent to which executive power enables the academies to promulgate regulations, however, is limited by the principle of necessity: rules so adopted must be necessary to the attainment of the military objective—the training of future officers. Since the academy codes are comprehensive in scope and promulgated much as an act of legislation, rather than as an immediate administrative response to a specific problem, the standard of necessity should arguably be especially strict. But in no event can executive power validate regulations which are not at least reasonably necessary to the accomplishment of the academies' mission.

In sum, none of the extrastatutory sources of academy rulemaking authority examined above justify substantive and procedural regulations which are not also within the scope of express and implied delegations of legislative power. Academy rules, in short, must be reasonably necessary to the training of future officers. While this conclusion may seem almost truistic, it will become clear that many aspects of the academy codes lack the requisite nexus to this goal and, therefore, that their promulgation by academy officials is without constitutional authorization.

2. Jurisdiction

Perhaps the most basic limitations on academy authority over cadets are jurisdictional. Military courts, like civilian courts, must have jurisdiction over the person of the accused and over the subject matter at issue to

entertain a criminal prosecution. Judgments of courts-martial that fail to satisfy the jurisdictional requirements are null and void.⁹⁶ Similarly, it may be that military authority cannot impose nonjudicial punishment⁹⁷ or take "nonpunitive corrective measures"⁹⁸ without meeting identical jurisdictional requirements.

⁹⁵ An academy proscription might be treated as "a general order or regulation" within the framework of Article 92 of the U.C.M.J., 10 U.S.C. § 892 (1970).

⁹⁶ See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118-22 (1866); *Mallow v. United States*, 161 Ct. Cl. 446, 450 (1963).

⁹⁷ See 10 U.S.C. § 815 (1970); text accompanying notes 26 *supra* and 240-64 *infra*.

⁹⁸ See text accompanying note 39 *supra*.

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These general requirements raise the question of what jurisdictional limitations, if any, exist with respect to the academies' administrative punishment⁹⁹ of cadets.

The Supreme Court has recently scrutinized jurisdictional requirements for criminal cases involving military personnel. In *O'Callahan v. Parker*¹⁰⁰ the Court held that a member of the Armed Forces may not be court-martialed for off-post criminal offenses allegedly committed on American territory while the defendant was on leave, when the charges could have been brought in a civilian court.¹⁰¹ Justice Harlan noted that a decade earlier the Court had held that "'military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense.'" ¹⁰² The requisite "status" was that of "a person . . . regarded as falling within the term 'land and naval Forces.'" ¹⁰³ *O'Callahan* supplemented the "status" criterion, however, with an additional subject matter requirement that the accused's crime be "service connected."¹⁰⁴ Whether an alleged offense meets this test for subject matter

jurisdiction must be determined by examining at least 12 specific criteria.¹⁰⁵

The impact of O'Callahan on cadet administrative sanctioning is unclear. No authority appears to specifically hold that an academy must have jurisdiction over the subject matter in order to penalize a cadet administratively. In view, however, of the axiom that a court or an executive agency may not penalize an individual without jurisdiction,¹⁰⁶ the existence of a jurisdictional prerequisite to academy imposition of punishment can hardly be doubted. While it is clear

⁹⁹ Military authorities sometimes make it a point to distinguish between "punitive" and "nonpunitive" sanctions imposed on cadets. See text accompanying notes 27 & 39 supra and 258 & 500 infra. For the purposes of this report, "punitive" and "punishment" refer to all sanctions imposed on cadets by the academies.

¹⁰⁰ 395 U.S. 258 (1969).

¹⁰¹ Id. at 272-73.

¹⁰² Id. at 275 (Harlan, J., dissenting), quoting *Kinsella v. Singleton*, 361 U.S. 234, 243 (1960); see id. at 267 (majority opinion), quoting *Kinsella*, supra at 241.

¹⁰³ 395 U.S. at 267, quoting *Kinsella v. Singleton*, 361 U.S. 234, 241 (1960). "[1]f the 'language of Clause 14 is given its natural meaning . . . [t]he term 'land and naval Forces' refers to persons who are members of the armed services. . . . 395 U.S. at 275, quoting *Reid v. Covert*, 354 U.S. 1, 19-20 (1957).

¹⁰⁴ 395 U.S. at 273-74. O'Callahan held that one's status "is merely the beginning of the inquiry, not its end. 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." Id. at 267.

¹⁰⁵ See id. at 273-74. The criteria are listed in *Relford v. Commandant*, 401 U.S. 355, 365 (1971); *United States ex rel. Jacobs v. Froehlke*, 334 F. Supp. 1107, 1110 n.6 (D.D.C. 1971).

¹⁰⁶ See, e.g., *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325-26 (1950); *In re Bonner*, 151 U.S. 242, 257 (1894).

that O'Callahan applies to a court-martial of a cadet, it does not necessarily follow that the decision applies in whole or in part to imposition of administrative sanctions. Some guidance on this question may be found, however, by examining the factors underlying its rationale. Recognizing that

military tribunals never have and probably never will afford the full range of protections provided in civilian courts,¹⁰⁷ the Court indicated that the jurisdictional limitations it enunciated were intended to insure that court-martial jurisdiction vests only when absolutely necessary to maintain military discipline.¹⁰⁸ By similar reasoning, academy administrative adjudicatory proceedings, which, as will be seen, do not afford the same protections as those found in analogous civilian administrative hearings, should be limited by O'Callahan's jurisdictional constraints.¹⁰⁹ If so, the factors used in O'Callahan to determine whether the military has jurisdiction in criminal cases would be applicable in the academy context.

3. The Bill of Rights

A crucial limitation on the power of academy officials over ca-

¹⁰⁷ 395 U.S. at 262-63. But see *United States v. Sharkey*, 19 U.S.C.M.A. 26, 27, 41 C.M.R. 26, 27 (1969), in which the Court of Military Appeals noted that O'Callahan should be read with "an eye to the important constitutional protections which it sought to preserve," namely, "the benefits of indictment and of trial by jury" and that therefore O'Callahan does not limit military jurisdiction over petty offenses over which civilian courts may not exercise jurisdiction. This attempt to limit the applicability of O'Callahan reflects the military's generally perturbed reaction to O'Callahan's frank recognition of the relative inadequacy of military courts, 395 U.S. at 262-63, and to its limitations on the military's jurisdictional authority. For expressions of this anger, see Chief Judge Quinn's scathing attack on the Supreme Court and on O'Callahan in *United States v. Borys*, 18 U.S.C.M.A. 547, 550, 40 C.M.R. 259, 262 (1969) (dissenting opinion), and the complaint of a retired Marine colonel and eminent military historian that the "Armed Forces are encountering noticeable lack of support . . . [from] the federal Judiciary," Heintz, *The Collapse of the Armed Forces*, *Armed Forces J.* June 7, 1971, at 4, col. 2.

¹⁰⁸ 395 U.S. at 265. As stated by the Court, "history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." *Id.* Moreover, [t]here are dangers lurking in military trials Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service

Determining the scope of the Constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to "the least possible power adequate to the end proposed."

Id. (emphasis in original), quoting *Toth v. Quarles*, 350 U.S. II, 22-23 (1955).

¹⁰⁹ See text accompanying notes 265-76 *infra*. That Congress has given the military, and hence the academies, statutory authority to impose nonjudicial punishment, see text accompanying notes 26 & 97 *supra*, does not indicate that it has authorized expansion of military jurisdiction.

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dets stems from the guarantees of the first 10 amendments to the Constitution. Although some authorities have maintained that the constitutional Framers originally intended the Bill of Rights to apply with full force to servicemen,¹¹⁰ the protections of the Bill of Rights were not applied with full force in the military until recently.¹¹¹ Rather, the military's judicial tribunals were generally required to comply with the spirit, though not the letter, of these constitutional amendments.¹¹² In 1960, however, the Court of Military Appeals, relying on an earlier Supreme Court instruction that military courts have the same responsibility as do other federal courts to protect an individual's constitutional rights,¹¹³ formulated a new test for the applicability of the Bill of Rights to the military.¹¹⁴ The court held "that the protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."¹¹⁵

4. Due Process at the Academies

The most important of the Bill of Rights limitations on academy adjudicatory proceedings is the due process clause. While it is well established that judicial and administrative actions must conform to the requirements of due process,¹¹⁶ what this means in practice is far less clear.¹¹⁷ Applying the due process clause to particular cases requires judicial balancing of the private interests affected against the governmental interests involved.¹¹⁸ This balancing of interests has proved particularly troublesome

in the military context, primarily because of the difficulty in determining what weight should be given

¹¹⁰ See, e.g., Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

¹¹¹ See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Hiatt v. Brown*, 339 U.S. 103 (1950); *Swaim v. United States*, 165 U.S. 553 (1897).

¹¹² See, e.g., *Anderson v. Laird*, 466 F.2d 283, 308-09 n.15 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).

¹¹³ *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

¹¹⁴ *United States v. Jacoby*, II U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

¹¹⁵ *Id.* at 430-31, 29 C.M.R. at 246-47; see *Dash v. Commanding General*, 307 F. Supp. 849, 853 (D.S.C. 1969).

¹¹⁶ See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). For a discussion of due process requirements in an administrative context, see generally Werdegar, *The Solicitor General and Administrative Due Process: A Quarter-Century of Advocacy*, 36 Geo. Wash. L. Rev. 481 (1968).

¹¹⁷ See, e.g., *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961); *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960).

¹¹⁸ *Wasson v. Trowbridge*, 382 F.2d 807, 811 (2d Cir. 1967); see *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971); *Hagopian v. Knowlton*, 470 F.2d 201, 207-08 (2d Cir. 1972).

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to the special needs of the military.¹¹⁹ Courts have also encountered serious problems in defining the due process requirements for adjudicatory proceedings at educational institutions.¹²⁰ Since the academies are both military and educational institutions, definition of the due process requirements in academy adjudicatory proceedings becomes exceedingly difficult.

It seems reasonable to begin an inquiry into what due process requires in academy adjudicatory proceedings with what due process requires in the military. In 1911 the Supreme Court stated in *Reaves v. Ainsworth*¹²¹ that "[t]o those in the military or naval service of the United States the military law is due process."¹²² In other words, what constituted due process in the military was to be determined by reference to military statutes and regulations rather than to fifth amendment principles. As a result, federal courts refused to accept jurisdiction or to find that due process had been violated unless it was alleged that the military had violated a statute or one of its own regulations.¹²³ Soon after the enactment of the UCMJ, however, the Court of Military Appeals reexamined and revamped the concept of due process in the military in two ways. First, the court developed two nonconstitutional doctrines for insuring procedural fairness in military adjudications—military due process¹²⁴ and general prejudice.¹²⁵ Second, the

court suggested—as later decisions were to reaffirm—that at some ill defined point the specific procedural safeguards mandated by the fifth amendment were applicable in military

¹¹⁹ See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Orloff v. Willoughby*, 345 U.S. 83 (1953). See generally Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 186-90 (1962).

¹²⁰ See, e.g., *Van Alstyne, The Student as a University Resident*, 45 *Denver L.J.* 582, 596 (1968). In 1961, the Fifth Circuit, departing from earlier case law, held that, while students facing school disciplinary action need not be given a "full-dress judicial hearing . . . [n]evertheless the rudiments of an adversary hearing may be preserved" and, therefore, procedural safeguards are required. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961). As a result of the confusion engendered by this decision, a federal court promulgated an unusual set of guidelines in an attempt to eliminate any uncertainty. See *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133 (W.D. Mo. 1968) (en bane) [hereinafter *General Order On School Discipline*].

¹²¹ 219 U.S. 296 (1911).

¹²² *Id.* at 304.

¹²³ See, e.g., *United States ex rel. French v. Weeks*, 259 U.S. 326, 335 (1922); *United States ex rel. Innes v. Hiatt*, 141 F. 2d 664, 666 (3d Cir. 1944).

¹²⁴ See *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). For a summary of the historic development of this term, see Warfel, "Military Due Process": What Is It?, 6 *Vand. L. Rev.* 251, 275-77 (1953).

¹²⁵ See *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

proceedings.¹²⁶

The term "military due process" was first employed in 1951 in *United States v. Clay*,¹²⁷ in which the Court of Military Appeals reversed a sailor's special court-martial conviction for disorderly conduct because proper instructions were not presented to the voting panel as required by the UCMJ. Stressing that the doctrine was not based on the Constitution, the court indicated that military due process requires actual conformity of military procedures to those procedures specified by acts of Congress and by regulations of the military.¹²⁸ Unlike the Supreme Court's constitutional due process formulation in *Reaves*, however, military due process can be violated only by a procedural error which conflicts with a statute or a regulation and which "materially prejudic[es] the substantial rights of the accused."¹²⁹ While the doctrine is thus somewhat vague, later cases have at least indicated what military due process is not: it is not the same as jurisdiction;¹³⁰ neither is it the cumulation of nonprejudicial errors in a single case;¹³¹ nor is it the same as general prejudice;¹³² it is not synonymous with federal civilian due process.¹³³ As with constitutional due process violations in civilian courts, decisions violative of military due process are void.¹³⁴

Like "military due process," the term "general prejudice" was conceived in a Court of Military Appeals' dictum.¹³⁵ In *United States v. Lee*,¹³⁶ the

Court of Military Appeals stated that general prejudice stems from neither the Constitution nor specific legislation, "but involves instead an overt departure from some 'creative and indwelling principle'—some critical and basic norm operative in the area under consideration."¹³⁷ This "principle" is derived, the court reasoned, "from all four corners of the Uniform Code of Military

¹²⁶ See *United States v. Clay*, I U.S.C.M.A. 74, 79, 1 C.M.R. 74, 79 (1951).

¹²⁷ I U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

¹²⁸ *Id.* at 77, 1 C.M.R. at 77; see *Wurfel*, supra note 120, at 280-81.

¹²⁹ *United States v. Lucas*, I U.S.C.M.A. 19, 25, 1 C.M.R. 19, 25 (1951).

¹³⁰ See, e.g., *United States v. Davis*, I U.S.C.M.A. 102, 107, 2 C.M.R. 8, 13 (1952).

¹³¹ See, e.g., *United States v. Zimmerman*, I U.S.C.M.A. 160, 162, 2 C.M.R. 66, 68 (1952); *Wurfel*, supra note 124, at 281.

¹³² See, e.g., *United States v. Lee*, I U.S.C.M.A. 212, 216, 217, 218, 2 C.M.R. 118, 122, 123, 124 (1952); *Wurfel*, supra note 124, at 281-85.

¹³³ See *United States v. Sutton*, 3 U.S.C.M.A. 220, 11 C.M.R. 220 (1953).

¹³⁴ See, e.g., *United States v. Taylor*, 28 C.M.R. 752 (1959); *United States v. Mortensen*, 8 U.S.C.M.A. 233, 24 C.M.R. 43 (1957).

¹³⁵ *Wurfel*, supra note 124, at 241, 278.

¹³⁶ I U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

¹³⁷ *Id.* at 217, 2 C.M.R. at 123.

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Justice."¹³⁸ One year later the Court of Military Appeals made clear that general prejudice constitutes a ground for reversal of decisions independent of that of military due process.¹³⁹ As with denial of military due process, cases in which there has been general prejudice are void.¹⁴⁰

While relegating its new doctrines to nonconstitutional status, the Court of Military Appeals simultaneously indicated that constitutional due process may present a direct limitation on military procedures¹⁴¹ beyond the indirect requirement of conformity with statute—heretofore acknowledged. Subsequent cases, both in the Court of Military Appeals and in the civilian federal courts, have reaffirmed the proposition that at some undefined point, specific procedural safeguards, guaranteed by the fifth amendment in the civilian community, must be made available to members of the military.¹⁴²

III

THE STRUCTURE OF THE ACADEMIES' ADJUDICATORY SYSTEMS

A. The Conduct Systems

Conduct systems are common to all five academies; each academy's superintendent has promulgated rules designed to regulate in detail a broad

range of cadet activities.¹⁴³ A cadet's failure to adhere to any such rule constitutes a conduct violation.¹⁴⁴

Conduct violations are grouped, according to the gravity of the

¹³⁸ Id.

¹³⁹ *United States v. Woods*, 2 U.S.C.M.A. 203, 208, 8 C.M.R. 3, 8 (1953).

¹⁴⁰ See, e.g., *United States v. Blake*, 21 C.M.R. 809 (1956); *United States v. Coulter*, 3 U.S.C.M.A. 657, 14 C.M.R. 75 (1954).

¹⁴¹ See *United States v. Clay*, I U.S.C.M.A. 74, 79, 1 C.M.R. 74, 79 (1951).

¹⁴² E.g., *Friedberg v. Resor*, 453 F.2d 935, 937 (2d Cir. 1971); *Unglesby v. Zimny*, 250 F. Supp. 714, 718 (N.D. Cal. 1965); *United States v. Dillon*, 16 C.M.R. 835, 838 (1954); see *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972).

¹⁴³ Conduct regulations specifically prescribe rules governing cadet appearance, attendance, habits, duties, morals, maintenance of room and equipment, use of automobiles, personal behavior, and the like. See *Comm'd't Mid'n Inst. P1620.10G Enc. 6* (1970); *R.C.C.U.S.C.G.A. 5-3-01 to 5-3-27* (1971); *R. U.S.C.C. 401-03* (1971); *U.S.A.F.C.R. 35-6* (1971); *U.S.M.M.A.M.R. 02101 to 02137* (1971); *U.S.N.A.M.R. 0401 to 0425* (1970). In addition to the specifically enumerated offenses, failure of a cadet to abide by any of the other comprehensive regulations governing his daily activities may constitute a separate conduct offense: failure to obey regulations. See, e.g., *Com'd't Mid'n Inst. P1620.10G Enc. 6(1322), (4321), (9999)* (1970); *id. P1620.10G Enc. 6, chg. 5 (4320)* (1971); *R.C.C.U.S.C.G.A. 5-7-02* (1971); *R.U.S.C.C. 403(b), (c)* (1971); *U.S.A.F.C.R. 35-6 (VII) (7)* (1971).

¹⁴⁴ See *Hagopian v. Knowlton*, 346 F. Supp. 29, 31 (S.D.N.Y.), *of d.*, 470 F.2d 201 (2d Cir. 1972).

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transgression and the severity of the punishment, into three categories, called, in descending order of seriousness, Class I, II and III offenses.¹⁴⁵ Punitive measures range from the mere assessment of demerits¹⁴⁶ to outright expulsion¹⁴⁷ and include a broad range of intermediate sanctions.¹⁴⁸ For offenses falling within either of the two less

¹⁴⁵ Minor offenses for which only a few demerits may be awarded are called Class III offenses at the Coast Guard, Merchant Marine and Military Academies; 1000 and 2000 Series offenses at the Naval Academy; and Class I offenses at the Air Force Academy. 3000 Series offenses at the Naval Academy and Class 11 offenses at the other academies include more serious violations for which demerits, or confinement, and/or tours, notes 146 & 148 *infra*, may be awarded after a hearing, except at the Naval Academy, before an officer or a cadet disciplinary board, see text accompanying notes 157-58 *infra*. Class III offenses at the Air Force Academy; 4000 Series offenses at the Naval Academy; and Class I offenses at the other academies include the most serious violations for which offenders must appear before a cadet or officer board for adjudication of guilt and assessment of punishment. See *Hagopian v. Knowlton*, 346 F. Supp. 29, 31 (S.D.N.Y.), *of d.*, 470 F.2d 201, 204 (2d Cir. 1972); *Comm'd't Mid'n Inst. P1620.10G Enc. 4(2)(6)* (1970); *R.C.C. U.S.C.G.A. 5-5-01* (1971); *R.U.S.C.C. 403, chg. 2* (1971); *U.S.A.F.C.R. 35-6(5)* (1971); *U.S.M.M.A.M.R. 03101(3)* (1971); text accompanying notes 57-58 *infra*. Hereinafter, the most serious conduct offenses at each academy will be called Class I offenses and the least serious offenses Class III offenses.

¹⁴⁶ Demerits are marks in conduct." *U.S.A.F.C.R. 35-6 (9(a))* (1971); see *id.* (5)(a). Regulations limit the number of demerits cadets may receive during a given time period. At each academy excess demerits may result in a cadet's being awarded loss of privileges and rank, warning, counseling, conduct probation, extra duty, separation from the academy or other penalties, see, e.g., *Hagopian v. Knowlton*, 470 F.2d 201, 203 n. 1 (2d Cir. 1972); *Com'd't Mid'n Inst. P1620.10G Enc. 4* (1970); *R.C.C.U.S.C.G.A. 5-4-04 to 5-4-10* (1971); *R.U.S.C.C., chg. 2 to 409, 413 to 425* (1971); *id. chg. Ito 1002; id. chg. 2 to 1005(a)(3)*,

(8); U.S.A.F.C.R. 35-6(9) to (II) (1971); U.S.A.F.C.R. 35-8(l)(e) (1968); U.S.M.M.A.M.R. 02131(1)(a)(3), 03109(4)(e), figs. 3-1-5, 3-1-6, 03107(4) (1971); text accompanying notes 307-308 *infra*; and may lower his graduation order of merit, text accompanying note 309 *infra*.

¹⁴⁷ Cadets may be separated from the academies for deficiencies in conduct. E.g., 10 U.S.C. § 4351 (a) (1970) (Army); *id.* §§ 6961, 6962 (Navy); *id.* § 9351(a) (Air Force); 14 U.S.C. § 182(a)(1970) (Coast Guard); see *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972), U.S.A.F.A.R. 537-1(4) (1971).

¹⁴⁸ These intermediate sanctions include restrictions, confinements, periodic reporting, tours, extra duty, reduction in rank, deprivation of leave, conduct probation and withdrawal of privileges.

A restriction is a penalty which requires a cadet to remain within specified geographical limits of an academy and which may deny him certain privileges, such as escorting of guests, attendance at athletic events and the use of certain recreational facilities. See R.C.C.U.S.C.G.A. 5-4-10(A), 7-2-10(D) (1971); R.U.S.C.C. 415(a) (1971) (called special confinement); R.U.S.M.A.R. 12.03 (1971); U.S.A.F.C.R. 35-6(12) (1971); U.S.M.M.A.M.R. 03110 (1971).

A confinement is a period of several hours during which a cadet may leave his room or his company area only to visit the latrine, to receive local official or long distance telephone calls, or when otherwise specifically authorized to do so.

See Com'd't Mid'n Inst. P1620.IOG Enc. 5(1) (1970) (called restriction); R.C.C.U.S.C.G.A. 5-4-10 (1971) (called restriction); U.S.A.F.C.R. 35-6(11)(a) (1971). Merchant Marine Academy midshipmen are not confined. See U.S.M.M.A.M.R. 03107(3) (1971). In addition to limited movement and loss of privileges, restricted and confined cadets may be

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serious classes, the amount and type of punishment to be awarded¹⁴⁹ for each specific offense is determined by using delinquency award guides which suggest limits on the severity of the punishment that may be imposed.¹⁵⁰

A conduct violation may be reported by any cadet, academy

required repeatedly, even hourly, to report for an inspection or to sign a roster indicating they are present. See Com'd't Mid'n Inst. P1620.10G Enc. 5(l)(c) (1970); R.C.C.U.S.C.G.A. 5-4-10(B)(4) (1971); U.S.M.M.A.M.R. 031 10(l)(a) (1971).

A tour is a 50-minute to one-hour period of marching with a rifle. E.g., Com'd't Mid'n Inst. P1620.IOG Enc. 5(2) (1970); R.C.C.U.S.C.G.A. 5-4-09 (1971); R.U.S.C.C., chg. 1, 415(c)(3), 417 (1971); U.S.A.F.C.R. 35-6(11)(6) (1971); U.S.A.F.C.W.S.C. (1971). Normally, cadets are required to walk two to four tours per day, two to seven days per week. E.g., R.C.C.U.S.C.G.A. 5-4-09(C) (1971); R.U.S.C.C., chg. 1, 417 (1971); U.S.A.F.C.W.S.C. (1972).

Extra duty awarded to a cadet may include performing janitorial services in the cadet living area, walking tours or other, unspecified tasks. Interview with 1972 Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972; see, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 5(2)(d) (1970) (no janitorial duty); R.C.C.U.S.C.G.A. 5-1-03(A) (1971) (same); U.S.M.M.A.M.R. 03107(3) (e), 03111 (1971).

Two academies authorize reduction in rank as a penalty. See R.U.S.C.C. 414(a)(1), chg. 1(1971); R.U.S.M.A. 12.03 (1971); U.S.A.F.C.R. 35-6(32)(d)(4) (1971). Leave may also be withheld as punishment. See, e.g., Com'd't Mid'n Inst. P1620. 10G Enc. 3(4)(f) (1970); R.C.C.U.S.C.G.A. 5-5-03(C)(3) (1971); R.U.S.M.A. 12.03 (1971).

A cadet placed on conduct probation who continues to disregard regulations or commits a serious offense will be subject to dismissal. See R.C.C.U.S.C.G.A. 5-4-06(B), 5-5-03(C)(I) (1971); U.S.A.F.C.R. 35-6(14) (1971); U.S.M.M.A.M.R. 03107(3)(i) (1971).

Cadets on restriction or confinement, or having assigned duties cannot, of course, exercise certain privileges. In addition to these indirect means of withdrawing cadet privileges, four academies specifically permit the withholding of privileges and/or liberty as a penalty. See Com'd't Mid'n Inst, P1620.1OG Enc. 3(4)(g) (1970); R.C.C.U.S.C.G.A. 5-5-03(C)(3) (1971); R.U.S.M.A. 12.03 (1971); U.S.M.M.A.M.R. 03107(3)(g) (1971).

Regulations also authorize the academies to penalize cadets by arrest (a form of incarceration), R.U.S.C.C. 424 (1971); U.S.A.F.C.R. 35-6(13) (1971); suspension from an academy, R.U.S.M.A. 12.03 (1971); U.S.M.M.A.M.R. 03107(3)(k) (1971); suspension of driving privileges on the academy grounds, U.S.A.F.C.R. 35-6(17) (1971); admonition and reprimand, R.U.S.M.A. 12-03 (1971); warning, Com'd't Mid'n Inst. P1620.1OG Enc. 3(4)(b) (1970); U.S.M.M.A.M.R. 03107(3)(b) (1971).

¹⁴⁹ Academy authorities often refer to "awarding" cadets penalties. See, e.g., Com'd't Mid'n Inst. P1620.1OG Enc. 3(4) (1970); R.C.C.U.S.C.G.A. 5-4-08(C) (1971); R.U.S.C.C. 403(a) (1971); U.S.A.F.C.R. 35-6(11) (1971). Variations of the same euphemism will be used throughout this report.

¹⁵⁰ See Com'd't Mid'n Inst. P1620.1OG Enc. 6(1) (1970); R.C.C.U.S.C.G.A. 5-4-08(c), 5-5-01(A)(2) (1971); R.U.S.C.C. 403 (1971) (limitation on Class I offenses); U.S.A.F.C.R. 35-6(2), (5), (15) (1971); U.S.M.M.A.M.R. 03107(l) (1971). The regulations containing these guides caution that the limits are only recommendations and that each case should be considered on an individual basis. Thus, a cadet may be given greater or lesser punishment than the guides recommend. See Com'd't Mid'n Inst. P1620.1OG Enc. 6(1) (1970); R.C.C.U.S.C.G.A. 5-4-08(B), 5-7-01 to 5-7-02 (1971); U.S.A.F.C.R. 35-6(2), (3), § VII (1971); U.S.M.A.D.S.-S.O.P. 38 (1968); U.S.M.M.A.M.R. 03107(1) (1971).

officer or instructor¹⁵¹ by completing a form designed to record all pertinent details of the infraction.¹⁵² Regulations specify detailed procedures for processing these forms through the cadet and officer chains-of-command to the authority charged with ultimately resolving the case.¹⁵³ Each cadet reported for violating a conduct rule is notified of his alleged offense¹⁵⁴ and permitted or required to explain his conduct in writing to the adjudicating authority.¹⁵⁵ At three academe-

¹⁵¹ See, e.g., R.C.C.U.S.C.G.A. 5-5-02(A), 5-5-05(A), 5-5-07(A) (1971); R.U.S.C.C. 404(a) (1971); U.S.M.M.A.M.R. 03101(4) (1971). Other individuals may be authorized to report offenses, including warrant officers, coaches and nonacademy officers. See, e.g., U.S.A.F.C.R. 35-6(18) (1971). First Class Coast Guard cadets (i.e., seniors) must report violations of conduct regulations by fellow classmates. R.C.C.U.S.C.G.A. 5-5-05 (1971). Air Force cadets may be required to report classmates and upperclassmen who are rule violators. See U.S.A.F.C.R. 35-6(8)(b) (1971). Merchant Marine cadets may be duty bound to report only offenses committed by their subordinates. Interview with Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972. For discussion of academy conduct system procedures, see *Hagopian v. Knowlton*, 470 F.2d 201, 205 (2d Cir. 1972).

¹⁵² See, e.g., Com'd't Mid'n Inst. P1620.1OG Enc. 2(2) (1970); R.C.C.U.S.C.G.A. 5-5-05(A)(1), (2), 5-507(A)(3) (1971); U.S.A.F.C.R. 35-6(23) (1971). For examples of these forms, see, e.g., Form CGACAD-18 (rev. Aug. 1968) (U.S.C.G.A.); U.S. Air Force Cadet Wing Form 10 (1964); U.S. Merchant Marine Academy Form KP 1-42 (1959); U.S. Military Academy Form 2-1 (1972).

¹⁵³ Each academy is organized into a cadet chain-of-command under the authority of one cadet commander. See R.C.C.U.S.C.G.A. 4-1-01 to 4-1-04 (1971); R.U.S.C.C. 103 to 105 (1971); U.S.A.F.C.W.M. 20-1 (1967); U.S.M.M.A.M.R. 04101 to 04104 (1971); U.S.N.A.M.R. 0101(1), (2) (1970). See also 10 U.S.C. § 4349 (1970). The academies' officer cadres are, of course, organized into their

own chains-of-command. The cadet company commanders forward the forms on which violations of conduct regulations are recorded directly to the officer in command of their units, who, if his judgment is not final, in turn passes the forms up the officer chain-of-command to the punishing authority, who makes recommendations to the final approving authority. The identity of the punishing and of the final approving authority depends upon the class of the offense charged. See note 145 *supra*. See Com'd't Mid'n Inst. P1620.10G Enc. 2 (1970); R.C.C.U.S.C.G.A. 5-5-01 to 5-5-08 (1971); U.S.A.F.C.R. 35-6(15), (16) (18) to (25) (1971); U.S.M.A.D.S.S.O.P. 14 (1968); U.S.M.M.A.M.R. 031019(9)(a) (1971).

¹⁵⁴ Cadets receive notice of alleged offenses either by receiving a personal copy of the form on which the offense was reported, see R.C.C.U.S.C.G.A. 5-5-06(A)(1), (B)(1), 5-5-08(A) (1971); by personal explanation by an officer or a cadet officer, see Com'd't Mid'n Inst. P1620.10G Enc. 2(3)(b)(I) (1970); R.C.C.U.S.C.G.A. 5-5-03(A)(2) (1971); U.S.A.F.C.R. 35-6(20)(c) (1971); by public notice on their company bulletin board, see R.C.C.U.S.C.G.A. 5-508(C) (1971); U.S.M.A.D.S.S.O.P. 14(d), (e) (1968); U.S.M.M.A.M.R.03105(2)(a) (1971); *id.* 03106(I)(a) (Class III, minor offenses); or, for serious offenses, by being personally served with a letter of formal charges, see U.S.M.M.A.M.R. 03103(2)(d), 03104(2)(a)(3) (1971).

¹⁵⁵ At some academies a cadet is permitted to make a written statement describing the details of his case. See, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 3(6)(a) to (e) (1970); U.S.M.M.A.M.R. 03103(4)(a), 03104(3)(a), 03106(2)(a) (1971). Such an explanation may be required, see, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 3(6)(a) (1970) (in cases involving classified materials only); R.U.S.C.C. 405 (1971); U.S.A.F.C.R. 35-6(8), (21), (22)(c) (1971); and disclosure of the identity of other cadets responsible for the offense may be required to be included, see R.U.S.C.C. 405(b) (1971); U.S.A.F.C.R. 35-6(8)(b) (1971).

mies, Class III, or minor offense cases, may be terminated by a cadet's merely initialing on the written report of his offense an acknowledgement of receipt and acceptance of the punishment awarded by his company commander.¹⁵⁶ Except at the Naval Academy,¹⁵⁷ however, a cadet charged with a Class I or II offense must appear personally before a board of officers and/or cadets for a hearing, often subsequent to a formal investigation.¹⁵⁸ Separate panels hear Class I and Class II offenses; the hearing board for the more serious Class I offenses may contain more officers of higher rank than a Class II board.¹⁵⁹

Academy conduct hearings consist of formal or quasi-formal questioning of the accused cadet by the board members.¹⁶⁰ Based on the cadet's explanations given at this hearing, and on the cadet's earlier written explanation of the circumstances of the offense and the investigator's report, a Class I and Class II board will render an opinion. This opinion is submitted to an officer in the office of the Commandant of Cadets, or to the Superintendent, upon which the recipient makes final judgment on the disposition of a conduct case. The Commandant, Superintendent, or another higher-ranking officer may be required to approve such a final judgment for it to go into effect.¹⁶¹

¹⁵⁶ See *Hagopian v. Knowlton*, 346 F. Supp. 29, 31 (S.D.N.Y.) *ar d.*, 470 F.2d 201 (2d Cir. 1972); Com'd't Mid'n Inst. P1620.10G Enc. 3(7) (b) (1971); R.C.C.U.S.C.G.A. 5-5-08(C) (1971);

U.S.M.M.A.M.R. 03105 (3) (a) (1971). Merchant Marine midshipmen must always personally appear before a hearing "mast" even if they do not contest the charges. See U.S.M.M.A.M.R. 03105(2)(b), 03106(1)(b).

¹⁵⁷ Naval Academy midshipmen do not normally appear before an adjudicating authority to discuss the circumstances of any offense. Rather, punishments are awarded, unless the accused midshipmen or his punishing authority specifically requests the accused's personal appearance, solely on the basis of the information contained in the report of offense and any written explanation the accused chooses or is required to submit. Interview with Performance Officer, U.S.N.A., July 24, 1972.

¹⁵⁸ R.C.C.U.S.C.G.A. 1-4-01(A), 5-5-03, 5-5-06 (1971); U.S.A.F.C.R. 35-6(6), (22)(b), (32) (197 I) (Class I only); U.S.M.M.A.M.R. 01402, 03103(3) (c), 03104(2) (a) (4), 03104(4)(a) (1971); Interview with Assistant Commandant of Cadets, U.S.M.M.A., Aug. 10, 1972. Formal investigation by one or more assigned cadets or officers may be required for all types of offenses. No procedures appear to have been promulgated as to how such investigations are to be conducted, See Com'd't Mid'n Inst. P1620.IOG Enc. 2(3)(d)(2) (1970); *id.* Enc. 2(3)(b)(1)(c), 3(b)(1)(d) (1971); R.C.C.U.S.C.G.A. 5-5-03(A)(1) (1971); U.S.M.M.A.M.R. 03103(i)(b), 03103 (2)(b), 03104(4)(b), 03104 (5)(a) (1971).

¹⁵⁹ E.g., U.S.M.A.D.S.S.O.P. 29(a) - (d), 30(a)(2), 30 (c)(2) (1968). Since August 1971, all voting members of the Air Force Academy Class I boards have been cadets, with an officer present merely as an advisor. See U.S.A.F.A., CWD Accomplishments-Academic Year, 1971-72, at I.

¹⁶⁰ See, e.g., U.S.M.A.D.S.S.O.P. 31(6x1), (5) (1968).

¹⁶¹ See Com'd't Mid'n Inst. P1620.IOG Enc. 2(e)(6)(1)(e), 2(3)(b)(1) (f) (1971);

Cadets are provided with some procedural safeguards in adjudications of conduct offenses. At Class I hearings, Coast Guard and Merchant Marine Academy cadets may be represented by counsel selected from among the Academies' officer or civilian staff,¹⁶² no other academy permits such an adviser to assist the accused. Although none of the academies permits a cadet to challenge a voting member of the hearing panel, the Coast Guard Academy requires that the president of an executive board replace any board member who may not be impartial.¹⁶³ A cadet has only a limited right to remain silent.¹⁶⁴ Regulations specify a variety of other minor safeguards followed by one or more of the academies,¹⁶⁵ including a variety of procedures for appeal.¹⁶⁶

B. The Honor Systems

Probably the most controversial of the quasi-judicial bodies which adjudicate cadet offenses are those implementing the academies' honor systems.¹⁶⁷ Each academy has established an honor

R.C.C.U.S.C.G.A. 1-4-01(1), 1-4-01 (J), 5-5-03(C), 5-5-06(A)(3)(d), 5-5-06 (B)(4)(d) (1971); U.S.A.F.C.R. 35-6(15), (32) (1971); U.S.M.A.D.S.S.O.P. 32(c)(2), 32(c)(3), 32(d)(2), 32(d)(3), (32)(h), (32)(i) (1968).

¹⁶² U.S.M.M.A.M.R. 03103(4)(b) (1971); Letter from Legal Officer, U.S.C.G.A., Nov. 30, 1972. At the Merchant Marine Academy, a cadet's "advisor" may furnish guidance and speak in behalf of an accused at the hearing, U.S.M.M.A.M.R. 03103(5)(c), (d) (1971), but may "[n]ot act as an advocate or encourage the use of any tactics or techniques of evasion so as to prevent the board from ascertaining the truth." *Id.* 03103(5)(b).

¹⁶³ R.C.C.U.S.C.G.A. 1-4-01(B) (1971).

¹⁶⁴ The Coast Guard Academy provides a right against self-incrimination for cadets for cadets committing "offenses punishable under the Universal [sic] Code of Military [sic] Justice." R.C.C.U.S.C.G.A. 5-3-14(A) (1971).

¹⁶⁵ See, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 2(1)(b) (1970); R.C.C.U.S.C.G.A. I-4-01(D) (1971) (requirement that all board members vote and that they vote in ascending order of rank, presumably to preclude possible influence over junior officers by their superiors); id. 1-4-01(G) (1971) ("summarized" record must be made of Class I conduct proceedings; requirement that all hearing proceedings be confidential); U.S.M.M.A.M.R. 01402(3)(c) (1971) (recommendations of Class I conduct board required to be in writing).

¹⁶⁶ See, e.g., U.S.M.M.A.M.R. 03103(8), 03104(7), 03105(7), 03106(5) (1971). Cadets may request reconsideration of punishment awards at various stages of the proceedings. See, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 3(18) (1971); R.C.C.U.S.C.G.A. 5-4-II (1971); U.S.M.M.A.M.R. 03103(7), 03104(6), 03105(6), 03106(4) (1971). In addition, a cadet who considers himself wronged may refer his grievance in writing to the Commandant of Cadets or the Superintendent. U.S.A.F.C.R. 35-6(36) (1971); see, e.g., R.C.C.U.S.C.G.A. 2-1-06(A) (1971); R.U.S.C.C. 201(e) (1971) (cited in *Hagopian v. Knowlton*, 470 F.2d 201, 205 n.1 I (2d Cir. 1972)); R.U.S.M.A. 12.10 (1971); U.S.M.M.A.M.R. 04407 (1971). For discussion of the differences between reconsideration and grievance procedures, see text accompanying notes 1051-54 *infra*.

¹⁶⁷ Most of the notoriety concerning the academies' honor boards undoubtedly results from

code¹⁶⁸ or honor concept¹⁶⁹ which forbids lying, cheating and stealing.¹⁷⁰ Two honor codes also proscribe "toleration"—the failure by a cadet to report an honor code violation of which he has knowledge.¹⁷¹ At each academy, a committee of cadets is elected annually by the corps to administer the code.¹⁷² It is from this group that the cadet boards charged with adjudicating¹⁷³ honor violations are appointed. Anyone may report a cadet for violating an honor code, includ-

the publicity accompanying five honor "scandals" at the Military and Air Force Academies. See *Hearings on Service Academies*, *supra* note 18, at, e.g., 10,346, 10,360, 10,581, 10,765; *Greenhouse, Cheating Scandal Growing at Point*, *N.Y. Times*, Apr. 29, 1973, at 13, col. 1; note 6 *supra*.

¹⁶⁸ Only the Military and the Air Force Academies have an "honor code." See U.S. Air Force Academy Catalog 30 (1972); U.S. Military Academy Catalog 108-09 (1972).

¹⁶⁹ The Coast Guard, Merchant Marine and Naval Academies have an "honor concept," which "establishes principles rather than outlines specific offenses." U.S.N.A. Inst. 1610.3 Enc. 1(1)(a) (1972); accord, R.C.C.U.S.C.G.A. 5-2-01 to 5-2-02 (1971); U.S.M.M.A.S.I. 72-10 (July 28, 1972). Hereinafter, an "honor concept" will be referred to as an "honor code" unless otherwise differentiated.

¹⁷⁰ R.C.C.U.S.C.G.A. 5-2-02 (1971); U.S.M.M.A.S.I. 72-10 (July 28, 1972); U.S.N.A. Inst. 1610.3 Enc. I (I)(a)(I) (1972); U.S. Air Force Academy Catalog 30 (1972); U.S. Military Academy Catalog 108 (1971).

¹⁷¹ U.S. Air Force Academy Catalog 30 (1972); U.S. Military Academy Catalog 108 (1971). At the Air Force and Military Academies cadets must report honor violations; failure to do so is itself an honor code violation, denominated "tolerating." See *Hearings on Service Academies*, *supra* note 18 at 10,249,

10,358, 10,563, 10,783, 10,801, 10,810. Neither the Naval nor the Merchant Marine Academy requires midshipmen to report honor concept violators. U.S.M.M.A.S.I. 72-10(d) (July 28, 1972); U.S.N.A. Inst. 1610.3(I)(a)(5) (1972); The Honor Concept, *supra* note 69, at 2, 13, citing Brigade Restricted Letter No. 1-52 (Sept. 30, 1952). The Coast Guard Academy does not proscribe "toleration" of honor or conduct offenses. Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972.

¹⁷² See, e.g., U. S. Merchant Marine Academy Memorandum No. 70-54(2), (3) (1970); U.S.N.A. Inst. 1610, 3(2)(a) (1972). The academies claim that the honor codes and concepts were created by the cadets and are administered and controlled by them. See, e.g., U.S.N.A. Inst. 1610, 3(1)(a)(2) (1972); Hearings on Service Academies, *supra* note 18, at 10,556, 10,799, 10,802; Honor Reference Handbook of the Air Force Cadet Wing 1-2 (1970) (in part elevated to the status of an Air Force Academy regulation by U.S.A.F.A.R. 537-7(2) (1969)) [hereinafter U.S.A.F.A. Honor Reference Handbook]. Each committee is charged with "indoctrinating" cadets about the workings of the honor code. This is accomplished by means of intensive training sessions during each cadet's freshman summer and periodic discussions throughout each academic year. See, e.g., Honor Oper. Inst., U.S.A.F.A. 2(15) (1970); R.C.C.U.S.C.G.A. 5-8-03 (1971); U.S.A.F.C.W.M. 30-1(3) (1966); U.S. Merchant Marine Academy Memorandum No. 70-54(1) (1970); U.S.N.A. Inst. 1610.3(2), (3)(a), (3)(c) (1972); Hearings on Service Academies, *supra* note 18, at 10,441, 10,443-45, 10,762-63, 10,766-67, 10,800-01, 10,813, 10,817, 10,889; Cadet Honor Code, Instruction and Reference Manual of the Air Force Cadet Wing (1967-69); The Cadet Honor Code, U.S.M.A., *supra* note 69, at 5-7; Calkins, *supra* note 71, at 2-3; Honor Instruction Manual of the Air Force Cadet Wing (1969); U.S.A.F.A. Honor Reference Handbook, *supra* at 38-39.

¹⁷³ See *Dunmar v. Ailes*, 348 F.2d 51, 53, 55 (D.C. Cir. 1965); text accompanying notes 13 *supra* and 423-25 *infra*.

ing the cadet himself.¹⁷⁴ When a possible honor violation is reported, the chairman or vice-chairman of the honor committee, elected by other committee members, appoints a three- or a seven-member investigating team from among the other committee members.¹⁷⁵ Except at the Coast Guard and the Merchant Marine Academies¹⁷⁶ this team decides, on the basis of its investigation, whether there is sufficient evidence that an honor violation has occurred to warrant a formal honor hearing. If the team so recommends, the chairman of the honor committee selects a panel from among the remaining committee members to hear the case.¹⁷⁷ At the Military and the Naval Academies, the chairman of the honor committee may unilaterally reject an investigating panel's decision to drop a case and require the case to be reconsidered by the same investigating board or to go forward to a full honor board for a formal hearing.¹⁷⁸

¹⁷⁴ See, e.g., U.S.A.F.C.W.M. 30-1(7) to (9) (1966); Hearings on Service Academies, *supra* note 18, at 10,455-46, 10,819-20; The Cadet Honor Code, U.S.M.A., *supra* note 69, at 7.

¹⁷⁵ See, e.g., Honor Oper. Inst., U.S.A.F.A. 1 (1970); U.S.A.F.C.W.M. 30-1(2), (10) ((966); U.S.N.A. Inst. 1610.3 Enc. 1(2), (4) ((972); The Cadet Honor Code, U.S.M.A., *supra* note 69, at 7. At the Naval Academy, moreover, cadets are appointed to investigate alleged honor violations prior to formal inquiry by a seven-member Class Investigating Board. See U.S.N.A. Inst. 1610.3 Enc. 1(2), (3) ((972).

¹⁷⁶ A procedure slightly different from that of the other academies is followed at the Coast Guard Academy. There, a permanent ten-member "Cadet Standards of Conduct Board," advised by permanent

three-member "Cadet Standards of Conduct Sub-Boards" (one for each under class), considers not only alleged violations of the cadet honor concept but also "conduct or social practices that may be in violation of the principles of high moral or ethical conduct." R.C.C.U.S.C.G.A. 5-8-03(B)(3) (1971) (emphasis added). No formal procedures have been promulgated for the Sub-Boards' prehearing investigations or for the conduct of the hearing itself. See R.C.C.U.S.C.G.A. 5-8-04 (1971).

At the Merchant Marine Academy, the Chairman and the Vice-Chairman of the Honor Committee decide, using information obtained by a three-man investigation team, whether to send a case forward to the main hearing panel. Interview with 1972-73 Honor Committee Chairman, U.S.M.M.A., Aug. 10, 1972. Similarly, at the Coast Guard Academy, the purpose of the investigation is to obtain facts for and make recommendations to the main hearing panel. Letter from Legal Officer, U.S.C.C.G.A. Sept. 11, 1972, at 2.

¹⁷⁷ See, e.g., Honor Oper. Inst., U.S.A.F.A. 1 ((970); U.S.N.A. Inst. 1610.3(2) to (4) (1972): The Cadet Honor Code, U.S.M.A., supra note 69, at 7. Only the Naval Academy requires that the investigating board formally vote on whether a case should go forward to a full honor hearing panel. See U.S.N.A. Inst. 1610.3(6)(i) (1972) (secret written ballot required).

¹⁷⁸ Cadet Honor Comm. Proc., U.S.M.A. I(B)(4) (1971); U.S.N.A. Inst. 1610.3(2)(f) (1972). If the Chairman of the Naval Academy's Honor Committee rejects the recommendation of an investigating team, he will instruct it to reconsider the case and to expand the investigation. Any second recommendation by the board is binding on the Chairman. U.S.N.A. Inst. 1610.3(3)(2)(f) (1972). In contrast, the Chairman of the Military Academy Honor Committee may totally reject an investigating board's recommendation to drop a case. During the 1971-72 school year, the Military Academy's Cadet Honor Committee Chairman sent to a full

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Hearing panels are composed of five to 12 honor committee members.¹⁷⁹ Honor board proceedings, which may be formal or quasi-formal in nature,¹⁸⁰ are presided over by the honor committee chairman or his designee, who normally does not vote.¹⁸¹ A nonparticipating officer-adviser observes such proceedings at the Air Force Academy.¹⁸² After examining witnesses and reviewing other information, honor board members decide whether a cadet has committed the offense alleged and recommend to the Commandant of Cadets what penalties, if any, should be imposed.¹⁸³

Air Force and Merchant Marine Academy cadets acquitted by a cadet honor board must be returned to the cadet corps in good standing and without prejudice,¹⁸⁴ although "significant new evidence" permits acquitted cadets to be retried and convicted at the Air Force Academy.¹⁸⁵ At the other three academies, a finding of not

honor board one case recommended by a cadet investigation team for termination. Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972.

¹⁷⁹ See Honor Oper. Inst., U.S.A.F.A. 2(l) (1970) (eight members at Air Force Academy); R.C.C.U.S.C.G.A. 5-8-02 (1971) (10 members at Coast Guard Academy, one First Class (Senior) representative from each company plus the Regimental Commander, all of whom vote); U.S.N.A. Inst. 1610.3 Enc. I (2)(e) (five to nine members at Naval Academy); The Cadet Honor Code, U.S.M.A., supra note 69 at 7 (12 members at Military Academy); Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972 (12 members at Merchant Marine Academy).

¹⁸⁰ E.g., Interview with Staff Judge Advocate, U.S.N.A., July 24, 1972.

¹⁸¹ See Cadet Honor Comm. Proc., U.S.M.A. II(B) (4), at 3 (1971); Honor Oper. Inst., U.S.A.F.A.

2(4) (1970); Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972. The Chairman does vote at the Coast Guard Academy. R.C.C.U.S.C.G.A. 5-8-02 (1971).

¹⁸² Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., Sept. 1, 1971.

¹⁸³ See Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., Sept. 1, 1971; Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972; Interview with Regimental Commander, U.S.C.G.A., Aug. 9, 1972.

¹⁸⁴ U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 44; Interview with 1971-72 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972. Air Force Academy honor code violators to whom an honor board grants "discretion" by voting to retain him must also be returned to the Academy in good standing. *Rose v. Department of the Air Force*, Civil No. 72-1605, at ii n.5 (S.D.N.Y. Dec. 19, 1972); U.S.A.F.C.W.M. 30-1 (14) (c) (1966), quoted in *Hearings on Service Academies*, *supra* note 18, at 10,821; U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 44.

¹⁸⁵ Significant new evidence produced following a hearing will be presented to the Board which voted on the case. The Board will decide by majority vote whether the case should be reopened to hear the new evidence. Honor Oper. Inst., U.S.A.F.A. 2(16) (1970).

¹⁸⁶ Letter from Legal Officer, U.S.C.G.A., Sept. 11, 1972. Coast Guard Academy authori-

guilty may be discounted altogether¹⁸⁶ or may result in the charges being terminated.¹⁸⁷ Cadets found guilty of violating the honor code are usually asked to resign.¹⁸⁸ Except at the Naval Academy, no cadet is required to resign before appearing for a *de novo*, adversarial hearing before a board of officers which makes recommendations to the Commandant or to the Superintendent as to how to dispose properly of a case.¹⁸⁹ Moreover, at the Naval, Coast Guard and Merchant Marine Academies the Commandant of Cadets may make a final judgment to impose a sanction other than separation from the Academy, thereby terminating the case.¹⁹⁰ At all academies the Su-

ties may, upon the advice of an all-officer Executive Committee, choose not to abide by the honor board's recommendation that an alleged honor violation not be sanctioned. *Id.*

¹⁸⁷ Cadet Honor Comm. Proc., U.S.M.A. II(B)(8) (1971) ("closed"); U.S.N.A. Inst. 1610.3 Enc. I(6)(i) (1972) ("terminated").

¹⁸⁸ Letter from Staff Judge Advocate, U.S.N.A., Oct. 12, 1972; Interview with Legal Officer, U.S.C.G.A., Dec. 13, 1972. As stated in the Air Force Academy's Honor Oper. Inst. 3(1) (1970), "there is implicit in each finding of guilty by an Honor Board a request that the man submit his resignation from the Cadet Wing for violating the Honor Code." Accord, R.U.S.M.A. 16.04 (1971); U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 44. Indeed, except when discretion is granted, see note 190 *infra*, Air Force Academy honor code "[v]iolators are expected to resign." U.S.A.F.A. Superintendent's Report, *supra* note 73, at 7. At the Coast Guard and Naval Academies, however, resignation is not so automatic since the honor board's recommendation is merely advisory and the Superintendent of the Naval Academy and the Secretary of the Navy, or the Superintendent of the Coast Guard Academy and the Commandant of the Coast Guard make the final decision as to whether the convicted cadet will remain at the academy. Letter from Legal Officer, U.S.C.G.A., Nov. 27, 1972; *id.*, Sept. II, 1972; Letter from Staff Judge Advocate, U.S.N.A., Oct. 12, 1972, citing U.S.N.A.R. 120103(5) (1972). While an honor board's recommendation that an honor violator be expelled is almost always officially approved at the Merchant

Marine Academy, Interview with Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972, most honor board recommendations are for probation rather than expulsion, *id.*, Nov. 26, 1972.

¹⁸⁹ Before a cadet is suspended or separated from the Coast Guard or Merchant Marine Academies for an honor offense, his case is automatically considered by an all-officer Executive Board which makes recommendations to the Superintendent of the Academy. See R.C.C.U.S.C.G.A., 1-4-01(F) (1971); U.S.M.M.A.M.R. 01402(1), 01402(3)(a)(I) (1971). At the Military and the Air Force Academies, however, honor cases are considered by an advisory officer board only if the guilty cadet so requests. See R.U.S.M.A. 16-03(c), 16-03(d), 16-04 (1971) (cadet or Superintendent may so request); U.S.A.F.C.W.M. 30-1(17)(d) (1966). Naval Academy midshipmen are not permitted to have their honor concept conviction reviewed by an officer hearing panel. Honor concept violators are interviewed, however, by the Commandant of Midshipmen who recommends how the case should be decided. See Letter from Staff Judge Advocate, I.J.S.N.A., Oct. 12, 1972.

¹⁹⁰ Except at the Military Academy, an honor board may choose not to ask for a guilty cadet's resignation. At the Naval and Merchant Marine Academies an honor board may, after voting a cadet guilty, "recommend" that a guilty midshipman receive an "assignment of probation by the Commandant" instead of "separation." U.S.N.A. Inst. 1610.3(6)(j) (1972); Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972. Coast Guard Academy Standards of Conduct Boards may recommend that honor violators receive "any legitimate sanction" instead of separation from the Academy. Letter from Legal Officer,

perintendent ultimately decides whether to accept the recommendation of the cadet honor board, the Commandant of Cadets and, if convened, the officer board¹⁹¹ that an honor violator be separated from the Academy.¹⁹² The Superintendent's decision to approve a cadet honor violator's resignation or a recommendation that a cadet be expelled from the academy becomes final only if approved by the Secretary concerned or his designee.¹⁹³ The Superintendents of the Air Force and Military Academies specifically retain the option to court-martial a cadet found to have violated the cadet honor code.¹⁹⁴ Of crucial importance to the discussions which follow are the procedures used by the academies in adjudicating alleged honor offenses. The academies employ varied procedures in an effort to afford

U.S.C.G.A., Sept. II, 1972. At the Air Force Academy, an honor board may permit a cadet found guilty of an honor violation to remain at the Academy by voting to grant him "discretion." See U.S.A.F.A. Honor Reference Handbook, *supra* note 172 at 37.

¹⁹¹ At the Air Force Academy an "Academy Board," rather than the Superintendent, determines whether a cadet honor code violator shall remain at the Academy. If the Academy Board recommends "disenrollment," the case may be returned to another board of officers for recommendations on the character of the disenrollment. Thereafter, the Superintendent forwards the record, together with his recommendations, to the Secretary of the Air Force. U.S.A.F.R. 53-3(21)(a) (1971).

¹⁹² See R.C.C.U.S.C.G.A. 1-4-01(J)(1) (1971); R.U.S.M.A. 16.04(c) (1971); U.S.N.A.R. 0408(4) (1968) (there is currently no regulation similar to 0408(4) that is applicable to the Naval Academy, see Letter from Staff Judge Advocate, U.S.N.A., Oct. 12, 1972); Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972. At the Coast Guard Academy, an all-officer Executive Board passes final judgment on the guilt of an alleged honor violator, using the cadet honor board recommendations on whether an alleged honor violator is guilty. R.C.C.U.S.C.G.A. 1-4-01 (1971); Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972. At the other academies, however, cadet

honor boards pass final judgment as to guilt.

Authority to discharge a cadet for violating the Military Academy's honor code has been based upon Congress' statutory grant of power to the Army to discharge a cadet for deficiency in conduct. See JAGA 1960/4704. See also 32 C.F.R. § 901,20 (1972) (authority to discharge honor code violators claimed by Air Force).

¹⁹³ U.S.C. § 6962 (1970); U.S.M.M.A.M.R. 03101(9)(c) (1971); U.S.N.A.R, 120103(4) (1972); Transcript of News Release, U.S.A.F.A., Jan. 22, 1972; Interview with Personnel Officer, U.S.M.A., Feb. 26, 1972; Letter from Legal Officer, U.S.C.G.A., Nov. 27, 1972.

"Secretary concerned" includes the Secretaries of the Army, Navy, and the Air Force, 10 U.S.C. § 101(8) (1970), and, for the purposes of this report, the Secretaries of Transportation (Coast Guard Academy) and of Commerce (Merchant Marine Academy).

Final approval authority is delegated to the Commandant of the Coast Guard for discharging Coast Guard cadets, see 49 C.F.R. 1.45(a)(1), (2) (1972); Secretary of Transportation Memorandum to Commandant, U.S.C.G., Sept. 3, 1968; and to the Maritime Administrator for discharging Merchant Marine cadets, see Letter from Rear Admiral A.B. Engel (Ret.), U.S.C.G., Sept. 12, 1972.

¹⁹⁴ See R.U.S.M.A. 16.04 (1971); U.S.A.F.C.W.M. 30-1(17)(d)(3) (1966). Air Force cadets found guilty of violating the Cadet Honor Code may request and receive a courtmartial in lieu of resigning, Honor Oper. Inst., U.S.A.F.A. 3(1) (1970).

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due process of law.¹⁹⁵ To minimize possible prejudice against an accused cadet, for example, Military Academy honor board members must come from a regiment other than that to which the accused belongs.¹⁹⁶ The Naval, Military and Merchant Marine Academies permit an accused to be represented at the honor hearing by a cadet honor committee member who serves as his advisory counsel.¹⁹⁷ Except at the Coast Guard Academy,¹⁹⁸ cadet honor hearings are tape recorded,¹⁹⁹ and the Naval Academy ensures that copies of all written statements admitted into evidence against the accused are available to him.²⁰⁰ Although the actual proceedings of the honor board may not be private,²⁰¹ regulations detail steps to ensure that the hearing remains confidential,²⁰² and all voting is by secret ballot.²⁰³ Three academies require that a finding of guilt be unanimous.²⁰⁴

¹⁹⁵ But see Letter from Honor and Ethics Comm. Legal Advisor, U.S.A.F.A., Mar. 23, 1973 ("no process is required" at Air Force Academy cadet honor hearings) (emphasis in original)).

¹⁹⁶ See Cadet Honor Comm. Proc., U.S.M.A. II(B)(4) (1971).

¹⁹⁷ Id. I(B)(5); U.S.N.A. Inst. 1610.3 Enc. 1(3)(b),(f) (1972) (advisor assigned); Hearings on Service Academies, supra note 18, at 10,446; Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972. At the Naval Academy the accused's honor committee member "advisor" will accompany the accused to all honor hearings and assist him to the extent the accused desires, but "tilt remains the responsibility of the accused to present his own case." U.S.N.A. Inst. 1610.3 Enc. 1 (3)(t) (1972).

¹⁹⁸ Letter from Legal Officer, U.S.C.G.A., Sept. 11, 1972.

¹⁹⁹ E.g., Cadet Honor Comm. Proc., U.S.M.A. 11(6)(10) (1971); U.S.A.F.C.W.M. 301(13)(b) (1966); U.S.N.A. Inst. 1610.3(6)(b) (1972).

²⁰⁰ See U.S.N.A. Inst. 1610.3(6)(d) (1972).

²⁰¹ At the Military and Air Force Academies cadets who are not honor committee members may attend honor hearings, see Cadet Honor Comm. Proc., U.S.M.A. II(B)(2), at 2-3 (1971); U.S.A.F.A. Honor Oper. Inst. 1(5)(a) (1970); id. at 2 attach. 1 (1970) (visitors may participate by submitting written questions to honor board chairman); The Cadet Honor Code, U.S.M.A., supra note 69, at 7.

²⁰² See *Rose v. Department of the Air Force*, Civil No. 72-1605, at i n.5 (S.D.N.Y. Dec. 19, 1972); Cadet Honor Comm. Proc., U.S.M.A. t1(B)(2) (1971) (no one who is not a cadet may attend, unless he is a witness); Honor Oper. Inst., U.S.A.F.A. 2(14) (1970); U.S.A.F.C.W.M. 30-1(19) (1966); U.S.N.A. Inst. 1610.3(5)(h), (5)(i), (6)(b), (6)(1), (6)(m) (1972); Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972 (only honor committee members permitted to attend).

²⁰³ Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972; see Cadet Honor Comm. Proc., U.S.M.A. 11(B) (8) (1971); Honor Oper. Inst., U.S.A.F.A. 2(10) (1970); U.S.A.F.C.W.M. 30-1(14) (a) (1966); U.S.N.A. Inst. 1610.3(6)(i) (1972).

²⁰⁴ The Cadet Honor Code, U.S.N.A., *supra* note 69, at 7; Introduction to the Cadet Honor Code for Officers and Key Personnel, United States Air Force Academy (7)(b) [hereinafter Introduction to the U.S.A.F.A. Honor Code], reprinted in *Hearings on Service Academies*, *supra* note 18, at 10,804; Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972; see Honor Oper. Inst., U.S.A.F.A. 2(11) (1970). See also U.S.N.A. Inst. 1610.3 Enc. I(6)(i) (1972) (less than unanimous, but minimum of two); Interview with

Despite these procedures, the protections actually available to cadets subject to honor hearings fall far short of those available in other administrative proceedings. Thus, as recently as 1966, the Judge Advocate General for the Navy concluded that "fairness" in administering the honor concept was achieved "in spite of the procedures employed which can only be described, at best, as poorly designed to assist . . . in discovering the truth of an allegation."²⁰⁵ Although in some service academies honor committee members are encouraged to disqualify themselves if they feel they cannot vote fairly and without bias,²⁰⁶ no academy grants to an accused an absolute right to challenge for bias one or more of the individuals assigned to hear his case.²⁰⁷ Further, although an accused cadet may present witnesses and relevant evidence in his behalf,²⁰⁸ at some academies the cadet may not remain silent²⁰⁹ or be present while other witnesses

1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972 (10 of 12 board members at the Merchant Marine Academy).

²⁰⁵ The Honor Concept, *supra* note 69, at 2, 12.

²⁰⁶ See, e.g., U.S.N.A. Inst. 1610.3(4)(e)(1)(1972); Introduction to the U.S.A.F.A. Honor Code, *supra* note 204, at (7) (b); *Hearings on Service Academies*, *supra* note 18, at 10,443.

²⁰⁷ At the Air Force Academy, however, cadets have a limited right to challenge hearing board members. See Honor Oper. Inst., U.S.A.F.A. 2(5) (1970) (objections by accused to any cadet selected to vote on his case will be voted upon by a majority vote of the honor board).

²⁰⁸ E.g., Honor Oper. Inst., U.S.A.F.A. I(5)(b), 2(6) (1970); U.S.A.F.C.W.M. 30-1(13)(d) (1966); U.S.N.A. Inst. 1610.3(6)(f) (1972).

²⁰⁹ Naval Academy midshipmen have been routinely advised prior to submitting a written prehearing statement that they may remain silent. *Hearings on Service Academies*, *supra* note 18, at 10,426-27. Convicted honor concept violators, moreover, were permitted to remain silent when interviewed by the Commandant of Midshipmen upon appeal. *Id.* at 10,447.

Until promulgation of new honor board procedures on April, 25, 1972, however, alleged Naval Academy honor violators were told at their honor hearing itself that "you must answer all questions asked." Com'd't Mid'n Inst. 1610.7c Enc. I(IV)(5) (1970). Today, an accused is advised that he "(has) the right to remain silent at this Honor Hearing." U.S.N.A. Inst. 1610.3 Enc. I(6)(e) (1972). Coast Guard cadets may

refuse to answer questions incriminating them under articles of the U.C.M.J., see R.C.C.U.S.C.G.A. 5-3-14(A) (1971), but refusal to answer other questions may result in a conduct violation, see *id.* 5-3-14. See also R.C.C.U.S.C.G.A. 5-5-0I(A)(I) (1971).

The Air Force Academy's honor committee has also reversed its policy regarding a right to remain silent, but in a manner opposite to that of the Naval Academy's honor committee. Prior to the beginning of the 1972-73 academic year, accused Air Force Academy honor code violators were advised prior to the investigation and hearing of their cases of their rights against self-incrimination pursuant to Art. 31, U.C.M.J., 10 U.S.C. § 831 (1970). U.S.A.F.A. Honor Oper. Inst. 2(5), (6) (1970). This year, however, the Honor Committee will neither afford nor inform cadets of such rights because of its understanding that honor boards conduct administrative rather than criminal hearings and that cadets before such hearing boards have no right against self-incrimination. Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 22, 1972.

In addition, alleged honor violators have no right against self-incrimination before a cadet

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testify in his case.²¹⁰ Even if he is present, an accused at some academies may not be allowed to question opposing witnesses directly.²¹¹ Yet at the Military Academy, members of the corps who are not a part of the honor committee, sometimes as many as 200 in number, may participate in the jury deliberations and in questioning the accused and other witnesses.²¹²

The Military Academy's honor system includes a particularly interesting "unofficial," "unpublicized" yet very real feature: the "silence."²¹³ If the Superintendent disagrees with the findings of a cadet honor board that a particular cadet has violated the honor code, and decides officially to retain him, the cadet will remain at the academy "in good standing."²¹⁴ However, such a cadet is nearly always "silenced." As a result "[h]e is given a room by himself, eats at a table by himself and is talked to by no one in the Corps, except on official business."²¹⁵

honor hearing board at the Military and Merchant Marine Academies. Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972; see *The Cadet Honor Code*, U.S.M.A., *supra* note 69, at 5-6.

²¹⁰ U.S.N.A. Inst. 1610.3 Enc. 1(5)(c), (d) (1972) (proceedings of investigation board); Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; Interview with 1971-72 Cadet Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Cadet Honor Comm. Proc., U.S.M.A. II(B)(5) to (7) (1971). The Naval Academy emphasizes, however, that an accused and his advisor must be present at all proceedings before the main hearing board, except during closed discussions and balloting. U.S.N.A. Inst. 1610.3 Enc. 1(6)(b) (1972). While an accused Air Force cadet must be confronted by the investigators of his case, U.S.A.F.C.W.M. 30-1 (17)(b) (1966), he is not always present during the investigators' questioning of each witness. Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., Sept. 1, 1971.

²¹¹ At the Air Force Academy the accused cannot question witnesses himself, but may ask the chairman of the honor board to do so. Honor Oper. Inst., U.S.A.F.A. 2 attach. 1 (1970). The Naval Academy permits the accused or his advisor to question witnesses. U.S.N.A. Inst. 1610.3 Enc. (I)(6)(d) (1972).

²¹² Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; see *Cadet Honor Comm. Proc.*, U.S.M.A. II(B)(5), (7) (1971).

²¹³ Charles, *supra* note 71, at 120. See generally text accompanying notes 852-940 *infra*.

²¹⁴ See R.U.S.M.A. 16.04 (1971); Letter from the Honorable Robert F. Froehlke, Secretary of the Army, to Father of Second Class Cadet Being Silenced, Enc., Oct. II, 1972 (hereinafter Letter from Secretary of the

Army].

²¹⁵ Letter from Honor Comm. Member for Chairman of Honor Comm., U.S.M.A., Dec. 15, 1971. See also Davidson, Honor Guide for Officers, U.S.M.A., ¶ 18, at 11 (1958) [hereinafter U.S.M.A. Honor Guide for Officers] (author was Army brigadier general and Superintendent of Military Academy); Karparkin, Punishing by the 'Silence', N.Y. Times, Jan. 14, 1973, at 12, cols. 1-2.

A more detailed description of a "silenced" cadet's experience is found in the following memorandum published by the 1960 Cadet Honor Committee:

The following information regarding the "Silence" is published by the Cadet Honor Committee for the benefit of the Corps:

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Cadets are not required to uphold the silencing and no punitive action is taken to insure compliance [f]or the most part. However, cadets uphold the silencing procedure well.

The philosophy behind the system is that once a cadet has been found to have violated the Honor Code, the Corps has no wish to associate with him and that after a long enough period of isolation, he will leave the Academy.²¹⁶

Cadets justify imposing the sanctions of the silence because they believe that the accused is really guilty but could not be discharged due to legal technicalities.²¹⁷ Silenced cadets usually resign.²¹⁸ No other academy employs the silence procedure;²¹⁹ when the issue of whether to do so arose in 1964 at the Air Force Academy, the silence was rejected owing to "[t]he mature judgment and wisdom of the Commandant of Cadets."²²⁰

C. The Ethics Systems

A third category of offenses is adjudicated at the Air Force and Coast Guard Academies by boards composed of cadets elected annually from each cadet company and charged with adjudicating offenses which fall in seriousness somewhere between honor and con-

1. The Silence lasts his entire career in the Armed Forces.
2. He is not permitted to wear his class ring.
3. He is addressed only on official business, and then as "Mister."
4. He will not be allowed to have roommates.
5. Seats next to him in Mess Hall will be left vacant.
6. If the man goes to the theatre or to athletic events, all seats adjacent to him (one seat on each side) will be vacated.
7. if he sits down at a table in the "Boodlers," that table will be vacated.
8. He will not be given the privilege of "cutting-in" or exchanging dances at a hop.
9. He will not participate in the Fourth Class System.

The Silence, Chairman, The Cadet Honor Committee, U.S.M.A., Sept. 23, 1960. See also notes 891-95 infra, As recently as the 1950's, moreover, "silenced" cadets have also been required to sit in classrooms separated from the other class members. Charles, supra note 71, at 121.

²¹⁶ Letter from Honor Comm. Member for Chairman of Cadet Honor Comm., U.S.M.A., Dec. 15,

1971; see Charles, *supra* note 71, at 121-22.

²¹⁷ See Charles, *supra* note 71, at 121; U.S.M.A. Honor Guide for Officers, *supra* note 215, If 18, at II (The Corps silences "a cadet considered guilty of an honor violation who did not elect to resign and could not be discharged for lack of legal proof."); Letter from Secretary of the Army, *supra* note 214.

²¹⁸ Charles, *supra* note 71, at 122.

²¹⁹ But see text accompanying note 316 *infra*.

²²⁰ Charles, *supra* note 71, at 244-45.

duct offenses.²²¹ These "ethics committees" are charged with promoting high moral and ethical standards among the corps²²² and with adjudicating alleged violations of these standards.²²³ Sanctions that may be recommended by the ethics committees include demerits, confinements, tours and restriction.²²⁴ One or more appointed officers act as nonvoting advisors to the ethics committees and may attend the hearing of each ethics board.²²⁵ A representative of the Air Force Academy's Ethics Committee observes each Honor and Class I conduct hearing to determine if it would be more appropriate to consider the alleged offense as an ethics rather than a conduct or an honor violation.²²⁶ No criteria have been formalized for determining which matters the ethics board will consider²²⁷ or how the investigation or

²²¹ See R.C.C.U.S.C.G.A. 5-8-03 (1971); U.S.A.F.C.R. 35-6(33) (1971); Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972. See also Interview with U.S.A.F. Officer Training School Officer, June 13, 1972 (U.S. Air Force Officer Training School, Lackland Air Force Base, Texas, is considering implementing an ethics system similar to that of U.S.A.F.A.). Hereinafter, "ethics boards" and "ethics committees" shall include the Cadet Standards of Conduct Boards and Sub-boards of the Coast Guard Academy.

²²² R.C.C.U.S.C.G.A. 5-8-01(B), 5-8-03(B) (1971); U.S.A.F.C.W.M. 30-2(1), (5), (8), (9)(b), (9) (c), (1965). Ethics standards are not the same as those set by the honor codes. See R.C.C.U.S.C.G.A. 5-8-03 (B)(3) (1971). Indeed, ethics standards are considered to be even higher than the "minimum" honor standards. See U.S.A.F.C.W.M. 30-2(3) (1965).

²²³ Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972. Five-member cadet Ethics Boards adjudicate certain egregious offenses "involving Ethics." U.S.A.F.C.R. 35-6(33) (1971).

²²⁴ U.S.A.F.C.R. 35-6(11), (32) (a), (33) (a) (1971); Hearings on Service Academies, *supra* note 18, at 10,788; see R.C.C.U.S.C.G.A. 5-4-08 (1971); Letter from Legal Officer, U.S.C.G.A., Sept. 11, 1972. Unlike at the Air Force Academy, Letter from Officer-in-Charge, Professional Ethics Comm., U.S.A.F.A., Dec. 6, 1972, an ethics violation may result in separation at the Coast Guard Academy, Letter from Legal Officer, U.S.C.G.A., Sept. 11, 1972. Penalties given for ethics violations at the Air Force Academy may be as severe as those given for the most serious type of conduct offenses. See U.S.A.F.C.R. 35-6(33) (1971).

²²⁵ See R.C.C.U.S.C.G.A. 5-8-02(A) (1971); U.S.A.F.C.W.M. 30-2(11), (12) (1965); Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972.

²²⁶ U.S.A.F.C.W.M. 30-2(9)(f), (g) (1965). Indeed, it is possible for an ethics board (1) to adjudicate a case and award a cadet punishment after his acquittal by an honor board and (2) after vacating a judgment of guilt and award of punishment for a conduct offense, to adjudicate the case as an ethics offense and award an even greater punishment. Interview with Officer-in-Charge, Professional Ethics Comm., U.S.A.F.A., June 6, 1972.

²²⁷ Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972; Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972. In judging the actions of fellow cadets,

Cadet Standards of Conduct Board members use as criteria the values of Coast Guard Academy cadets as they exist at present. Interview with Regimental Commander, U.S.C.G.A., Aug. 9, 1972. In contrast, the Air Force Academy's Ethics Committee adopts as its criterion "[its] own judgment of what [ethics] the [cadets] should have." Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972 (emphasis added.) See generally U.S.A.F.C.W.M. 30-2(9)(b), (c) (1965).

hearings will be conducted.²²⁸ According to regulations, ethics board decisions on guilt and punishment are advisory and become effective only upon approval by the Commandant of Cadets or the Superintendent.²²⁹ At the Coast Guard Academy, cadets receive a de novo hearing before the officers of the Executive Board,²³⁰ who view the ethics board's recommendations as just one relevant consideration.²³¹ At the Air Force Academy, on the other hand, ethics committee recommendations are reviewed directly only by the Superintendent or the Commandant of Cadets.²³² At both academies, a cadet may "appeal" an adverse ethics board decision to a designated authority.²³³

D. Some General Observations

Cadets are routinely informed by various means of the decisions and findings of all academy adjudicatory boards, of the factors considered in reaching the conclusions made by the boards and of the identity of the cadets penalized.²³⁴ The information may be dissemi-

²²⁸ Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972; Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972. As a matter of practice, four Ethics Committee members, led by the Ethics Committee Chairman, informally investigate all Air Force Academy ethics cases. Instead of voting as to whether a case should be dropped or forwarded to the main hearing panel, the investigators arrive at a consensus. The Chairman also serves as one of the five voting members of the main ethics hearing panel. One of the investigators makes out a written report which the accused is neither permitted to have nor to see, but which becomes part of his permanent cadet record. After the case is summarized informally to the hearing panel by one or more of the investigators, the accused enters and is given an opportunity to explain his side of the case. Although permitted to bring witnesses, usually none appears at the hearing for either side. Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., Aug. 9, 1972.

²²⁹ See, e.g., R.C.C.U.S.C.G.A. 5-8-03(B)(5) (1971); U.S.A.F.C.R. 35-6(32), (33) (1971). In reality, however, adjudications of guilt or innocence and of punishment by an Air Force Academy Ethics Board have the effect of final judgments, see U.S.A.F.C.R. 35-6(32), (33) (1971), as evidenced by the fact that Air Force Academy Ethics Board recommendations are never modified by the Commandant of Cadets or the Superintendent. Interview with Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972.

²³⁰ The Executive Board is an eight-member, all-officer board which decides whether a cadet is suitable to remain at the Coast Guard Academy and adjudicates all Class I offenses. See R.C.C.U.S.C.G.A. 1-4-01 (1971); text accompanying note 145 supra.

²³¹ Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972.

²³² See U.S.A.F.C.R. 35-6(32), (33) (1971). But see note 229 supra.

²³³ As with conduct offenses, cadets at both academies may present any ethics grievance to the Superintendent or to the Commandant of Cadets. See R.C.C.U.S.C.G.A. 2-1-06, 5-4-I I (1971); U.S.A.F.C.R. 35-6(36) (1971). See also text accompanying note 166 supra. But see text accompanying notes

945-46 *infra*.

²³⁴ E.g., Com'd't Mid'n Inst. P1620.I0G Enc. 3(7)(a) (1971) (conduct offenses); R.U.S.C.C. 423 (1971) (same); U.S.A.F.C.W.M. 30-1(15) (1966) (honor offenses);

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nated about honor code violation cases, for example, on explanatory sheets posted on each company's bulletin board, in frequent, periodic oral reports given each company by its honor representatives,²³⁵ and over public loudspeakers.²³⁶ In addition, the means by which a cadet has been separated from an academy may be recorded in his official military records²³⁷ and on his academic transcript.²³⁸ Because of the obvious possible adverse effects of such widespread publicity, as well as various other adverse consequences resulting from the penalties awarded by academy adjudicatory boards,²³⁹ alleged cadet offenders are certain to want the maximum safeguards required by law. The next section of this report will discuss these requirements.

IV

THE SUBSTANTIVE AND PROCEDURAL PROPRIETY OF THE ACADEMIES' ADJUDICATORY SYSTEMS

The academy adjudicatory systems are complex mechanisms for the control of virtually all cadet behavior. The systems have apparently been designed to mold the cadet into the academies' image of a professional military leader, eliminating from the ranks those who fail to fit this image. Yet little thought has been given to either the

U.S.A.F.C.W.M. 30-2(9) (g) (1965) (ethics offenses); Affidavit of 1972-73 Honor Comm. Vice-Chairman, U.S.A.F.A., *Rose v. Department of the Air Force*, Civil No. 72-1605 (S.D.N.Y. Dec. 19, 1972); Interview with Legal Officer, U.S.C.G.A., Nov. 22, 1972 (identities not divulged); Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972 (cadet identified by class but not by name); Report of Proceedings, Ninth Conference of Superintendents of the Armed Forces, Commandants of Cadets Conference, July 25, 1967. See also *Hagopian v. Knowlton*, 470 F.2d 201, 205 (2d Cir. 1972) (demerit list posted each week).

²³⁵ See, e.g., U.S.A.F.C.W.M. 30-1(15) (1966); Affidavit of 1972-73 Honor Comm. Vice-Chairman, U.S.A.F.A., *Rose v. Department of the Air Force*, Civil No. 72-1605 (S.D.N.Y. Dec. 19, 1972); Interview with Legal Officer, U.S.C.G.A., Nov. 22, 1972 (identities not divulged); Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972; Interview with Class of 1971 Honor Comm. Secretary, U.S.N.A., Nov. 22, 1972.

²³⁶ Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972 (information divulged even if cadet retained at the Academy).

²³⁷ Letter from Honor Comm. Representative, U.S.A.F.A., Sept. 13, 1972; Letter from Legal Officer, U.S.C.G.A., Oct. 16, 1972; Letter from Commandant of Midshipmen, U.S.M.M.A., Oct. 31, 1972; Letter from Staff Judge Advocate, U.S.N.A., Oct. 12, 1972, at 2. *Contra*, Letter from Information Officer, U.S.M.A., Oct. 25, 1972, at 2.

²³⁸ See Affidavit of Major Charles E. Hart, *Rose v. Department of the Air Force*, Civil No. 72-1605, at 2 (S.D.N.Y. Dec. 19, 1972); Letter from Staff Judge Advocate, U.S.N.A., Oct. 12, 1972. *Contra*, Letter from Legal Officer, U.S.C.G.A., Oct. 16, 1972; Letter from Information Officer, U.S.M.A., Oct. 25, 1972, at 2.

²³⁹ See text accompanying notes 302-18 *infra*.

procedural fairness or the substantive propriety of the adjudicatory systems, the result often being that cadets are subject to grossly inequitable treatment at the hands of their fellow cadets and academy officials.

This section will initially consider excessive penalties and the unwarranted exercise of military jurisdiction. The procedural aspects of the academies' systems will then be examined in light of due process and other relevant constitutional provisions. Next, constitutional limitations on the substantive content of academy proscriptions will be discussed. Finally, one particularly egregious academy practice—the silence—will be explored, pointing up the numerous constitutional issues which that practice raises.

A. Imposition of Punishments in Excess of Statutory Limitations

Article 15 of the UCMJ²⁴⁰ provides statutory authority for the imposition of nonjudicial punishment and places strict limitations on such sanctions.²⁴¹ The questions of whether and to what extent military commanders may punish members of their command, including officers,²⁴² without trial have thus been decided by Congress. Since cadets must be given all the benefits of the UCMJ,²⁴³ cadet punishments without a court-martial must be limited to article 15's explicit statutory maximums.

Moreover, as historical analysis indicates, Congress intended to include academy disciplinary powers among those limited by article 15. Prior to 1916, various types of summary punishments, including those imposed on Military Academy cadets²⁴⁴ were thought to be authorized as inherent incidents of command.²⁴⁵ Yet Army leaders, apparently unsure about the scope and limits of such inherent powers,

²⁴⁰ 10 U.S.C. § 815 (1970).

²⁴¹ *Id.*; see text accompanying notes 26 *supra* and 251 *infra*.

²⁴² See text accompanying note 252 *infra*.

²⁴³ *United States v. Ellman*, 9 U.S.C.M.A. 549, 552, 553, 26 C.M.R. 329, 332, 333 (1958); Zbar & Mazza, *supra* note 6, at 32.

²⁴⁴ See U.S. Military Academy Regs. ¶ 91 (1832); Miller, *A Long Look at Article 15*, 28 *Mil. L. Rev.* 37, 41 (1965).

²⁴⁵ "[T]hat is, they imposed summary punishment [on their own authority] without statutory authority. Miller, *supra* note 244, at 40, 41, citing 17 *American State Papers* (2 *Military Affairs*) 39 (W. Lowrie & W. Franklin eds. 1834). For examples of many types of summary punishment imposed by military authorities prior to 1916 without statutory authority, see U.S. Military Academy Regs. ¶ 91 (1832); J. Billings, *Hardtack and Coffee* 147-52 (1969); *General Orders Issued by Major General Putnam* 41-42 (W. Ford ed.

1893); Miller, *supra* note 244, at 38-44; F. Wilkeson. *Recollections of a Private Soldier in the Army of the Potomac* 30-36 (1887); 6 *Writings of George Washington* 70-71, 91-92, 114, 233-34 (Fitzpatrick ed. 1932).

repeatedly sought to have them formally codified.²⁴⁶ The initial statutory authorization of nonjudicial punishment came in 1916²⁴⁷ and was followed in 1920 by enactment of a one-week limitation on nonjudicial withholding of privileges, restrictions and hard labor without confinement,²⁴⁸ No distinction was drawn in either the original codification of authority or its subsequent revisions²⁴⁹ between sanctions imposed on cadets and those assessed against other members of the military,²⁵⁰ Thus, since the present nonjudicial punishment article provides explicit limitations on the amount and types of punishment that may be imposed for "minor offenses" upon officers as well as other military personnel,²⁵¹ and since cadets are to be treated as offi-

²¹⁶ See Hearings on H.R. 23,628 Before the House Comm. on Military Affairs, 62nd Cong., 2d Sess. 88-89 (1912); H.R. Exec. Doc. No. 1, 52d Cong., 2d Sess., pt. 2, at 210-11 (1892); 2 H.R. Exec. Doc. No. 1, 49th Cong., 2d Sess., pt. 2, at 315-16 (1886); Miller, *supra* note 244, at 38-45; 6 *Writings of George Washington* 91-92, 114 (Fitzpatrick ed. 1932); 10 *Writings of George Washington* 362, 376 (Fitzpatrick ed. 1933).

²¹⁷ See Act of Aug. 29, 1916, ch. 418, § 3, art. 104, 39 Stat. 667; Miller, *supra* note 244, at 45, 55. But see 1962 U.S. Code Cong. & Ad. News 2380-81 (some power given to Navy commanders since 1775).

²¹⁸ Act of June 4, 1920, ch. 227, § 2, art. 104, 41 Stat. 808; see Miller, *supra* note 244, at 45-46.

²¹⁹ See, e.g., U.C.M.J. art. 15, 10 U.S.C. § 815 (1970).

²⁵⁰ Nor has any distinction been drawn between cadets and other members of the military either in the original or in subsequent statutory limitations on military authority to impose nonjudicial punishment.

²⁵¹ 10 U.S.C. § 815 (1970) provides in relevant part:

(b)...[A]ny commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial

(1) upon officers of his command---

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command-

(i) arrest in quarters for not more than 30 consecutive days;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(2) upon other personnel of his command---

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above-

cers in applying the Uniform Code,²⁵² cadet punishments without court-martial are limited by the statutory maximums applicable to officers.²⁵³

These limitations have not, however, been observed. The Military and Air Force Academies have routinely imposed penalties on cadets different in kind and/or far greater in severity than those authorized by article 15.²⁵⁴ For example, an Air Force Academy cadet has been awarded 55 demerits, 225 tours and nine months restriction solely for "[p]ossessing [an] empty liquor bottle in [his] room."²⁵⁵ The length of this restriction far exceeds the 30- or 60-day maximums specified by article 15.²⁵⁶ Imposition of tours, moreover, is not explic-

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restrictions to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

This section also limits the duration of consecutive article 15 punishments that involve deprivation of liberty.

The legislative history of the latest amendment to article 15 indicates Congress' intention that the military's authority to impose nonjudicial punishment be limited by the stated statutory maximums. See Hearings on H.R. 7656 Before Subcomm. No. I of the House Comm. on Armed Services, 87th Cong., 1st Sess. 4919 (1962); Hearings on H.R. 11,257 Before a Subcomm. of the Senate Comm. on Armed Services, 87th Cong., 2d Sess. 24 (1962); Miller, *supra* note 244, at 64-65. The 1962 amendments added the provision that members of the military must be afforded a right to demand a court-martial, with its attendant safeguards, in lieu of accepting nonjudicial punishment. See 10 U.S.C. § 815(a) (1970). Although this, like all other article 15 provisions, is applicable to cadets, cadets have not been given this choice.

²⁵² *United States v. Ellman*, 9 U.S.C.M.A. 549, 552, 26 C.M.R. 329, 332 (1959). Even if cadets were not considered "officers" in applying article 15, they would certainly be considered to be among "other personnel of [a commanding officer's] command," and thus be included within the article 15 limitations. See note 251 *supra*.

²⁵³ The Army, Navy and Air Force, however, claim that cadet penalties are not restricted by the limitations of article 15. Letter from Brigadier General Walter T. Galligan, Commandant of Cadets, U.S.A.F.A., June 19, 1972; Letter from Captain P.J. Ryan, Acting Commandant, U.S.N.A., Dec. 22, 1971; Letter from Colonel Hugh J. Clausen, Chief, Military Justice Division, U.S. Army, Jan. 6, 1972; Letter from Major General George S. Prugh, Judge Advocate General, U.S. Army, Dec. 14, 1971; cf. U.S.A.F.A.R. 111-9(2)(d) (1970).

²⁵⁴ Although less frequently, the Naval and Coast Guard Academies also impose penalties violative of article 15. See Com'd't Mid'n Inst. P1620.10G Enc. 6(4491), at 6 (1970); Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; Interview with Performance Officer, U.S.N.A., July 24, 1972. If Merchant Marine Academy cadets were subject to the UCMJ, some penalties imposed by that Academy would also violate article 15. See Interview with Assistant Commandant of Cadets, U.S.M.M.A., Aug. 10, 1972; note 18 *supra*.

²⁵⁵ Special Orders No. 175(3), U.S.A.F.A. (April 28, 1959); cf. Special Orders No. P-42(I), (2), U.S.A.F.A. (May 4, 1971) (180 days restriction and 120 tours); Special Orders No. 48(4), U.S.M.A. (April 5, 1971) (40 demerits, 132 tours, 6 months restriction, reduction to rank of private).

²⁵⁶ 10 U.S.C. § 815(b) (1970), quoted in note 251 *supra*. Article 15's limitations are applicable here since the penalties of restriction, arrest, extra duties and correctional custody that

itly authorized by statute and apparently falls outside the scope of the nonjudicial penalties contemplated by Congress.²⁵⁷

Academy officials resist the application of article 15 to their disciplinary systems by arguing that the sanctions imposed at the academies are not "punitive" but rather "administrative"²⁵⁸ or

may be imposed under article 15 are essentially equivalent to the restriction, arrest, confinement and extra duties imposed by the academies. Compare the definitions of these academy punishments in U.S.A.F.C.R. 35-6(12), (13) (1971) and in note 148 *supra* with the definitions of the above named article 15 penalties described in Manual for Courts-Martial, United States 11 131(c)-(d) (rev. ed. 1969) and in Miller, *supra* note 244, at 70-72, 76-78, 80-83. Indeed, restriction at the Naval, Coast Guard and Merchant Marine Academies entails the same periodic signing in or muster requirements as authorized for restriction under article 15. Compare Manual for Courts-Martial, United States ¶ 131(c)(2) (rev. ed. 1969) with Com'd't Mid'n Inst. P1620.IOG Enc. 5(1)(b)(c) (1970); R.C.C.U.S.C.G.A. 5-4-10(B)(4) (1971) and U.S.-M.M.A.M.R. 031 10(1)(a) (1971).

²⁵⁷ It might be argued that requiring cadets to walk penalty tours is sanctioned by article 15's authorization of "extra duties, including fatigue or other duties" for servicemen who are not officers. See 10 U.S.C. §§ 815(bx2)(E), (b)(2)(H)(V) (1970), quoted in note 251 *supra*. For several reasons, however, such statutory authorization appears not to exist. As previously noted, cadets are to be treated as officers when applying the UCMJ, note 24 *supra*, and article 15 is intended to authorize assigning extra duties only to servicemen who are not officers. 10 U.S.C. § 815 (1970). Further, even if cadets were not considered officers for these purposes, it is clear that "extra" and "fatigue" duties "[m]ay not be of a kind which demeans [enlisted men's] grades or positions," see Manual for Courts-Martial, United States ¶ 131(c)(6) (rev. ed. 1969); or which are cruel and unusual, ridiculous or unnecessarily degrading, U.S.A.R. 27-10 IJ 3-8(d) (1968); Miller, *supra* note 244, at 77. Pursuant to these restrictions, enlisted men may not be required to perform acts similar to tours, e.g., carrying a loaded knapsack, Manual for Courts-Martial, United States, *supra*, ¶ 125, and guard duty, E. Byrne, Military Law 91 (1970), citing Article 1410 of Navy Regulations. See generally Miller, *supra* note 244, at 76-78. Finally, it seems obvious that "duties" may reasonably refer only to activities normally assigned to servicemen in accomplishment of a valid military purpose, not to activities solely punitive in nature. Thus, while "fatigue duties" might include, e.g., requiring a serviceman to cut grass, it appears improper to construe it to including walking penalty tours.

²⁵⁸ Letter from Colonel Hugh J. Clausen, Chief, Military Justice Division, U.S. Army, Jan. 6, 1972; Letter from Major General George S. Prugh, Judge Advocate General, U.S. Army, Dec. 14, 1971; Letter from Captain P.J. Ryan, Acting Commandant, U.S.M.A., Dec. 22, 1971.

[N]onpunitive measures that a commanding officer . . . is authorized and expected to use to further the efficiency of his command or unit [include] administrative admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, and rebukes, written or oral, not imposed as punishment for a military offense. These nonpunitive measures may also include, subject to any applicable regulations, administrative withholding of privileges.

Manual for Courts-Martial, United States ¶ 128(c) (rev. ed. 1969).

The use of the word "punishment" at least 23 times in the first nine pages of the Air Force Academy's Discipline and Conduct Regulations, U.S.A.F.C.R. 35-6 (1971), indicates the academy's recognition that the sanctions imposed on its cadets are "punishments." By comparing the kinds and severity of academy penalties (see text accompanying notes 146-48 *supra*) with the "nonjudicial punishment" of article 15 (see 10 U.S.C. § 815 (1970); *Conn v. United States*, 376 F.2d 878, 880 (Ct. Cl. 1967)) and the "nonpunitive" measures enumerated in Manual for

"correctional and educational"²⁵⁹ in nature. Such arguments strain semantics to the breaking point²⁶⁰ and are hardly persuasive in light of the fact that

Congress has made no such distinction. Indeed, the academies' characterization appears meaningless since due process requires that private interests be evaluated "not in terms of labels or fictions, but in terms of their true significance or worth,"²⁶¹ and since the Manual for Courts-Martial recognizes that article 15 nonjudicial punishments are themselves "primarily corrective in nature."²⁶² The import of these considerations is clear: academy assessments of punishments different in kind or greater in severity than those provided by the UCMJ are made without legal authority,²⁶³ and like all governmental acts contrary to law, are violative of due process.²⁶⁴

B. Jurisdiction

The Supreme Court in *O'Callahan v. Parker*²⁶⁵ ruled that the jurisdiction of military commanders in criminal cases is limited to offenses which are "service connected."²⁶⁶ If the *O'Callahan* rationale is given its full sweep and applied to administrative as well as criminal proceedings in the military,²⁶⁷ academy officials lack jurisdiction to punish cadets for offenses which are not "service connected."²⁶⁸

Courts-Martial, United States ¶ 128(C) (rev. ed. 1969), it is evident that academy penalties are "punishments." See *Anderson v. Laird*, 466 F.2d 283, 296 (D.C. Cir.), cert. denied 409 U.S. 1076 (1972); Webster's Third International Dictionary 1843 (1966).

²⁵⁹ See *Hagopian v. Knowlton*, 346 F. Supp. 29, 30 (S.D.N.Y.), aff'd, 470 F.2d 201 (2d Cir. 1972), citing R.U.S.C.C. 401 (as amended Nov. 1, 1971).

²⁶⁰ See, e.g., *United States v. Jenkins*, 7 U.S.C.M.A. 261, 262, 22 C.M.R. 51, 52 261 (1956). *Knight v. Board of Educ.*, 200 F. Supp. 174, 178 (M.D. Tenn. 1961); *Graham v. Knutzen*, 351 F. Supp. 642, 664 (D. Neb. 1972); see note 394 *infra*.

²⁶² Manual for Courts-Martial, United States 129(b) (rev. ed. 1969) (emphasis added).

²⁶³ After this illegality was called to the attention of legal officers at the Air Force and Naval Academies, these academies modified their conduct systems so that penalties in excess of article 15 are now given much less frequently. See Interview with Former Naval Academy Midshipman, Class of 1973, Oct. 1, 1972; Letter from Brigadier General Walter T. Galligan, U.S.A.F.A., June 19, 1972. The Air Force Academy continues to maintain, however, that it is not bound by article 15's limitations. *Id.*

²⁶⁴ See, e.g., *Conn v. United States*, 376 F.2d 878 (Ct. Cl. 1967). Imposition of nonjudicial punishments other than, or in excess of, those permitted by § 815 also violates § 893's prohibition of improper punishment. See Manual for Courts-Martial, United States ¶ 172 (rev. ed. 1969), interpreting 10 U.S.C. § 893 (1970). Moreover, § 855 of the Uniform Code has been interpreted to proscribe any punishment not explicitly authorized by the Code, irrespective of the relative severity of the proposed substituted penalty. *United States v. Titcomb*, 38 C.M.R. 752, 756 (1968).

²⁶⁵ 395 U.S. 258 (1969).

²⁶⁶ *Id.* at 272-74; see text accompanying note 104 *supra*.

²⁶⁷ See text accompanying notes 106-109 *supra*.

²⁶⁸ See text accompanying note 104 *supra*.

Application of the *O'Callahan* test to academy adjudicatory proceedings requires a determination of the scope of its "service connected" criterion.²⁶⁹

The requisite "service connection" has been found to exist for an offense committed completely outside a military reservation only in limited circumstances.²⁷⁰ As a borderline example, the Court of Military Appeals, contrary to substantial circuit and district court precedent,²⁷¹ has found wrongful use and possession of marijuana off base to have a "special military significance" bringing these offenses within military court-martial jurisdiction because of their particularly "disastrous effects . . . on the health, morale and fitness for duty of persons in the armed forces."²⁷² Applying similar reasoning to cadet offenses, particular acts committed outside of the academies and by cadets out of uniform might be considered sufficiently militarily related to warrant academy jurisdiction. Academy officials might successfully argue, for example, that their interest in insuring that only cadets with irreproachable moral and ethical standards join its officer elite is sufficiently compelling to justify academy jurisdiction over egregious off-base cadet conduct.²⁷³

²⁶⁹ See, e.g., *Relford v. Commandant*, 401 U.S. 355, 363-70 (1971); *Diorio v. McBride*, 431 F.2d 730, 731 (5th Cir. 1970) (per curiam).

²⁷⁰ Civilian federal courts appear to have found offbase activity by servicemen within O'Callahan limitations on military court-martial jurisdiction only when the offense was committed on foreign soil. See, e.g., *Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). Not surprisingly, in view of the military's hostility toward O'Callahan's jurisdictional limitations, see note 84 supra, the Court of Military Appeals has interpreted O'Callahan broadly to permit the exercise of military jurisdiction over offbase activity in less limited circumstances. Recurring examples include: offenses committed by a member of the military against another member of the military (e.g., *United States v. Cook*, 19 U.S.C.M.A. 13, 41 C.M.R. 13 (1969) (larceny); *United States v. Bell*, 40 C.M.R. 825 (1969) (aggravated assault)); criminal acts in which a serviceman's military status was a factor enabling him to commit an offense (e.g., *United States v. Peak*, 19 U.S.C.M.A. 19, 41 C.M.R. 19 (1969) (wrongful appropriation of an automobile); *United States v. Morisseau*, 19 U.S.C.M.A. 17, 41 C.M.R. 17 (1969) (cashing a forged check)); offenses involving conduct which could bring discredit to the armed forces in the eyes of the civilian community (e.g., *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969) (drunk and disorderly in uniform off post); *United States v. Everson*, 40 C.M.R. 1005 (1969) (aggravated assault)); and acts deemed to have a "special military significance" (e.g., *United States v. Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969)).

²⁷¹ *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Redmond v. Warner*, 12 Crim. L. Rep. 2531 (D. Haw. Feb. 20, 1973); *Schroth v. Warner*, Civil No. 73-3726 (D. Haw. Jan. 31, 1973); *Lyle v. Kincaid*, 344 F. Supp. 223 (M.D. Fla. 1972); *Moylan v. Laird*, 305 F. Supp. 551 (D.R.I. 1969).

²⁷² *United States v. Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969); accord, *United States v. Castro*, 18 U.S.C.M.A. 598, 600, 40 C.M.R. 310, 312 (1969); *United States v. Boyd*, 18 U.S.C.M.A. 581, 582, 40 C.M.R. 293, 294 (1969). But see *United States v. Morley*, 20 U.S.C.M.A. 179, 43 C.M.R. 19 (1970); *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969).

²⁷³ The success of this argument is quite dubious, however, particularly since O'Callahan

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Despite O'Callahan's clear teachings, however, some academies go still farther. They consider the "all-encompassing" cadet honor and ethics codes to "apply anytime, anyplace, and in any situation."²⁷⁴ Cadets may be discharged from some academies for honor code violations committed on leave from the academy and in contexts unrelated to the academies or to the military. A cadet on leave in Montana, for example, who tells an acquaintance that he is from Maine when in fact he is from Virginia might be expelled from the Air Force and Military Academies for lying.²⁷⁵ Several academy conduct regulations are interpreted as expansively as the honor and ethics codes and proscribe acts which are sufficiently nonmilitary as to make academy jurisdiction questionable. Both the Coast Guard and Merchant Marine Academies, for example, proscribe hitchhiking anytime, anywhere and for any reason.²⁷⁶ If O'Callahan is to have any vitality in academy adjudications, these situations must be more carefully scrutinized to determine whether their military connection is such as to permit military jurisdiction.

would prohibit such a broad exercise of military jurisdiction over a cadet after he became a member of that elite. See text accompanying note 271 *supra*.

²⁷⁴ The Cadet Honor Code and System, U.S.M.A. 12-13 (undated); U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 3; see *Hearings on Service Academies*, *supra* note 18, at 10,789; Interview with Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972; M. Taylor, *West Point Honor System* 5

(undated) (author was an Army Major General and Superintendent of West Point at time of publication). See also Hearings on Service Academies, *supra* note 18, at 10,785.

²⁷⁵ Similarly, lying to a girlfriend off base, while on leave, about a subject not directly related to the military, might be construed as giving the academies jurisdiction to prosecute a cadet for having committed an honor offense. E.g., Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972.

²⁷⁶ Interviews with Commandant and Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972; see R.C.C.U.S.C.G.A. 5-3-24(213) (1971); U.S.M.M.A.M.R. 02114 (1971). Further examples might include: R.C.C.U.S.C.G.A. 5-7-01 (223) (1971) (smoking or use of tobacco on a street made a Class II offense); Running Light, U.S. Coast Guard Academy 130 (1971); (freshmen prohibited from discussing Coast Guard Academy with anyone outside the Academy); R.C.C.U.S.C.G.A. 5-7-01 (134-M) (1971) (no motorcycle riding anytime, anywhere, without authority). Any authority to prescribe and apply rules derived by the academies solely from their capacity as educational institutions is limited to matters conforming to jurisdictional limitations similar to those in *O'Callahan*. See *Sullivan v. Houston Independent School Dist.*, 307 F. Supp. 1328, 1341 (S.D. Tex. 1969) (mem.). Similarly, cadets have received academy penalties for speeding a car while off base, out of uniform, and unidentified with the military. Letter from 1969 Air Force Academy Graduate, May 1, 1973. A cadet has been penalized in recent years, moreover, for kissing his girlfriend ("Public Display of Affection") at a Denver civilian airport while on leave and out of uniform. See Letter from 1972 Air Force Academy Graduate, April 7, 1973.

C. The Procedural Propriety of the Academies' Adjudicatory Systems—Due Process Considerations

1. Background

The essence of procedural due process, as it has been articulated by the courts, is that the Constitution prohibits agencies and organs of the federal and state governments from acting in a clearly one-sided or arbitrary fashion.²⁷⁷ In the area of adjudication, this constitutional proscription has been translated into the requirement that proceedings be "fundamentally fair."²⁷⁸ To determine whether any given procedure or set of procedures meets the fundamental fairness test, the extent of the loss which the individual stands to suffer, should summary procedures be applied, must be weighed

against the benefit accruing to the government from such an application.²⁷⁹

a. Formulating a Due Process Standard for the Academies—Three developments have helped clarify the manner in which procedural due process requirements in the military should be determined. First, federal civilian courts have recently exhibited a willingness to assert jurisdiction to decide due process issues in cases to which the military is a party.²⁸⁰ Second, the decisions of these courts demonstrate that military adjudicatory procedures will today be held to a stricter due process standard than in the past.²⁸¹ Third, the Court of Military Appeals has indicated that the decisions of civilian courts in nonmilitary due process cases are a useful barometer against which the prejudicial impact of a denial of safeguards to a military accused can be tested.²⁸² Thus, if failure to provide a particular procedural safeguard justifies a federal district court in holding that due process has been denied, failure by the military to provide a

²⁷⁷ Buss, *supra* note 5, at 551.

²⁷⁸ See, e.g., *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161-74 (1951) (Frankfurter, J., concurring); *Morgan v. United States*, 304 U.S. 1, 19 (1938); *Chicago, M. & St. P. Ry. v. Polt*, 232 U.S. 165, 168 (1914); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963); Buss, *supra* note 5, at 549, 551 n.17.

²⁷⁹ E.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163-64, 168 (1951) (Frankfurter, J., concurring); see, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970); *Wasson v. Trowbridge*, 382 F.2d 807, 811 (2d Cir. 1967).

²⁸⁰ See, e.g., *Wasson v. Trowbridge*, 269 F. Supp. 900 (E.D.N.Y.), rev'd on other grounds, 382 F.2d 807 (2d Cir. 1967); *Dunmar v. Ailes*, 230 F. Supp. 87 (D.D.C. 1964), *aff'd*, 348 F.2d 51 (D.C. Cir. 1965).

²⁸¹ See text accompanying notes 116-42 *supra*.

²⁸² *Lt United States v. Clay*, 1 U.S.C.M.A. 74, 77-80, 1 C.M.R. 74, 77-80 (1951).

similar procedural right raises a serious due process question.²⁸³

In light of these three developments, it is clear that in order to understand the due process limitations applicable to the academies, a court must first examine the requirements of due process in those civilian contexts most analogous to those involving academy adjudicatory practices. Judicially determined due process standards in student disciplinary proceedings at tax-supported, state military schools seem to provide the closest parallel.²⁸⁴ Only slightly less in point are cases involving student disciplinary adjudications at tax-supported, civilian educational institutions.²⁸⁵ Indeed, both the courts²⁸⁶ and the academies themselves²⁸⁷ have assumed that the constitutional due process requirements articulated in this latter category of cases help to define due process requirements for academy adjudicatory proceedings. This is not to say that valid distinctions between the civilian and military contexts should not be taken into account; clearly there are unique factors which weigh heavily on the side of government interests whenever the military is involved. Yet even in the military, strong consideration must be given to the effect that a denial of procedural rights will have upon the accused. Thus, while it is true that due process requirements may differ in military and civilian settings,²⁸⁸ these distinctions should produce different results only in those cases in which the special needs of the military justify it.²⁸⁹ When the particular needs of the military academies in training fu-

²⁸³ *Id.* at 79, 1 C.M.R. at 79; see, e.g., *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972); *Krawez v. Stans*, 306 F. Supp. 1230 (E.D.N.Y. 1969).

²⁸⁴ An exhaustive search has revealed only one such case: *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970).

²⁸⁵ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

²⁸⁶ See, e.g., *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972).

²⁸⁷ For example, the "Military Administrative Law" subsection of a text prepared by the Air Force Academy's Department of Law for use in cadet instruction quotes portions of the following cases in

teaching cadets due process requirements in adjudicatory proceedings against students by educational institutions: *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957). 2 Dep't of Law, U.S.A.F.A., *An Introduction to Law* 535-39 (1969).

²⁸⁸ See *Hagopian v. Knowlton*, 470 F.2d 201, 209-10 (2d Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).

²⁸⁹ "Military necessity" has been found to justify many incursions on individual liberties otherwise violative of due process. See, e.g., *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Korematsu V. United States*, 323 U.S. 214 (1944); *Unglesby v. Zimny*, 250 F. Supp. 714, 718 (N.D. Cal. 1965). See also *O'Callahan v. Parker*, 395 U.S. 258, 281-83 (1969) (Harlan, J., dissenting); Warren, *supra* note 119, at 183.

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ture officers cannot reasonably justify the difference, civilian case law should control.

Wasson v. Trowbridge,²⁹⁰ a Second Circuit decision involving procedural due process requirements in a Merchant Marine Academy cadet expulsion hearing, illustrates the approach courts have taken in balancing governmental and cadet interests while reviewing academy adjudicatory proceedings. There, the court first stated that in areas of vital government concern, such as military affairs, private interests must yield more readily to legitimate government interests.²⁹¹ Following this reasoning, the court distinguished a key "civilian" precedent, *Dixon v. Alabama State Board of Education*,²⁹² in which the Fifth Circuit required a state-supported university to hold a full quasi-adversarial hearing before expelling a student.²⁹³ Although the court recognized that the individual's interest here might be greater than it was in *Dixon* because more alternatives are available to an expelled student than to an expelled cadet, it held that the Government's interest in insuring that future officers of the Merchant Marine are fit for duty justifies permitting the military greater freedom in fashioning disciplinary procedures than that proper for civilian authorities.²⁹⁴

This line of reasoning seems to clearly undervalue the valid interests of individual cadets. Indeed, given a proper airing, these interests may indicate that despite the presence of special military concerns in the academy context, accused cadets may require greater procedural safeguards than those provided the student in *Dixon*. The interests of the cadet in a procedurally fair hearing, or conversely, the detriment he may suffer from its denial, will be the subject of the discussion which follows.

b. The Penalty Problem—One of the most obvious concerns in formulating a due process standard is the impact of the sanctions which may be imposed on an accused in the event of an adverse decision.²⁹⁵ Nonetheless, courts which have been confronted with due process controversies involving the academies' adjudicatory systems have failed to consider adequately the effects of academy sanctions.

²⁹⁰ 382 F.2d 807 (2d Cir. 1967).

²⁹¹ *Id.* at 812.

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

²⁹³ *Id.* at 158-59.

²⁹⁴ 382 F.2d at 812.

²⁹⁵ See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Buss, *supra* note 5, at 577-85.

Instead, they have relied on the analogy between the academies and civilian universities, an analogy, which in the area of punishments, is totally unsatisfactory.

There is authority to suggest that due process requirements in cases involving student disciplinary proceedings should be predicated on the assumption that punishments imposed by educational institutions are not of a criminal nature.²⁹⁶ A greater number of more persuasive authorities, however, including *Dixon v. Alabama*, have rejected this notion, recognizing

that school disciplinary sanctions may cause a student far greater harm than that resulting from a prison sentence given to a professional criminal.²⁹⁷ The characterization of academy punishments as noncriminal would be especially misleading,²⁹⁸ since academy sanctions, unlike civilian college penalties, often take the form of imprisonment,²⁸⁹ and often are more severe than

²⁹⁶ See *Madera v. Board of Educ. of City of New York*, 386 F.2d 778, 780 (2d Cir. 1967); *Graham v. Knutzen*, 351 F. Supp. 642, 668 (D. Neb. 1972); *General Order on School Discipline*, supra note 120, at 142. See also *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967). There is authority that the nature of the deprivation involved, rather than the "civil-criminal" distinction, is the primary factor in determining what due process standards are required. See, e.g., *In re Gault*, 387 U.S. 1, 49-50, 68 (1967); *Buss*, supra note 5, at 558.

²⁹⁷ *Seavey, Dismissal of Students: Due Process*, 70 *Harv. L. Rev.* 1406, 1407 (1957). This principle has been relied on in the landmark school disciplinary case *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961), and was echoed recently by District Judge Doyle:

I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding.

Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wisc. 1968), an'd, 418 F.2d 163 (7th Cir. 1969); accord, *Van Alstyne*, supra note 120, at 595. Because of the unique value of an academy education, see text accompanying note 400 infra, and the nature and severity of academy penalties, it is even more likely that academy penalties may have a more detrimental impact on a cadet than will many criminal sanctions. Cf. *In re Gault*, 387 U.S. 1, 49-50, 68 (1967); *Buss*, supra note 5, at 558.

²⁹⁸ Indeed, the Department of the Air Force has recognized that conviction and expulsion for an honor code violation might be considered "by our society to be of a quasi-criminal nature." Memorandum of Law, *Rose v. Department of the Air Force*, Civil No. 72-1605, at II (S.D.N.Y. Dec. 19, 1972). See also *Rose v. Department of the Air Force*, Civil No. 72-1605, at 6 (S.D.N.Y., Dec. 19, 1972). But see *Dunmar v. Ailes*, 348 F.2d 51, 52 n.1 (D.C. Cir. 1965).

²⁹⁹ For a description of academy imprisonments and the durations for which they have been imposed, see text accompanying notes 148 & 255 supra and 301-02 infra. "Imprisonment" has been defined as

the restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. It is not a necessary part of the definition ["of imprisonment"] that the confinement should be in a place usually appropriated to that purpose . . .

[I]t may take place without the actual applica-

those imposed on civilian students.³⁰⁰ Even in cases not involving a type of imprisonment, the impact of the academies' penalties on the cadet is likely to be much greater than the effect of levying similar punishments on the civilian university student.

Academy penalties are likely to affect cadets both directly through their immediate imposition and indirectly through their impact on a cadet's academic life and psychological attitudes. The most obvious potential loss to an accused cadet stems from the harshness of the penalties themselves. Numerous tours and lengthy restrictions, normally punishments of some severity, are further intensified on occasion. For example, after May 1st of his final year, a Military Academy cadet may be required to walk tours as much as six hours per day, six days per week in an effort to complete all awarded tours prior to graduation.³⁰¹ For more serious offenses, a cadet may, of course, be discharged from the Academy; but this action may go beyond mere expulsion since a cadet who leaves an academy during his junior or senior year may be ordered to two or four years of active duty, respectively, in enlisted status.³⁰² Alternatively, an expelled cadet may be dishonorably discharged from the Armed Forces, may be barred from readmission or reappointment to an academy or any other officer training program and may lose some or all of the academic credits earned while at the academy.³⁰³

tion of any physical agencies or restraint . . . but by verbal compulsion and the display of available force.

Black's Law Dictionary 889-90 (rev. 4th ed. 1968).

³⁰⁰ See, e.g., text accompanying notes 255 supra and 301-03 infra.

³⁰¹ B. Galloway & R. Johnson, *West Point: America's Power Fraternity* ch. 2 (to be published 1973) (pagination unavailable) (Johnson graduated from West Point in 1965), quoting Resignation Letter of 2d Lt. David Vaught from the U.S. Army; Letter from 1969 Military Academy Graduate, Dec. 6, 1971; Punishment Tours for First Classmen, U.S.M.A. [1969] (tour assignment list for Cadet First Class Vaught

from Tactical Officer, Co. H-3); see Letter from Former Assistant Staff Judge Advocate, U.S.M.A., Jan. 2, 1973 ("four cadets walked as many as seven hours per day after May 1, 1969, in an effort to complete all their awarded tours prior to graduation"). As a result of marching over eighty hours in only three weeks, including "six straight days with a rifle on concrete," Cadet David Vaught, Class of 1969, U.S.M.A., received a chronic hip disability, severe blisters and foot ailments, and hemorrhoids. Galloway & Johnson, *supra*.

³⁰² 10 U.S.C. §§ 4348(b), 6959(b), 9348(b) (1970); 14 U.S.C. § 182(b) (1970); Department of Defense Directive 1332.23 (V)(B)(2)(b), (d) (1968). See also Bu. Pers. Inst. 1300.33E (1968); R.U.S.M.A. 16.01(e) (1971); U.S. Air Force Academy Catalog 64 (1972). A cadet who fails to complete the course of instruction at an academy may also be transferred to the Reserve Component of his Armed Force. 10 U.S.C. §§ 651(a), 4348(b), 6959(b), 9348(b) (1970); 14 U.S.C. § 182(b) (1970). An honor violation officially follows a cadet on enlisted status, and in at least one case has resulted in a loss of advancement opportunity. Letter from Separated Cadet, U.S.A.F.A., Sept. 13, 1972.

³⁰³ See, e.g., U.S.A.F.R. 53-3, attachs. 4, 5 (1971); text accompanying note 675 *infra*.

Slightly less evident but equally important are the effects of academy sanctions on a cadet's academic and overall performance. Because virtually all of a cadet's time is allocated to prescribed military, athletic and academic training,³⁰⁴ lengthy punishments reduce the amount of time he can devote to preparing properly for evaluation in all of these areas. In addition, cadets found culpable of honor, ethics or conduct offenses will inevitably be downgraded in key areas of cadet competition. A crucial effect of academy sanctions is likely to occur in the "military order of merit," an evaluation system based primarily upon the amount of punishment received during a given period³⁰⁵ and biannual leadership ratings of each cadet by peers, upperclassmen and academy officers.³⁰⁶ In addition to the direct effect of punishment on a cadet's standing in such a system, a subsidiary effect arises from the way in which his evaluators' opinions are colored by his conviction for an offense. As a result, punishment for any offense is likely to lower a cadet's relative standing in the military order of merit and, therefore, decrease his cadet rank³⁰⁷ and privi-

See also 32 C.F.R. t 901.20(b), (c) (1971). Indeed, academy authorities have frequently sought to deny cadets earned academic credits as a penalty. See, e.g., *Farley v. Mack*, Civil No. 72-776 K (D. Md., filed July 28, 1972) (Naval Academy Midshipman who had otherwise completed all academic, degree requirements denied Bachelor of Science degree for having applied for a conscientious objector discharge from the Navy); U.S.A.F.A. Form 0-611 (1968) (cadets required to sign waiver of right to academic credits earned after their marriage); Hearings on Service Academies, *supra* note 18, at 10,326 (cadets who marry are denied academic degree); Greenhouse, *Ousted Midshipman Sues for B.S. Degree*, N.Y. Times, June 22, 1973, at 25, cols. 7-8. But see text accompanying note 675 *infra*.

³⁰⁴ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,271-73, 10,289, 10,324, 10,504, 10,554, 10,686, 10,700-14, 10,881-82, 10,887-89; R.C.C.U.S.C.G.A. 2-3-01 (1971); U.S.A.F.C.W.S.C. (1972); Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 23; *The New Republic*, Feb. 13, 1965, at 10; Simons, *supra* note 78, at 88, 220. As a result of these demands, "[t]he most critical thing in a cadet's life is time." J. Heise, *The Brass Factories* 66 (1969). "If cadets were to do everything they were supposed to, they would need a 26 hour day." Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 24, quoting from a 1971 Air Force Academy time study. See J. Heise, *supra* at 26, 106 (1969); D. Leiby, *Professional Socialization of the Naval Officer: The Effect of Plebe Year . . .* 66 (1970) (dissertation presented to the faculty of the Graduate School of Arts and Sciences of the University of Pennsylvania). See also *Anderson v. Laird*, 466 F.2d 283, 306-07 n.3 (D.C. Cir. 1972) (MacKinnon, J., dissenting), cert. denied, 409 U.S. 1076 (1972).

³⁰⁵ See Affidavits of Midshipman Nicholas A. Enna, U.S.M.A., and Warren K. Kaplan, *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), rev'd per curiam, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972); Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; Interview with Performance Officer, U.S.N.A., July 24, 1972; note 146 *supra*.

³⁰⁶ J. Lovell, *The Cadet Phase of the Professional Socialization of the West Pointer: Description, Analysis, and Theoretical Refinement* (1969) (dissertation presented to the University of Wisconsin by West Point graduate); Interview with Commandant of Cadets, Aug. 9, 1972; interview with Performance Officer, U.S.N.A., July 24, 1972.

³⁰⁷ Interview with Legal Officer, U.S.C.G.A., Dec. 15, 1972; Interview with Staff Judge

leges³⁰⁸ as well as lower his final standing at graduation.³⁰⁹

A third type of personal loss, primarily social or psychological, also arises from a cadet's conviction. This is particularly true in the case of honor violations. The honor code is the topic of hours of introductory cadet indoctrination³¹⁰ and additional periodic discussion throughout each academy

year.³¹¹ Cadets, who have been trained to live by the letter of the code, understandably feel great trauma at having violated it.³¹² More importantly, a convicted cadet may be stigmatized not only while at the academy³¹³ but throughout his military career.³¹⁴ At the Military Academy, this pariah mentality arises even when a board of officers reverses the honor conviction on appeal since, in such a case, the Corps of Cadets usually votes to refrain from speaking to the cadet, except on official business, for his

Advocate, U.S.N.A., July 24, 1972; see Hearings on Service Academies, *supra* note 18, at 10,907.

³⁰⁸ See U.S.A.F.A.R. 537-8(3)(b) (1966); Hearings on Academies, *supra* note 18, at 10,907. Conduct grades, based on the number of demerits awarded for certain designated time periods, are periodically assigned to each cadet. See Com'd't Mid'n Inst. P1620.IOG Enc. 4(1) (1970); R.C.C.U.S.C.G.A. 5-4-04 (1971); U.S.A.F.C.R. 35-6(10) (1971); U.S.M.A.D.S.S.O.P. 4 (1968); U.S. M.M.A.M.R. 03109 (1971). These grades help determine each cadet's graduation order of merit, U.S.N.A.R. 1531.16G(4)(b) (1972), and the kind and amount of his privileges. Com'd't Mid'n Inst. P1620.IOG Enc. 4(2) (1970); R.C.C.U.S.C.G.A. 5-4-10 (1971); U.S.-M.M.A.M.R. 03107(4) (1971).

³⁰⁹ The Graduation Order of Merit is a ranking of all cadets who graduate from an academy. It influences the allocation of honors and awards at commencement, and initially determines a graduate's relative standing for promotion list and assignment purposes. See Hearings on Service Academies, *supra* note 18, at 10,907; M. Janowitz, *The New Military* 125-26 (1964); White, Report of the Special Advisory Committee on the United States Air Force Academy to the Secretary and Chief of Staff of the Air Force 25-27 (1965).

³¹⁰ This indoctrination begins "from the moment [a cadet] passes through the Academy's gates and is driven home as a cardinal principle of life," *N.Y. Times*, Aug. 4, 1951, at 5, col. 5, and continues throughout each cadet's freshman summer, see Charles, *supra* note 71, at 198-201; Gallagher, *U.S.M.A. Honor System*, VI Higher Education 117, 118 (Jan. 1950) (Federal Security Agency publication); note 172 *supra*.

³¹¹ See note 172 *supra*.

³¹² To be accused or found guilty of an honor violation is an emotionally trying experience." Letter from the Executive For Honor and Ethics Committees, U.S.A.F.A., Oct. 15, 1971. In addition, intense self-guilt may result from a conviction for an honor violation. See Charles, *supra* note 71, at 208-09 (intense feelings of guilt in even those Air Force Academy cadets given "discretion"); Minority Report, *supra* note 6, at 2; Mutschler, *Why Air Force Academy Cadets Cheat*, *Boston Globe*, Jan. 31, 1972 (former Air Force Academy staff psychiatrist reporting that Air Force Academy cadet was separated for lying about brushing teeth). Indeed, because of this guilt sensation, the majority of Air Force Academy honor code violations are

self-reported. Clelland, *supra* note 69, at 29. Between July 1, 1967, and Jan. 22, 1972, 39% of West Point's Honor Code violators were self-reported. See Letter from Information Officer, Enc. I, U.S.M.A., Mar. 24, 1972.

³¹³ See text accompanying notes 213-20 *supra* and 867 *infra*.

³¹⁴ See note 215 *supra* and text accompanying note 868 *infra*.

entire career in the Armed Forces.³¹⁵ While this "silencing" procedure is not part of the honor systems at the other four academies, many cadets individually ostracize a cadet permitted to remain at an academy after an officer-board reversal of a guilty verdict of a cadet honor committee. This informal practice is abetted by the fact that cadets found guilty of an honor violation by a cadet board are segregated from the rest of the corps pending review of the conviction by an appellate board of officers.³¹⁶ Thus, even in the event of reversal, an initial finding of guilt is made known to the corps, and a cadet's reputation is unalterably damaged.³¹⁷ Whatever may be said of the wisdom of such stigmatization and ostracism, it is undeniable that they must be included among the personal costs to a cadet convicted under academy adjudicatory procedures.³¹⁸

c. Cadet Psychology and the Hearing Process--In balancing the interests of the Government and the losses to accused cadets and thereby defining due process standards required of academy adjudicatory hearings, courts should not fail to consider another factor integral to the balancing process: the unique position of the cadet at the hearing. The initial problem stems from the relative inexperience and immaturity of the cadets. The adjudicatory process compels cadets to make a number of crucial decisions about their cases while under

³¹⁵ See text accompanying notes 214-15 *supra*.

³¹⁶ *Hagopian v. Knowlton*, Civil No. 72-2814, at 41-42 (S.D.N.Y. July 26, 1972) (supplementary

opinion), *affd*, 470 F.2d 201 (2d Cir. 1972) (called "Boarders Ward" at the U.S.M.A.); Letter to Sen. Charles H. Percy from 1971-72 Honor Representative, U.S.A.F.A. (undated) (called "Security Flight"). One West Point cadet was confined to the boarders ward for over three months, during which time he was both under the guard of a cadet assigned to follow him and forbidden to attend official academy functions. Interview with Second Class Cadet Being Silenced, U.S.M.A., March 9, 1973. Similarly, in 1971, a cadet was not permitted to attend classes during the 42 days his appeal was pending. Interview with 1971-72 Honor Representative, U.S.M.A., Feb. 18, 1973. Such punitive segregation from the corps and suspension of participation in academy activities prior to the final determination of a case is both unnecessary and unjustified; moreover, it "constitutes constructive expulsion" without due process of law. See *Graham v. Knutzen*, 351 F. Supp. 642, 667 (D. Neb. 1972).

³¹⁷ Reputation is, of course, protected by due process of law. See, e.g., *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969); *Hagopian v. Knowlton*, 346 F. Supp. 29, 32 (S.D.N.Y.), *aff d*, 470 F.2d 201 (2d Cir. 1972). As stated recently by the Supreme Court: "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

³¹⁸ Humiliation, embarrassment, and loss of status are the inevitable and probably intentional results of any punishment." *Buss*, *supra* note 5, at 577. Another personal cost to cadets is the academies' telling their parents about their violations, see, e.g., U.S.M.A., Cadet Honor Comm. Procedures 3(d)(7) (1970); note 50 *supra*, a practice which some educational authorities recognize serves as a punishment in itself, see *Buss*, *supra* note 5, at 591 n.207.

pressure, generally without the immediate advice of counsel and within a relatively short period of time. Cadets who enter the academies are normally between the ages of 17 and 23,³¹⁹ and are frequently not equipped to deal with this situation. Most are minors away from home for the first time.³²⁰ This age and inexperience factor, when combined with the restrictive nature of the academies' curricula and training, has prompted a number of commentators,³²¹ including military authorities themselves,³²² to recognize that cadets are generally quite immature;³²³ yet the nature of the decisions a cadet may be required to make demands a high level of maturity and judgment. For example, should he be found guilty of having violated an

honor code, a cadet will have to decide whether to resign as asked or, instead, to appear before a board of officers with such attendant risks as court-martial, greater punishment and notation of the offense in permanent records.³²⁴ An accused cadet will have to decide whether to give a written statement to interrogators when they ask for a confession³²⁵ and must decide as to its contents should he choose to comply, again without adequate guidance.³²⁶

The disadvantageous effect in the hearing process of the immaturity factor is exacerbated by the presence of a second factor: the conditioned automatic deference to officers and cadet superiors which is ingrained in each cadet from the beginning of his academy

³¹⁹ See, e.g., U.S. Air Force Academy Catalog 52 (1972).

³²⁰ See *Anderson v. Laird*, 466 F.2d 283, 311 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).

³²¹ See, e.g., Boroff, *Annapolis: Teaching Young Sea Dogs Old Tricks*, *Harpers*, June 1963, at 46, 49; Brown, *Annapolis—Stronghold of Mediocrity*, 96 *Forum and Century* 153, 156-57 (Oct. 1936).

³²² After West Point's 1951 honor scandal, the Army told members of the press that the 90 cadets separated from the Academy were only "young kids" and therefore should not be stigmatized for life. *N.Y. Times*, Aug. 4, 1951, at 5, col. 5; see DoD House Appropriations Hearings, 1966, *supra* note 12, at 45 (remarks of Vice Admiral Rickover); White, *supra* note 309, at 89; Letter from Col. Ben H. Settles (Ret.), U.S.A.F. (former Commander of Air Force Officer Training School), to the Editor, *Air Force Times*, May 10, 1967, at 30, col. 3 [hereinafter Settles-Letter].

³²³ As stated by one Air Force Colonel who served as Commander of the Air Force Officer Training School: "Grave matters, such as lying, cheating or stealing, should no longer be adjudicated by immature individuals, especially in view of the great pressures that have accrued in the cadet program." Settles Letter, *supra* note 322, at 30, col. 5. But see *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).

³²⁴ See text accompanying notes 237-38 *supra* and 611-22 *infra*. The law has long recognized the incapacity of minors to make certain legally binding decisions. See, e.g., Restatement (Second) of Contracts § 18 (Tent. Draft No. 1, 1964).

³²⁵ See text accompanying notes 785-808 *infra*.

³²⁶ See text accompanying notes 589-99 *infra*.

experience.³²⁷ This conditioning continues throughout a cadet's tenure at the

academy,³²⁸ and is developed through a minutely regulated training program which includes both a vast array of "nuisance" regulations³²⁹ and conditioned acceptance of immediate and often arbitrary correction by cadet and officer superiors.³³⁰ The result, not surprisingly, is that cadets appearing before panels of upperclass cadets or particularly of officers (whom they hold in special esteem) are often at such a psychological disadvantage ³³¹ that they may not

³²⁷ The academies' summer training programs, historically known at West Point as "Beast Barracks" (see, e.g., Ambrose, *supra* note 6, at 225, 278, 296) provide cadets entering the academies with military training designed to transfer them from civilian to cadet life. See generally *Hearings on Service Academies*, *supra* note 18, at 10,467-504, 10,563-64, 10,576-77, 10,594, 10,597-624.

It is difficult to appreciate adequately the intense conditioning experience which occurs during a cadet's first year at the academy. A glimpse is suggested by the following testimony of a Naval Academy midshipman:

It really affects him just about every minute of the day. Whenever he is out of his room, he must be on guard and be performing properly. When he goes in the passageways, the halls, he must double-time, stop, he must go in the center of the passageway During all this time his eyes are straight ahead

If a plebe makes a mistake in front of an upper-Glassman while he is in the passageway or something, the upperclassman will tell him to do 10 pushups as a punishment . . . counting "One, Sir," through, "10, Sir."

Hearings on Service Academies, *supra* note 18, at 10,504; see *id.* at 10,510, 10,765; Smith, *Why I Resigned from Annapolis*, *The Atlantic*, Oct. 1947, at 34-40.

³²⁸ Freshman cadets are required to respond immediately to questions addressed to them with either "Yes, Sir"; "No Sir"; "No Excuse, Sir"; "Sir, may I make a statement;" or "Sir, may I ask a question." E.g., U.S.A.F.C.W.M. 50-1 ch. II(5)(c)(4) (1968); see Johnson, *The Tainted Image of West Point*, 35 *The Progressive* 13, 15 (Feb. 1971). This conditioned obedience is reinforced year after year. For example, one of Air Force Academy's "most esteemed" First Class Cadets was told by his field-grade officer supervisor, when the cadet assumed one of the Academy's key cadet leadership positions, that "[m]ister, I only want to hear three things from you: Yes sir, no sir, and no excuse sir." Morgenstern, *supra* note 74, at 4.

³²⁹ For example, fourth class cadets may be punished for violating fourth class duties by being required to "report," often between 6:00 and 6:30 a.m., to an upperclassman's room for "Special Instruction" or a "Special Inspection," at which a cadet is required to present an immaculate appearance and may be required to simultaneously "brace" (assume a rigid and uncomfortable posture), recite knowledge and

perform a "manual of arms" with a rifle. See, e.g., Com'd't Mid'n Inst. 1531.2F (15-16) (1970); Hearings on Service Academies, *supra* note 18, at 10,476, 10,479, 10,577, 10,618-19, 10,851.

³³⁰ See notes 327-29 *supra* and 331 & 1096 *infra*.

³³¹ The notion of survival at West Point is central to understanding cadet motivation. On the infamous first day of Beast Barracks that word ascends to preeminence in the cadet's vocabulary—a position from which it may never descend. All during . . . plebe year . . . the new cadet is constantly impressed both by the powerlessness of his own position and the related necessity of doing what he has to in order to get by—to survive. . . .

Letter front a First Class Cadet to Dean of the Academic Board, U.S.M.A., Sept. 28, 1971, at 5.

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adequately be able to present their own cases, a situation which is compounded by the strict military formality observed at many of these hearings.³³² The impact that these two psychological factors ought to have upon the due process balancing process in general, and the computation of the "loss" to an accused cadet in particular, can hardly be overlooked.

With these factors in mind—the psychological disadvantages of the accused cadet, his typical level of immaturity, and the effects of the sanctions which may be imposed upon him—we now turn to a comparison of the procedural safeguards generally thought to be required by fundamental fairness and the actual adjudicatory practices of the academies.

2. Vagueness

One possible violation of due process of law arises from the rules defining cadet offenses themselves, a number of which appear overly broad and vague. The over breadth concept renders unconstitutional a statute which, despite the clarity of its terms, may in application proscribe constitutionally protected activity.³³³ Furthermore, the void-for-vagueness doctrine of the Supreme Court requires that a statute provide fair warning as to what conduct constitutes a violation³³⁴ in order to enable an individual to

avoid inadvertently committing an offense,³³⁵ and to guide courts and juries in determining whether an offense has been committed.³³⁶ Although there is widespread agreement that the doctrine is not restricted to statutes or regulations imposing criminal sanctions,³³⁷ authorities sharply div-

³³² See text accompanying notes 426-31 *infra*.

³³³ See, e.g., *Shomberg v. California*, 283 U.S. 359 (1931).

³³⁴ See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952). "In determining whether a statute is vague in the constitutional sense, the test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Fleuti v. Rosenberg*, 302 F.2d 652, 656 (9th Cir. 1962), vacated on other grounds, 374 U.S. 449 (1963). In applying the void-for-vagueness doctrine, a statute must be judged on its face. See, e.g., *United States v. Harriss*, 347 U.S. 612, 617-19 (1954); *United States v. Spector*, 343 U.S. 169, 171 (1952).

³³⁵ See, e.g., *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926): "[A] statute • • so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."

³³⁶ See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927).

³³⁷ *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925). As stated in *Fleuti v. Rosenberg*, 302 F.2d 652, 655 (9th Cir. 1962), vacated on other grounds, 374 U.S. 449 (1963), "[T]he Supreme Court has also applied [the void-for-vagueness doctrine] in civil proceedings, and • • • has expressly ruled that a criminal penalty need not be involved." Moreover, it is

ide on whether vagueness may invalidate administrative rules promulgated by school authorities.³³⁸ Some courts, often recognizing the impossibility of detailing the almost infinite variety of student misconduct that might be proscribed, have upheld the constitutionality of broad rules promulgated by educational institutions.³³⁹ Other courts have declared equally broad school rules unconstitutionally vague.³⁴⁰ The courts do seem to agree, however, that the degree of specificity required for college rules is not as great as that necessary for criminal statutes.³⁴¹ Yet considerable confusion remains, since the language used by courts to test the constitutional specificity of school

rules remains virtually the same as that applied to criminal statutes.³⁴²

The uncertainty as to vagueness standards applicable in the educational setting becomes still more pronounced with respect to the academies, since no court has ever decided whether or not any academy rules are unconstitutionally vague.³⁴³ Broad academy proscrip-

not the criminal penalty that [is] held invalid, but the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *Id.*, quoting *A.B. Small Co. v. American Sugar Ref. Co.*, *supra* at 239.

³³⁸ *Sword v. Fox*, 446 F.2d 1091, 1099 & n.28 (4th Cir.), cert. denied, 404 U.S. 994 (1971).

³³⁹ See, e.g., *id.* (sufficiency of term "demonstration"); *Whitfield v. Simpson*, 312 F. Supp. 889, 896 (E.D. Ill. 1970) (3-judge court) (sufficiency of terms "gross disobedience" and "misconduct"); *Beaney & Cox*, *supra* note 5, at 403. Some courts allow broad disciplinary action on the basis of the school's inherent powers. See, e.g., *Norton v. Discipline Comm.*, 419 F.2d 195, 200 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970). For a discussion of the applicability of the void-for-vagueness doctrine in the context of educational institutions, see generally *Van Alstyne*, *supra* note 120, at 592-93 nn. 23-24.

³⁴⁰ See, e.g., *Soglin v. Kauffman*, 418 F.2d 163, 167-68 (7th Cir. 1969) (insufficiency of terms "misconduct"); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970) (insufficiency of term "extreme style and fashion [of attire]"); *Sullivan v. Houston Independent School Dist.*, 307 F. Supp. 1328, 1345-46 (S.D. Tex. 1969) (insufficiency of term "in the best interests of the school.")

³⁴¹ See, e.g., *Sword v. Fox*, 446 F.2d 1091, 1099 (4th Cir.), cert. denied, 404 U.S. 994 (1971); *General Order on School Discipline*, *supra* note 120, at 146-47.

³⁴² See *Soglin v. Kauffman*, 418 F.2d 163, 168 (7th Cir. 1969), framing the test as whether the regulation "contains . . . clues which could assist a student, an administrator or a reviewing judge in determining whether conduct . . . is susceptible to punishment by the University." Compare *Sword v. Fox*, 446 F.2d 1091, 1099 (4th Cir.), cert. denied, 404 U.S. 994 (1971), with *General Order on School Discipline*, *supra* note 120, at 146.

³⁴³ The District of Columbia Circuit Court of Appeals specifically declined to decide the matter. In *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965), the court said:

Whatever the application of the vagueness doctrine to matters military, we feel sure that it is not the province of a court to determine what conduct is condemned, and what is not, by the "common law" of the Corps of Cadets—a creature of the Cadets themselves. . . . We are in no position to find too vague the code thus found applicable. . . .

tions are seriously undermined, however, now that both Articles 133 and 134 of the UCMJ,³⁴⁴—the so-called "general articles"—have been held void for vagueness and overbreadth by two circuit courts of appeals.³⁴⁵ The reasoning of these cases is particularly applicable to the academies, for academy proscriptions, some of which are identical in language to the general articles,³⁴⁶ fail to give reasonable notice of what is prohibited so that a cadet may act accordingly; permit arbitrary and discriminatory enforcement by cadet officials and officers; and chill constitutionally protected activity.³⁴⁷

For example, the Air Force Academy's Professional Ethics Committee and the Coast Guard Academy's Cadet Standards of Conduct Board are charged with adjudicating those acts which violate the ethical standards of the corps of cadets.³⁴⁸ To decide whether an act violates these ethical standards, committee members consider only whether an act has violated the ethical standards of the cadet corps—a fundamentally circular operation.³⁴⁹ As a result it is quite possible that a cadet's considered judgment that his conduct is ethical will prove to be at variance with the retrospective judgment of the ethics committee. Thus, the committee's essentially *de novo* evalua-

But see *Levy v. Parker*, Civil No. 71-1917, at 21 (M.D. Pa. Apr. 18, 1973) (authority relied on in *Dunmar* overruled); text accompanying notes 344-47 *infra*.

³⁴⁴ 10 U.S.C. §§ 833, 834 (1970).

³⁴⁵ *Levy v. Parker*, Civil No. 71-1917 (M.D. Pa. Apr. 18, 1973); *Avrech v. Secretary*, Civil No. 71-1841 (D.C. Cir. Mar. 20, 1973). *Avrech* held that civilian standards of specificity apply to the military. *Id.* at 10. The court partially rested its holding on its belief "that today . . . Article 134 gives no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities," *id.* at 7; that under the article, the military had impermissibly "patched together" a "crazy guilt of offenses," unconstitutionally vague in meaning and overly broad in scope, *id.* at 6; and that, partially through the impermissible "practice under Article 134 of judicially creating new offenses by analogizing them to previously recognized offenses under that Article," the article's "coverage has no limits," *id.* at 8.

³⁴⁶ See, e.g., U.S.A.F.C.R. 35-6 (VIII) (3) (c) (6) (1971) ("conduct unbecoming a cadet").

³⁴⁷ See *Levy v. Parker*, Civil No. 71-1917, at 27 (M.D. Pa. Apr. 18, 1973).

³⁴⁸ Interview with 1971-72 Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972 (ethics committee charged with discerning the actual standards of the Corps); Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972 (ethics committee decides what standards of the Corps "should be").

³⁴⁹ See text accompanying note 227 *supra*. The criterion employed by the Air Force Academy's ethics committee is "the ethical standards of the Cadet Wing." Interview with 1971-72 Cadet Professional Ethics Comm. Chairman, U.S.A.F.A., Sept. 2, 1971. The only written guidance as to what might be an unethical act appears to be the nebulous criterion suggested by the following comment in the Honor Instruction Manual of the Air Force Cadet Wing, at 16-2 (1969): "The objective [of the Honor Code and Ethics Program] is to develop one's integrity . . . through a positive attitude to always do 'what is right,' rather than being content with a minimum performance."

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tion of ethical standards may create, in effect, an *ex post facto* rule which the cadet, believing he acted ethically, has nonetheless violated.³⁵⁰ This possibility is compounded by the facts that cadets are unfamiliar with most prior decisions of the ethics boards³⁵¹ and that, at least at the Air Force Academy, ethics boards may refuse to follow their own precedents.³⁵²

Vagueness is not confined to the ethics codes; many academy conduct regulations also fall short of providing sufficient notice of the required standard of behavior.³⁵³ For example, forbidding "carelessness,"³⁵⁴ "indifference of any kind"³⁵⁵ and "general inattention"³⁵⁶ fails to provide any meaningful standard of conduct with which a cadet can comply. Similarly, distinguishing degrees of culpability on classifications so vague as "lacking judgment," "poor judgment," "extremely poor judgment" and "gross lack of judgment"³⁵⁷ appears to be an impossible task. Yet the academies' conduct systems

³⁵⁰ Indeed, this is precisely what happened in the ethics case described in note 366 *infra*. The two cadets convicted of an ethics offense and many other discontented cadets felt that, because the act in question was

a common practice among members of the Cadet Wing, the essentially ex post facto determination that the act was an ethics violation was unfair. Interviews with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., Sept. 2, 1971, June 6, 1972.

³⁵¹ Cadets are informed of the holdings of their ethics boards through their elected ethics representatives and are given some instruction in ethics soon after entering the academy and occasionally during the year. E.g., Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., Sept. 2, 1971; see U.S.A.F.C.W.M. 30-2(9) (a) (1965); Ethics Instruction Manual of the Air Force Cadet Wing (1971). Yet, since there is no codified, indexed compilation of ethics board holdings and since the few available case summaries are not used by the ethics boards, cadets have very little knowledge of what conduct has been considered unethical by previous ethics boards. Indeed, a cadet usually first becomes aware that an act is considered unethical when his ethics representative reports that another cadet has been convicted of an ethics violation. Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., Sept. 2, 1971.

³⁵² In the summer of 1968 an Air Force cadet was convicted of committing an "ethics violation" and given two months restriction and forty confinements for committing an act which the 1967 Cadet Wing Ethics Committee had not only declared to be ethical but also "a service to the Wing." Letters from 1967 Air Force Academy Graduate, Sept. 22, 1972, Oct. 3, 1972.

³⁵³ Smith, supra note 327, at 37. Similarly, academy penalties may be worded so vaguely as to preclude cadets from knowing what to expect for committing an offense. For example, violators of U.S.A.F.C.R. 35-6(33)(g) (1969) (traffic violations) may receive "'non-listed' punishments".

³⁵⁴ U.S.A.F.C.R. 35-6(VIII) (3)(b)(5) (1971) (Class II offense).

³⁵⁵ R.U.S.C.C. 403(b) (1971) (Class II offense).

³⁵⁶ Id. 403(c) (Class III offense).

³⁵⁷ U.S.M.A.D.S.S.O.P. (IX)(B) (1)(905), (906), (907), (908) (1971). Although these regulations do provide examples for guidance, they are open ended. Compare id. (VIII)(B)(I)(a)(807) ("unsatisfactory appearance") with id. (808) ("unkempt appearance").

have a number of rules employing such hopelessly imprecise language which cadets interpret at their peril and which demand totally subjective judgments by charging and adjudicating authorities as to whether an offense has been committed.³⁵⁸

Further vagueness questions arise with regard to the clarity of the criteria employed in determining and adjudicating honor offenses, particularly in the

area of the mens rea elements used in defining a violation. Neither the Military nor the Air Force Academy adequately defines the mental state which must accompany an act proscribed by the codes in order to inculcate an alleged honor offender.³⁵⁹ The only illumination on this matter appears to be that provided by the Honor Reference Handbook of the Air Force Cadet Wing: "There are two elements in an honor violation, the act and the intent."³⁶⁰

The Handbook outlines situations in which the offender need merely intend to commit the prohibited act and others in which he must intend to violate the honor code itself.³⁶¹ Unfortunately, however, there is no real attempt at either academy to outline which type of intent must accompany which proscribed acts in order for an honor violation to occur.³⁶² As a result, individual members of these academies' honor boards may consider either, both or neither of these types of intent when adjudicating honor offenses,³⁶³ and inconsistent deci

³⁵⁸ See, e.g., Com'd't Mid'n Inst. P1620.IOG Enc. 6(3172) (1970) (disrespect); R.U.S.C.C. 403(a) (1971) ("[g]ross lack of judgment"); U.S.A.F.C.R. 35-6 (VIII) (3)(b)(3) (1971) ("[c]onduct reflecting poor judgment"); id. (VIII)(3) (c) (2) ("[p]oor judgment (gross)"); id. (IV)(30)(f) ("unsatisfactory conduct trends"); id. (VIII) (3) (a) (3) ("[i]mproper (not public) conduct"); id. (VIII) (3) (c) (3) ("[d]isrespect"); id. (VIII) (3) (c) (4) ("[i]nsubordination") See also U.S.C.G.A., Recommendations for Demerit Offenses Listing for Section 03101 of the New Academy Regulations Book, Article No. 02120 (undated) ("[o]ther serious intentional offenses"), which is currently being recommended for inclusion as a Class I offense in the new Coast Guard Academy regulations book. Compare with A. Herbert, *Misleading Cases in the Common Law* 31, 33, 36-37 (4th ed. 1928), quoted in Van Alstyne, *supra* note 120, at 592 n.23.

³⁵⁹ The other academies, however, define the mens rea element of honor offenses much more precisely. Compare, for example, the vagueness of the criteria outlined in the text accompanying note 360 *infra* with the specificity of, e.g., R.C.C.U.S.C.G.A. 5-3-10, 5-3-12, 5-3-13, 5-3-19 (1971); U.S.M.M.A.S.I. 72-10, at 1-2 (1972); U.S.N.A. Inst. 1610.3 Enc. 1 (1) (b) (1972).

³⁶⁰ U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 4.

³⁶¹ That is, the pamphlet makes the standard distinction between mala prohibita and mala in se. See *id.*

³⁶² See, e.g., *id.*

³⁶³ As a further result, cadets are adjudicated honor code violators when they did not intend to violate the honor code and despite the feeling of many other cadets that such intent is necessary. See note 367 *infra*. Indeed, the officer advisor to the Air Force Academy's cadet honor committee admitted that "in over 50% of our cases" honor board members fail to

sions may result.³⁶⁴

Still greater confusion results from trying to decide on a case-by-case basis whether a particular act constitutes an honor offense. It is clear that the cadets themselves are uncertain of the scope and definition of the honor codes' proscriptions. As stated in a special Report to the Chief of Staff USAF on the Air Force Academy's honor code, cadets see "a `gray area,' or one of confusion in [their] minds" as to what constitutes an honor violation.³⁶⁵ Indeed, it is apparent that the language used at the academies to proscribe some offenses is so vague that there is sometimes uncertainty as to whether an act should be adjudicated as a conduct, an honor or an ethics offense. ³⁶⁶ Because of this confusion, cadets may be convicted of honor or ethics offenses for acts they believed not to be proscribed by their honor or ethics code³⁶⁷ and conflicting verdicts may readily

consider even whether an accused honor code violator intended to commit the alleged act. Interview with Executive for Honor and Ethics, U.S.A.F.A., Sept. 2, 1971; see Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., Sept. 1, 1971.

³⁶⁴ See text accompanying notes 367-68 *infra*.

³⁶⁵ U.S.A.F.A. Superintendent's Report, *supra* note 73, attach. 2, at 5; accord, Charles, *supra* note 71, at 190-91 (confusion over whether taking food from dining hall is honor violation); *id.* at 239-44; Majority Report, *supra* note 74, at 9; Mutschler, *supra* note 312; The Honor Concept, *supra* note 69, at 12 (Judge Advocate General of the Navy concludes "[m]ore certainty . . . is sorely needed . . . [and] more definitive standards appear to be required."); Interview with Executive for Honor and Ethics, U.S.A.F.A., Sept. 2, 1971 (see text accompanying notes 366-68 *infra*); Interview with 1971-72 Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972 (e.g., confusion over whether lying to a girlfriend violates honor code); Letters from U.S.A.F.A. Honor Comm. Chairman to Chairman, Officer-Cadet Council of Review, Feb. 4, 1966, printed in U.S.A.F.A. Superintendent's Report, *supra*, attach. 3; see U.S.M.A. Honor Guide for Officers,

supra note 215, at 12-13.

³⁶⁶ The 1971-72 Chairman of the Air Force Academy's Professional Ethics Committee stated, for example, that it is uncertain what may properly be considered an ethics or a conduct offense. That determination is a "judgment call." Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F., Sept. 2, 1971. Indeed, a conduct or an honor hearing may even be terminated while in progress because of an ethics representative's unilateral decision that the offense charged is an ethics offense. See generally text accompanying note 226 supra. As an example of this uncertainty, some Air Force cadets stayed with two cadets who had paid for a motel room without paying a motel fee themselves—a not uncommon practice among cadets at the time. When the motel owner complained to the Academy about this conduct, the Superintendent was faced with the problem of deciding whether to charge the delinquent cadets with, if anything at all: (1) a conduct offense for, e.g., committing an act bringing discredit upon the Wing, or conduct unbecoming a cadet; (2) an honor offense, for, e.g., stealing services from the motel owner; or (3) an ethics offense, for committing unethical acts. The cadets were charged and convicted of the latter offense. Interviews with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972, Sept. 2, 1971; see The Cadet Professional Ethics Comm., Ethics Instruction Manual of the Air Force Cadet Wing 37 (1971).

³⁶⁷ For example, two cadets, A and B, were separated from the Air Force Academy as honor code violators during the 1970-71 school year when A signed out B from the academy

occur in cases having substantially identical fact patterns.³⁶⁸ This difficulty of categorization of offenses compounds the lack of fundamental fairness occasioned by the nebulous language defining offenses within each category. For while it is serious enough that a cadet may not know whether an act is proscribed, it is even more significant that he may not know what personal costs he may incur should his judgment prove mistaken. Thus, a cadet may face expulsion as an honor violator for an act which he believed to constitute, at most, a minor conduct violation.

3. The Right to a Fair Hearing

Fundamental to our concept of due process of law is the notion that before the government can deprive an individual of life, liberty or property, it

must afford him a chance to be heard and must employ procedures at such a hearing that are fundamentally fair.³⁶⁹ Some due process requirements are quite clear; all criminal defendants, for example, have a right to trial.³⁷⁰ Furthermore, the Supreme Court has held that, unless compelling circumstances dictate otherwise, an administrative agency must provide an opportunity for a hearing when its decision may deprive a person of some constitutionally protected interest.³⁷¹ Yet the import of the hearing requirement in the context of academy adjudications is far from certain, since there are several legal principles arguably relevant to the academies which may justify the dilution of an individual's right to be heard.

First, it is generally conceded that Congress has the power to

and, to the knowledge of both, A wrote in an inaccurate destination for B. Since this practice was quite common among the Wing, many cadets, including A and B, felt the honor committee's adjudication of their guilt was unfair. Interview with Executive for Honor and Ethics, U.S.A.F.A., Sept. 2, 1971. Similarly, many cadets were outraged in the fall of 1968 when three Air Force cadets were separated from the Academy as honor code violators for "stealing" a construction company's truck. The cadets used the truck for two hours and returned it with a full tank of gas. Letter from 1969 Air Force Academy Graduate, Feb. 15, 1973; see Letter from 1972 Air Force Academy Graduate, Feb. 12, 1973.

³⁶⁸ Interview with Former Executive for Honor and Ethics, U.S.A.F.A., April 11, 1973. For example, at the Air Force Academy separate honor boards have voted two of three cadets involved in an incident "not guilty" of an honor violation but voted the third cadet "guilty" of an honor violation for the same act. *Id.* See Letter from Former Executive for Honor and Ethics, U.S.A.F.A., Feb. 11, 1973 ("What is one day not a violation under the slightest change of circumstances becomes a violation").

³⁶⁹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *In re Murchison*, 349 U.S. 133, 136 (1965); text accompanying notes 277-78 *supra*.

³⁷⁰ E.g., *Adamson v. California*, 332 U.S. 46, 54 (1947).

³⁷¹ See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 558-59 (1956); *Dohany v. Rogers*, 281 U.S. 362, 369 (1930).

abrogate, within constitutional limitations, many of the procedural safeguards which would otherwise be thought necessary to insure fundamental

fairness.³⁷² However, an examination of the Uniform Code of Military Justice and particularly article 15—the only UCMJ provision bearing on academy non-court-martial adjudications³⁷³—reveals no such congressional attempt. Although article 15 authorizes nonjudicial punishment for minor offenses "without the intervention of a court-martial,³⁷⁴ it does not explicitly sanction summary imposition of punishment without providing an accused the opportunity to respond.³⁷⁵ Rather, on its face, article 15 merely permits punitive action to be taken, where minor offenses are concerned, without the full panoply of procedures attendant to a court-martial. There is no indication that Congress intended wholesale abolition of the constitutional right to a hearing. This is important because, as recent court opinions have observed, earlier decisions permitting alteration of due process standards did so only with explicit congressional authorization.³⁷⁶ Thus, Congress did not intend to eliminate the right to a fair hearing as mandated by the Constitution, but rather sought only to alter the scheme for penalizing military personnel for minor offenses.

Some statutes, however, do demonstrate a congressional intent to abrogate, in some cases, the right of some academy cadets to a hearing.³⁷⁷ But it is clear that even Congress must observe certain constitutional minima.³⁷⁸ Thus, legislation empowering the Commandant of the Coast Guard to "summarily dismiss" a Coast Guard Academy cadet³⁷⁹ is unconstitutional to the extent that it purports to deny a cadet these minimum safeguards.³⁸⁰ Such due process absolutes, as they have been defined by the courts, will be explored at

³⁷² See, e.g., *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 894-96 (1961); *Hannah v. Larche*,

³⁶³ U.S. 420 (1960); *Greene v. McElroy*, 360 U.S. 474 (1959).

³⁷³ See text accompanying notes 23-26 *supra*.

³⁷⁴ 10 U.S.C. § 815(b) (1970).

³⁷⁵ Id. Indeed, prior to imposition of an article 15 punishment, military men must be specifically advised that they have a right to contest their charges in a court-martial. See Manual for Courts Martial, United States ¶ 133(a) (rev. ed. 1969). See also 10 U.S.C. § 815(a) (1970).

³⁷⁶ See, e.g., *Greene v. McElroy*, 360 U.S. 474, 495, 499 (1959); *Garrott v. United States*, 340 F.2d 615, 618-19 (Ct. Cl. 1965).

³⁷⁷ See 10 U.S.C. § 6962 (1970); 14 U.S.C. § 182(a) (1970).

³⁷⁸ See, e.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-98 (1953); *United States ex rel. Knautf v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Homer v. Richmond*, 292 F.2d 719, 722-23 (D.C. Cir. 1961); *Parker v. Lester*, 227 F.2d 708, 715-16 (9th Cir. 1955).

³⁷⁹ 14 U.S.C. § 182(a) (1970).

³⁸⁰ See *Clackum v. United States*, 296 F.2d 226 (Ct. Cl. 1960).

length in subsequent sections.

A second consideration that should be evaluated in determining the hearing requirements at the academies is the significance of the de novo appellate hearings sometimes given cadets subsequent to initial adjudication of a conduct, honor or ethics offense.³⁸¹ Some courts, in reviewing adjudications by administrative agencies, including a relatively recent student disciplinary decision,³⁸² have held that a de novo appellate hearing compensates for a denial of due process at an earlier stage of the proceeding.³⁸³ Other courts, however, have specifically rejected this doctrine, recognizing that in order to adequately protect important individual interests, a proper hearing is required before rather than after that interest is abridged.³⁸⁴

That due process requires more than a fair appellate hearing in academy adjudications is evidenced by even a cursory examination of the academy systems. First, a cadet faces a "brutal need"³⁸⁵ for a constitutionally fair initial hearing, since the damage he may suffer—both tangible and psychological—begins to accrue immediately after a cadet adjudicatory committee finds him guilty of a violation.³⁸⁶ Second, and even more

persuasive, academy appellate re-

³⁸¹ See text accompanying notes 189 & 230 supra.

³⁸² *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747 (W.D. La. 1968).

³⁸³ E.g., *Jordan v. United Ins. Corp. of America*, 289 F.2d 778, 783 (D.C. Cir. 1961); *Columbia Auto Loan v. Jordan*, 196 F.2d 568, 571-72 (D.C. Cir. 1952); *Jordan v. American Eagle Fire Ins. Co.*, 169 F.2d 281, 290-91 (D.C. Cir. 1948). This is precisely the position adopted by the Legal Adviser to the Air Force Academy honor committee with regard to alleged honor offenses. Interview with Honor Committee Legal Advisor, U.S.A.F.A., Sept. 2, 1971. Similarly, the Military Academy interprets the District of Columbia Court of Appeals' failure in *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965), to address the propriety of cadet honor committee proceedings and regulations "as indicating 'Due Process' only becomes necessary at the board of officers [appellate] level." Letter from Former 'Assistant Staff Judge Advocate, U.S.M.A., May 9, 1973. The Air Force and Military Academies' honor hearing boards, however, may be de novo in name only. See text accompanying notes 473-79 infra.

³⁸⁴ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261, 264 (1970); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-53 (1941).

³⁸⁵ The Court in *Goldberg v. Kelly* recognized that imposing a deprivation upon an individual "in the face of . . . 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it." 397 U.S. at 261, quoting *Kelly v. Wyman*, 294 F. Supp. 893, 899-900 (S.D.N.Y. 1968).

³⁸⁶ "Because their liberty is at stake, accused students must be afforded due process of law Whenever a student's liberty is jeopardized as a consequence of the hearing . . . even if only in the future, his rights must be protected at the original fact-finding hearing." Buss, supra note 5, at 570. Examples of irreparable losses to a cadet resulting from his having been found by a cadet honor board to have violated an honor code include involuntary segregation from the corps, prohibition from attending classes and other official corps functions, mandatory resignation or virtually certain involuntary separation from the academy, intense self-guilt, damage to reputation, and, at West Point, probable imposition of the silence. See

view, at least in the case of honor offenses, is largely ineffectual, since a cadet convicted by an honor board is effectively pressured not to appeal³⁸⁷ and, even if he does appeal, he will still be adjudged guilty by his fellow cadets despite a reversal of his conviction by an officer board of review.³⁸⁸

A final factor to consider in determining the extent to which cadets have a right to a hearing prior to imposition of punishment by academy officials is

the significance of the traditional judicial distinction between interests considered "rights" and those deemed mere "privileges."³⁸⁹ Historically, some courts have held that a "privilege," such as a student's enrollment in a tax-supported educational institution,³⁹⁰ might be revoked by a government agency without a hearing.³⁹¹ Other courts, however, have construed the student's interests as "liberty"³⁹² or "property"³⁹³ within the meaning of the fourteenth amendment³⁹⁴ and have required a hearing with full due process safeguards before these interests could be abridged. Today, the right-privilege distinction has eroded virtually out of existence.³⁹⁵

text accompanying notes 295-318 *supra* and 609-24 & 852-940 *infra*. A cadet found by a cadet honor board to have violated an honor code is considered "guilty." E.g., Cadet Honor Comm. Proc., U.S.M.A. II(B) (8), (9) (1971); U.S.A.F.C.W.M. 30-1(17) (c), (d) (1966), reprinted in *Hearings on Service Academies*, *supra* note 18, at 10,823; U.S.N.A. Inst. 1610.3 Enc. 1(6) (i), (j) (1972); Majority Report, *supra* note 74, at 10 (U.S.M.A.); Transcript of Press Conference of Superintendent, U.S.A.F.A., Jan. 28, 1972, at 7; White, *supra* note 309, at 73. But see *Dunmar v. Ailes*, 348 F.2d 51, 52 n.1 (D.C. Cir. 1965).

³⁸⁷ See text accompanying notes 609-24 *infra*.

³⁸⁸ See text accompanying notes 213-220 *supra*.

³⁸⁹ See generally B. Schwartz, *An Introduction to American Administrative Law* 117-22 (2d ed. 1962); Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 *Notre Dame Law* 174, 175-76 (1963).

³⁹⁰ See, e.g., *Hamilton v. Regents*, 293 U.S. 245, 261 (1934); *Waugh v. Board of Trustees*, 237 U.S. 589, 596-97 (1915). See also *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), cert. denied, 319 U.S. 748 (1943) (due process held inapplicable in educational context).

³⁹¹ See, e.g., *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd per curiam* by an equally divided Court, 341 U.S. 918 (1951) (dismissal from government employment).

³⁹² See, e.g., *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (freedom from racial segregation); *Berea College v. Kentucky*, 211 U.S. 45, 68 (1908) (Harlan, J., dissenting) (right to impart and receive instruction). See generally Comment, 60 *Mich. L. Rev.* 499, 501 (1962).

³⁹³ See, e.g., *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), cert. denied, 319 U.S. 748 (1943) (dictum) (right to study, as well as to practice medicine, is a "property" right). See generally Comment, 60 *Mich. L. Rev.* 499, 501 n.14 (1962).

³⁹⁴ The meaning of the due process clause of the fourteenth amendment is, except in ways not here

relevant, identical to that of the same clause in the fifth amendment. See *Hibben v. Smith*, 191 U.S. 310, 325 (1903); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901).

³⁹⁵ See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitu-*

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Courts either label as "rights" interests formerly considered "privileges" ³⁹⁶ or disregard the label altogether and look to the nature and significance of the interest sought to be protected.³⁹⁷ Yet despite its virtual extinction in favor of an analysis of the interests involved, the academies have continued to rely upon the right-privilege distinction in denying cadets the full measure of procedural due process.³⁹⁸

The foregoing discussion demonstrates that neither arguments predicated on an express congressional diminution of procedural rights nor those predicated on either the *de novo* hearing doctrine or the right-privilege dichotomy can serve to justify academy procedures which afford a cadet little or no meaningful opportunity to be heard. Nonetheless, courts confronted with requests to insure accused cadets a fundamentally fair hearing must be persuaded that the individual interests at stake sufficiently counterbalance those of the academies.

The interests of a cadet faced with possible expulsion cannot be minimized. As numerous courts have recognized, expulsion from any

tional Law, 81 Harv. L. Rev. 1439, 1458-64 (1968). As a result, due process requires a hearing to protect many interests formerly not requiring a hearing. See, e.g., *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) (termination of residency in public housing).

³⁹⁶ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare payments); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956) (public employment). For authority that receiving an education is a "right," see, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 111, 171 S.W.2d 822, 826 (1942), cert. denied, 319 U.S. 748 (1943) (dictum).

³⁹⁷ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); *Willner v. Committee on Character*

& Fitness, 373 U.S. 96, 103-04 (1963); Cafeteria Workers, Local 473 v. McElroy, 367 U.S. 886, 894 (1961); Sostre v. McGinnis, 442 F.2d 178, 198, 203 (2d Cir. 1971) (en banc), cert. denied, 405 U.S. 978 (1972).

³⁹⁸ See Anderson v. Laird, 466 F.2d 283, 293 (D.C. Cir.) (Bazelon, C.J., concurring), cert. denied, 409 U.S. 1076 (1972).

The approach of the military officials seems permeated . . . by an attitude that the cadets have no "right" to attend the Academy, a view which fails to appreciate that they do have a right to be free of unconstitutional requirements, and to be entitled to attend the service academies, assuming they are qualified and duly selected, without being subject to unconstitutional conditions.

Id. at 305 (Leventhol, J., concurring). Thus, applicable to the academies is the well-recognized principle that once a state establishes a benefit available to the public, it may not condition receipt of that benefit upon abandonment of a constitutionally protected right. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967). See also Slochower v. Board of Higher Educ., 350 U.S. 551, 557-58 (1956); Wieman v. Updegraff, 344 U.S. 183, 191-92); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960). In other words when a limitation is imposed on a constitutional right as a precondition to the receipt of some benefit, the restriction must either be justified by a countervailing interest that is substantially and directly connected with the restriction, or fail. See, e.g., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

educational institution is a serious sanction, and the interests of one so threatened are vital and deserving of meaningful protection.³⁹⁹ The proposition seems equally applicable to the academies, for a number of courts, recognizing the unique value of an academy education,⁴⁰⁰ have already extended the fair hearing requirement to cadets in jeopardy of suspension or dismissal.⁴⁰¹ Moreover, cadets facing expulsion risk the loss of another vital interest—obtaining a commission in the Armed Services.⁴⁰² In contrast, the entries on the Government's side of the ledger are minimal. If Congress in enacting article 15 did not see fit to abrogate the right to a hearing in a tactical setting, there seems little justification for its abrogation in the nonoperational setting of the academies.

Thus, in the case of dismissal or suspension, the cadet's interest clearly

predominates. But what of the standards when expulsion is not the penalty? There are still significant interests involved from the cadet's point of view, impairment of which cannot be redressed by a de novo appellate hearing. Substantial injury to reputation,⁴⁰³ loss of privileges and reduction in rank⁴⁰⁴ are among the possible consequences of a finding of culpability—interests sufficiently important to require that due process be afforded at the initial stages of adjudication. Yet, while finding the Military Academy's expulsion proce-

³⁹⁹ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961) ("an interest of extremely great value"); *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wisc. 1968), *at*'d, 418 F.2d 163 (7th Cir. 1969); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 754 n.14 (W.D. La. 1968); *General Order on School Discipline*, *supra* note 120, at 144. See generally Goldstein, *supra* note 46, at 396 nn. 81-82.

⁴⁰⁰ *Hagopian v. Knowlton*, 470 F.2d 201, 208-09 (2d Cir. 1972); *af*'g 346 F. Supp. 29, 32, 34 (S.D.N.Y.); *Brown v. Knowlton*, Civil No. 72-3184, at 2, 7 (S.D.N.Y. Aug. 3, 1972).

⁴⁰¹ *Wasson v. Trowbridge*, 285 F. Supp. 936, 944 (E.D.N.Y. 1968), quoting *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967);

The threshold question [in determining the constitutionality of the Academy's disciplinary proceedings] is whether or not the Academy procedure in general and as applied in a plaintiff's case conform[s] to due process requirements in that the Cadet was "given a fair hearing

Accord, *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y. Aug. 3, 1972); *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *af*'t d, 470 F.2d 201 (2d Cir. 1972); *cf.* *Grimm v. Brown*, 449 F.2d 654 (9th Cir. 1971) (discharge of an officer from the Air Force for misconduct); *Keene v. Rodgers*, 316 F. Supp. 217, 221-22 (D. Me. 1970) (dismissal for misconduct from Maine Maritime Academy).

⁴⁰² *Hagopian v. Knowlton*, 470 F.2d 201, 209 (2d Cir. 1972); see text accompanying note 303 *supra*; *cf.* *Truax v. Raich*, 239 U.S. 33, 41 (1915).

⁴⁰³ See text accompanying notes 310-18 *supra*.

⁴⁰⁴ See note 148 *supra*; text accompanying notes 307-08 *supra*. Many other interests also may be impaired, including loss of future promotion and assignment opportunities. See text accompanying note 309 *supra*:

dures for misconduct to be "inadequate," the Second Circuit has recently

upheld the validity of the "existing measures presently available to a cadet for contesting an individual award of demerits;" for individual Class III minor delinquencies.⁴⁰⁵ The court reasoned that "[s]hort of expulsion, the procedures available to a cadet . . . satisfy . . . due process . . . because the sanctions imposed are slight, the nature of the proceeding is corrective and educational, and the burden on the proceedings which a hearing would impose is excessive."⁴⁰⁶

The court appears to have rendered this opinion, as have courts in other academy cases,⁴⁰⁷ without sufficiently considering all the cadet interests involved. It is important to note, moreover, that the opinion does not foreclose the applicability of stricter standards to all nondismissal adjudications, since it dealt only with procedures for minor Class III offenses, where the cadet's stake is least significant.⁴⁰⁸ As has been shown, the sanctions for the more serious Class I and II offenses are not so slight,⁴⁰⁹ but reach proportions which render them more punitive than "corrective" or "educational" in effect.⁴¹⁰ Thus, when all the factors are weighed, administrative burdens seem insufficient⁴¹¹ to justify denying a cadet some kind of a personal hearing at which he may introduce evidence and confront witnesses to contest alleged Class I and II offenses. Such a hearing is, in fact, the generally accepted norm, with only the Naval Academy failing to provide one.⁴¹²

To insist that the academies must give an accused cadet a hearing is, of course, less to answer a question than to raise one: what must a hearing entail? The general requirements of due process in the context of an academy hearing can be found in opinions of courts

⁴⁰⁵ Hagopian v. Knowlton, 470 F.2d 201, 204, 210 (2d Cir. 1972); see Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

⁴⁰⁶ 470 F.2d at 210-11.

⁴⁰⁷ E.g., *Wasson v. Trowbridge*, 285 F. Supp. 936 (E.D.N.Y. 1968); *Dunmar v. Ailes*, 230 F. Supp. 87 (D.D.C. 1964), *aff'd per curiam*, 348 F.2d 51 (D.C. Cir. 1965).

⁴⁰⁸ See note 145 *supra*.

⁴⁰⁹ See *id.*

⁴¹⁰ See text accompanying notes 254-64 & 301-09 *supra*.

⁴¹¹ In light of the legal manpower available at the Military and Air Force Academies, providing essentially fair adjudicatory practices would not appear to be a costly and difficult task. See note 584 *infra*.

⁴¹² See text accompanying notes 157-58 *supra*. It is also the practice of both the Military and Naval Academies to summarily expel cadets for conduct deficiencies. See, e.g., *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972) (U.S.M.A.); *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y., Aug. 3, 1972) (U.S.M.A.); *Complaint, Cohen v. Mack*, Civil No. 72-884-K (D. Md., filed Aug. 31, 1972) (Naval Academy); *Majority Report, supra* note 74, at 11.

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evaluating hearing procedures in civilian school disciplinary cases,⁴¹³ as well as those examining adjudicatory practices at the academies themselves.⁴¹⁴ For example, an accused cadet is entitled to an effective hearing "at a meaningful time and in a meaningful manner,"⁴¹⁵ and he must be permitted to present an adequate defense "both from the point of view of time and the use of witnesses and other evidence."⁴¹⁶ Other courts have observed that while due process does not require a "full dress" formal hearing with all the safeguards of a court of law,⁴¹⁷ it does demand that the hearing afford the "rudiments of an adversary proceeding,"⁴¹⁸ and "the rudimentary elements of fair play."⁴¹⁹ It is not, however, these general guidelines which raise procedural due process issues today. Rather, it is the applicability *vel non* of specific procedural guarantees to academy proceedings that generates the most frequent and most sensitive questions.⁴²⁰

Before considering these specific guarantees in detail, it may be

⁴¹³ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

⁴¹⁴ See, e.g., cases cited in notes 6, 9 *supra*.

⁴¹⁵ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁴¹⁶ *Wasson v. Trowbridge*, 285 F. Supp. 936, 944 (E.D.N.Y. 1968), quoting *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); accord, *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); General Order on School Discipline, *supra* note 120, at 147.

⁴¹⁷ See, e.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 205 (M.D. Tenn. 1968), *af'd*, 407 F.2d 834 (6th Cir. 1969), cert. dismissed as improvidently granted, 397 U.S. 31 (1970). The *Dixon* court recognized that requiring a full dress judicial hearing may be impractical and detrimental to the educational atmosphere. 294 F.2d at 159.

⁴¹⁸ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961); see *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970). It is clear from *Wasson v. Trowbridge*, 285 F. Supp. 936, 945-46 (E.D.N.Y. 1968), however, that a "fair hearing" need not be an adversary proceeding if every factual dispute is resolved in favor of the cadet.

⁴¹⁹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

⁴²⁰ The subsections that follow this analysis of the right to a hearing evaluate in some detail the applicability at the academies of a number of specific procedural guarantees. There a number of procedures, however, that due process may well require in academy adjudications but which will not be evaluated because of insufficient information about the extent to which they are or are not presently being employed at the academies. For example, the decision-maker's conclusions must rest solely on the legal rules and evidence adduced at the hearing. See *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967). The decision maker must state reasons for his determination and indicate the evidence upon which he relied. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). All disciplinary actions must be taken on grounds supported by substantial evidence. *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970). A transcript of a hearing must be made for use on appeal. See *Wright v. Texas So. Univ.* 392 F.2d 728, 729 (5th Cir. 1968). But see *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963).

useful to raise briefly several points which may illuminate the analytical framework that must be employed. Some courts have exhibited a willingness to dilute due process standards otherwise required in school discipline cases in which the hearings were considered not to be adjudications but to be merely advisory or investigatory in nature.⁴²¹ Such reasoning should have no

impact on the academies' hearing procedures, for characterization of a school disciplinary proceeding as an administrative investigation hardly justifies a failure to provide normal procedural safeguards.⁴²² More importantly, even if the investigatory characterization did provide a valid justification for diminishing due process guarantees, an academy conduct, honor or ethics hearing is more than an investigation—the focus of the proceeding is on a particular cadet's misconduct, and its sole purpose is to determine whether he is guilty and whether to impose sanctions.⁴²³ While it is true that the hearing panels' findings of fact sometimes serve only as recommendations,⁴²⁴ they are intended to, and in fact do, play a crucial role in the ultimate verdict.⁴²⁵ It seems improbable, then, that the investigation rationale could alter due process standards at cadet adjudications.

A second factor which may influence evaluation of procedural safeguards at the academies is the degree of formality at cadet hearings. Cadets are required to salute and "report" upon arrival,⁴²⁶ to "sound off in a full military manner,"⁴²⁷ to preface and complete all

⁴²¹ See *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Barker v. Hardway*, 283 F. Supp. 228, 237-38 (S.D.W. Va.), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969); *Madera v. Board of Educ.*, 386 F.2d 778, 781-82 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968). This distinction has been made in other contexts. See *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). But see *Buss*, *supra* note 5, at 567-70, 607 (*Wasson*, *Madera* and *Barker* erroneously treated student disciplinary proceedings as an investigation).

⁴²² See *Buss*, *supra* note 5, at 562-70.

⁴²³ Cf. *Buss*, *supra* note 5, at 569-70. A recent decision characterized academy hearings as adjudications. See *Rose v. Department of the Air Force*, Civil No. 72-1605, at 2 (S.D.N.Y. Dec. 19, 1972). See also *Dunmar v. Ailes*, 348 F.2d 51, 53, 55 (D.C. Cir. 1965) (Cadet Honor Committee decides whether cadets violate honor code); text accompanying note 386 *supra*.

⁴²⁴ See text accompanying notes 161, 189 & 229 *supra*; cf. *Buss*, *supra* note 5, at 569.

⁴²⁵ See, e.g., *Clelland*, *supra* note 69, at 29; Interview with Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972; text accompanying notes 623 & 942 *infra*. Indeed, some academy adjudications of guilt are more than mere recommendations; they have the effect of final judgments.

Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972; see note 229 supra.

⁴²⁶ E.g., U.S.M.A.D.S.S.O.P. 31(b)(1) (1968); Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972.

⁴²⁷ E.g., Interview with Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972.

statements with "sir"⁴²⁸ and may be required to stand at attention or parade rest throughout the proceedings.⁴²⁹ Whatever "family spirit" may exist in student adjudications at civilian institutions,⁴³⁰ then, is nonexistent at the academies, where an adversarial, formal, superior-subordinate relationship is maintained.⁴³¹ It is in light of this atmosphere that due process requirements must be assessed.

a. Notice--If the right to a hearing outlined in the foregoing section is to have any significance, it is clear that an accused must be notified that allegations have been made against him and that he will be required to answer the charges at a hearing. Thus, generally speaking, due process demands that the accused be given notice of the precise nature of his alleged offense sufficiently prior to the hearing or trial to enable him to prepare and present an adequate defense.⁴³² Although the precise nature of the notice required may vary with the context and circumstances of a particular case,⁴³³ the general requirements of notice in school adjudications are clear: a stu-

⁴²⁸ E.g., *id.*; Interview with Third Group Air Officer Commanding, U.S.A.F.A., Sept. 2, 1971 (Commandant's Disciplinary Board hearings). Cadets are referred to as "mister" at Academy conduct hearings. *Id.*

⁴²⁹ See, e.g., U.S.M.A.D.S.S.O.P. 31(b)(5) (1968) (although "having cadets seated during questioning is encouraged").

⁴³⁰ Authorities have recognized that requiring an adversarial hearing in student disciplinary cases would help destroy the "community spirit" of mutual confidence and respect that should exist between students and faculty at an educational institution. See, e.g., *Hagopian v. Knowlton*, 346 F. Supp. 29, 30-31 (S.D.N.Y.), *affd*, 470 F.2d 201 (2d Cir. 1972); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159

(5th Cir.), cert. denied, 368 U.S. 930 (1961); *Beaney & Cox*, supra note 5, at 396-97.

⁴³¹ This adversarial setting is created by a variety of factors incident to academy hearings, e.g., the threat of severe penalties, see text accompanying notes 146-48 & 301-18 supra; the formality of the hearings, see text accompanying notes 327-32 & 426-29 supra; the fact that cadets are judged by their military cadet and officer superiors, see text accompanying notes 158-59, 172-73 & 221 supra; the completeness of the subjugation of cadets to academy officials, see text accompanying notes 327-32 supra; the retributive nature and emphasis of military justice, see *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969); and the inherently adversarial nature of any military tribunal, see *id.*

⁴³² See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The Second Circuit has recognized that three days might be insufficient time for a cadet to prepare properly his defense before a conduct expulsion hearing. See *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967). Some college cases have required that notice be given at least one week in advance of any hearing. See, e.g., *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), *atfd.*, 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Schiff v. Hannah*, 282 F. Supp. 381, 383 (W.D. Mich. 1966). But see *Jones v. State Bd. of Educ.*, 279 F. Supp. 190, 205 (M.D. Tenn. 1968), *affd.*, 407 F.2d 834 (6th Cir. 1969), cert. dismissed as improvidently granted, 397 U.S. 31 (1970) (two days held sufficient).

⁴³³ See, e.g., *Esteban v. Central Mo. State College*, 415 F.2d 1077, 1089-90 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970).

dent accused of an offense must be apprised, usually in writing,⁴³⁴ of the charges against him,⁴³⁵ of the grounds for such charges,⁴³⁶ of the nature of the evidence to be used against him⁴³⁷ and of the identity of all adverse witnesses.⁴³⁸ Unfortunately, there is not sufficient information available to determine the full extent to which the various academy adjudicatory bodies comply with these standards. Clearly, there is substantial compliance at some academies; the Merchant Marine⁴³⁹ and Naval Academies,⁴⁴⁰ for example, formally notify in writing accused honor violators of the charges against them and, at the Naval Academy,⁴⁴¹ of the basis of the charges. Moreover, at each academy special written forms are routinely used to notify cadets of the details of alleged conduct offenses.⁴⁴² Most other academy adjudicatory

bodies, however, are considerably more casual about their notice procedures and, as might be expected, these informal practices have resulted in abuses as to the time and manner of notification and the amount of information conveyed. For example cadets often are not informed of the identity of informants or of

⁴³⁴ See, e.g., *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), aff'd 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965 (1970); *Graham v. Knutzen*, 351 F. Supp. 642, 668 (D. Neb. 1972); General Order on School Discipline, supra note 120, at 147.

⁴³⁵ E.g., *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir.), cert. denied, 368 U.S. 930 (1961); *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970).

⁴³⁶ E.g., *Hagopian v. Knowlton*, Civil No. 72-2814, 4t 36 (S.D.N.Y. July 26, 1972) (supplementary opinion); *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 758 (W.D. La. 1968); General Order on School Discipline, supra note 120, at 147; cf. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

⁴³⁷ E.g., *Wasson v. Trowbridge*, 285 F. Supp. 936 (E.D.N.Y. 1968); *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970); General Order on School Discipline, supra note 120, at 147.

⁴³⁸ E.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

⁴³⁹ See U.S. MerchantMarine Academy Superintendent's Instruction 72-10, Sample Statement of Charges (July 28, 1972). In addition to informing an accused cadet of the charges to be considered, a Merchant Marine Academy honor committee member "verbally explains all the facts the honor board has concerning the case." Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972. The Merchant Marine Academy honor committee, however, does not inform an alleged violator in writing of the evidence to be used against him, because the committee wishes to prevent the Department of Naval Science from learning of an honor violation. Thus, the accused would be protected from the Department's practice of denying a Naval Reserve Commission to a cadet who violates the code but is retained at the Academy on probation. *Id.*

⁴⁴⁰ See U.S.N.A. Inst. 1610.3 Enc. 1(3)(e) (1972) (oral explanation of charge also required).

⁴⁴¹ See *Id.* 1610.3 Appendix A, Enc. 1.

⁴⁴² See text accompanying note 152 supra.

witnesses who will present evidence against them⁴⁴³ and frequently receive

such late notification of the charges as to make the preparation of a meaningful defense impossible.⁴⁴⁴ A graphic demonstration of the latter practice was afforded at the Air Force Academy during its 1972 cheating scandal. Within the 48-hour period immediately following the discovery by cadet officials that en masse cheating had been occurring, 40 honor hearings were convened and completed,⁴⁴⁵ 39 of which resulted in verdicts of guilty.⁴⁴⁶ The penalty assessed in all 39 cases was immediate separation from the academy and, in most cases, activation in enlisted status for a period of two years.⁴⁴⁷ In light of the gravity of the charges and the severity of the sanctions, it can hardly be argued that such practices meet the constitutional standard of adequate notice. Nor can it be gainsaid that a lack of adequate notice will serve to render other constitutional guarantees, such as right to a hearing, right to counsel and the like, meaningless.

b. Bias--Among the most elusive of due process concepts and yet one of the most vital to the ' protection of the rights of an accused party is that of "legal bias." It cannot, of course, be questioned that an alleged offender has a right to have the charges against him considered impartially⁴⁴⁸ and that legal bias on the part of the

⁴⁴³ Thus, cadets know this information only if they "pick it up." Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972; accord, Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972. This information is not provided in Merchant Marine Academy honor cases because the accused "might get to the man." Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972.

⁴⁴⁴ At the Merchant Marine, Military and Naval Academies, if a cadet is required to or desires to submit a written statement as a basis for adjudicating his offense, he must do so within 24 hours or less after notification of the offense. See U.S.M.A.D.S.S.O.P. II(4)(c) (1972); Com'd't Mid'n Inst. P1620.1OG Enc. (3)(6)(c) (1970); Interview with Assistant Commandant of Cadets, U.S.M.M.A., Aug. 10, 1972. The cadet may be required to have his honor case heard 24 hours after notification. See U.S. Merchant Marine Academy Superintendent's Instruction 72-10, Sample Statement of Charges (July 28, 1972).

⁴⁴⁵ Connally, Vindication of the Code, Talon, Jan. 1972, at 24 [hereinafter Connally, Vindication of the

Code]; see Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 21-22. Similarly, three West Point First Class Cadets were recently charged with an honor violation one evening, adjudicated honor code violators by a cadet honor subcommittee and by a full honor board that same night, and processed out of the Academy as voluntary resignees the next morning. Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with First Class Cadet Being Silenced, U.S.M.A., Feb. 18, 1973.

⁴⁴⁶ Connally, Vindication of the Code, *supra* note at 24; Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 22.

⁴⁴⁷ Connally, Vindication of the Code, *supra* note 445, at 24; Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 21; Letter from Chief, Congressional Inquiry Division, Office of Legislative Liaison, to Sen. Charles H. Percy, June 9, 1972.

⁴⁴⁸ See, e.g., *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); *United States v.*

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trier of fact in either a criminal or an administrative hearing constitutes a denial of due process.⁴⁴⁹ Yet deciding whether bias exists, what its nature is and whether the quantum of bias present is constitutionally impermissible all present problems less easily resolved.

Legal bias can properly be divided into three categories—prejudgment, personal prejudice and interest—with differing due process standards associated with each category. Although it is clear that prejudgment by the adjudicating body as to factual issues involved in a case may result in a denial of due process,⁴⁵⁰ little judicial guidance has been forthcoming as to how great this type of bias must be before the Constitution is violated.⁴⁵¹ It does appear, however, that the bias must be substantial⁴⁵² and that it must stem from a source outside the adjudicatory process.⁴⁵³

A second type of legal bias which involves an attitude or predisposition by the trier of fact, for or against a party, may be labelled "personal prejudice."⁴⁵⁴ In some contexts, such bias may not be considered "personal" unless it involves animosity to a particular party, rather than opposition to the position he adopts, or mere favoritism toward an opposing party.⁴⁵⁵ As is the

case with prejudgment, the quantum of personal prejudice necessary to constitute "legal bias" is uncertain. Some assistance on the question is provided, however, by an Eighth Circuit ruling that the tendency of a hearing examiner to "take over the examination of witnesses, to discomfort counsel and to be unnecessarily sharp and impatient" was insufficient to show legal bias, even when combined with rulings uniformly adverse to the aggrieved party.⁴⁵⁶ Moreover, the Supreme Court has stated that total rejection of a position of one of the parties cannot of itself impugn the integrity or competence of the trier of fact.⁴⁵⁷ Under the holding of the latter case, it could appear difficult, if not impossible, to prove personal prejudice amounting to legal bias on the part of an adminis-

Thompson, 37 C.M.R. 915, 919 (1967).

⁴⁴⁹ *In re Murchison*, 349 U.S. 133, 136 (1955); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763 (6th Cir. 1966); 2 K. Davis, *Administrative Law Treatise* § 12.02, at 147-48 (1958).

⁴⁵⁰ 2 K. Davis, *Administrative Law Treatise* § 12.01, at 131 (1958); see, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757, 763-67 (6th Cir. 1966).

⁴⁵¹ 2 K. Davis, *Administrative Law Treatise* § 12.01, at 131 (1958).

⁴⁵² See K. Davis, *Administrative Law Text* § 12.02 (3d ed., 1972).

⁴⁵³ *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); 2 K. Davis, *Administrative Law Treatise* § 12.02, at 147-48 (1958).

⁴⁵⁴ See 2 K. Davis, *Administrative Law Treatise* § 12.01, at 131 (1958).

⁴⁴⁵ *Id.* § 12.02, at 146.

⁴⁵⁶ *Bituminous Material & Supply Co. v. NLRB*, 281 F.2d 365, 372 (8th Cir. 1960).

⁴⁵⁷ *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659 (1949).

trative hearing officer.⁴⁵⁸

A third type of legal bias, which may be classified as "interest," exists when the adjudicator in any criminal or administrative hearing stands to gain or lose personally as a result of the outcome of a controversy.⁴⁵⁹ Whether

such an interest is a grounds for disqualification depends upon the magnitude of the interest.⁴⁶⁰ Again here, the failure of the courts to articulate consistent and meaningful guidelines⁴⁶¹ leaves open the question as to how much interest constitutes bias sufficient to violate due process.

Before proceeding to examine the existence of bias in the academy adjudicatory systems, it may be well to make note of a fourth type of bias which usually does not constitute legal bias: the crystallization of an adjudicator's point of view as to issues of law or policy prior to the hearing.⁴⁶² No disqualification results when, for example, a member of an administrative agency enters a proceeding with formulated views on important economic policies in issue.⁴⁶³ As noted earlier, however, substantial prejudgment as to factual issues, unlike predetermination of legal issues or policies, is a denial of due process. Logically then, when crystallization of viewpoints causes substantial prejudgment of the facts of a case, or, for that matter, causes personal prejudice or interest, the distinction between permissible and legal bias is meaningless and a violation of due process occurs.

There is no doubt that the right to have one's case heard before adjudicators free from legal bias, whatever its form, extends to cadets at the federal academies. The Court of Appeals for the Second Circuit has recognized this right to an impartial hearing in holding that a Merchant Marine Academy cadet should have been permitted to show at a district court hearing that members of his Academy conduct hearing panel had had such prior contact with his case that they could be presumed to have been biased.⁴⁶⁴ The applicability of the "legal bias" concept in the context of academy adjudications is cru-

⁴⁵⁸ Schwartz, *supra* note 389, at 144.

⁴⁵⁹ See 2 K. Davis, *Administrative Law Treatise* § 12.01, at 31 (1958).

⁴⁶⁰ 2 K. Davis, *Administrative Law Treatise* § 12.01 (1958).

⁴⁶¹ K. Davis, *Administrative Law Text* § 12.03 (3d ed. 1972). Note, however, that despite the general prohibition against "interest," members of a regulated industry often serve as adjudicators for the agency or board which regulates that industry. *Id.* § 12.04.

⁴⁶² 2 K. Davis, *Administrative Law Treatise* § 12.01 (1958); see, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *Skelly Oil Co. v. FPC*, 375 F.2d 6, 17-18 (10th Cir. 1967), modified on other grounds, 390 U.S. 747 (1968).

⁴⁶³ 2 K. Davis, *Administrative Law Treatise* § 12.01 (1958).

⁴⁶⁴ *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967).

cial, moreover, because the systems are rife with possibilities for partiality and prejudice. One obvious problem when cadets sit in judgment is the very limited size of the student body of which the accused is a member and from which the cadet hearing board members must be drawn. As observed by a cadet member of the committee which recently promulgated the Merchant Marine Academy's honor code, there are so few cadets at the academies that most cadets know each other, and it is difficult to avoid personal prejudice or prejudgment in some cases.⁴⁶⁵ The impact of such preconceptions has been manifested by animosity toward, and harassment of, an accused cadet during the hearing⁴⁶⁶ or by consideration of improper factors in formulating a decision at its conclusion.⁴⁶⁷ Despite some academy precautions to the contrary,⁴⁶⁸ it appears that voting members of adjudicatory hearing panels often display prejudgments and prejudices which may be of sufficient intensity to constitute legal bias.⁴⁶⁹

Even more serious than such personal predilections, however, may be the pervasive institutionalized bias against an accused, a

⁴⁶⁵ "[With] nine hundred guys it's easy to know just something about everyone of them. . . . Everybody knows just about everybody So everybody has their own personal judgment." Interview with 1972-73 Honor Comm. Vice Chairman, U.S.M.M.A., Aug. 10, 1972. Because of the doctrine of necessity, however, this problem may not, in a given context, constitute a denial of due process. See 2 K. Davis, *Administrative Law Treatise* § 12.04 (1958). See also *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967).

⁴⁶⁶ The Air Force Academy's Department of Law has observed that at Commandants Board proceedings, "[b]oard members, at times, criticize respondents for their derelictions." Letter from the Air Force Academy Department of Law to the Commandant of Cadets, Aug. 7, 1967, at 2. At times honor board members go even beyond pointed criticism. One of the voting members of an Air Force Academy honor board convened in the spring of 1967 screamed in the face of a freshman cadet respondent after listening to part of his testimony, "do you expect us to believe that shit?" As a result, the cadet was considerably unnerved, for he was faced with either changing his story midway through his hearing, thereby destroying his credibility, or continuing his present line of testimony while realizing that at least one voting board member intensely disapproved. Letter from 1969 Air Force Academy Graduate, Feb. 1, 1973.

⁴⁶⁷ The 1968-69 Chairman of the Air Force Academy's Cadet Honor Committee exhibited personal bias, for example, when he exclaimed prior to voting on the issue of discretion in one honor case that "[t]his guy has been in trouble before and we don't want that kind around." Letter from 1969 Air Force Academy Graduate, Feb. 15, 1973; see Letter from Another 1969 Air Force Academy Graduate, Feb. 14, 1973.

⁴⁶⁸ The Military Academy cautions, for example, that "[b]oard members should have no prior connection with the infractions giving rise to the board." U.S.M.A.D.S.S.O.P. (28)(c) (1968); accord, *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (U.S.M.M.A. conduct hearings). In most cases, however, cadets have no right to challenge a cadet or officer member of a conduct, honor or ethics hearing panel. See text accompanying notes 163 & 207 *supra*.

⁴⁶⁹ See letter from First Class Cadet, U.S.M.A., to Senator Sam J. Ervin, Jr., May 3, 1972.

situation which seems common in academy adjudications. ⁴⁷⁰ Academy officers and cadets are likely to have the preconceived notion that subordinates brought before them for adjudication of a conduct infraction are guilty of the offense charged. As cadet officials at two academies have observed, alleged offenders appearing before an academy conduct hearing panel are presumed guilty unless they can prove otherwise;⁴⁷¹ indeed, the

purpose of the Air Force Academy's conduct hearings was identified by one key cadet official as being merely to determine how much punishment a cadet would receive for the offense charged.⁴⁷²

The most blatant institutional bias, however, is exhibited by the officer boards which reconsider honor offenses after a cadet honor board has found a violation of the Military or Air Force Academies' honor codes.⁴⁷³ These boards, with rare exceptions, are composed entirely of Military or Air Force Academy graduates.⁴⁷⁴ As a result, the board members, believing the code "belongs" solely to cadets,⁴⁷⁵ are likely to hold the deeply ingrained notion that reviewing officers are not to interfere in the administration of the honor code by overturning the cadet honor board's decisions.⁴⁷⁶ Perhaps as a result, they rarely conclude that a cadet convicted by the cadet honor committee is, in fact, innocent. Indeed, many of these officers may feel actual animosity toward cadets appearing before their appeal board. Since

⁴⁷⁰ The District Court for the Southern District of New York recognized one aspect of this bias when it observed that Military Academy officials would likely consider repeated vigorous attempts by a West Point cadet to contest an allegation that he had committed a conduct offense to be inconsistent with the spirit of Academy procedures and to be not in the best interests of either the Academy or the cadet himself. *Hagopian v. Knowlton*, 346 F. Supp. 29, 30-32 (S.D.N.Y.), *afl d*, 470 F.2d 201 (2d Cir. 1972). For further evidence of this pervasive attitude that cadets should not question the judgment of their military superiors, see note 535 and text accompanying notes 970-75 & 1112-1114 *infra*.

⁴⁷¹ Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972; Letter from Former Midshipman, Class of 1973, U.S.N.A., Oct. 3, 1972. See also U.S.A.F.C.R. 35-6(32)(a) (1971) (purpose of U.S.A.F.A. Class I (*supra* note 122) conduct hearings is "to confront the cadets reported . . . and to recommend . . . appropriate punishment," not, apparently, to adjudicate guilt or innocence).

⁴⁷² Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972.

⁴⁷³ See text accompanying note 189 *supra*.

⁴⁷⁴ Of the 58 members of the 12 officer appeal boards convened between July 1964 and January 1972 for honor cases at the Military Academy, for example, only three were not graduates of the Military Academy. Each of these nongraduates served on a different board, containing four other voting members who were Military Academy graduates. Honor Case Statistics, attachment to Letter from Information Officer, U.S.M.A., March 24, 1972.

⁴⁷⁵ See text accompanying notes 73 & 172 *supra* and 902 *infra*.

⁴⁷⁶ See text accompanying note 903 *infra*.

they review the honor ethic, as epitomized by the cadet honor codes, as so fundamental to their own ideals,⁴⁷⁷ they have an intangible but nonetheless real personal interest in insuring that the honor codes are not "weakened" by cadets who, having violated the code, attempt some "legalistic" means of remaining at the academy.⁴⁷⁸ As a result of these sentiments, the members of the Air Force and Military Academies' officer appeal boards often evidence what must be considered not only interest but also a degree of policy prejudice so extreme as to result in impermissible factual prejudice and personal prejudice. Both of these factors prevent them from affording a sufficiently impartial hearing to comply with the standards of due process of law.⁴⁷⁹

c. Separation of Functions--A crucial requisite of due process in criminal cases is that the judicial function must be separate from those of investigation and prosecution.⁴⁸⁰ Although the prohibition against combining such functions has not been extended to federal or state administrative cases generally,⁴⁸¹ there are administrative areas in which separation of functions is clearly required.⁴⁸² The field of academy adjudication is one such area, for not only has the separation of functions doctrine been held applicable in the educational environment *per se*,⁴⁸³ but the Second Circuit has recently affirmed

⁴⁷⁷ See text accompanying notes 1035-64 & 1105-07 *infra*.

⁴⁷⁸ Cf. Lovell, *supra* note 306, at 32-33. Academy graduates and officials have often expressed contempt for using rules and procedures they consider "legalistic" in administering the cadet honor code. See text accompanying notes 1120-21 *infra*.

⁴⁷⁹ It is impossible to verify this conclusion statistically; however, support may come from the facts that

only two of the 12 officer appeal boards convened at the Military Academy from July 1960 to January 1972, and two of the nine officer appeal boards convened at the Air Force Academy from July 1, 1959, to December 7, 1971, reversed convictions by a cadet honor committee. Letter from Executive for Honor and Ethics, U.S.A.F.A., Dec. 8, 1971; Honor Case Statistics, attachment to Letter from Information Officer, U.S.M.A., March 24, 1972. Unconscious bias by academy officers against cadet claims has been recognized in other contexts. The Second Circuit Court of Appeals, for example, in effect judicially noticed that a Military Academy officer was unable to believe that a West Point cadet could possibly be a sincere conscientious objector. See *United States ex rel. Donham v. Resor*, 436 F.2d 751, 754 (2d Cir. 1971).

⁴⁸⁰ See, e.g., *In re Murchison*, 349 U.S. 133, 137-38 (1955).

⁴⁸¹ See *Marcello v. Bonds*, 349 U.S. 302, 311 (1955); *Estrin v. Moss*, 221 Tenn. 657, 677-78, 430 S.W.2d 345, 354 (1968), appeal dismissed, 393 U.S. 318 (1969); *Firemen's & Policemen's Civil Service Comm'n v. Hamman*, 404 S.W.2d 308, 312 (Tex. 1966).

⁴⁸² E.g., *Trans World Airlines v. CAB*, 254 F.2d 90 (D.C. Cir. 1958); *State v. ex rel. Beam v. Fulwiler*, 76 Wash. 2d 313, 315-18, 456 P.2d 322, 324-25 (1969) (civil service discharge); *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 209-11, 94 N.W.2d 711, 721-22 (1959) (teacher discharge).

⁴⁸³ See, e.g., *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); K. Davis, *Administrative Law Text* § 13.02 (3d ed. 1972). But see *Jones v. State Bd. of Educ.*, 279 F. Supp. 190

the decision of a district court in *Hagopian v. Knowlton* that, in Military Academy conduct cases, due process demands that the prosecutorial, hearing and appellate functions be kept separate.⁴⁸⁵

In *Hagopian* a third-year cadet at the Military Academy obtained an injunction to prevent his final separation from the Academy. He had been "cashiered" from West Point without a hearing after receiving 107 demerits within approximately five and one-half months, during which period 102 demerits were the maximum number allowed.⁴⁸⁶ The court found that the cadet's Tactical Officer had been the "reporting officer" for seven of the 16 offenses charged, accounting for 46 of his 107 demerits. Furthermore, "[t]his same officer reported him, made the awards, subsequently determined that the awards were correct and just, and then . . . [recommended him] for consideration of expulsion."⁴⁸⁷ As a result, the court concluded, "[t]here was

an unfortunate merger of function in the Tactical Officer"⁴⁸⁸ which, though perhaps satisfactory for minor sanctions for "correctional and educational discipline,"⁴⁸⁹ "does not satisfy due process or the simple needs of natural justice" when possible expulsion is involved.⁴⁹⁰

At first blush it may seem difficult to reconcile Hagopian's insistence on a separation of function within the academies' conduct systems with the general practice in the military of a commanding

(M.D. Tenn. 1968), *aff d*, 407 F.2d 834 (6th Cir.), cert. dismissed as improvidently granted, 397 U.S. 31 (1970).

⁴⁸⁴ 470 F.2d 201 (2d Cir, 1972), *affg* 346 F. Supp. 29 (S.D.N.Y. 1972).

⁴⁸⁵ 346 F. Supp. at 31; *accord*, *Jaremko v. Knowlton*, Civil No. 72-3419 (S.D.N.Y. Aug. I, 1972) (temporary restraining order granted); *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y. Aug. 3, 1972) (preliminary injunction granted).

⁴⁸⁶ 346 F. Supp. at 30. Many Class III offenses for which demerits leading to expulsion can be awarded are quite picayune, including, for example, "general inattention." See *id.* at 31. Among the demerits precipitating Cadet Hagopian's expulsion proceedings were 10 demerits meted out, on two succeeding days, for "being in need of a haircut." *Id.* at 32; *Karpatkin*, *supra* note 215, at 12, col. 3.

⁴⁸⁷ 346, F. Supp. at 31.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 32.

⁴⁹⁰ *Id.* at 31, 32; see *In re Murchison*, 349 U.S. 133 (1955); *Offutt v. United States*, 348 U.S. 11 (1954); *United States v. Marzano*, 149 F.2d 923, 926 (2nd Cir. 1945). The Hagopian court further explained its rationale by stating that the Tactical Officer "was placed in the undesirable position of being the one required to report and the one who acted upon the report and the one who reviewed his own action." 346 F. Supp. at 31-32, citing *People ex rel. Bond v. Trustees*, 4 App. Div. 399, 39 N.Y.S. 607 (3rd Dep't 1896). Despite the merger of functions problem noted in Hagopian, the Military Academy does caution against concentration of functions in its various hearing boards. See U.S.M.A.D.S.S.O.P. 28(c) (1968), quoted in note 468 *supra*.

officer serving as both prosecutor and judge in imposing upon his subordinates nonjudicial punishments which can lead to their involuntary

discharge from the Armed Forces.⁴⁹¹ Yet important distinctions exist between the assessment of nonjudicial punishment and the awarding of demerits—differences arising from factors unique to the academies. It is easy to perceive the necessity in a smaller, operational military unit commanded by one officer⁴⁹² for that officer to be able to impose nonjudicial punishment on his subordinates who fail to discharge their military duties.⁴⁹³ Indeed, Congress' purpose in granting nonjudicial article 15 powers was to enable company commanders to handle disciplinary problems without resorting to a court-martial.⁴⁹⁴ In the nonoperational academy context, however, other military personnel are not, as may often be true in the field, dependent for their survival on cadets' properly performing their day-to-day functions.⁴⁹⁵ The necessity for a company officer serving as prosecutor, adjudicator and appellate judge, though real in smaller operational units, vanishes in the academy context. And, since nonjudicial punishments imposed at the academies may entail greater

⁴⁹¹ See 10 U.S.C. § 815 (1970). In courts-martial, moreover, the convening authority is in a position to influence greatly the course of the proceedings since he appoints the personnel of the court-martial panel, *id.* §§ 822-24; orders particular cases to its docket, *id.* § 834; and has the power of removal or termination of a court-martial panel, *Manual for Courts-Martial, United States* §§ 5(a)(6), 37(b)(rev. ed. 1969). See McCoy, *Due Process for Servicemen—The Military Justice Act of 1968*, 11 *Wm. & Mary L. Rev.* 66, 83-87 (1969). In summary courts-martial, one commissioned officer serves as judge, jury, prosecutor, defense counsel and court reporter. For special courts-martial the convening authority can appoint the judge and jury and can also review the sentence and findings of the court prior to execution of the sentence. For well-articulated criticism of these concentrations of functions, see, e.g., R. Rivkin, *GI Rights and Army Justice: The Draftee's Guide to Military Life and Law* 257-58 (1970).

⁴⁹² The company is normally the smallest unit commanded by an officer with the power to administer nonjudicial punishment. See *U.S.A.R.* 27-10 ¶ 3-2 (1968).

⁴⁹³ According to the "necessity" exception to the rule against merger of functions, an administrative agency may merge functions in one individual if no other person is available to share the functions and the necessity for having the case decided is greater than that for keeping the functions separate. See K. Davis, *Administrative Law Text* § 12.05 (3d ed. 1972).

⁴⁹⁴ See, e.g., S. Misc. Rep. No. 1911, 87th Cong., 2d Sess. 1, 2 (1962).

⁴⁹⁵ Of course, it may be important to regulate some aspects of cadet behavior, e.g., the speed at which a cadet drives. And because of the resources devoted to training him and the responsibilities he may later have, the Government may have a greater interest in regulating the cadet's behavior than in the case of other members of the public. See *Hagopian v. Knowlton*, 470 F.2d 201, 209-10 (2d Cir. 1972); text accompanying notes 29-94 *supra*. Such interest, however, is obviously not as great as that existing in the day-to-day operational units. See *Miller*, *supra* note 244, at 102-104. More importantly, most aspects of cadet behavior regulated by the academies are of relatively minor importance, e.g., arrangement of a cadet's room, see text accompanying notes 835-39 & 1088-89 *infra*.

losses than those assessed in other military situations,⁴⁹⁶ the need for separation of functions in the former is still more compelling.

An even more important distinction between academy conduct penalties and nonacademy nonjudicial punishment arises from the fact that the latter may be imposed only for acts constituting offenses under the Uniform Code of Military Justice,⁴⁹⁷ while cadets may receive conduct punishments for many acts not proscribed by the Uniform Code.⁴⁹⁸ This distinction is crucial, for the system of nonjudicial punishment codified in Article 15 of the UCMJ guarantees to the accused the right to trial by court-martial in lieu of accepting the nonjudicial punishment assessed.⁴⁹⁹ Cadets have no such right but are expected to accept demerits without great opposition in the "correctional and educational spirit" in which they are imposed.⁵⁰⁰ Furthermore, the "correctional and educational spirit" of the cadet conduct system makes the assessment of demerits far more routine a matter than is the imposition of nonjudicial punishment upon noncadets. These factors, combined with the vagueness, triviality and sheer quantity of offenses for which demerits may be awarded,⁵⁰¹ make it far more likely that a cadet will exceed his demerit quota and be separated from an academy than that an

enlisted man or officer will receive sufficient nonjudicial punishment to be involuntarily discharged from the Armed Forces. Perhaps in recognition of the greater danger posed by academy proceedings, the Coast Guard, Naval and Merchant Marine Academies have taken steps to avoid

⁴⁹⁶ See text accompanying notes 310-13 supra.

⁴⁹⁷ Manual for Courts-Martial, United States ¶ 128(b) (rev. ed. 1969).

⁴⁹⁸ See text accompanying note 246, supra.

⁴⁹⁹ 10 U.S.C. § 815(a) (1970); Manual for Courts-Martial, United States ¶ 132 (rev. ed. 1969).

⁵⁰⁰ As stated in *Hagopian v. Knowlton*, 346 F. Supp. 29, 30-31 (S.D.N.Y.), aff'd, 470 F.2d 201 (2d Cir. 1972):

The disciplinary system [at the Military Academy] is characterized as "correctional and educational in nature, rather than being legalistic and punitive." . . .

Relying on the foregoing expressions of policy, a cadet receiving a "Class III Delinquency" or an award of demerits for misconduct at the lowest level of culpability, should not be expected, at his peril, to make every such award of demerits a cause celebre to be argued or litigated to the fullest reach of due process. Rather, he should be expected to accept his demerits, and consequent punishment, in the correctional and educational spirit in which imposed. It is against the interests of the academy, public and the cadet to encourage him at great risk to protest and cavil over every adverse determination.

⁵⁰¹ See *Hagopian v. Knowlton*, 346 F. Supp. 29, 31 (S.D.N.Y.), aff'd, 470 F.2d 201 (2d Cir. 1972).

merger of the reporting and adjudicating functions for certain offenses.⁵⁰²

Unfortunately, the academies are not always so cognizant of the separation of functions problem. As is the case at the Military Academy, Air Force Academy company officers charge cadets with offenses, adjudicate the issues and, in the case of minor violations, are the sole reviewing authority for the judgment.⁵⁰³ The separation of functions requirement is also violated by the Air Force Academy's Professional Ethics Committee since the chairman of the committee both investigates alleged ethics offenses and serves as one of the five voting cadets who decide each case.⁵⁰⁴ At the Naval Academy, although requests for reconsideration of awards of penalties for

conduct offenses must be reviewed by higher authority,⁵⁰⁵ the Academy officer who awards, approves or reviews punishments is often the same officer who originally placed the cadet on report.⁵⁰⁶ At the Coast Guard Academy it is possible for company officers to award penalties for charges they themselves bring against cadets,⁵⁰⁷ and at the Merchant Marine Academy cadet adjudicating officers sometimes informally investigate conduct offenses prior to formally hearing the case.⁵⁰⁸ Findings of guilt for such offenses may result, as in Hagopian, in a cadet's separation from an academy.⁵⁰⁹ The failure of the academies to ensure a proper separation of functions, then, results, as did the Military Academy's treatment of Cadet Hagopian, in a violation of due process.

d. Confrontation and Cross-Examination of Witnesses--Both the sixth amendment and due process of law guarantee a crimi-

⁵⁰² *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; see U.S.M.M.A.M.R. 03106(l)(b) (1971). As the result of a recent policy change, under which cadet company officers never report cadets for offenses, the Hagopian situation would not arise at the Merchant Marine Academy. Interview with Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972.

⁵⁰³ See U.S.A.F.C.R. 35-6(18), (23) (1971); text accompanying notes 486-90 *supra*.

⁵⁰⁴ Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972. Since there are 80 cadet ethics representatives, *id.*, there is certainly no necessity for such concentration of functions.

⁵⁰⁵ See Com'd't Mid'n Inst. P1620.10G Enc. 3(8) (1971).

⁵⁰⁶ Interview with Legal Officer, U.S.N.A., July 24, 1972 (Battalion Officer may place a midshipman on report and decide the case); Letter from Former Midshipman, Class of 1973, U.S.N.A., Oct. 3, 1972.

⁵⁰⁷ ¹ See Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972. However, as a practical matter, company officers at the Coast Guard Academy avoid adjudicating cases involving charges brought by themselves. *Id.*

⁵⁰⁸ Interview with 1972 Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972.

⁵⁰⁹ See, e.g., Com'd't Mid'n Inst. P1620.10G Enc. 4(2)(e) (1970).

nal defendant a right to confront and to cross-examine witnesses offering testimony or other evidence to be used against him.⁵¹⁰ Due process of law also requires that these safeguards be afforded in a variety of administrative contexts.⁵¹¹ These rights are clearly fundamental⁵¹² and have been viewed as absolutely essential to a fair administrative hearing.⁵¹³ Thus, an administrative agency must normally provide an opportunity for confrontation and cross-examination, even in the absence of an express congressional mandate.⁵¹⁴

The relevant question here, however, is whether the Constitution dictates that these guarantees be observed in academy proceedings. Confrontation and cross-examination have been required in cases

⁵¹⁰ E.g., *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965). The sixth amendment states, in relevant part, that "[in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witnesses against him." The right to confront and cross-examine witnesses exists in military criminal trials. *United States v. Clay*, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951). Many authorities consider cross-examination to be an integral part of the right of confrontation. As noted by Mr. Justice Black in *Pointer v. Texas*, 380 U.S. 400, 404 (1965), "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused to confront the witnesses against him." Accord, *Black's Law Dictionary* 372 (rev. 4th ed.); 5 J. Wigmore, *Evidence* § 1395, at 123-24 (3rd ed. 1940).

⁵¹¹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). As stated in *Greene*,

[w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in the requirements of confrontation and cross-examination [This Court] has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

360 U.S. at 496-97. Thus, the rights to confrontation and cross-examination are part of "our long-accepted notions of fair procedures," *id.* at 506-07 (citations omitted), and are "the constitutional norm, and not the exception," *Crow v. California Dep't of Human Resources*, 325 F. Supp. 1314, 1318 (N.D. Cal. 1970).

⁵¹² *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963). As stated by President Dwight D. Eisenhower about the right to confrontation, "In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." Quoted in *Jay v. Boyd*, 351 U.S. 345, 373 (1956) (Frankfurter, J., dissenting).

⁵¹³ E.g., *Peters v. Hobby*, 349 U.S. 331, 350-51 (1955) (Douglas, J., concurring), see I K. Davis, *Administrative Law Treatise* § 7.05 (1958).

⁵¹⁴ E.g. *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (discharge from private employment based on administrative findings). When administrative discharge procedures have been specified by Congress, however, some courts have held that confrontation and cross-examination were excluded by implication and therefore need not be granted. E.g., *Harrison v. McNamara*, 228 F. Supp. 406 (D. Conn. 1964).

involving protection of some of the most crucial interests at stake in cadet adjudications: liberty,⁵¹⁵ reputation,⁵¹⁶ pursuit of a chosen profession⁵¹⁷ and attendance at an educational institution.⁵¹⁸ Since it is the latter two interests which are ultimately involved in an academy hearing, cases contesting military discharges or student expulsions provide the most useful guidance as to whether and to what extent these safeguards must be afforded in academy proceedings.⁵¹⁹

The majority of courts considering both types of issues has indicated that an accused should be permitted to confront witnesses.⁵²⁰ Although most of the military discharge cases that have considered the matter have also required that cross-examination be permitted,⁵²¹ the school and college expulsion cases in the area are divided.⁵²² Some have required cross-examination⁵²³ while others have employed a

⁵¹⁵ See, e.g., *Pointer v. Texas*, 380 U.S. 400 (1965).

⁵¹⁶ See, e.g., *Greene v. McElroy*, 360 U.S.474 (1959).

⁵¹⁷ See, e.g., *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963) (attorney denied admission to bar on basis of an unfavorable letter); *Kelly v. Herak*, 252 F. Supp. 289 (D. Mont. 1966) (discharge of state employee).

⁵¹⁸ See, e.g., *Williams v. Dade County School Bd.*, 441 F.2d 299 (5th Cir. 1971).

⁵¹⁹ It should be noted that there is no indication that a right to confront witnesses has ever been afforded Army personnel in nonjudicial punishment proceedings. Although confrontation and cross-examination of witnesses are not specifically required by article 15, there appears to be no valid reason for denying these rights. *Miller*, supra note 244, at 102-04. Indeed, failure to grant these safeguards, even in a tactical situation, may violate due process. See *id.* Apparently in recognition of these factors, the Navy has been routinely allowing confrontation and cross-examination in its article 15 proceedings. *Id.* at 103.

⁵²⁰ For a student case requiring confrontation of witnesses, see *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 652 (W.D. Mo. 1967), *affd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). For authority recognizing the desirability of a right to confront witnesses in a student disciplinary hearing, see, e.g., *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970). See generally *Buss*, supra note 5, at 594-97, 599. For authority indicating confrontation of witnesses is a due process prerequisite to discharge from the Armed Forces, see, e.g., *Bland v. Connally*, 293 F.2d 852 (D.C. Cir. 1961). Most military discharge cases denying a right to confrontation of witnesses appear not to have considered whether the right is guaranteed by due process of law but to have relied on reasoning that the sixth amendment applies only in criminal cases. See, e.g., *Courtney v. Secretary*, 267 F. Supp. 305 (C.D. Cal. 1967); *Beard v. Stahr*, 200 F. Supp. 766 (D.D.C. 1961). But see, e.g., *Grimm v. Brown*, 291 F. Supp. 101 I, 1014 (N.D. Cal. 1968) (requiring "disclosure of charges and adverse statements with the identification of the sources"); *Unglesby v. Zimney*, 250 F. Supp. 714 (N.D. Cal. 1965) (requiring confrontation of evidence rather than of witnesses).

⁵²¹ *Grimm v. Brown*, 291 F. Supp. 1011, 1014 (N.D. Cal. 1968); *Gamage v. Zuckert*, 265 F. Supp. 357, 358 (D.D.C. 1966). Some cases indicate that although there may be a right to cross-examination of witnesses, a plaintiff may waive it by failing to utilize the military procedures which do exist in the preparation of his defense. See, e.g., *Brown v. Gamage*, 377 F.2d 154, 159 (D.C. Cir.), *cert. denied*, 389 U.S. 858 (1967).

⁵²² *Buss*, supra note 5, at 598.

⁵²³ E.g., *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *all'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Tibbs v. Bd. of Educ.*,

balancing test in holding that this procedural safeguard need not be granted.⁵¹⁴ Decisions in the latter category, however, appear to have been

predicated upon factors not present in the academy situation. For example, some involved lesser penalties than expulsion and no serious loss of a student's liberty.⁵²⁵ Courts have also relied on the fact that the hearing in question was merely investigative in nature rather than adjudicative.⁵²⁶ Moreover, a few decisions have noted that cross-examination of witnesses might be impractical as well as detrimental to a college's educational atmosphere.⁵²⁷

Such holdings do not justify a denial of the rights of confrontation and cross-examination in academy adjudications. Academy conduct, honor and ethics hearings are definitely adjudicatory rather than investigative in nature⁵²⁸ and potentially involve a significant loss of liberty,⁵²⁹ expulsion from an academy⁵³⁰ and even discharge from the Armed Forces.⁵³¹ Nor is the analogy to the preservation of the "community" atmosphere of an educational hearing a valid reason for denying cross-examination of witnesses at academy adjudicatory hearings,⁵³² for they, like all military proceedings, are by their very nature adversarial.⁵³³ Furthermore, unlike many constitutional guarantees which place limits upon the government's ability to gather evidence, cross-examination furthers the pursuit of truth—primarily

114 N.J. Super. 287, 276 A.2d 165 (App. Div.) (per curiam), aff'd, 59 N.J. 506, 284 A.2d 179 (1971). Other student cases, although not requiring cross-examination, have recognized its desirability. See, e.g., *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970).

⁵²⁴ E.g., *Madera v. Board of Educ.*, 386 F.2d 778, 788 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir.), cert. denied, 368 U.S. 930 (1961). For discussion of limitations on the position of the above cited cases with regard to cross-examination, see generally Buss, *supra* note 5, at 594-97, 599.

⁵²⁵ See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778, 784-85 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968); Buss, *supra* note 5, at 599.

⁵²⁶ See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778, 788-89 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968); Buss, *supra* note 5, at 599.

⁵²⁷ E.g., *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir.), cert. denied, 368 U.S. 930

(1961):

This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.

⁵²⁸ See text accompanying notes 386 & 423 supra. See also text accompanying notes 42, & 424-25 supra.

⁵²⁹ See, e.g., text accompanying notes 148, 254-56, 301-02 & 316 supra.

⁵³⁰ See text accompanying notes 147, 188, 302 & 486 supra and 624 infra.

⁵³¹ See text accompanying note 303 supra.

⁵³² See text accompanying notes 430, 500 & 527 supra and 582 infra.

⁵³³ See text accompanying note 43 supra.

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by providing a check on the credibility of witnesses.⁵³⁴ In light of these factors, particularly the extremely high risk of loss at academy hearings, it seems evident that academy due process should be modeled after military discharge proceedings and the better-reasoned school cases, and that the right to cross-examine accordingly should be provided in cadet adjudications.

Furthermore, the practical problems which might be anticipated were cross-examination permitted do not require a different result. For example, any threat posed to military discipline by a cadet's cross-examination of a military superior⁵³⁵ could be alleviated by limiting the questioning strictly to relevant inquiries presented in a courteous, military manner,⁵³⁶ or by permitting only the cadet's advisor or representative to conduct the examination.⁵³⁷ Should academy officials fear a disturbance as a result of a public confrontation between a witness and the accused cadet, hearings could be held in private, restricting attendance to only those immediately involved and a reasonable number of observers.⁵³⁸ This has, in fact, been done

⁵³⁴ See, e.g., 5 J. Wigmore, Evidence §§ 1361-62 (3d ed. 1940); note 541-42 infra. Indeed, according to

many authorities, cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." E.g., 5 J. Wigmore, *Evidence* § 1367, at 29 (3d ed. 1940).

⁵³⁵ The Air Force Academy apparently views cross-examination of a military superior by a cadet subordinate as undermining the quality of the superior-subordinate relationship the academies try to foster. As stated in a Letter from the U.S. Air Force Academy Department of Law to the Commandant of Cadets, attach. 2, at 2, Aug. 1967:

[cadets] may not be represented by counsel or permitted to cross-examine witnesses [at Air Force Academy expulsion hearing boards for conduct deficiency]. The reason for this procedure is to prevent the possible compromising situating [sic] in which a cadet might cross-examine his superior.

The Merchant Marine Academy does not share this view, however, for it permits cadets to cross-examine superior officers at executive board hearings. Interview with Assistant Commandant of Cadets, U.S.M.M.A., Aug. 10, 1972. The potential adverse effects of cross-examination, moreover, are far less at an academy than in the day-to-day functioning of an operational military unit, and seem small in comparison with the severity of the penalties to which cadets may be subject. See Buss, *supra* note 5, at 596.

⁵³⁶ As Professor Buss has observed:

The choice need not be either no cross-examination or unrestrained cross-examination, even when the kinds of issues involved make cross-examination vital. Interrogation may be terminated when it becomes personally threatening to witnesses and strays from the controlling issues. Placing limits upon the scope and manner of cross-examination would be a peculiarly appropriate way of manifesting the flexibility of the fundamental fairness standard.

Buss, *supra* note 5, at 596. The Merchant Marine Academy apparently agrees. See note 535 *supra*.

⁵³⁷ Buss, *supra* note 5, at 596.

⁵³⁸ *Id.* Several commentators have noted that only rarely will a school's interest demand public hearing when the student demands a private one. See Heyman, *Some Thoughts on*

at some academies.⁵³⁹ Indeed, positive benefits may accrue from allowing confrontation and cross-examination, as Air Force Academy officials discovered when they first granted these rights at honor hearings in October 1965.⁵⁴⁰ For, as the Academy's former officer-in-charge of the honor committee observed, granting confrontation and cross-examination results in increased candor by accused cadets⁵⁴¹ and "greater objectivity" by all who

testify.⁵⁴²

Despite the weight of legal authority and the absence of significant practical problems, the academies deny cadets a right to confront and cross-examine opposing witnesses at many cadet hearings. Violations of these rights take several different forms. For example, at the Merchant Marine,⁵⁴³ Air Force⁵⁴⁴ Naval⁵⁴⁵ and Military⁵⁴⁶

University Disciplinary Proceedings, 54 Calif. L. Rev. 75, 79 (1966).

⁵³⁹ Four academies' honor committees, although permitting non-honor-committee members to observe honor hearings, restrict the number of observers to only a few. Interview with 1972-73 Honor Comm. Chairman, U.S.A. F.A., Aug. 22, 1972; Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972; Interview with 1971-72 Honor Comm. Vice-Chairman, U.S.M.A., Nov. 26, 1972; Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972. At the Military Academy, however, hundreds of cadets may observe and participate in honor hearings. See text accompanying note 554 *infra*. Permitting cadets to observe honor proceedings gives the corps a feeling of participating with the honor committee in the administration of "their" honor code and gives them valuable training in adjudicating military offenses. Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972. Although it might, for these reasons, be good policy to require every cadet to attend at least one adjudicatory hearing, only a few cadets need attend a hearing at one time. Thus, in view of the potential pressures both during and after a hearing if large numbers attend, the Military Academy might well adopt the restricted attendance policy of the other academies.

⁵⁴⁰ Beck, *supra* note 77, at 5. Calkins, *supra* note 71, at 22. The reason the Academy denied cadets these rights prior to October 1965 was fear that an accused might conform his testimony to that of the witnesses, thereby hampering ascertainment of the truth. See Charles, *supra* note 71, at 235. But see text accompanying notes 534 *supra* and 541-42 *infra*.

⁵⁴¹ Indeed, the very first time confrontation was allowed, the accused cadet revoked his prior denials and admitted guilt when confronted by the testimony of his peers. Beck, *supra* note 77, at 5. Other authorities have recognized that students charged with offenses are usually willing to admit a violation and accept punishment. See, e.g., Heyman, *supra* note 538, at 76.

⁵⁴² Beck, *supra* note 77, at 5. Similarly, one military authority has observed about nonjudicial punishment proceedings that "[cross examination of the witness by the offender might uncover testimony favorable to the offender that was not elicited during examination of the witness . . . and it might even show that the witness was not telling the truth." Miller, *supra* note 244, at 103-04.

⁵⁴³ Interview with 1972 Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972 (conduct hearing officer often interviews witnesses outside hearing).

⁵⁴⁴ Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., June 8, 1972 (investigation report given to hearing panel outside presence of the accused); Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972 (same). At the Air Force Academy voting board members are always briefed by a cadet investigator "in the presence of the accused," as required by Honor Oper. Inst., U.S.A.F.A. 2, at 1, (1970). Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., June 8, 1972. The same briefing, however, ha=y

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Academies, voting panel members interview witnesses outside of the hearing or listen to an investigator's report at the hearing prior to the arrival of the accused. Moreover, the Coast Guard,⁵⁴⁷ Military,⁵⁴⁸ Naval⁵⁴⁹ and Merchant Marine⁵⁵⁰ Academies sometimes permit an alleged offender to enter the hearing room only after all other witnesses have testified and all other evidence has been presented.⁵⁵¹ In these cases the accused cadet may not be informed of what has been said or done prior to this arrival or even be told of the identity of the witnesses against him.⁵⁵² The obvious adverse effects of such practices are compounded at Military Academy honor hearings by the fact that other cadets not involved in the case may attend the hearing and question the accused.⁵⁵³ Thus, on occasion, as many as 200 cadet observers have questioned an alleged offender,⁵⁵⁴ who, not having

often already been given to the honor hearing panel prior to the briefing given pursuant to the regulation. *Id.*

⁵⁴⁵ Interview with Class of 1971 Honor Comm. Secretary, U.S.N.A., Feb. 16, 1973 (investigation report given to main hearing panel outside presence of accused). This practice directly violates U.S.N.A. Inst. 1610.3 Enc. 1(6)(b) (1972), which requires that an accused be present at all proceedings before the main hearing board, except during closed discussions and balloting.

⁵⁴⁶ Letter from Former Assistant Staff Judge Advocate, U.S.M.A., Feb. 28, 1973 (witnesses interviewed outside hearing by hearing board members).

⁵⁴⁷ Interview with Commandant of Cadets, U.S.C.G.A., Aug. 9, 1972; Interview with 1972-73 Regimental Commander, U.S.C.G.A., Aug. 9, 1972 (Cadet Standards of Conduct Board).

⁵⁴⁸ See Cadet Honor Comm. Proc., U.S.M.A. II(B)(6) (1970) (honor hearings); Interview with Former Assistant Judge Advocate, U.S.M.A., Feb. 1, 1973 (same); Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972 (same).

⁵⁴⁹ Unlike the other academies, the Naval Academy's procedures provide for two honor hearings; one before a "class investigating board," followed by another before a "brigade honor board." See U.S.N.A. Inst. 1610.3 Enc. 1(5), (6) (1972). An accused is not permitted to be present at the former while the preliminary investigation report is made or while witnesses and other evidence are presented against him. See *id.* at 5(c), (d), (e) (1972).

⁵⁵⁰ Although a Merchant Marine cadet is occasionally permitted to enter before the arrival of witnesses, he is routinely denied the right to confrontation. Interview with 1972 Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972.

⁵⁵¹ This practice was apparently followed at the Air Force Academy until October 1965. See text accompanying notes 540 *supra*. Today, although alleged Air Force Academy honor code violators may confront witnesses, they may not cross-examine them, except by asking the Chairman of an Honor Board to ask the question for them. Honor. Oper. Inst., U.S.A.F.A. 2, attachment 1 (1970).

⁵⁵² Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with Class of 1970 Honor Comm. Secretary, U.S.N.A., Feb. 19, 1973. At Coast Guard Academy honor and ethics hearings, however, an accused cadet may be given a summary of the witnesses' testimony at the discretion of the hearing panel. Interview with 1971-72 Regimental Commander, U.S.C.G.A., Aug. 9, 1972.

⁵⁵³ Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972.

⁵⁵⁴ *Id.*

heard the testimony upon which their questions were based, was no doubt unable to respond to them adequately.

e. Right to Counsel--The sixth amendment provides that "[in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"⁵⁵⁵ a provision which the Supreme Court has held applicable to "any offense" for which a "person may be imprisoned . . . whether classified as petty, misdemeanor, or felony."⁵⁵⁶ The Court has viewed this right as a "fundamental" one and as binding on the states through the due process clause of the fourteenth amendment.⁵⁵⁷ Due process has similarly been employed to extend the right to assistance of counsel to numerous types of administrative adjudications,⁵⁵⁸ even when the hearings involved were not adversarial in nature.⁵⁵⁹ And the courts have also held that

the right to counsel cannot be denied in an administrative hearing without express congressional approval.⁵⁶⁰ Recent cases have further expanded the right by ruling not only that attorneys must be provided for indigents who are threatened with substantial loss through criminal⁵⁶¹ or administrative actions,⁵⁶² but also that the right to counsel applies during custodial interrogation and other

⁵⁵⁵ There is a split of authority on whether the sixth amendment's right to counsel applies in military criminal cases. Compare *United States v. Culp*, 14 U.S.C.M.A. 199, 215-16, 33 C.M.R. 411, 427-28 (1963) (sixth amendment not applicable), with *id.* at 216-18, 33 C.M.R. at 428-30 (Quinn, C. J. concurring) (sixth amendment applicable). The fifth amendment's right against self-incrimination, however, guarantees a right to counsel during military criminal interrogations. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). For discussion of the right to counsel in military criminal and noncriminal cases, see generally Miller, *supra* note 244, at 100-02; Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 *Mil. L. Rev.* 1, 18-21 (1971).

⁵⁵⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). In light of *Argersinger's* deemphasis of the severity of the penalties necessary to invoke the sixth amendment right to counsel, it could be argued that this constitutional provision is applicable to academy adjudications. However, for the purposes of the following discussion, primary reliance will be placed on the stronger grounds of due process.

⁵⁵⁷ E.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁵⁸ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (welfare revocation hearing); *Kent v. U.S.*, 383 U.S. 541, 561-62 (1966) (informal juvenile hearings).

⁵⁵⁹ See, e.g., *Mempa v. Rhay*, 389 U.S. 128 (1967) (deferred sentencing hearing held after revocation of probation); *In re Gault*, 387 U.S. 1 (1967) (juvenile hearings). But see *Menechino v. Oswald*, 430 F.2d 403 (2d Cir.), cert. denied, 400 U.S. 1023 (1970) (parole hearing). Some authorities, however, indicate that nonadversary, investigative hearings may not require a right to counsel. See, e.g., *In re Groban*, 352 U.S. 330 (1957).

⁵⁶⁰ See, e.g., *United States v. Weller*, 309 F. Supp. 50, 51 (N.D. Cal. 1969), appeal dismissed for lack of jurisdiction, 401 U.S. 254 (1971).

⁵⁶¹ See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵⁶² *Clutchette v. Proconier*, 328 F. Supp. 767, 778 (N.D. Cal. 1971).

"critical stages" of the criminal process.⁵⁶³

A number of factors combine to indicate that the right to counsel routinely afforded in criminal and administrative hearings must be granted in academy adjudications as well. One of these is the body of case law applicable to student adjudications in general, and academy hearings in particular. In many instances of major disciplinary proceedings at educational institutions, courts have concluded that students are entitled to the advice and assistance of an attorney.⁵⁶⁴ Furthermore, at least two federal courts have indicated that Military Academy cadets are, at a minimum, entitled to the advice and assistance of counsel prior to an expulsion proceeding.⁵⁶⁵ In one of these cases the court specifically castigated the efforts of Military Academy officials to prevent a military attorney from honoring the request of a cadet faced with expulsion for advice and assistance in drafting his statement of defense.⁵⁶⁶

There are considerations beyond the teachings of the case law however.⁵⁶⁷ One is the nature of the cadet interests involved in acad-

⁵⁶³ E.g., *United States v. Wade*, 388 U.S. 218 (1967) (lineups); *Miranda v. Arizona*, 384 U.S. 436, 473-75 (1966) (pretrial situations).

⁵⁶⁴ E.g., *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 731 (M.D. Ala. 1968). But see, e.g., *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (student not entitled to a lawyer so long as, *inter alia*, "the government does not proceed through counsel" and "other aspects of the hearing taken as a whole are fair"); *Barker v. Hardway*, 283 F. Supp. 228, 237-38 (S.D.W. Va.), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969); *Madera v. Board of Education of NYC*, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968). The factors relied on by *Wasson*, *Madera* and *Barker* clearly do not exist at the academies. See *Buss*, *supra* note 5, at 606-15; text accompanying notes 421-25 *supra*.

⁵⁶⁵ See *Brown v. Knowlton*, Civil No. 72-3184, at 7 (S.D.N.Y. Aug. 3, 1972); *Hagopian v. Knowlton*, 346 F. Supp. 29, 33 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972). While indicating that the informal nature of an academy adjudicative proceeding militates against an inflexible constitutional right to have counsel present at a hearing, the Second Circuit has affirmed the proposition that access to the advice and assistance of an attorney must be accorded a cadet in the preparation of his defense. 470 F.2d at 211-12.

⁵⁶⁶ *Brown v. Knowlton*, Civil No. 72-3184, at 7 (S.D.N.Y. Aug. 3, 1972): "It seems clear . . . that such

fierce obstruction as is now shown to block advice and assistance violates elementary principles of fairness." Similarly, in *Hagopian v. Knowlton*, 346 F. Supp. 29, 33 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972), Judge Briant criticized Military Academy officials for having "discouraged" Academy attorneys "from counseling cadets who were called to appear before Conduct boards." *Accord*, *id.* at 34-35 (supplementary opinion). See Letter from Father of 1971 Air Force Academy Graduate to Deputy Asst. Sec. of Personnel Policy, Office of the Asst. Sec. of Manpower Reserve Affairs, June 4, 1971 (Academy attorney who wrote a legal brief in behalf of an expelled cadet was criticized by his superiors for "making it too strong").

⁵⁶⁷ For example, Congress apparently had no intention to afford military personnel a right to the assistance of counsel at any stage of nonjudicial punishment proceedings, see Hearings on H.R. 7656 Before Subcomm. No. I of the House Comm. on Armed Services, 86th Cong.,

emy adjudications. Such fundamental concerns as liberty,⁵⁶⁸ reputation,⁵⁶⁹ freedom from coercion⁵⁷⁰ and attendance at an educational institution⁵⁷¹ are endangered—all interests which have prompted granting the right to counsel in other contexts. Moreover, academy penalties can often be harsher than these imposed for criminal offenses⁵⁷² and may take the form of imprisonment,⁵⁷³ a class of punishment which the Supreme Court has held to require the right to counsel.⁵⁷⁴ Furthermore, failure to provide counsel for cadets may vitiate the right to a hearing,⁵⁷⁵ in that without an attorney's assistance in delineating issues, presenting factual contentions and conducting effective cross-examination,⁵⁷⁶ even intelligent, well-educated individuals may not be able to represent their interests adequately before a fact-finding body.⁵⁷⁷ Finally, considering the adversarial nature of academy adjudicatory proceedings⁵⁷⁸ and the severity of expulsion and the other penalties cadets may incur,⁵⁷⁹ it is not unreasonable to assume that legal counsel would prove invaluable in assuring cadets that their constitutional rights would be protected.⁵⁸⁰

perceived necessity of giving commanders of tactical military units additional ability to enforce discipline, see Hearings on H.R. 7656, *supra* at 4961; Miller, *supra* at 101. This necessity is not present at the academies, however. See text accompanying notes 491-96 *supra*. And in practice assistance of counsel usually has been available to Army officers, Miller, *supra* at 101, and is now in fact available to all military personnel facing nonjudicial punishment, see Memorandum for the Secretaries of the Military Departments from Secretary of Defense Melvin R. Laird, Jan. II, 1973.

⁵⁶⁸ See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel at probation revocation hearings); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

⁵⁶⁹ K. Davis, *Administrative Law Treatise* § 8.10, at 382 (Supp. 1970).

⁵⁷⁰ See *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

⁵⁷¹ See, e.g., *Keene v. Rodgers*, 316 F. Supp. 217 (D. Me. 1970).

⁵⁷² Cf. Miller, *supra* note 244, at 102 (counsel necessary at certain article 15 nonjudicial punishment proceedings because loss may be as serious as that resulting from court-martial). See text accompanying note 297 *supra*.

⁵⁷³ See note 299 *supra*.

⁵⁷⁴ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); text accompanying note 556 *supra*.

⁵⁷⁵ See *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970); *Miranda v. Arizona*, 384 U.S. 436, 468-9 (1966). See also *Johnson v. New Jersey*, 384 U.S. 719, 727, 728, 729 (1966).

⁵⁷⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970).

⁵⁷⁷ See, e.g., *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

⁵⁷⁸ See text accompanying note 431 *supra*.

⁵⁷⁹ See text accompanying notes 146-48, 188, 224, 299, 301-17 & 402 *supra*.

⁵⁸⁰ See *Brown v. Knowlton*, Civil No. 72-3184, at 3-7 (S.D.N.Y. Aug. 3, 1972); *Hagopian v. Knowlton*, 346 F. Supp. 29, 32-33 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972). Counsel could perform invaluable functions. For example, prior to a hearing counsel could advise the cadet of his rights and suggest how he should proceed. See *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 651 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); text accompanying note 576 *supra*.

Not only do the considerations noted above compel the conclusion that cadets should be afforded counsel, but the countervailing interests of the academies are relatively slight. Although academy officials might claim that the use of counsel will pose an unmanageable administrative burden on academy resources,⁵⁸¹ that destruction of the military discipline of the academies and of the "family spirit" of the university setting will result,⁵⁸²

and that attorneys would begin demanding the "full panoply of procedural rights,"⁵⁸³ such contentions are easily answered.

First, there is substantial evidence that affording cadets the assistance of counsel will not pose undue administrative burdens.⁵⁸⁴ Sec-

⁵⁸¹ The Second Circuit has recognized, for example, that for infractions carrying relatively slight penalties, "[i]t would be an undue burden to impose on the routine administration of the [Military] Academy's disciplinary system the requirements of a hearing . . . before an adjudication of demerits for [Class III minor offenses]." *Hagopian v. Knowlton*, 470 F.2d 201, 210 (2d Cir. 1972).

American military officials have opposed many reforms, including affording the assistance of counsel in general courts-martial, because of fear that defendants would "beat" the charges with legal technicalities and thereby impair military discipline. But the military quickly and efficiently adapted to a policy of affording assistance of counsel in general courts-martial, and there is no evidence that discipline or efficiency suffered. Sherman, *The Civilianization of Military Law*, 22 U. Maine L. Rev. 3, 91-92 (1970).

⁵⁸² See Hearings on H.R. 7656, *supra* note 567, at 4961; Miller, *supra* note 244, at 101. The Second Circuit seems to have been recognizing the desirability of retaining a "family spirit" at the academies when it referred to "[t]he importance of informality in the [academy expulsion] proceedings." *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972).

⁵⁸³ This fear was expressed by the Second Circuit when denying a right to counsel at a parole hearing. *Menechino v. Oswald*, 430 F.2d 403, 412 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).

⁵⁸⁴ As the Second Circuit observed:

[B]ecause the meetings of the [Military Academy's] Academic Board to consider expulsion of deficient cadets are infrequent [approximately eight per year], the additional steps required here should have a minimal impact on the functioning of the Academy and virtually none on the operation of the Academy's disciplinary system.

Hagopian v. Knowlton, 470 F.2d 201, 212 (2d Cir. 1972).

In light of the considerable resources expended to provide cadets with the finest academic, athletic and military training, it hardly seems an "undue" administrative burden to provide legal counsel as part of academy adjudications. Cf. 115 Cong. Rec. 30, 159 (1969) (remarks of Rear Admiral Chapman quoting President Lyndon B. Johnson's remarks on signing the Military Justice Act of 1968 at creation of the United States Navy Court of Military Review).

Indeed, it is difficult to understand how the Air Force and the Military Academies could be unduly burdened by providing assistance of counsel in academy adjudications. For, while there is only one attorney in the United States for every 582 citizens, see *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 (1972); *Statistical Abstract of the United States* 5, 153 (1971), these academies have, with at least 15 and 20

permanently assigned lawyers, respectively, an average of one lawyer for every 243 cadets, see U.S. Air Force Academy Catalog 50, 141 (1972); U.S. Military Academy Catalog 65, 106 (1971).

only, it is clear that academy adjudicatory hearings are, by their very nature, formal and adversarial; the atmosphere is more punitive than familial.⁵⁸⁵ Finally, since cadets today are quite sensitive to adjudicatory proceedings which they perceive as unfair,⁵⁸⁶ it seems unlikely that the grant of the right to counsel could be any more disruptive to academy discipline than would its denial.⁵⁸⁷

Despite these compelling reasons, cadets are often denied counsel in adjudicatory proceedings. It is beyond the scope of this discussion to outline in detail the full extent to which cadets are permitted assistance of counsel at each type of hearing at every academy.⁵⁸⁸ However, certain general observations can be made. Each academy other than West Point⁵⁸⁹ and Annapolis⁵⁹⁰ appears to permit military legal counsel to advise and represent cadets in most types of expulsion proceedings.⁵⁹¹ Only the Coast Guard⁵⁹² and the Merchant Marine Academies,⁵⁹³ however, permit a legal or nonlegal counsel to represent cadets and, at the Merchant Marine Academy,⁵⁹⁴ to cross-examine witnesses, at Class I conduct hearings. Apparently, representation by counsel is not allowed at any academy for any other nonexpulsion conduct adjudications or for ethics hearings.⁵⁹⁵ At the

⁵⁸⁵ See text accompanying notes 426-31 supra.

⁵⁸⁶ See text accompanying notes 989-93 & 995-96 infra.

⁵⁸⁷ But see *Hagopian v. Knowlton*, 346 F. Supp. 29, 33 (S.D.N.Y.), aff'd, 470 F.2d 201 (2d Cir. 1972) (civilian counsel might be "counter-productive").

⁵⁸⁸ A full analysis of the right to counsel at the academies would require outlining whether cadets are permitted or required (and so advised) to receive the advice or assistance of, or be represented by, another cadet, a nonlegal officer, a military lawyer or a civilian lawyer before each of the numerous types of

adjudicatory boards at each academy.

⁵⁸⁹ At the Military Academy, an attorney may not assist or represent a cadet for "aptitude" expulsion proceedings because Military Academy authorities do not consider such a board "legalistic," but may, however, do so at a "habits and traits" expulsion hearing. See *Brown v. Knowlton*, Civil No. 72-3184, at 3-7 (S.D.N.Y. Aug. 3, 1972). See also *Hagopian v. Knowlton*, 346 F. Supp. 29, 33 (S.D.N.Y.), and, 470 F.2d 201 (2d Cir. 1972).

⁵⁹⁰ See Letter from Staff Judge Advocate, U.S.N.A., Mar. 8, 1973 (midshipmen may consult but may not be represented by counsel).

⁵⁹¹ Interview with Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972; Interview with Staff Judge Advocate, U.S.A.F.A., Sept. I, 1971; Letter from Legal Officer, U.S.C.G.A., Nov. 30, 1972.

⁵⁹² See Letter from Legal Officer, U.S.C.G.A., Nov. 30, 1972; text accompanying note 162 supra.

⁵⁹³ Interview with Assistant Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972; text accompanying note 162 supra. In practice, since there are no attorneys at the Merchant Marine Academy, it member of the Academy's faculty or staff represents an accused. Interview with Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972.

⁵⁹⁴ Interview with Commandant of Midshipmen, U.S.M.M.A., Aug. 10, 1972.

⁵⁹⁵ E.g., Letter from Legal Officer, U.S.N.A., Mar. 23, 1973; see U.S.N.A. Inst. 1610.3 Enc. I(3)(b), (I) (1972).

Military, Naval and Merchant Marine Academies, an alleged honor code violator may be permitted⁵⁹⁶ or assigned⁵⁹⁷ another cadet or officer to advise him. The Merchant Marine Academy permits another cadet to argue and cross-examine witnesses on behalf of an accused.⁵⁹⁸ The other academies, however, do not permit cadets to obtain legal or nonlegal assistance for honor hearings. Moreover, no legal or nonlegal assistance was provided during the interrogation and hearing stages of the academies' four major cheating incidents.⁵⁹⁹

4. Appeals

Although no general constitutional right to appeal appears to exist in administrative adjudications,⁶⁰⁰ a recent federal district court decision

suggests that students may by right appeal the decisions of educational disciplinary boards.⁶⁰¹ Other federal courts have indicated that a right to an internal appeal of academy decisions may also exist.⁶⁰² Whatever the requirements of due process, academy regula-

⁵⁹⁶ See Cadet Honor Comm. Proc., U.S.M.A. **I(B)** (5) (1971); Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972; text accompanying note 197 supra.

⁵⁹⁷ Midshipmen may choose an advisor by name. An advisor will be appointed, however, if the midshipman does not choose an advisor or state that he does not wish an advisor appointed. See U.S.N.A. Inst. 1610.3 Enc. 1(3) (f)(1972).

⁵⁹⁸ Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972.

⁵⁹⁹ See, e.g., Interview with 1971-72 Honor Committee Chairman, U.S.A.F.A., June 8, 1972 (U.S.A.F.A. 1972 honor scandal); N.Y. Times, Aug. 8, 1951, at 12, col. 7 (U.S.M.A. honor scandal).

⁶⁰⁰ *ICC v. City of Jersey City*, 322 U.S. 503, 514 (1944); *Reetz v. Michigan*, 188 U.S. 505, 508 (1903). Whether a "rehearing," which "resembles an appeal to another administrative tribunal," *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 281 (1924), will be given is, then, left to agency discretion, although it is clear that such discretion can be abused. See *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946); *Atlantic Coast Line R.R. v. United States*, 209 F. Supp. 157, 160 (S.D. Fla. 1962).

⁶⁰¹ See *Esteban v. Central Mo. State College*, 277 F. Supp. 649, 650-51 (W.D. Mo. 1967), *af'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). The right to appeal is not uniformly granted in the educational context, however. The University of Virginia's student honor committee, for example, expels students with no appeal to a faculty or administrative body on the rather incredible grounds that "the Honor Committee [is], an appeal . . . from the original decision of the accusers" that the accused has violated the honor code. Guidelines to Counselors in Honor System Orientation, University of Virginia Honor Committee⁴ (1971). The Assistant Attorney General of the State of Virginia justifies this failure to provide an appeal on the grounds that an appeal is not constitutionally required and that an accused "may always seek to vindicate his rights in a court of law." Letter from Assistant Attorney General of the Commonwealth of Virginia to President, Student Body, Medical College of Virginia, Feb. 24, 1971.

⁶⁰² Cadet Joachim Hagopian was ordered reinstated to the Military Academy because his expulsion proceedings denied him due process of law as a result of the cumulative effect of a

tions provide for appellate procedures, thereby giving cadets a right to appeal adverse adjudicatory decisions pursuant to academy regulations.⁶⁰³ Once

having provided such a right, the academies are bound to apply it in such a way as to afford due process and avoid invidious discrimination ⁶⁰⁴

Although some academy officials assert that their appellate procedures can compensate for previous denials of due process,⁶⁰⁵ the appellate procedures themselves often operate in a manner which violates due process. Some of these procedures have been identified in earlier sections as involving specific due process problems. For example, the Air Force, Naval and Military Academies' practice of allowing review of convictions for minor conduct offenses by the officer who initially charged and evaluated the alleged offense may well contravene the due process requirement that these functions be kept separate.⁶⁰⁶ Equally troublesome are the problems raised by the bias often present in the review of Air Force and Military Academy honor convictions by officer appeal boards⁶⁰⁷ composed almost entirely of academy graduates.⁶⁰⁸

Still more serious, however, is the practice of exerting pressure on cadets convicted of honor violations not to exercise their right to

number of procedural defects, one of which was the inadequacy of the procedures for appealing his conduct offenses. *Hagopian v. Knowlton*, 346 F. Supp. 29, 31, 32 (S.D.N.Y.), *ar'd*, 470 F.2d 201 (2d Cir. 1972). For a description of appellate procedures for the academies honor, conduct and ethics systems, see text accompanying notes 166, 189 & 233 *supra*.

⁶⁰³ Even if an academy may not be required by the Constitution to grant a cadet a right to appeal, procedures established by academy regulation attain the status of a "right" and must be substantially complied with by the academy promulgating the regulation. See *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969).

⁶⁰⁴ Cf. *Douglas v. California*, 372 U.S. 353, 355-57 (1963); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

⁶⁰⁵ E.g., Interview with Honor Comm. Legal Advisor, U.S.A.F.A., Sept. 2, 1971; see text accompanying note 383 *supra*.

⁶⁰⁶ See text accompanying notes 487-90 & 503-06 *supra*.

⁶⁰⁷ West Point maintains that because the function of an officer board which hears honor cases after a Cadet Honor Board is to investigate *de novo* the Cadet Honor Board's "allegation" of a violation of the

Cadet Honor Code, such a board of officers is not an "appeal" board. Letter from Information Officer, U.S.M.A., April 30, 1973. However, because the function of a Cadet Honor Board is to adjudicate whether or not a cadet is guilty of an honor code violation, see text accompanying notes 386 & 482 *supra*, and because a cadet convicted by a Cadet Honor Board of an honor offense is considered automatically for involuntary separation from the Academy unless he "voluntarily" resigns, the officer board's hearing is, in fact, an "appeal" from a Cadet Honor Board's decision. See, e.g., [Middletown, N.Y.] Times Herald Record, May I, 1973, at 10, col. 2; Letter from 1971-72 Honor Representative, U.S.M.A., Dec. 15, 1971; cf. Clelland, *supra* note 69, at 29 (U.S.A.F.A. officer board described as an "appeal"); White, *supra* note 309, at 71 (U.S.A.F.A. officer boards conduct a "review").

⁶⁰⁸ See text accompanying notes 473-79 *supra*.

appeal at all, but rather to "voluntarily"⁶⁰⁹—and "quietly"⁶¹⁰—resign. The types of pressures involved range from inducements inherent in the appellate system itself, to direct and personal coercion. At the Air Force Academy, for example, a cadet convicted of an honor violation is advised by a military legal officer that if he exercises his right to appeal his conviction rather than resign as requested, the Superintendent may decide to court-martial him.⁶¹¹ While there are certain procedural advantages to a court-martial which might better enable a convicted honor code violator to obtain an acquittal, the court-martial process subjects him to the risk of criminal conviction and confinement in a military prison.⁶¹² The impact of this pressure on a cadet is obvious: he will probably choose not to appeal.⁶¹³

Courts have held such coercive practices unconstitutional since due process will not permit an individual to be coerced into waiving his right to appeal⁶¹⁴ through threat of greater punishment.⁶¹⁵ This principle has been held specifically applicable in military administrative proceedings where the "stark choice" facing the accused was to

⁶⁰⁹ Letter from Chief, Congressional Inquiry Division, Office of Legislative Liaison, Dept. of the Air Force, to Sen. Charles H. Percy, June 9, 1972; Transcript of Press

Conference by Lt. Gen. A.P. Clark, Superintendent, U.S.A.F.A., at the U.S. Air Force Academy, Jan. 20, 1972, at 9A [hereinafter U.S.A. F.A. Press Conference].

⁶¹⁰ Taylor, *supra* note 274, at 7.

⁶¹¹ See U.S.A.F.C.W.M. 30-I(17)(d)(3) (1966); U.S.A.F.R. 53-3, attach. 2, 3 (1971); Letter from CWH to Former Air Force Academy Honor Representative, U.S.A.F.A., Jan. 21, 1972; Interview with Executive for Honor and Ethics, U.S.A. F.A., Sept. 2, 1971.

⁶¹² Thus, a cadet threatened with court-martial if he appeals may readily envision imprisonment in Fort Leavenworth—a certain deterrent to exercising his right to appeal. If a cadet is convicted of an offense by a court-martial, he may receive an indefinite amount of punishment, including dishonorable discharge and confinement at hard labor. See Manual For Courts-Martial, United States ¶ 127 (rev. ed. 1969).

⁶¹³ In fact, a negligible percentage of cadets do appeal. See text accompanying note 623 *infra*.

⁶¹⁴ See text accompanying notes 603-04 *supra*. Even if a procedure is not required by a constitutional provision or by a statute, it becomes a "right" when created by an administrative regulation which cannot be taken away in violation of the regulation. E.g., *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969).

⁶¹⁵ In *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966), the court commented on a trial judge's decision to give a defendant the choice between the risk of an 18-month prison sentence or, if he decided not to appeal, the certainty of probation:

The court was without right to bargain thus with the defendant, or to put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered. . . . [I]t is unfair to use . . . power . . . to place a defendant in the dilemma of making an unfree choice. . . . The vice is that . . . he is in an unequal position.

This principle was echoed by the Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 724-25 (1969), in which the Court stated that in exercising a right to appeal, "due process" requires that a defendant be free of apprehension of "retaliatory motivation on the part of the sentencing judge."

accept the stigma of an involuntary discharge or face court-martial.⁶¹⁶ Yet, the choice presented to cadets who have wished to appeal an honor conviction at the Military and Air Force Academies, especially in cases of mass cheating incidents, has been similarly "stark," for they have been threatened with court-martial, imprisonment and other penalties if they sought appellate review.⁶¹⁷

Other coercive elements routinely influence an honor violator's decision whether to appeal a board's decision. Many are told that if they forgo an appeal and resign, no notation of the honor violation will appear on their files; but if they appeal unsuccessfully, the fact that they were separated from the academy due to an honor violation will be noted on their official records.⁶¹⁸ Some cadets undoubtedly choose not to appeal because they know it is extremely unlikely that an officer appeal board would reverse their conviction.⁶¹⁹ Even if a cadet's honor conviction is reversed, he knows he is likely to be ostracized and, at the Military Academy, silenced.⁶²⁰ Since the isolation process begins even during the appeal,⁶²¹ the virtually automatic ostracism that deciding to appeal evokes deters some cadets from exercising the right at all.⁶²²

Not surprisingly, in light of the facts marshalled above, few

⁶¹⁶ *Middleton v. United States*, 170 Ct. Cl. 36, 41 (1965). Due process of law was violated in *Middleton* because a serviceman "was denied . . . fair treatment by being faced with [the] harsh and disagreeable option" of court-martial before it had been actually decided that the plaintiff would be court-martialed if he did not resign. 170 Ct. Cl. at 41. Likewise, cadet honor code violators are threatened with court-martial before it is actually determined that if they do not resign they will be court-martialed. See text accompanying note 611 supra.

⁶¹⁷ See, e.g., Annual Report of the Superintendent, U.S. Air Force Academy 7 (1965) ("resigned of own free will" rather than face court-martial or officer board for a military crime). *Look*, Jan. 24, 1967, at 23, 25 (cadets threatened with court-martial, dishonorable discharges and three years of imprisonment); *Newsweek*, Aug. 13, 1951, at 78 (cadets charge they *were* threatened with loss of citizenship and prison terms at Fort Leavenworth).

⁶¹⁸ See Letter from Former Assistant Staff Judge Advocate, U.S.M.A., Feb. 28, 1973; Interview with 1972-73 Honor Comm. Chairman, U.S.M.M.A., Aug. 10, 1972. See also Hearings on Service Academies, supra note 18, at 10,432 (U.S.N.A. official record will show conduct rather than honor offense if cadet resigns). Merchant Marine Academy cadets are told that their permanent records reflecting that they left the Academy for violating the honor code will result in their never becoming a commissioned officer and in curtailment of their future employment opportunities. The purpose of this advice is "to cut down frivolous appeals." Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972.

⁶¹⁹ See text accompanying notes 448-79 supra.

⁶²⁰ See text accompanying notes 213-20 & 313-18 supra and 852-940 infra.

⁶²¹ See text accompanying note 316 supra.

⁶²² See, e.g., Letter from Cadet Honor Representative Separated from Air Force Academy in January, 1972 Honor Scandal to Senator Charles H. Percy, undated ("If I had asked for a hoard . . . I would have had to wait for three weeks. I was not guaranteed that those three weeks would not be spent in solitary confinement as I had spent the past day and a half.").

Military and Air Force Academy cadets appeal honor convictions to an officer appeal board.⁶²³ As one West Point graduate has aptly stated, in actuality, being found guilty by the Cadet Honor Committee is the virtual equivalent of expulsion."⁶²⁴ This denial of the procedural safeguard of an appeal can only compound the other denials of due process which occur in Air Force and Military Academy honor proceedings.

5. The Single Expulsion Penalty

The Supreme Court has held that the remedies which an administrative agency employs in preventing unlawful practices must be reasonable.⁶²⁵ This principle raises another problem with the honor systems, since at the Military and Air Force Academies, expulsion⁶²⁶ is the sole penalty for having violated the cadet honor code, with no significance attached to the gravity of the offense.⁶²⁷ Except, perhaps,

⁶²³ C3 Of 150 cadets found guilty of violating the Military Academy's honor code from July 1, 1967, until January 22, 1972, for example, only nine appealed to an officer board. Letter from Information Officer, Enc. I, U.S.M.A., March 24, 1972. Of 466 cadets found guilty of violating the Air Force Academy's honor code from July 1, 1959, to December 7, 1971, only nine cadets appealed to an officer appeal board. Letter from Executive for Honor and Ethics, U.S.A.F.A., Dec. 8, 1971. At both academies only two cases appealed have resulted in a cadet's conviction being reversed, see note 479 supra. See also Hearings on Service Academies, supra note 18, at 10,630 (as of February, 1968, only one West Point honor code violator in 3'h years had appealed), 10,432 (as of February, 1968, only one Naval Academy Midshipman in five years had exercised his full right to appeal); Letter from Chief, Congressional Inquiry Division, Office of Legislative Liaison, U.S.A.F., to Senator Charles H. Percy, June 9, 1972 (as of 1972, fifteen officer appeal boards in history of Air Force Academy). Indeed, as of April 1962, seven years after the Air Force Academy had

begun operating, an Air Force Academy official could boast that "no cadet has requested a second board or availed himself of formal channels of appeal once adjudged guilty by his fellow cadets." Clelland, *supra* note 69, at 29.

⁶²⁴ Galloway and Johnson, *supra* note 301, ch. 4.

⁶²⁵ *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933). Failure by an administrative agency to consider remedies less burdensome to the defendant than that imposed can itself be grounds for avoiding enforcement. See *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613-14 (1946).

⁶²⁶ Since a cadet who leaves the Military and Air Force Academies for having violated a cadet honor code has either been involuntarily separated from that academy or has "voluntarily" resigned under threat of involuntary separation, the term "expulsion" is appropriately used in this context.

⁶²⁷ See Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 21. At the Air Force Academy an honor code violator may be granted "discretion" by his honor board to remain at the Academy in good standing with no penalty imposed at all. See notes 184 & 190 *supra*. Very few cadets are granted "discretion," however, because of severe institutional restrictions on its use. Beck, *supra* note 77, at 16. See generally Charles, *supra* note 71, at 204-212. Thus, since nearly all honor code violators are separated from the Academy, see text accompanying notes 188 & 623-24 *supra*, for purposes of this discussion it will be assumed that Air Force Academy honor violators receive expulsion as the only penalty.

to those at the academies,⁶²⁸ it seems obvious that some honor offenses are more serious than others. Taking a dime left in a telephone booth coin changer,⁶²⁹ for example, hardly constitutes as serious an honor offense as stealing something of value from another cadet or cheating on an examination. In light of these disparities, it may legitimately be asked whether the practice of punishing all honor offenses with expulsion meets the Supreme Court's reasonableness test.

Perhaps the only way to determine the reasonableness of the single sanction policy is to weigh the benefit thereby accruing to the academies against the interests of cadets in having a graduated system of penalties. The cadet's interests stem largely from the stake he has in not being separated from an academy for an honor violation. As has been shown, this interest is

protected by due process of law,⁶³⁰ since expulsion may deprive him of an opportunity to pursue his education, end his military career and seriously cloud his future.⁶³¹

The only conceivable interests of the Military and Air Force Academies in the single expulsion penalty seem to be deterrence of future code violations, elimination of officer candidates with unacceptable character traits and preservation of the integrity of the code.⁶³² The support which the academies can claim on the basis of these interests may be questioned on several grounds. First, apparently neither the Naval, Coast Guard nor Merchant Marine Academy feels that its honor concept requires expulsion as the only penalty in order to accomplish these objectives; all impose probation or other intra-academy sanctions as alternatives to separation.⁶³³ Second, as

⁶²⁸ As expressed by the Military Academy's Honor Committee Chairman during its 1973 honor scandal: "Out in the civilian world there might be degrees of honorability, but to us there are just two: honorable and dishonorable." Greenhouse, *supra* note 167. "We learn to live under an absolute moral ethic rather than a situational ethic." Cunningham, *What Cadets Are Saying About That Scandal*, N.Y. Post, May 4, 1973, at 11, col. 4; see Galloway & Johnson, *supra* note 301, ch. 4; Letter from 1967 Air Force Academy Graduate, *The Association of Graduates Magazine*, U.S. Air Force Academy 49 (Winter 1972).

⁶²⁹ See text accompanying note 842 *infra*. See also text accompanying notes 840-42 *infra*.

⁶³⁰ See, e.g., text accompanying notes 400-01 *supra*.

⁶³¹ Causing, e.g., life-long social stigma among those who know of his honor code violation; loss of opportunities for admission to another educational institution and for future employment. See text accompanying notes 517-18 *supra*.

⁶³² Some cadets and academy officials feel that abolition of the single expulsion penalty would weaken the respect and effectiveness of the honor code by giving it less "teeth." Letter from 1969 Air Force Academy Graduate, Feb. 5, 1973.

⁶³³ See text accompanying note 190 *supra*. At one time the Naval Academy provided a means for sanctioning honor violators with demerits, restriction or extra duty under its conduct system in lieu of probation or separation from the Academy. See U.S.N.A.R. 0408(2), chg. 3 (1964), quoted in *Hearings on Service Academies*, *supra* note 18, at 10,448. Today, however,

a recent study of college discipline demonstrates, the common notion that Draconian penalties alone decrease the incidence of campus misconduct is simply unfounded.⁶³⁴ Indeed, the study concludes that effective deterrence in college communities governed by honor systems results from the existence of a system of formal sanctions, coupled with peer disapproval of serious violations, rather than from the existence of a singularly severe sanction.⁶³⁵ Third, as recognized by the Air Force Academy in permitting honor violators to receive "discretion," a cadet convicted of an honor violation "may truly [have] learned the lesson for which the Honor Code was intended" and be worthy of becoming an officer and an Academy graduate.⁶³⁶ Thus, in principle, it is evident that honor code violators are not always so tainted as to preclude them from becoming officers. And routinely considering lesser penalties instead of demanding expulsion in nearly every case would be, as when giving "discretion" in the first place, "a definite step toward humanizing the honor code."⁶³⁷

In light of these considerations, it seems that the Military and Air Force Academies have little to gain in imposing expulsion on *all* convicted honor code violators; in contrast, a cadet found guilty of a minor violation has everything to lose. Under the Supreme Court's reasonableness test, it seems clear that due process requires these academies to incorporate a graduated scale of penalties into their honor systems based on the seriousness of the offense involved.

D. Procedural Propriety—Other Academy Abuses

1. Res Judicata

The doctrine of *res judicata* dictates that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of

the parties and their privies, and, as to them, constitutes an absolute bar to subsequent actions involving the same claim,

Naval Academy honor violators may receive only probation or separation from the academy. Interview with 1971-72 Honor Comm. Chairman, U.S.N.A., July 24, 1972; see U.S.N.A. Inst. 1610.3(6)(j) (1972).

⁶³⁴ Salem & Bowers, *Severity of Formal Sanctions as a Deterrent to Deviant Behavior*, 5 *Law & Soc. Rev.* 21 (1970). See also note 1119 *infra*.

⁶³⁵ Salem & Bowers, *supra* note 634.

⁶³⁶ Beck, *supra* note 77, at 7; Kelly, *Honor—That Controversial Code*, *Denver Post Empire Magazine*, April 2, 1967, at 17, col. I.

⁶³⁷ Report of the Board of Visitors, U.S. Air Force Academy 16 (1967); accord, Beck, *supra* note 77, at 7.

demand or cause of action.⁶³⁸ The crucial problem in the current inquiry is to determine to what extent and in what circumstances the traditional *res judicata* doctrine applicable to judicial⁶³⁹ and administrative⁶⁴⁰ proceedings applies to academy adjudications. Courts have recognized that "[t]he policy considerations which underlie *res judicata*—finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense—are as relevant to the administrative process as to the judicial."⁶⁴¹ Not surprisingly, then, *res judicata* has, with a few judicially created exceptions,⁶⁴² been held by the Supreme Court to apply "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate."⁶⁴³ Thus, despite some earlier judicial refusals to apply the *res judicata* principle to administrative proceedings,⁶⁴⁴ it is now apparent that it is generally necessary to do so.

Additional taxing questions arise, however, in the academy context⁶⁴⁵

because of the dizzying complex of adjudicative committees, boards and systems which may assert jurisdiction consecutively over the same act of misconduct. Each academy convenes separate hearing panels to adjudicate conduct and honor offenses;⁶⁴⁶ in addition, the Air Force Academy has a third board which hears alleged ethics

⁶³⁸ E.g., *Sobina v. Busby*, 62 Ill. App. 2d 1, 17, 210 N.E.2d 769, 777 (1965). Collateral estoppel, an aspect of the general rule of *res judicata*, permits a judgment to be invoked in a second proceeding involving a different cause of action to estop reconsideration of all matters which were actually litigated in the first action and which were essential to its determination. *Cromwell v. County of Sac*, 94 U.S. 351 (1876); K. Davis, *Administrative Law Text* § 18.01 (3d ed. 1972). The rule of collateral estoppel is incorporated in the *res judicata* doctrine throughout this discussion.

⁶³⁹ See, e.g., *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

⁶⁴⁰ *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966); K. Davis, *Administrative Law Text* § 18.02 (3d ed. 1972); K. Davis, *Administrative Law Treatise* § 18.02 (1970 Supp.).

⁶⁴¹ *Painters Dist. Council No. 138, AFL-CIO v. Edgewood Contracting Co.*, 416 F.2d 1081, 1084 (5th Cir. 1969).

⁶⁴² See text accompanying notes 652-57 *infra*.

⁶⁴³ *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). See 2 K. Davis, *Administrative Law Treatise* §§ 18.01-.12 (Supp. 1970).

⁶⁴⁴ E.g., *Schere v. Christenberry*, 179 F. Supp. 900 (S.D.N.Y. 1959).

⁶⁴⁵ This discussion assumes, without deciding, that although academy punishments are often sufficiently severe to be considered quasi-criminal in nature, see notes 298-300 *supra*, they would not be considered "criminal" so as to permit application of the fifth amendment's prohibition against double jeopardy. It is for this reason that the practices outlined in this section are discussed in terms of a civil concept—*res judicata*. As will become evident, these practices might also violate principles of equitable estoppel and of due process of law.

⁶⁴⁶ See text accompanying notes 158-59 & 177-79 *supra*.

infractions.⁶⁴⁷ Each academy also convenes separate expulsion hearing boards which consider not offenses but "deficiencies" in a cadet's honor, conduct or aptitude for commissioning, with a separate board for each type

of deficiency.⁶⁴⁸ The res judicata problem arises, of course, in those cases in which an academy has unsuccessfully prosecuted a cadet for an act alleged to constitute a deficiency or offense of one category and subsequently prosecutes him again, considering the same act under a second or even a third system.⁶⁴⁹ Since avoidance of unnecessary burdens, finality to litigation, prevention of needless litigation⁶⁵⁰ and, hence, the avoidance of harassment and unfairness⁶⁵¹ require the application of res judicata principles in administrative cases, the doctrine would seem to prohibit the multiple adjudication of alleged offenses at the academies.

Nor do any of the recognized administrative exceptions to the application of the res judicata doctrine⁶⁵² appear to bar its application at the academies. Failing to invoke res judicata when its application would cause an injustice⁶⁵³ when significant new evidence has been discovered⁶⁵⁴ or when new violations with no indication of harassment are present⁶⁵⁵—all valid reasons for restraint in the doctrine's application—may be assumed not to be factors in most academy cases.

Courts have also held that res judicata principles do not apply in successive prosecutions pursuant to two different statutes,⁶⁵⁶ even

⁶⁴⁷ See text accompanying notes 221-23 supra.

⁶⁴⁸ See, e.g., R.C.C.U.S.C.G.A. 1-4-01(A), 1-4-04 (1971); U.S.A.F.A.R. 537-1 (2)(a), (3), (4), (5) (1971); U.S. M. M.A. M. R. 01402(1), 03204(5) (1971). See generally *Brown v. Knowlton*, Civil No. 72-3184, at 4 (S.D.N.Y. Aug. 3, 1972); J. Masland & L. Radway, *Soldiers and Scholars; Military Education and National Policy* 200-01 (1957). The Military Academy has created an additional board to consider expelling a cadet for having undesirable "habits or traits." See, e.g., *Brown v. Knowlton*, supra. See also *Dunmar v. Ailes*, 348 F.2d 51, 53-54 (D.C. Cir. 1965).

⁶⁴⁹ See text accompanying notes 663-74 infra.

⁶⁵⁰ See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 340 (1945); *Old Dutch Farms, Inc. v. Milk Drivers Local 584*, 281 F. Supp. 971, 974 (E.D.N.Y. 1968); text accompanying note 641 supra.

⁶⁵¹ For an illustration of this potential for harassment, see text accompanying notes 663-75 *infra*.

⁶⁵² See generally K. Davis, *Administrative Law Text* ? 18.03, 18.04 (3d ed. 1972).

⁶⁵³ See *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969); *Restatement of Judgments* § 70(1) (1942).

⁶⁵⁴ See 2 K. Davis, *Administrative Law Treatise* § 18.03, at 564 (1958).

⁶⁵⁵ See *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962).

⁶⁵⁶ See, e.g., *Title v. INS*, 322 F.2d 21, 23-25 (9th Cir. 1963) (a finding in denaturalization

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if the statutes appear identical, so long as the policies under which they were enacted differ.⁶⁵⁷ Yet this exception, too, should have no force in academy adjudications since successive prosecutions at each academy are pursuant to regulations promulgated by its superintendent, rather than pursuant to congressional legislation. This distinction is crucial since the exception goes only to different statutes enacted by Congress, and, while some rulemaking power may exist in the President and his subordinates,⁶⁵⁸ it is doubtful that, as limited as that power must be,⁶⁵⁹ it authorizes the creation of a complex of adjudicatory boards which may subject accused offenders to a multiplicity of prosecutions.⁶⁶⁰ Moreover, it can scarcely be said, as this exception would demand, that the policies underlying the various cadet adjudicatory systems differ sufficiently to warrant successive prosecutions under each system. This is especially true when the act alleged is tried successively, not in the somewhat qualitatively differing realms of conduct and honor,⁶⁶¹ but in the areas of honor and ethics which represent only slightly differing degrees of moral conduct,⁶⁶² and hence, similar policy considerations.

Despite the clear applicability of the *res judicata* principle in the

proceeding not binding in later deportation proceedings); *Brandenfels v. Day*, 316 F.2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963).

⁶⁵⁷ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969). See generally K. Davis, *Administrative Law Treatise* § 18.04 (Supp. 1970).

⁶⁵⁸ See text accompanying notes 35 & 80 *supra*.

⁶⁵⁹ See text accompanying notes 81-94 *supra*.

⁶⁶⁰ By authorizing such a system, military authorities might well be intruding upon the legislative rulemaking function specifically vested by the constitutional framers in the Congress.

Some decisions permitting successive prosecutions have relied in part upon the fact that the prosecutions were by different agencies. See, e.g., *NLRBV v. Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir. 1955), cert. denied, 351 U.S. 952 (1956). These cases are, of course, inapplicable to the academies, where successive prosecutions could occur only within one agency (academy).

⁶⁶¹ See Majority Report, *supra* note 74, at 10, 15. But see DoD House Appropriations Hearings, 1966, *supra* note 12, at 39 ("in practice, the distinction between the two spheres - honor and regs — has become blurred").

⁶⁶² See Beck, *supra* note 77, at 14-15; text accompanying notes 221-22 *supra*. The merger of policies underlying "aptitude" proceedings on the one hand, and conduct, honor, ethics and "habits and traits" proceedings on the other is further evidenced by the fact that aptitude boards consider, in determining a cadet's aptitude for a commission, the number and seriousness of convictions entered against the cadet by the other boards. See, e.g., Letter from Honor Comm. Legal Advisor, U.S.A.F.A., Jan. 4, 1973 ("aptitude" board considers honor and conduct offenses); *id.*, Feb. 13, 1973, at 2 (same). Similarly, policy distinctions between "conduct" and "honor" proceedings seem to have little meaning in view of the fact that a breach of the Cadet Honor Code may be a ground for involuntary separation from an academy for "misconduct." *Id.*, citing U.S.A.F.A.R. 537-3 (1966); U.S.A.F.R. 53-3(22)(a)(2) (1971).

academy context, multiple adjudications frequently occur for the same act. On two occasions, for example, Air Force Academy cadets have been prosecuted for an ethics offense after the act in question⁶⁶³ had been heard and adjudged by an honor board not to be an honor offense. One such attempt was successful.⁶⁶⁴ Frequently, moreover, West Point cadets adjudicated "not guilty" of an honor offense for a particular act are subsequently charged and adjudged to have committed a conduct offense for precisely the same act.⁶⁶⁵ Similarly, the Merchant Marine Academy plans⁶⁶⁶ to prosecute as a conduct offense acts arising out of the same set of operative

facts which have already given rise to an unsuccessful prosecution of an honor offense.⁶⁶⁷ Furthermore, only a federal court order⁶⁶⁸ recently prevented the Military Academy from expelling a cadet who had been adjudged unqualified to be a commissioned officer by an "aptitude" board after a "habits and traits" board considering the same acts had reached an opposite determination. ⁶⁶⁹

⁶⁶³ See generally note 366 supra.

⁶⁶⁴ Interview with 1971-72 Professional Ethics Comm. Chairman, U.S.A.F.A., June 6, 1972; see generally note 366 supra. The honor board acquitting these cadets necessarily must have found either that they did not commit the act charged or that, even if they did, the act was not proscribed by the honor code. In the former case, subsequent academy adjudicatory boards are collaterally estopped from finding to the contrary. See note 638 supra. In the latter event, the Academy is estopped by the doctrine of res judicata from attempting to obtain a different outcome by having the significance of the act considered by another adjudicatory board, even if academy authorities characterize the boards as having different purposes. See text accompanying notes 638 & 656-62 supra. For another possible type of res judicata violation at the Air Force Academy, see text accompanying note 352 supra.

⁶⁶⁵ *Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972*, Interview with Personnel Officer, U.S.M.A., Feb. 26, 1972. Following these procedures, the Military Academy often sanctions as conduct offenses acts which, by definition, can only be construed as honor offenses. For example, an honor board determined that "[s]ubmitting evasive, incomplete and misleading matter in an official communication" was not an honor offense; yet the act was subsequently condemned as a conduct offense. See Special Orders No. 187(5) (Dec. 1, 1970); accord, e.g., Special Orders No. 184(2) (Nov. 25, 1970) ("submitting composition approximately one-half of which consisted of phrases and sentences taken directly from course texts without being identified or acknowledged as to specific source"). Since these acts are, by definition, honor offenses, see text accompanying note 170 supra, the honor board acquittal could only have been based on the ground that the cadets did not, in fact, commit the acts. Therefore, a conduct board was collaterally estopped from finding that the cadets did in fact commit the act.

⁶⁶⁶ The Merchant Marine Academy's Honor System⁶⁶⁶ has been established only since Aug. 9, 1972. See note 69 supra.

⁶⁶⁷ Interview with 1972-73 Honor Comm. Vice-Chairman and Summer Regimental Commander, U.S.M.M.A., Aug. 10, 1972.

⁶⁶⁸ *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y. Aug. 3, 1972).

⁶⁶⁹ *Id.*; Affidavit of Captain William F. Belcher, U.S.M.A., (July 31, 1972); see Letter from Second Class Cadet, U.S.M.A., to the Honorable Sam J. Ervin, Jr., May 3, 1972. In

To fully understand the potential for abuse and to appreciate the impact of such successive prosecutions, it may be helpful to examine a final example in greater detail. In the spring semester of 1971 an Air Force Academy cadet was found guilty by the Cadet Honor Committee of lying by giving a false explanation for his unauthorized absence from class. The Honor Committee, however, voted for "discretion,"⁶⁷⁰ thereby permitting the cadet, pursuant to regulation, to remain at the Academy "in good standing."⁶⁷¹ Subsequent to this decision, the Superintendent personally informed members of the honor board that he felt they had reached an improper decision in granting discretion and "requested" that the board reconsider the case. Since the board members indicated they believed the result would be the same, the matter was not reconsidered.⁶⁷² Having failed to secure an honor expulsion, the Superintendent convened a Commandant's Disciplinary Board to consider whether the act of missing class without authorization warranted penalizing the cadet for misconduct; he then convened an officer board to consider whether the prior honor conviction and other acts of misconduct justified expelling the cadet for lack of aptitude for commissioned service. The conduct board voted to penalize the cadet for misconduct.⁶⁷³ When

this case, the acts of misconduct found by the "habits and traits" board to have been committed but not to warrant expulsion were later considered, in addition to other factors, by the "aptitude" board as grounds for this latter board's recommendation that the cadet should be expelled. Interview with Assistant Staff Judge Advocate, U.S.M.A., March 6, 1973 (interviewed in personal capacity). While the "aptitude" board might properly consider those other factors to warrant expulsion, it is prohibited by the doctrine of collateral estoppel from reconsidering the previously adjudicated issues.

⁶⁷⁰ Interview with 1971 Air Force Academy Graduate, Feb. II, 1973; Letter from Father of 1971 Air Force Academy Graduate to Deputy Ass't Sec'y of Personnel Policy, Office of the Ass't Sec'y of Manpower Reserve Affairs, June 4, 1971 [hereinafter Letter to Deputy Ass't Sec'y of Personnel Policy]; see Letter

from Honor Committee Legal Advisor, U.S.A.F.A., Jan. 4, 1973.

⁶⁷¹ Legal Brief in Support of Recommendation of Commandant's Board [1971 Air Force Academy Graduate]; Letter to Deputy Ass't Sec'y of Personnel Policy, *supra* note 670.

⁶⁷² Letter from Honor Comm. Legal Advisor, U.S.A.F.A., Jan. 4, 1973; see Letter to Deputy Ass't Sec'y of Personnel Policy, *supra* note 670, at 2.

⁶⁷³ Interview with 1971 Air Force Academy Graduate, Feb. 11, 1973; Interview with Father of 1971 Air Force Academy Graduate, Feb. 11, 1973; see Letter from Honor Comm. Legal Advisor, U.S.A.F.A., Jan. 4, 1973; Letter to Deputy Ass't Sec'y of Personnel Policy, *supra* note 670. The Cadet honor board considered the propriety of the cadet's lying about why he missed class while the conduct board considered the propriety of his missing class—two separate acts. Assuming that a cause of action is defined as a "general transaction" (see H. Peterfreund & J. McLaughlin, *New York Practice* 569-70 (2d ed. 1968)), since both acts arose from the same incident, it would appear that the Academy would be barred from prosecuting the cadet for both a conduct and honor violation. See text accompanying note 638 *supra*.

the officer panel voted to separate the cadet for lack of aptitude for commissioned service,⁶⁷⁴ the cadet was informed, four days prior to his scheduled graduation from the Academy, that he would neither graduate nor be commissioned, but rather might be activated for two years as an enlisted man in the Air Force. It was also decided that he would not be granted an academic degree despite the fact that he had completed all his academic requirements for graduation.⁶⁷⁵

The possibilities for harassment and vindictive prosecutions under such a system are myriad. For reasons of fairness alone, then, it is clear that cadets need the protection of *res judicata* principles in academy adjudications; and in light of the applicable law, there can be no valid reasons for refusing to apply those tenets.

2. Confessions and Self-Incrimination

The question of the right of a cadet accused of violating academy regulations to remain silent arises in a number of contexts. For purposes of

clarity, the scope of the right will be examined in two phases, the first of which will concern freedom from self-incrimination and

⁶⁷⁴ The "aptitude" board vote for expulsion, considering "the honor violation in question" as one of "numerous allegations of misconduct." Academy officials justified doing so because the "aptitude" board "met to consider an entirely separate matter relating to the cadet in question, i.e., his aptitude for commissioned service." Letter from Honor Comm., Legal Advisor, U.S.A.F.A., Jan. 4, 1973. Nevertheless, consideration of the honor offense at the "aptitude" board was barred by the doctrine of collateral estoppel, as well as by Academy regulations. See text accompanying notes 638 & 671 supra. The recommendations and findings of the "aptitude" board were later affirmed by another panel of officers: the Academy Board. Interview with 1971 Air Force Academy Graduate, Feb. 1 I, 1973; Letter from Honor Comm. Legal Advisor, U.S.A.F.A., Jan. 4, 1973.

⁶⁷⁵ He received his degree several weeks later, but only after intervention by his congressmen, extensive press coverage and more than one conference in Washington, D.C., by Pentagon officials with the Superintendent and the Commandant of Cadets. Interview with 1971 Air Force Academy Graduate, Feb. II, 1973; see Interview with Father of 1971 Air Force Academy Graduate, Feb. 11, 1973. Naval Academy authorities also maintain the position that a cadet's failure to complete the military requirements for graduation from an academy permits them to withhold his Bachelor of Science degree. See Complaint, *Farley v. Mack*, Civil No. 72-776 K (D. Md., filed July 28, 1972) (Naval Academy midshipman conscientious objector discharge applicant denied Bachelor of Science degree although he had passed all examinations and completed other requirements for the degree); U.S.A.F.C.R. 35-4, §§ 2-3 (1968) (Air Force Academy Cadets required to sign statement each semester that they "voluntarily waive any right [to] any academic or other credits that would otherwise accrue . . . on and after the date of [his] marriage."): Letter from Director of Cadet Records to Father of 1971 Air Force Academy Graduate, July 20, 1971; Greenhouse, supra note 303. Courts have clearly distinguished, however, between fulfilling the military requirements, thereby "graduating," and receiving an academic degree from an academy. See, e.g., *United States v. Redgrave*, 116 U.S. 474, 480, 482 (1886); *Leopold v. United States*, 18 Ct. Cl. 546, 557-58 (1883); *Benjamin v. United States*, 10 Ct. Cl. 474, 484-85 (1874).

the second, protections against coerced confessions.

*a. The Right to Remain Silent--*The right of an accused cadet to remain silent is based upon several legal principles. Primary, of course, is the guarantee of the fifth amendment that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"⁶⁷⁶ a proscription explicitly

applicable to an academy adjudication to the extent it may be thought to be a "criminal case." Furthermore, the Supreme Court has indicated that a criminal suspect has a right to "refusal of disclosure,"⁶⁷⁷ i.e., to choose freely not to speak at all,⁶⁷⁸ which is based upon due process of law. Here again, the applicability of the theory to academy adjudications may depend on whether accused cadets are "criminal suspects." In addition, Article 31 of the UCMJ prohibits members of the Armed Forces from compelling an individual to incriminate himself.⁶⁷⁹ Article 31's prohibition against compulsory self-incrimination embodies the principle of,⁶⁸⁰ yet is broader than, the fifth amendment privilege.⁶⁸¹ Thus, if the prerequisites for invoking the fifth amendment are met, the operative conditions of article 31 would be satisfied. Hence, if the fifth amendment right applies to the academies, article 31 must also be applicable. As will be demonstrated below, the fifth amendment does have force in the academy context because academy adjudications are "criminal" within judicial construction of the term and may subsequently subject the cadet to formal criminal proceedings. Moreover, the nature of the proceedings and the significance of the cadet interests at stake arguably require recognition of a due process right to remain silent.

Cases interpreting the fifth amendment provide ample authority that academy penalties themselves require that cadets be afforded a right to remain silent. At least as early as 1945, a federal court

⁶⁷⁶ U.S. Const. amend. V.

⁶⁷⁷ *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

⁶⁷⁸ *Developments in the Law—Confessions*, 79 *Harv. L. Rev.* 935, 981 (1966) [*hereinafter* *Developments—Confessions*]. This due process right to remain silent was recognized by the Supreme Court as part of fourteenth amendment due process long before the fifth amendment's privilege against self-incrimination was declared enforceable against the states. *Id.*

⁶⁷⁹ 10 U.S.C. § 831(a) (1970) provides that "[n]o person subject to this chapter may

compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him." See also *id.* § 831(c).

⁶⁸⁰ *United States v. Brints*, 15 C.M.R. 818, 820 (1953); accord, e.g., *United States v. Hadway*, 36 C.M.R. 818, 820 (1966). But see *United States v. Eggers*, 3 U.S.C.M.A. 191, 195, II C.M.R. 191, 195 (1953).

⁶⁸¹ See, e.g., *United States v. White*, 17 U.S.C.M.A. 211, 216, 38 C.M.R. 9, 14 (1967); *United States v. Musguire*, 9 U.S.C.M.A. 67, 68, 25 C.M.R. 339, 330 (1958).

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observed that the test for whether a case is "criminal" within the purview of the fifth amendment is not the name given the offense by the legislature or the courts. Rather, the standard must be whether the case involves "'in its essential character and effect, a punishment of an offense against the public instead of a grant of a civil right to a private person.'" ⁶⁸² Other authorities have found that "[t]he words `criminal cases,' used in the State and Federal constitutions, have been construed by the courts to extend to and include [actions assessing] imprisonment, fines, forfeiture and penalty, whether to be recovered in a criminal or civil proceeding."⁶⁸³ Strong grounds for application of the self-incrimination proscription of the fifth amendment to the academies are also found in the Supreme Court's decision in *In re Gault*.⁶⁸⁴ There it was argued that the right to remain silent should not be afforded in juvenile proceedings, since they are "civil" or "administrative" rather than "criminal" in nature.⁶⁸⁵ To this contention the Court responded in language pertinent to the academies as well as juvenile adjudications:

It is true that the statement of the privilege in the Fifth Amendment . . . is that no person "shall be compelled in any *criminal case* to be a witness against himself." However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission

and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.⁶⁸⁶

The impact of this decision on the academies is two-fold. Initially, by setting up a standard involving "inculcation" rather than "criminality," the Court extended the protection of the fifth amendment to any proceedings at which fault will be determined and pun-

⁶⁸² Bowles v. Trowbridge, 60 F. Supp. 48, 49 (N.D. Cal. 1945), quoting Huntington v. Attrill, 146 U.S. 657, 683 (1892).

⁶⁸³ E.g., People ex rel. Akin v. Butler St. Foundry & Iron Co., 201 Ill. 236, 254-55, 66 N.E. 349, 355 (1903).

⁶⁸⁴ 387 U.S. 1 (1967).

⁶⁸⁵ Id. at 49; see Buss, supra note 5, at 604. Military officials consider academy adjudications to be administrative rather than criminal in nature. See, e.g., Letter from 1972-73 Honor Comm. Chairman, U.S.A.F.A., Jan. 8, 1973.

⁶⁸⁶ 387 U.S. 1, 49 (1967).

ishment assessed.⁶⁸⁷ Within such a framework, academy adjudications clearly involve the possibility of "inculpatory" statements⁶⁸⁸ and are "penal" in nature since they may result in the loss of a cadet's liberty,⁶⁸⁹ or assessment of other penalties as punishment for an offense against the institution and hence the public rather than a remedy for a private wrong. Moreover, the *Gault* decision, by refusing to rely on the traditional criminal-civil dichotomy and by focusing instead on the inculpatory nature of the statements made,⁶⁹⁰ demonstrated the Court's unwillingness to allow form to govern substance.⁶⁹¹ In light of the fact that the cadet losses accompanying academy penalties are sometimes more severe than those in many "criminal" prosecutions,⁶⁹²

application of the same form-substance principle would appear to dictate that they be considered "criminal" within the meaning of the fifth amendment, despite their "administrative" form.⁶⁹³

It is not necessary, however, to prove conclusively that academy hearings are "criminal" in order to 'demonstrate that the right to remain silent must be afforded. Rather, the Supreme Court has held that the fifth amendment privilege against self-incrimination "'can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory' "⁶⁹⁴ to protect " `any disclosures which the witness may reasonably apprehend could be used in

⁶⁸⁷ Id. "[Culpable] is not necessarily equivalent to `criminal,' for . . . it implies that the act or conduct spoken of is reprehensible or wrong but not that it involves malice or a guilty purpose. 'Culpable' in fact connotes fault rather than guilt." Black's Law Dictionary 454 (rev. 4th ed. 1968).

⁶⁸⁸ See, e.g., text accompanying notes 144, 183, 223 *supra*.

⁶⁸⁹ Cf. *In re Gault*, 387 U.S. 1,49-50(1966).

⁶⁹⁰ See 387 U.S. at 49-50. Courts have held that protection of fundamental rights should depend upon the existence of a serious threat to an individual's liberty and not upon characterization of the case as "criminal" or "civil." Buss, *supra* note 5, at 604; see, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir. 1969). This principle is clearly applicable in the fifth amendment area, since the right involved is unquestionably fundamental. *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).

⁶⁹¹ *Id.*; accord, *Bowles v. Trowbridge*, 60 F. Supp. 48 (N.D. Cal. 1945). Another characterization on which academy authorities might rely to avoid application of the right against self-incrimination is that academy proscriptions are by "regulation" rather than by "statute." Academy regulations seem to be the `law" of the academies, however, by which cadets must abide. Cf., e.g., *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (regulations have the force of a statute).

⁶⁹² See text accompanying note 297 *supra*.

⁶⁹³ See *Bowles v. Trowbridge*, 60 F. Supp. 48 (N.D. Cal. 1945) (citations omitted).

⁶⁹⁴ *In re Gault*, 387 U.S. 1,47(1967) (emphasis in original), quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964) (White, J., concurring).

a criminal prosecution or which could lead to other evidence that might be so used.' "⁶⁹⁵ Thus, drawing from the criminal case law, the privilege against self-incrimination applies in civil administrative proceedings,⁶⁹⁶ "not only . . . to answers that would in themselves support a conviction . . . but likewise [to] those which would furnish a link in the chain of evidence needed to prosecute."⁶⁹⁷ This is in accord with the Supreme Court's teaching that the fifth amendment right is to be given a liberal construction,⁶⁹⁸ and that it protects the individual against self-incrimination "in any manner."⁶⁹⁹ In applying this standard "it need only be evident from the implications of the question" that answering it or explaining a refusal to do so might result in an injurious disclosure to justify the application of the privilege.⁷⁰⁰ Thus, an individual is protected against making any disclosure in any setting,⁷⁰¹ which may "*tend*"⁷⁰² to incriminate him by providing a link in a chain of evidence which might reasonably lead to a later criminal prosecution. ⁷⁰³

The applicability of such standards to academy adjudications is clear, since cadets are often questioned, charged and adjudged in proceedings which could lead to criminal charges against them pursuant to the Uniform Code of Military Justice. This is true of many conduct and ethics offenses, especially those of the most serious Class I category.⁷⁰⁴ At the Air Force Academy, moreover, an honor code violator is advised that if he does not resign as requested, he may be court-martialed,⁷⁰⁵ a contingency which is specifically authorized by regulation.⁷⁰⁶ Perhaps to emphasize the reality of this possibility, he

⁶⁹⁵ 387 U.S. at 47-48 (emphasis omitted).

⁶⁹⁶ "The phrase 'in any criminal case' is interpreted to mean in any proceeding of any kind, or even in any investigation without a proceeding, whether judicial, administrative, or legislative." I K. Davis, *Administrative Law Treatise* § 3.07 (1958).

⁶⁹⁷ *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

⁶⁹⁸ E.g., *id.*

⁶⁹⁹ *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

⁷⁰⁰ *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

⁷⁰¹ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

⁷⁰² E.g., 10 U.S.C. § 831(a) (1970) (*emphasis added*); *Eimspack v. United States*, 349 U.S. 190, 201 (1955) (*emphasis added*).

⁷⁰³ See, e.g., *Hoffman v. United States*, 341 U.S. at 486; *McCarthy v. Arndstein*, 266 U.S. 34, 40(1924); Johnson, *The Constitutional Rights of College Students*, 42 *Texas L. Rev.* 344, 356-60 (1964). Apparently in recognition of this, the Coast Guard Academy grants cadets a right against self-incrimination for offenses punishable by the UCMJ. See note 164 *supra*.

⁷⁰⁴ Compare, e.g., U.S.A.F.C.R. 35-6(VIII)(3)(c)(6) (1971) (defining one Class I offense) with 10 U.S.C. § 934 (1970) (making same conduct criminal); see text accompanying note 145 *supra*.

⁷⁰⁵ Text accompanying note 611 *supra*.

⁷⁰⁶ Text accompanying note 194 *supra*. The UCMJ also provides that cadets may be court-

is advised in writing of the provisions of the UCMJ which his honor offense might violate.⁷⁰⁷ In such cases it cannot be doubted that disclosures made by cadets may provide a link in a chain of evidence that can lead to their criminal prosecution and tend to incriminate them. Cadets, therefore, must be given the right to remain silent at any stage of an Air Force Academy honor proceeding and in at least those other serious adjudications for which prosecution may be reasonably apprehended under the UCMJ.

To observe that the right to remain silent must be recognized in many academy proceedings is not to exhaust the inquiry, however. The Supreme Court has held that in those contexts to which the fifth amendment privilege applies, no "penalty" may be imposed upon the accused for its exercise,⁷⁰⁸ with "penalty" defined not merely as fine or imprisonment⁷⁰⁹ but as "the imposition of any sanction which makes assertion of the Fifth Amendment

privilege 'costly.' "⁷¹⁰ Thus, threatening a public employee or other person in public trust⁷¹¹ with loss of professional reputation or standing or loss of employment should he exercise his right against self-incrimination has been held, in the absence of a grant or a waiver of immunity, to violate his right to remain silent.⁷¹² By analogy, then, it is clear that the academies cannot make a cadet's assertion of his right against self-incrimination "costly" by threatening him with expulsion, suspension, tours, confinements, restrictions or other losses of professional reputation and

martialed. See text accompanying notes 24-25 supra.

⁷⁰⁷ See Letter from CWH to CW U.S.A.F.A., Jan. 21, 1972 (advising cadet his conduct might violate article 134, U.C.M.J.

⁷⁰⁸ *Spevack v. Klein*, 385 U.S. 511, 514 (1967).

⁷⁰⁹ *Id.* at 515.

⁷¹⁰ *Id.*

⁷¹¹ E.g., teachers, lawyers and policemen. See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

⁷¹² E.g., *Gardner v. Broderick*, 392 U.S. 273 (1968) (employment as a policeman); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (same); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956) (city employment). In *Garrity* the Court prohibited threat of loss of employment from being used to coerce an individual into waiving his right against self-incrimination. Cases following *Garrity*, however, suggest that if a public employee were granted immunity from use of compelled testimony or its fruits in connection with a criminal prosecution, he could not invoke the self-incrimination clause to avoid answering a question directly and specifically related to the performance of his official duties. See, e.g., *Uniformed Sanitation Men Ass'n v. Sanitation Comm'r*, 392 U.S. 280, 284 (1968) (dictum); *Gardner v. Broderick*, supra at 278 (dictum). This leaves open two questions with regard to the academies: (1) What, in light of jurisdictional and other limitations, constitutes conduct relating to the performance of official cadet duties (every aspect of cadet behavior being regulated?) and (2) ultimately, is the penalty the cadet seeks to avoid by remaining silent "criminal"? For discussion of these issues, see text accompanying notes 14-142, 265-76, 296-300 & 682-93 supra.

standing which are peculiarly significant at the academies.

Perhaps in recognition of the principles outlined above, the academies have,

on occasion, afforded a right to remain silent (or against self-incrimination) to cadets suspected of honor violations.⁷¹³ In most conduct, honor, ethics and separation hearings, however, cadets are required to answer fully and truthfully all questions asked them.⁷¹⁴ Indeed, cadets at the Military Academy must report unintentional acts which if intentional would violate the honor code;⁷¹⁵ for failure to do so, the cadet will automatically receive demerits⁷¹⁶ which can accumulate so as to result in loss of class standing, privileges or even expulsion from the Academy.⁷¹⁷ Furthermore, knowing failure to report an unintentional violation of the honor code is itself an intentional honor violation which may result in expulsion.⁷¹⁸ Cadets, are also required to state in writing whether their conduct offenses are "intentional" or "unintentional."⁷¹⁹ This admission is significant be-

⁷¹³ See, e.g., *Dunmar v. Ailes*, 348 F.2d 51, 54 (D.C. Cir. 1965) (per curiam) (U.S.M.A. Board of Officers); *Hearings on Service Academies*, supra note 18, at 10,427, 10,477 (U.S.N.A. Cadet Honor Committee); *id.* at 10,807, 10,821 (U.S.A.F.A. Cadet Honor Committee); U.S.A.F.A. Honor Reference Handbook, supra note 172, at 43 (Cadet Honor Committee); Majority Report, supra note 74, at 15 (West Point's 1951 honor scandal); Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Nov. 26, 1972; text accompanying notes 164 & 209 supra. But see *N.Y. Times*, Aug. 8, 1951, at 12, col. 7 (self-incrimination required). Alleged Air Force Academy honor code violators had no right against self-incrimination during the first 10 years of the Academy's operation. Beginning in 1965, however, Air Force cadets were advised prior to questioning at honor investigations and again prior to honor hearings that they had a right against self-incrimination, see *Beck*, supra note 77, at 4; *Charles*, supra note 71, at 235-36, a practice which was observed during and subsequent to that Academy's 1965 and 1967 honor incidents, Annual Report of the Superintendent, U.S. Air Force Academy 71 (1965); see *Honor Oper. Inst.*, U.S.A.F.A. 2(5), (6) (1970); U.S.A.F.A. Superintendent's Report, supra note 73, at 17. As of the 1972-73 academic year, however, this right was revoked by the Cadet Honor Committee on the grounds that it did not apply to administrative hearings. Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 22, 1972; see Letter from 1972-73 Honor Comm. Chairman, U.S.A.F.A., Jan. 8, 1973.

⁷¹⁴ E.g., no right to remain silent is afforded at Air Force or Military Academy honor hearings, *The Cadet Honor Code*, U.S.M.A., supra note 69, at 11; note 713 supra (U.S.A.F.A.), or at most

academy conduct hearings, whether expulsion or a lesser punishment is involved, see, e.g., Special Orders No. [order number deleted by Air Force Academy officials] (Dec. 30, 1955) (cadet punished for "[i]nsubordination, i.e., declining to answer question and questioning authority of superior"); Testimony of Personnel Officer, U.S.M.A., in case of a cadet being considered for expulsion from the Academy 122-24 (May, 1972). But see Com'd't Mid'n Inst. 1620.I0H, ch. 4, § 2(d) (1973).

⁷¹⁵ Fowler, *supra* note 71, at 37.

⁷¹⁶ *Id.*

⁷¹⁷ See text accompanying notes 146, 305 & 486 *supra*.

⁷¹⁸ Fowler, *supra* note 71, at 37-38.

⁷¹⁹ See, e.g., R.U.S.C.C. 405 Fig. 2, 3 (1971); U.S.A.F.C.R. 35-6(8)(c), (16), (22) (c) (1971); U.S.A.F.C.W. Form 103 (1967).

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cause offenses of one class are usually considered to be in a more serious category of offenses if committed intentionally.⁷²⁰ For example, the offense of unintentionally missing class, which is a Class II offense,⁷²¹ would be upgraded to "absent class (intentional)," which is a more serious Class I offense, if discovered to have been committed intentionally.⁷²² Such upgrading of an offense will result, of course, in the assessment of a greater number of demerits,⁷²³ and will thereby increase the chance a cadet will be punished or expelled for misconduct.

In addition to the self-incrimination problems outlined above, a further, unique issue arises at the Military and Air Force Academies. At those institutions, all cadets are required to sign a statement during each semester, pursuant to the truthfulness requirement of the cadet honor code, that they have never been and are not married.⁷²⁴ This practice raises severe self-incrimination questions, since marriage is grounds for expulsion from the academy and, if the cadet involved is in his last two years, for his activation for two or more years of enlisted duty.⁷²⁵ Nor can these constitutional difficulties be abrogated, as the military might claim, by recourse to the

public papers exception to the self-incrimination doctrine. This exception, as articulated by the Supreme Court, requires the submission in judicial or administrative proceedings of papers kept pursuant to law or government regulation, notwithstanding the self-incriminatory character of the papers.⁷²⁶ But documents to which the exception applies are those required to be routinely kept incidental to the regulation of

⁷²⁰ Compare, e.g., U.S.A.F.C.R. 35-6(VIII)(5)(a)(3) (1971) with id. (5)(c)(1) (Class III offense of "unintentional damage to equipment" upgraded to Class I offense when "intentional").

⁷²¹ See U.S.A.F.C.R. 35-6(VIII)(1)(b)(2) (1971).

⁷²² See id. (c)(4).

⁷²³ See note 145 *supra*.

⁷²⁴ Air Force Academy cadets must sign this statement upon accepting an appointment to the Academy and within five days after the start of each Fall and each Spring semester. U.S.A.F.C.R. 35-4(3) (1968); see U.S.A.F.A. Form 0-611 (1968). Military Academy cadets must verify that they are not married each time they apply for leave or for permission to participate in an extracurricular activity trip, see U.S.M.A. Form 2-342 (1972); U.S.M.A. Form 2-71 (1969). Until the 1970-71 academic year Naval Academy midshipmen were required to sign a "nonmarriage" statement essentially identical to that of the Air Force Academy after summer, Christmas and spring leaves. See SRNC-USNA-EXEC-1752/121 (8-63); See Letter from Legal Officer, U.S.N.A., Nov. 2, 1972. The Coast Guard Academy has required only its class of 1964 to sign a "non marriage" statement. Letter from Legal Officer, U.S.C.G.A., Oct. 27, 1972.

⁷²⁵ See text accompanying note 302 *supra*.

⁷²⁶ See *Shapiro v. United States*, 335 U.S. 1 (1948); *Wilson v. United States*, 221 U.S. 361 (1911). See generally, K. Davis, *Administrative Law Treatise* § 3.09 (1958).

on-going activities, which require regular inspection to insure compliance.⁷²⁷ The academy marriage forms are hardly of this type, since they are not "kept" incidental to regulation, but are "produced" in order to allow discharge of married cadets from the academy. The implications of validating such a

practice are striking. If the marriage form requirement is constitutional, might not academy officials legally require cadets to complete periodic statements, subject to expulsion for misstatements, as to whether they had committed any or all offenses under any academy regulation? Moreover, even in the unlikely event that the marriage restriction is a substantively valid regulation (that is, one reasonably related to accomplishing the academies' missions),⁷²⁸ its enforcement is certainly no more necessary than any of a number of other academy regulations to which the self-incrimination prohibition applies with full force. It would appear, therefore, that the Air Force and Military Academies cannot constitutionally require cadets to submit the incriminating marriage certificates.⁷²⁹

*b. Confessions--*Since the 1700's, a basic principle of Anglo-American law has been that a confession⁷³⁰ obtained from an accused⁷³¹ by one in authority⁷³² under pressure sufficient to create

⁷²⁷ *Shapiro v. United States*, 335 U.S. 1,33(1948); *Wilson v. United States*, 221 U.S. 361, 380 (1911).

⁷²⁸ See *O'Neill v. Dent*, Civil No. 71-1480 (E.D.N.Y. July 16, 1973); note 838 and text accompanying notes 829-32 *infra*.

⁷²⁹ See text accompanying note 94 *supra*. The Supreme Court has recognized in other contexts that requiring individuals to submit documents incriminating themselves violates the fifth amendment. E.g., wagering, tax and gun registration requirements, *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); information about the Communist Party, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).

⁷³⁰ Under the early view, a "confession" was "an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it." 3 Wigmore, *Evidence* § 821, at 308 (Chadbourn rev. ed. 1970) (emphasis removed from original). Under the modern view, "an admission . . . by an accused . . . should . . . be treated as if it were a confession for purposes of invoking the exclusionary rules which apply to confessions." *Id.* § 821, at 326.

⁷³¹ The doctrine of confessions applies only to an accused, not to a witness or a civil party. *Id.*

§ 815. The criminal-noncriminal distinction is far from clear. *Id.* § 815, at 286-89. Nonetheless, there is ample justification for rejecting the noncriminal classification with respect to academy adjudications. See text accompanying notes 297-300 & 682-93 *supra*.

⁷³² 3 *Wigmore, supra note 730, § 827. Most American courts determine whether a person is a "person in authority" within the meaning of the confessions doctrine by examining, on a case-by-case basis, the actual relationship between the person in question and the confessor as it affects the probable strength of the inducement. Id. § 827, at 446-47; see, e.g., People v. Brown, 198 Cal. App. 2d 253, 255, 17 Cal. Rptr. 884, 885 (1961).*

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a fair risk of falsity must be excluded from evidence.⁷³³ Under the aegis of the Supreme Court, this once merely common law doctrine has taken on constitutional dimensions, so that today a conviction "founded in whole or in part" upon an improperly obtained confession is itself invalid for reasons apart from the suspected untrustworthiness of the confession.⁷³⁴ Courts have relied upon the fourth amendment prohibition of unreasonable search and seizures,⁷³⁵ the fifth and fourteenth amendment due process clause,⁷³⁶ the fifth amendment privilege against self-incrimination⁷³⁷ and the sixth amendment right to the assistance of counsel⁷³⁸ to render invalid such coerced statements and convictions obtained through their use. Such multifaceted constitutional restrictions are designed not only to ensure that confessions are based upon reliable evidence⁷³⁹ but to protect a whole "complex of values,"⁷⁴⁰ including deterrence of improper conduct by those in authority,⁷⁴¹ assurance that a confession is a product of a "free and rational choice,"⁷⁴² and more generally, the guarantee of fundamental fairness.⁷⁴³ All of these considerations, of course, are relevant to academy adjudications. Yet to determine the applicability of the coerced confession exclusionary rule to the academies, it is first necessary to examine the requirements of civilian and military law in the area.

Turning first to the civilian standards, the admissibility of a confession

ultimately turns on "voluntariness;"⁷⁴⁴ an accused has a

⁷³³ See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 *Ohio State L.J.* 449, 452-53 (1964); 3 *Wigmore*, supra note 730, §§ 817, 819-820C. "

⁷³⁴ See *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

⁷³⁵ See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 485-87 (1963); Herman, supra note 733, at 458-62.

⁷³⁶ See, e.g., *Rogers v. Richmond*, 365 U.S. 534, 544-45 (1961) (fourteenth amendment); *Lee v. United States*, 322 F.2d 770 (5th Cir. 1963) (fifth amendment).

⁷³⁷ See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964)

⁷³⁸ See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, (1964); *Massiah v. United States*, 377 U.S. 201 (1964); Herman, supra note 733, at 481-95.

⁷³⁹ *Developments-Confessions*, supra note 678, at 963-64 (1966).

⁷⁴⁰ See *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); 3 *Wigmore*, supra note 730, 826, at 351-52.

⁷⁴¹ *Developments-Confessions*, supra note 678, at 963-64. Society has "the deep-rooted feeling that the police must obey the law while enforcing the law [and] that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano v. New York*, 360 U.S. 315, 320-21 (1959).

⁷⁴² *Developments-Confessions*, supra note 678, at 963-64; see *id.* at 973-81.

⁷⁴³ See, e.g., *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *Lisenba v. California*, 314 U.S. 219, 236 (1941).

⁷⁴⁴ "Voluntariness" has been the primary admissibility test for over two hundred years. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."⁷⁴⁵ Interpreting this broad guideline has not been easy, for, as the Supreme Court itself has recognized, there is no "single litmus-paper test."⁷⁴⁶ Rather, legal voluntariness must be determined "from the totality of the relevant circumstances of a particular situation."⁷⁴⁷ In deciding which cases meet this standard, the Court has relied on a wide range of factual elements,⁷⁴⁸ which can be grouped into two somewhat overlapping categories: the status of the accused and the conduct of the accusers. Factors

of the first type which have proved influential include the youth of the accused,⁷⁴⁹ the length of time he has been interrogated⁷⁵⁰ or held incommunicado,⁷⁵¹ his lack of food⁷⁵² or sleep,⁷⁵³ and whether or not he has been moved from place to place.⁷⁵⁴ The factors in the second category on which the Court has relied include the number⁷⁵⁵ and hostility⁷⁵⁶ of the interrogators, their failure to advise an accused of his rights⁷⁵⁷ or allow him access to an attorney or other assistance,⁷⁵⁸ and their attempts to influence him⁷⁵⁹ through advice, promises, assurances or deceptions.⁷⁶⁰ Such factual considerations must be weighed in each case to determine whether the conviction under review was based "in whole

⁷⁴⁵ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

⁷⁴⁶ *Culombe v. Connecticut*, 367 U.S. 568, 601 (1961); see 3 Wigmore, *supra* note 730, § 826, at 352.

⁷⁴⁷ 367 U.S. at 606.

⁷⁴⁸ For lists of these factors, see, e.g., *Garrity v. New Jersey*, 385 U.S. 493, 505-06 (1967) (Harlan, J., dissenting); *Manual for Courts-Martial, United States* ¶ 140a (rev. ed. 1969); Comment, 33 *Neb. L. Rev.* 507, 508 (1954).

⁷⁴⁹ E.g., *Reek v. Pate*, 367 U.S. 433 (1961) (19-year-old boy).

⁷⁵⁰ E.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961) (sporadic rather than systematic); *Reck v. Pate*, 367 U.S. 433 (1961) (six- and seven-hour stretches); *Chambers v. Florida*, 309 U.S. 227 (1940) (all-night interrogation).

⁷⁵¹ E.g., *Haynes v. Washington*, 373 U.S. 503 (1963) (16 hours).

⁷⁵² E.g., *Reek v. Pate*, 367 U.S. 433 (1961); *Payne v. Arkansas*, 356 U.S. 560 (1958).

⁷⁵³ E.g., *Leyra v. Denno*, 347 U.S. 556 (1954); *Chambers v. Florida*, 309 U.S. 227 (1940).

⁷⁵⁴ E.g., *Ward v. Texas*, 316 U.S. 547 (1942) (moved to several different locations).

⁷⁵⁵ E.g., *Reek v. Pate*, 367 U.S. 433 (1961) (groups); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (same).

⁷⁵⁶ E.g., *Ashdown v. Utah*, 357 U.S. 426, 430 (1958) (*interrogators were "temperate and courteous"*).

⁷⁵⁷ E.g., *Clewis v. Texas*, 386 U.S. 707 (1967); *Haynes v. Washington*, 373 U.S. 503

(1963) (to remain silent).

⁷⁵⁸ E.g., *Culombe v. Connecticut*, 367 U.S. 568, 630-31 (1961) (failure to obtain lawyers after request); *Fikes v. Alabama*, 352 U.S. 191 (1957) (lawyer turned away).

⁷⁵⁹ E.g., *Lynumn v. Illinois*, 372 U.S. 528 (1963) (promise of recommended leniency).

⁷⁶⁰ E.g., *Haynes v. Washington*, 373 U.S. 503 (1963); *Lynumn v. Illinois*, 372 U.S. 528 (1963).

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or in part"⁷⁶¹ upon a confession obtained by any degree of trick, fraud, threat, promise, fear, hope⁷⁶² or other improper inducement.⁷⁶³ If so, the conviction is invalid.

Two recent Supreme Court decisions, moreover, embody the most significant extension of the coerced confession doctrine by holding that if the accused was not provided a right to counsel or was not fully advised of his right to remain silent, his confession is invalid.

In *Escobedo v. Illinois*⁷⁶⁴ the Court reasoned that police interrogation is a "critical" stage of the criminal process, since at that point suspicion has already focused⁷⁶⁵ and the police may attempt to obtain a confession. The Court therefore characterized interrogation as an adversary situation, in which the defendant has a crucial need for the assistance of counsel.⁷⁶⁶ This conclusion was necessary, the Court observed, for failure to provide counsel during questioning "would make the trial no more than an appeal from the interrogation"⁷⁶⁷ and would render the right to a lawyer at trial essentially meaningless.⁷⁶⁸

Two years after *Escobedo*, the court articulated in its landmark decision *Miranda v. Arizona*⁷⁶⁹ its most advanced confession requirements by

expressly holding that the privilege against self-incrimination applied during custodial interrogation and by formulating safeguards for protection of the privilege. *Miranda*, relying upon

⁷⁶¹ *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

⁷⁶² E.g., threat of corporal violence; promise of pardon, lighter punishment or milder treatment; promises of other favorable action; influences of a religious or moral nature. See *Miranda v. Arizona*, 384 U.S. 436, 476 (1966); 3 Wigmore, *supra* note 730, §§ 825, 827, 832-36, 838-41, 852; Koessler, *The Admissibility of Confessions Obtained by Trickery*, 50 A.B.A.J. 648 (1964); *Developments—Confessions*, *supra* note 678, at 980-81. Thus, the common interrogation technique of falsely telling one suspect that his alleged accomplice has confessed and implicated him seems vulnerable to constitutional attack. *Id.* at 980.

⁷⁶³ E.g., assurance that "you had better confess," or that "it would be better to tell the truth," or its equivalent; and various other phrases and inducements. 3 Wigmore, *supra* note 730, §* 832, 834-36, 838-40. Indeed, courts have held unconstitutional a promise of a specified sentence and seemingly mild assurances of assistance. See, e.g., *State v. Woodruff*, 259 N.C. 333, 338, 130 S.E. 2d 641, 645 (1963) (sheriff would "certainly try to help him").

⁷⁶⁴ 378 U.S. 478 (1964).

⁷⁶⁵ *Escobedo* limited its requirement of the right to counsel to interrogations occurring when the focus of the criminal process "is on the accused and its purpose is to elicit a confession." *Id.* at 492. Interpreting this limitation is a continuing problem in applying the *Escobedo* decision. *Developments—Confessions*, *supra* note 678, at 1007 (1966).

⁷⁶⁶ See 378 U.S. at 490-92. See generally *Developments—Confessions*, *supra* note 678, at 999-1007 (1966).

⁷⁶⁷ 378 U.S. at 487.

⁷⁶⁸ *Id.* Indeed, if counsel is not provided during questioning, "For all practical purposes, the conviction is already assured. . . . *Id.*

⁷⁶⁹ 384 U.S. 436 (1966).

the fifth amendment privilege against self-incrimination, held that one who is in custody or otherwise deprived of his freedom of action in any significant way⁷⁷⁰ must be warned prior to questioning that he has a constitutional right

to remain silent; that anything he says can be used against him in court; that he has the right both to consult with a lawyer and to have him present during interrogation; and that if he is indigent a lawyer will be appointed to represent him.⁷⁷¹ Any statement obtained from a person who has not been given these prior warnings, the Court concluded, may not be used against him.⁷⁷² Additionally, the Court explained that the privilege against self-incrimination must be given a broad application, and that it prohibits informal, as well as formal, coercion of confessions.⁷⁷³

The applicability of these requirements of civilian criminal cases to academy adjudications is reinforced by an examination of the applicable military law. The general standard, as outlined by the Court of Military Appeals, is that inducements, promises, threats or physical or mental abuse deprive an accused of his freedom of will and, therefore, render any confession obtained through their use inadmissible as violating the privilege against self-incrimination.⁷⁷⁴ The court has held, moreover, that the *Miranda* requirements must be met in military criminal cases.⁷⁷⁵ Indeed, some of the *Miranda* safeguards were extended by Article 31 of the UCMJ to accused military personnel 16 years before *Miranda* was decided.⁷⁷⁶ Article 31 prohibits any person subject to the Uniform Code from

⁷⁷⁰ Id. at 444. As a consequence, *Miranda* warnings are not confined to hearings at which guilt will be established or routine investigations which may result in a criminal prosecution. *Mathis v. United States*, 391 U.S. 1 (1968); see, e.g., *Carter v. McGinnis*, 351 F. Supp. 787 (W.D.N.Y. 1972).

⁷⁷¹ 384 U.S. at 467-69, 471, 473.

⁷⁷² The Court concluded that:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. . . .

Id. at 468.

⁷⁷³ Id. at 461.

⁷⁷⁴ United States v. King, 16 C.M.R. 858, 865 (1954); see Manual for Courts-Martial, United States ¶ 140(a)(2) (rev. ed. 1969).

⁷⁷⁵ See, e.g., United States v. Tempia, 16 U.S.C.M.A. 629, 635, 37 C.M.R. 249, 255 (1967).

⁷⁷⁶ This was accomplished by Act of May 5, 1950, ch. 169, 64 Stat. 118 (codified at 10 U.S.C. § 831 (1970)). For a discussion of article 31's operation, see, e.g., Developments—Confessions, *supra* note 678, at 1084-90.

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interrogat[ing] or request[ing] any statement from . . . an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.⁷⁷⁷

Article 31 has been interpreted to require safeguards similar to those afforded in civilian cases. Thus, the provision mandates that only voluntary statements by an accused are permitted⁷⁷⁸ that a confession is vitiated if there is a "fair risk" that the method of interrogation employed makes it unreliable⁷⁷⁹ and that to be valid a confession must be "the product of a free choice."⁷⁸⁰ It would appear that article 31 safeguards must be accorded in academy adjudicatory proceedings even if such adjudications are not deemed criminal in nature. The Manual of Courts-Martial explicitly requires article 31 warnings to be given in article 15 adjudications.⁷⁸¹ To the extent that academy proceedings may be equated with article 15 adjudications-and the relationship does seem persuasive⁷⁸²-cadets must be given article 31 warnings prior to interrogation. Apparently in recognition of this, some academies have, at least on some occasions, provided cadets the article 31 safeguards.⁷⁸⁴

⁷⁷⁷ U.C.M.J. Art. 31(b), 10 U.S.C. § 831(b) (1970). In many ways Article 31 of the U.C.M.J. is broader than the fifth amendment privilege against self-incrimination. See, e.g., *United States v. Mewborn*, 17 U.S.C.M.A. 431, 434, 38 C.M.R. 229, 232 (1968) (voice identification excluded under the statute but not by fifth amendment); *United States v. Nowling*, 9 U.S.C.M.A. 100, 25 C.M.R. 362 (1958) (air policeman who suspects that an airman has no pass may not lawfully order him to produce his pass); Fratcher, *supra* note 37, at 877.

⁷⁷⁸ *United States v. McKay*, 9 U.S.C.M.A. 527, 26 C.M.R. 307 (1958).

⁷⁷⁹ *Id.* at 530, 26 C.M.R. at 310 (1958) (dictum).

⁷⁸⁰ *United States v. Colbert*, 2 U.S.C.M.A. 3, 7, 6 C.M.R. 3, 7 (1952) (dictum); see *Developments-Confessions*, *supra* note 678, 973-82, 1085.

⁷⁸¹ *Manual for Courts-Martial, United States* ¶ 133(a), (b) (rev. ed. 1969).

⁷⁸² See text accompanying notes 240-64 & 372-76 *supra*. The only express statutory authority for penalizing cadets "without court-martial" is U.C.M.J. art. 15, 10 U.S.C. § 815 (1970).

⁷⁸³ "[R]itualistic readings" of Article 31 fail to meet the statute's requirements; the warnings must be given, rather, in such a way as to convey its import. *United States v. Hernandez*, 4 U.S.C.M.A. 464, 468, 16 C.M.R. 39, 42 (1954).

⁷⁸⁴ See *Hearings on Service Academies*, *supra* note 18, at 10,426-27, 10,447, 10,804; Charles, *supra* note 71, at 203, 235-36; *Denver Post Empire Magazine*, April 2, 1967, at 16, 17, cols., 2, 1; U.S.M.A. Honor Guide for Officers, *supra* note 215, at 7; U.S.A.F.A. Honor Reference Handbook, *supra* note 172, at 43; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 17. Today, however, article 31 safeguards are not afforded before or during Air Force

Despite the myriad of constitutional, decisional and statutory law to the contrary, however, the academies often compel cadets to confess to having committed offenses for which they are under suspicion.⁷⁸⁵ Cadets are generally required to answer truthfully and completely, for example, all questions asked of ^{them}⁷⁸⁶ under the intense moral persuasion of their honor code and the threat of expulsion for its violation.⁷⁸⁷ Indeed, one group of Army investigators severely criticized Military Academy officials during West Point's 1951 honor scandal for inducing cadets to confess by telling

them that to remain silent was "ridiculous and beneath the dignity" of cadets⁷⁸⁸ and by assuring cadets that if they "told the truth" they would be "treated fairly."⁷⁸⁹

The true extent of the academies' failure to apply constitutional and statutory principles in this area may become clear only by examining in greater detail the type of mass prosecution that occasionally occurs at the academies. An example is offered by the practices of Air Force Academy cadets during that institution's January 1972 "honor scandal." The incident, as related by publications of the Academy itself, began with a single suspect, a cadet under suspicion of petty theft being questioned by the Wing Commander and ten Cadet Honor Committee members.⁷⁹⁰ After more than five and one-half hours of questioning the cadet suspect "broke down" and described a mass cheating operation in which he and several other cadets were involved.⁷⁹¹ With the help of more than 40 additional

and Military Academy honor proceedings. Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Letter from 1972-73 Honor Comm. Chairman, U.S.A.F.A., Jan. 8, 1973.

⁷⁸⁵ See text accompanying notes 714-29 *supra* and 786-808 *infra*.

⁷⁸⁶ Text accompanying note 714 *supra*.

⁷⁸⁷ See text accompanying notes 167-94 *supra* and 1034-64 *infra*.

⁷⁸⁸ Minority Report, *supra* note 6, at 1-2.

⁷⁸⁹ *Id.*; see E. Blaik, *You Have to Pay the Price* 281 (1960); Galloway & Johnson, *supra* note 301, ch. 4. The report reads: some cadets were "penalized simply for telling the truth. . . The important thing is that those who said 'No Comment' or lied fared better than those who told the truth."

Minority Report, *supra* note 6, at 1-2. See also Majority Report, *supra* note 74, at 10 (cadet confessions also resulted from other coercive influences); Parke, *West Point Says 80 Admit to Cheating; Coercion is Denied*, *N.Y. Times*, Aug. 8, 1951, at 1, col. 5.

⁷⁹⁰ U.S.A.F.A. Press Conference, *supra* note 609; Connally, *The Honor Investigation Implications?*, *The Association of Graduates Magazine* 10 (Winter 1972) [hereinafter Connally, *The Honor Investigation Implications*].

⁷⁹¹ U.S.A.F.A. Press Conference, *supra* note 609, at 2; see Connally, *The Honor Investigation Implications*, *supra* note 790, at 10; Connally, *Vindication of the Code*, *supra* no445, at 23.

cadet officers and Honor Committee members, cadets implicated by this informant, and many other cadets subsequently implicated, were awakened in the middle of the night⁷⁹² and told to proceed to an "important meeting."⁷⁹³ By morning between 75 and 125 suspects⁷⁹⁴, had been placed in rooms where they were guarded,⁷⁹⁵ forbidden to talk to anyone, including each other,⁷⁹⁶ and, in some cases, uninformed for hours as to why they were being held.⁷⁹⁷ Each cadet was interrogated, some for as long as six hours,⁷⁹⁸ by five to 12 cadet investigators,⁷⁹⁹ some of whom required the accused cadets to stand at a "brace"⁸⁰⁰ and to answer all questions with "sir."⁸⁰¹ Some accused cadets were held and questioned throughout the night and into the following day, sleeping, if they could, in chairs.⁸⁰² The interrogators were hostile in the extreme;⁸⁰³ the suspects were bombarded with

⁷⁹² E.g., one cadet was summoned at 1:30 A.M. Interview With Expelled 1971-72 Honor Comm. Representative, U.S.A.F.A., June 13, 1972. Another was awakened at exactly 3:28 A.M. Heise, Farewell to Duty, Honor, Country, supra note 6, at 21.

⁷⁹³ Connally, The Honor Investigation Implications?, supra note 790, at 10; Connally, Vindication of the Code, supra note 445, at 23. "The Cadets were not informed as to the purpose of that meeting." Id.; see Heise, Farewell to Duty, Honor, Country, supra note 6, at 21.

⁷⁹⁴ Heise, Farewell to Duty, Honor, Country, supra note 6, at 21.

⁷⁹⁵ Id.; see Connally, The Honor Investigation Implications, supra note 790, at 10; Connally, Vindication of the Code, supra note 445, at 23.

⁷⁹⁶ Heise, Farewell to Duty, Honor, Country, supra note 6, at 21; Connally, The Honor Investigation Implications, supra note 790, at 10; Connally, Vindication of the Code, supra note 445, at 10; Letter from Honor Representative Convicted of Cheating, U.S.A.F.A., to Senator Charles H. Percy, at 2 (undated) ("not allowed to speak the rest of the day").

⁷⁹⁷ Letter from Honor Representative Convicted of Cheating, U.S.A.F.A., to Senator Charles H. Percy, at 2 (undated) ("I was not told what I was being held for nor could I even ask why."). One cadet convicted of participating in the cheating ring claims that he was confined for 18 hours before he discovered the exact reason. See Heise, Farewell to Duty, Honor, Country, supra note 6, at 21.

⁷⁹⁸ Heise, Farewell to Duty, Honor, Country, supra note 6, at 21.

⁷⁹⁹ See id. at 21-22; Interview with Separated 1971-72 Honor Comm. Representative, U.S.A.F.A.,

June 13, 1972 (interrogated by 12 cadets).

⁸⁰⁰ To learn "to assume the proper military posture," Fourth Cadets are required to assume the position of attention known as "bracing." See Hearings on Service Academies, *supra* note 18, at 10,504, 10,576, 10,577, 10,617; Lovell, *supra* note 306, at 18. Part of the "brace-up position" is the pulling in of one's chin in such a way as to create wrinkles underneath. See Hearings on Service Academies, *supra* note 18, at 10,504. For pictures of a cadet "bracing" with his "chin in" see, e.g., *Contrails, U.S.A.F.A.*, 293 (1970); *N.Y. Times Magazine*, April 16, 1961, at 86; *Look*, Oct. 6, 1970, at 36.

⁸⁰¹ See Connally, *The Honor Investigation Implications*, *supra* note 790, at 10-11; Connally, *Vindication of the Code*, *supra* note 445, at 23-24; Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 22.

⁸⁰² Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 21; Interviews with Expelled 1971-72 Honor Representative, *U.S.A.F.A.*, June 14, Aug. 21, 1972.

The experience of one accused cadet, apparently typical, is related in Heise, *Farewell*

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questions from all sides. The cadets under suspicion were threatened with court-martial for various offenses, including experimenting with drugs, if they persisted in refusing to answer questions or refusing to sign a confession.⁸⁰⁴ The cadets were also threatened with a variety of other reprisals;⁸⁰⁵ told, in some cases untruthfully, that signed statements from fellow cadets had already been received by the Honor Committee attesting to his participation in the scandal;⁸⁰⁶ and otherwise harassed.⁸⁰⁷ The investigations continued around the clock; in less than 48 hours 39 cadets were convicted of having violated the cadet honor code. Using information obtained at these interrogations, all 39 of these cadets were separated from the Academy; most are now serving two year tours as enlisted members of the Air Force.⁸⁰⁸

to *Duty, Honor, Country*, *supra* note 6, at 21:

[M]any [questions] were screamed right in his face. . . . Again and again, they wanted to know if he was the ringleader of an organized cheating operation. When his answer did not satisfy his questioners they were heard to yell: "Bullshit, _____!" And on and on it went.

The questioning was so intense that cadets reported it reminded them of POW interrogation training previously given them at the Academy. *Id.*; see Interview with Separated 1971-72 Honor

Comm. Representative, U.S.A.F.A., June 14, 1972 (yelling and screaming; bombarded with three questions at one time). Indeed, the pressure was such that one cadet vomited during his interrogation. See Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., June 8, 1972.

⁸⁰⁴ Interview with Separated 1971-72 Honor Comm. Representative, U.S.A.F.A., Aug. 21, 1972; Interview with 1971-72 Honor Comm. Representative, U.S.A.F.A., June 13, 1972. Cadets have been threatened with court-martial on other occasions in an attempt to elicit information. See, e.g., Galloway & Johnson, *supra* note 301.

⁸⁰⁵ Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 22. As one cadet put it: "One of the first things [the honor representatives] said to me was that "if you don't tell us, we'll turn you over to the OSI and you know they'll make you talk."" *Id.*

⁸⁰⁶ Interview with Separated Honor Code Violator, U.S.A.F.A., Aug. 20, 1972; Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 22; Letter from Separated 1971-72 Honor Comm. Representative, U.S.A.F.A., to Senator Charles H. Percy (undated); see *Affidavits of Three Former U.S.A.F.A. Cadets*, March 9, 10 (1972). Such deceitful ploys have been used to elicit confessions from cadets on other occasions. See, e.g., Galloway & Johnson, *supra* note 301, ch. 4 (used by West Point Honor Representatives during 1951 cheating scandal).

⁸⁰⁷ E.g., in the middle of the investigation some of the suspects were required to get haircuts; one had to get three of them. Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 23. Another suspect was told by a cadet interrogator: "If you were a man you would just go ahead and stand up and tell us everything about it, and maybe I'd save a little bit of respect for you." Interview with Former 1971-72 Honor Comm. Representative, U.S.A.F.A., June 13, 1972.

⁸⁰⁸ Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 22; see Connally, *The Honor Investigation Implications*, *supra* note 790, at 12; Connally, *Vindication of the Code*, *supra* note 445, at 24; text accompanying note 302 *supra*. Those cadets now enlisted status each have in their personnel records an Air Force Form 785 indicating that they left the Academy for violating the honor code. As a result, opportunities are denied them even during their years of

As is readily apparent, the procedures employed by the Air Force Academy's Honor Committee in the 1972 honor scandal contravene both the letter and the spirit of the confession standards outlined above.⁸⁰⁹ These massive official interrogations conducted for such lengthy periods were "inherently coercive" and therefore, the confessions obtained were "invalid."⁸¹⁰ The tactics to which the interrogators resorted obviously created sufficient

physical and psychological pressures to give rise to a substantial risk that the confessions were not truthful, and it certainly cannot be thought that the cadets being interrogated gave the confessions voluntarily. This lack of voluntariness is brought into clearer focus when the fact is considered that the interrogation here was of underclassmen by upperclass cadet officers in precisely the same manner as upperclassmen interrogate Fourth Classmen during the first year at the Academy—a year in which cadets are taught unstinting and unquestioning obedience to the commands of upperclass cadets who daily and intensely interrogate them on a number of topics.⁸¹¹ Having come to accept such a system, a cadet questioned in the honor investigation by an upper-class cadet may not recognize his right to remain silent and, even if he should, may not dare assert it. Yet this is precisely the situation—a military subordinate feeling compelled to answer his higher-ranking interrogator—which Congress sought to avoid when it required that accused servicemen be informed, prior to questioning, of their article 31 rights.⁸¹² Despite such considerations Air Force Academy officials sanction these improper interrogation methods and continue to fail to give article 31 and Miranda warnings.⁸¹³ The Air Force has offered two justifications. First, almost unbelievably,

enlisted status. Interview with 1971-72 Honor Comm. Representative Separated as an Honor Code Violator, U.S.A.F.A., Aug. 21, 1972; Letter from Cadet Honor Code Violator Now in Enlisted Status, Sept. 13, 1972.

⁸⁰⁹ Apparently in recognition of this, the Air Force Academy has promulgated new guidelines for conducting large scale honor interrogations. Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 22, 1972.

⁸¹⁰ See *Spano v. New York*, 360 U.S. 315, 322 (1959); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).

⁸¹¹ The daily questioning process is extremely intense. Indeed, cadets learn to answer all questions by saying only "Yes, sir; No, sir; No excuse sir; Sir, may I ask a question?" or "Sir, may I make a statement?" See text accompanying notes 327-29 *supra*.

⁸¹² See, e.g., *United States v. Kemp*, 13 U.S.C.M.A. 89, 97, 32 C.M.R. 89, 97 (1962);

Developments—Confessions, *supra* note 678, at 1086-87. Such inherent command pressure on accused cadets was a significant factor in obtaining confessions during West Point's 1951 honor scandal. Majority Report, *supra* note 74, at 10.

⁸¹³ Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 21, 1972; Letter from 1971-72 Honor Comm. Chairman, U.S.A.F.A., Jan. 8, 1972.

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Academy attorneys advise Cadet Honor Committee members and other officials that their interrogation procedures do not create "undue pressure" on the cadets being interrogated.⁸¹⁴ Second, and perhaps more fundamentally, Academy officials characterize honor proceedings as "administrative" rather than "criminal,"⁸¹⁵ despite the severity of the consequences upon conviction.⁸¹⁶

Such arguments can hardly be thought to forestall the application of constitutional and statutory principles, since the pressure on the cadet being interrogated is clearly "undue" and the penalty he faces is criminal in nature.⁸¹⁷ It must be remembered that cadets are required, at risk of penalty, to answer all questions asked, are bound by their honor code to answer all questions truthfully or face almost certain expulsion, and are interrogated possessing the attitudes inculcated by the Fourth Class System. The pressures resulting from these three factors are the essence of what Miranda sought to prevent.⁸¹⁸ Furthermore, the cadets interrogated in the honor scandal were subject to other types of suasion in that they were in custody and deprived of their freedom of action in a significant way⁸¹⁹—"pressure"

⁸¹⁴ When consulted on this matter of undue pressure, Col. . . . of the Law Department stated that because of the particular environment, that is, cadets questioning cadets, none of the methods used in questioning could be considered 'undue' pressure. Col. . . . further stated that this was due to the fact that all cadets have experienced the fourth class system in which they were required to stand at a position of attention at all times, responding to all questions with the use of "sir," and received strong verbal attack frequently. In other words, because this type of pressure was a part of each cadet's experience for ten months, it could not be considered extreme or undue.

Connally, *The Honor Investigation Implications*, *supra* note 790, at 10, 12; Connally, *Vindication*

of the Code, *supra* note 445, at 24.

⁸¹⁵ Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 21, 1972; Letter from 1971-72 Honor Comm. Chairman, U.S.A. F.A., Jan. 8, 1972; cf. text accompanying notes 258-59 & 500 *supra*.

⁸¹⁶ See text accompanying notes 188-94, 302-03 & 310-18 *supra*. At the Air Force Academy, honor code "[v]iolators are expected to resign." U.S.A.F.A. Superintendent's Report, *supra* note 73, at 7.

⁸¹⁷ See text accompanying notes 297-300 & 682-93 *supra*.

⁸¹⁸ Compare *Miranda v. Arizona*, 384 U.S. 436, 448-58 (1966), with text accompanying notes 790-808 *supra*.

⁸¹⁹ The interrogations were conducted in rooms assigned for use by the Cadet Wing Commander and his cadet chain-of-command. See Connally, *The Honor Investigation Implications*, *supra* note 790, at 10-12; Connally, *Vindication of the Code*, *supra* note 445, at 23; text accompanying note 153 *supra*. These rooms were the Cadet Wing's counterpart to the station house since they were used for in-custody interrogation. Since the cadets were, in effect, ordered to attend the interrogation "meeting" and required to remain there in light of the nature of the interrogation, they must be considered to have been "in custody." Cf. *United States v. Lackey*, 413 F.2d 655, 657 (7th Cir. 1969) ("in custody" in a post office basement). Even if

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factors stressed in *Miranda*⁸²⁰ and in the Court of Military Appeals' cases⁸²¹ applying that decision to the military. There is no doubt that the proceedings had become adversary, a consideration which, some authorities maintain, was at the core of the Court's *Miranda* and *Escobedo* guidelines.⁸²² Academy attempts to characterize honor proceedings as "administrative" cannot alter an accused cadet's right to be free from coercion. Admittedly, the applicability of some constitutional⁸²³ and common law⁸²⁴ restrictions on interrogation, as well as those of article 31,⁸²⁵ may depend upon whether the proceedings in question are thought to be "criminal" or "civil."⁸²⁶ It is evident today, however, that the impact of fourth, fifth and sixth amendment requirements, like those of article 31, depends upon the nature of the potential loss involved rather than upon semantic classifications.⁸²⁷ Nonetheless, if it were necessary to classify academy adjudicatory proceedings involving possible expulsion or other severe penalties on the

strength of the sanction alone, compelling arguments could be advanced that these proceedings should be categorized as "criminal" for the purposes of the coerced confessions doctrine.⁸²⁸

E. Substantive Constitutional Limitations

1. Substantive Due Process

In addition to the constitutional procedural strictures discussed above, the fifth amendment imposes substantive limitations on the

the cadets were not "in custody," they were clearly deprived of their freedom of action in a significant way. Cf. *United States v. Dickerson*, 413 F.2d 1111, 1114 (7th Cir. 1969), which explains that an accused must be given the Miranda warnings "in his own bedroom if it appears he is not free to go where he pleases."

⁸²⁰ *Miranda v. Arizona*, 384 U.S. 436, 448-58 (1966); see *United States v. Dickerson*, 413 F.2d 1111, 1114-16 (7th Cir. 1969); *United States v. Squeri*, 398 F.2d 785, 790 (2d Cir. 1968).

⁸²¹ The Miranda rules govern all criminal military interrogations. *United States v. Tempia*, 16 U.S.C.M.A. 629, 635, 37 C.M.R. 249, 255 (1967). The Tempia court also specifically adopted the in-custody and freedom-of-action tests of Miranda. *Id.* at 636, 37 C.M.R. at 256.

⁸²² *United States v. Turzynski*, 268 F. Supp. 847, 853 (N.D. Ill. 1967); see *United States v. Dickerson*, 413 F.2d 1111, 1114 (7th Cir. 1969).

⁸²³ See U.S. Const. amends. V, VI. While the fourth amendment is not confined to criminal cases, decisions construing it as restricting interrogations appear to have arisen only in the criminal area. See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964).

⁸²⁴ See 3 Wigmore, *supra* note 730, § 815.

⁸²⁵ While some of the provisions of article 31 contain language referring to "criminal" proceedings, see 10 U.S.C. § 831(a), (d)(1970), the warnings required by article 31 must be given to anyone accused or suspected of "an offense," *id.* § 831(b).

⁸²⁶ See 3 Wigmore, *supra* note 730, § 815; text accompanying notes 676-93 *supra*.

⁸²⁷ See, e.g., text accompanying notes 682-90 *supra*.

⁸²⁸ See text accompanying notes 297-300 & 682-93 *supra*.

actions of the Federal Government and its delegates. The doctrine of substantive due process requires that governmental action depriving an individual of life, liberty or property have at least a rational basis.⁸²⁹ Since academy conduct codes clearly circumscribe individual liberty, academy

regulations must be shown to bear some degree of relation to the accomplishment of legitimate academy goals.

It is not completely clear how neatly the academies are required to tailor their regulations. The doctrine of substantive due process, as enunciated by the Supreme Court, is in a state of flux.⁸³⁰ While courts often require that administrative or school regulations be "reasonable" or "reasonably related" to a legitimate goal,⁸³¹ the traditional deference of courts to military discretion requires only a showing that there has been a "rational exercise of discretion."⁸³²

Whether or not many academy regulations could be held to deny substantive due process depends on how strictly the courts are willing to scrutinize the academies' actions. Under a deferential test, the most attenuated, hypothetical connection between regulation and goal would be a sufficient basis for upholding the regulation. The "toleration clause" of the West Point and Air Force honor codes, for example, might be found to promote the academies' goals of inculcating loyalty and maintaining high standards of integrity in potential

⁸²⁹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568, 580-82 (1973).

⁸³⁰ Since the 1930's, the Supreme Court has been wary of substantive due process, feeling that substantive review, especially of state legislation, casts the Court in the role of a "superlegislature." See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Da-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Thus, the Court's scrutiny of many facets of state and federal action has been limited and deferential. Legislation and regulations have been upheld if they might be considered rational under any state of facts that might be imagined. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955). The Court's comments in the recent case of *Roe v. Wade*, 41 U.S.L.W. 4213, 4225 (U.S., Jan. 22, 1973), indicate that substantive due process may be resuming a role as a guarantor of meaningful scrutiny where personal, as opposed to economic, liberties are infringed. If the court finds that the personal liberty involved is "fundamental," the Government must justify any abrogation of that liberty by showing that its actions were necessary to promote a compelling state interest. *Id.* at 4226. If the personal liberty infringed is found to be less than fundamental, it is not clear what test would be applied. The Court might return to the traditional substantive due process

standard and scrutinize governmental action to see if it is "reasonable" or "reasonably related" to a legitimate governmental end. See, e.g., *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

⁸³¹ E.g., *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *International Ry. v. Davidson*, 257 U.S. 506, 514 (1922); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 754 (5th Cir. 1966).

⁸³² E.g., *Nixon v. Secretary*, 422 F.2d 934, 939 (2d Cir. 1970); *Raderman v. Kaine*, 411 F.2d 1102, 1106 (2d Cir. 1969).

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military officers.⁸³³ Under any more stringent test, however, this provision might be found to be less than "reasonably" or "substantially" related to any valid military interest, and thus unconstitutional.⁸³⁴

Other regulations are even more tenuous and might be held unconstitutional even under a lenient test. For example, the Military Academy requires "[a]ll cadets who received Congressional appointments [to] send appropriate Christmas greetings to their Congressmen each year."⁸³⁵ More, "First Classmen [must], prior to or during June Week, write to their Congressmen expressing their appreciation for the opportunity to attend West Point."⁸³⁶ Coast Guard Academy freshmen are instructed that "[f]ourth classmen must not discuss interclass or Academy affairs outside the reservation."⁸³⁷ The Air Force and Military Academies proscribe "sitting in [a] parked car."⁸³⁸ Indeed, as recently noted by the Air Force Academy's top

⁸³³ See text accompanying notes 1075-77 *infra*.

⁸³⁴ See text accompanying notes 1034-64 & 1068-87 *infra*. Even less likely to be reasonably related to any legitimate military purpose is the Air Force Academy's recent expulsion of a cadet for "tolerating a tolerator." The cadet was expelled solely for failing to report that one year earlier his roommate had not reported a third cadet who the roommate suspected might have cheated—this despite the roommate's explanation that the cadet who had allegedly cheated was already scheduled to leave the academy. See Letter from Chief, Congressional Inquiry Division, Office of Legislative Liaison, U.S.A.F., to Senator Charles H. Percy, June 9, 1972; Letter from Separated 1971-72 U.S.A.F.A. Honor Representative to Senator Charles H. Percy, undated, at 2; Statement of Separated 1971-72 U.S.A.F.A. Honor Representative to Honor Comm. (undated).

⁸³⁵ R.U.S.C.C. 319(c)(3) (1971). Similarly, the Military Academy requires fourth class cadets appointed by congressmen to mail letters to the congressmen by October 1st, after submitting them

to the company tactical officer. Those cadets are informed that [in] general, the letters should thank the party concerned for the appointment and should state the date the cadet arrived, that he has successfully completed his summer training, and that he is now settling down for the beginning of the academic year. *Id.* 319(c)(2).⁸³⁶ *Id.* 319(c)(4).

⁸³⁷ U.S.C.G.A., *Running Light 130* (1971). Breach of this requirement could be construed as a serious Class I offense. See R.C.C.U.S.C.G.A. 5-7-01 (120M), (208), (322) (1971).

⁸³⁸ U.S.A.F.C.R. 35-6(VIII)(9)(a)(I) (1971); U.S.M.A.D.S.S.O.P. 38(111)(B)(3)(327) (1968). Other apparently unreasonable academy regulations include R.C.C.U.S.C.G.A. 5-701(134- M) (1971) ("[ul]se of [motorcycle] without authority"); *id.* 5-7-01 (223) (smoking or use of tobacco on a street, a Class II offense); *id.* 5-7-01 (375) (unauthorized use of tobacco, a Class III offense). The Merchant Marine Academy's regulation prohibiting cadets from marrying has recently been declared unconstitutional by the United States District Court for the Eastern District of New York. See *O'Neill v. Dent*, Civil No. 71-1480 (E.D.N.Y. July 16, 1973); Kaplan, *Court Voids Ban on Marriages by the Merchant Marine Academy*, *N.Y. Times*, July 18, 1973, at 13, cols. I-5. Whatever the propriety of proscribing marriage for cadets there seems to be less of a rational basis for requiring, as a prerequisite to admission to an academy, that applicants never have been married, e.g., U.S. Air Force Academy Catalog 52 (1972), particu-

1971 graduate, "[r]egulations govern the most minute details of life, from folding underwear, to the hand you hold your books in when you walk, to holding your girlfriend's hand."⁸³⁹ Even if certain provisions of the codes are constitutional, many of their specific applications are dubious. The honor codes have been interpreted as proscribing such trivial acts⁸⁴⁰ as asking a roommate how to spell a word to be used in a research paper⁸⁴¹ and taking a dime left in the coin return of a pay telephone.⁸⁴²

The relation of such rules of conduct to any substantial academy purpose, however questionable on a *prima facie* consideration, becomes yet more tenuous in that they attempt to shape behavior which is not useful and "not really practical in the services."⁸⁴³ Indeed, other academies contemplating similar provisions chose not to adopt them because of an acknowledged disutility in promoting academy goals.⁸⁴⁴

larly in view of the fact that a cadet may have reached the age of 23 upon entering an academy, *id.*

This appears to have been recognized by the War Department in 1935 when it disapproved the dismissal of a West Point cadet who was married at the time of his entrance to the Military Academy but had secured a Mexican divorce. Letter from the Adjutant General, U.S. Army, to Superintendent, U.S.M.A., Sept. 9, 1935, summarized in File No. 351.1, Adjutant General, U.S. M.A.

⁸³⁹ Letter from 1972 Air Force Academy graduate to the Editor, undated, *The Humanist*, Jan./Feb. 1973, at 2 (published in part only) [hereinafter Letter of 1972 Air Force Academy Graduate]; see *Denver Post*, Jan. 24, 1973, at 57, col. 3.

⁸⁴⁰ The honor codes are often applied to minutiae. Heise, *Farewell to Duty, Honor, Country*, supra note 6, at 22; Letter from separated 1971-72 U.S.A.F.A. Honor Representative to Senator Charles H. Percy, undated ("For even the most trivial offense [a cadet] would be dismissed from the Academy."); White, supra note 309, at 72. See also Galloway & Johnson, supra note 301, ch. 4.

⁸⁴¹ Galloway & Johnson, supra note 301, ch. 4; Morgenstern, supra note 74, at 3. Proscribing this act is inconsistent with the Air Force and Military Academies' practice of having Academy professors "changing all around," cadets' Rhodes Scholarship applications. See note 1019 infra.

⁸⁴² Letter from 1972 Air Force Academy Graduate, Apr. 7, 1973; Letter from 1971 Air Force Academy Graduate, Feb. 12, 1973; Letter from 1969 Air Force Academy Graduate, Dec. I, 1972. For further examples, see, e.g., Letter from 1967 Air Force Academy Graduate, Oct. 3, 1972, at 2 (1967 honor committee considered a cadet's listening in on ski instructions on ski slopes without paying for them to be an honor violation); Mutschler, supra note 312, at 18, col. 3; Truscott, *West Point: On Their Honor*, *N.Y. Times*, Aug. 19, 1972, at 23, col. 6. It may be unreasonable to consider an act an honor code violation, for two reasons. First, it may be unreasonable to consider a particular kind of conduct to violate an honor code proscription. Even when an act does violate an honor code proscription, however, it may be unreasonable to proscribe that act as an honor code violation.

⁸⁴³ DoD House Appropriations Hearings, 1966, supra note 12, at 39; see note 1308 and text accompanying notes 1017, 1086 & 1096 supra. See also text accompanying notes 841 supra and 1019 infra.

⁸⁴⁴ See, e.g., text accompanying notes 220 supra. See also text accompanying note 1117 infra.

2. Equal Protection

The due process clause of the fifth amendment has also been held to include a guarantee of equal protection of the laws, similar to that of the fourteenth amendment.⁸⁴⁵ Thus the Federal Government must justify any discrepancy in its treatment of similarly situated persons. Where a discrimination exists, the

government must show that its basis for imposing unequal burdens or affording unequal benefits is rationally related to a proper governmental objective .⁸⁴⁶

The service academies and officer training schools both operate under the aegis of the Federal Government. While the aims of these institutions are substantially the same, regulations ostensibly geared to promoting these aims often impose disproportionately harsh treatment on cadets at the academies. For example, the Air Force Academy's Board of Visitors noted that one form of physical punishment,⁸⁴⁷ was administered to cadets but not to officer candidates or Air Force recruits, and commented that "why it should be considered absolutely essential as a means of controlling members of a select group of highly motivated cadets continues to be an enigma to members of the Board."⁸⁴⁸

Similar differentiations have drawn criticism from courts which have been unable to discern any valid governmental purpose in discriminating against academy cadets. As the District of Columbia

⁸⁴⁵ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). For the difference in purpose between due process and equal protection of the laws, see *Truax v. Corrigan*, 257 U.S. 312, 332 (1921).

⁸⁴⁶ The tests for whether equal protection of the laws has been denied are expressed in varied terminology. Traditionally, the equal protection clause has required "that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated." Tussman & TenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949); see *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). Under a more recent formulation of the equal protection standard, "statutory classifications which either are based upon certain 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest." *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting). "And sometimes the Court will . . . hold a rational classification to be impermissible because the state has available to it a means of achieving its objective that will have less onerous effect upon interests protected by the Equal Protection Clause." Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 Sup. Ct. Rev. 39, 58. In the administrative context, the adoption of a rule resulting in discrimination in fact, which officials either knew or should have known would be

discriminatory in effect, denies equal protection of the laws, regardless of the officials' intent. Cf. *Smith v. Texas*, 311 U.S. 128, 132 (1940).

⁸⁴⁷ The "physical punishment" involved requiring cadets to maintain the "front leaning rest" position—the "up" phase of a push-up. Report of the Board of Visitors, U.S. Air Force Academy 9, 10-11 (1970).

⁸⁴⁸ *Id.* at 11.

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Circuit Court of Appeals observed in invalidating the academies' mandatory chapel attendance requirement, "[t]he concept of government necessity is undercut by the fact that approximately 95% of the Service officers do not graduate from the Academies, and have never been subject to this compulsory chapel requirement."⁸⁴⁹ Furthermore, as argued, but not addressed by the court in *Hagopian v. Knowlton*,⁸⁵⁰ cadets may be denied equal protection by the failure of an academy to provide in cadet adjudications the procedural safeguards routinely afforded to other members of the military.⁸⁵¹

F. The Silence

Perhaps the single greatest affront to common notions of due process in academy adjudications is presented by the Military Academy's practice of "silencing" and segregating a cadet convicted⁸⁵² by an honor board but who has not been separated from the Academy.⁸⁵³ An examination of this practice might best begin with a glance at its historical origins.⁸⁵⁴ The silence appears to have origi-

⁸⁴⁹ *Anderson v. Laird*, 466 F.2d 283, 303 (D.C. Cir.) (Leventhal, J., concurring), cert. denied, 409 U.S. 1076 (1972). Many other aspects of the academies' training programs seem to deny cadets due process of law by unreasonably requiring them to undergo hardships not required at nonacademy officer training schools, e.g., the "silence." See text accompanying notes 213-20, 313-17 & 852-940 *supra*.

The rationality of many standards imposed on cadets but not on nonacademy officer candidates is further undercut by the fact that, as noted by Vice-Admiral Rickover, they shape behavior that is not useful and "not really practicable in the services." DoD House Appropriations Hearings, 1966, *supra* note 12, at 39; see e.g., text accompanying notes 835-42 *supra*.

⁸⁵⁰ 346 F. Supp. 29 (S.D.N.Y.), aH'd, 470 F.2d 201 (2d Cir. 1972).

⁸⁵¹ See Plaintiff's Brief for a Preliminary Injunction, at 12, Hagopian v. Knowlton, 346 F. Supp. 29 (S.D.N.Y. 1972), citing Friedberg v. Resor, 453 F.2d 925 (2d Cir. 1971). Compare U.S.A.R. 15-6 (1966) with Letter from Personnel Officer, U.S.M.A., to U.S.M.A. Cadet, Class of 1972, Apr. 28, 1972.

⁸⁵² Because significant losses accrue to a cadet upon an honor board's finding that he has violated an honor code, because the academies consider a cadet found by a cadet honor board to have violated an honor code to be "guilty," see text accompanying notes 386 & 423 supra, and because the word "conviction" means a finding that an accused is "guilty," Black's Law Dictionary 403 (rev. 4th ed. 1968), it is appropriate to refer to such a finding as a "conviction." See [Middletown, N.Y.] Times Herald Record, May 3, 1973, at 9, cols. 3-4. But see Letter from Information Officer, U.S.M.A., Apr. 30, 1973 (findings of the Cadet Honor Committee are characterized as an "allegation" of a violation of the Cadet Honor Code which is "investigated" by a Board of Officers). The Academy's characterization of honor committee findings as "allegations" is a relatively recent development. Compare R.U.S.M.A. 17.13, quoted in Dunmar v. Ailes, 348 F.2d 51, 53 (D.C. Cir. 1965), with R.U.S.M.A. 16.04(a) (1971).

⁸⁵³ See text accompanying notes 213-20 supra.

⁸⁵⁴ The earliest known incident invoking a procedure similar to the silence appears to have been the nationwide scandal which occurred in 1871 when three West Point freshmen thought to have told a lie were summarily required by the First Class to leave the post. See, e.g., The

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nated prior to the formalization of West Point's Honor System by Superintendent Douglas MacArthur in 1923,⁸⁵⁵ and was at first administered informally by a group of cadets called the "Vigilance Committee"⁸⁵⁶ which operated "outside the law."⁸⁵⁷ The silence appears to have arisen primarily because West Point cadets felt that an honor violator had "broken the faith" and had to be quickly and permanently "excommunicated,"⁸⁵⁸ and that administrative measures for the discharge of honor violators were too slow and ineffective to accomplish this goal.⁸⁵⁹

Nor were these cadets concerned with the legal consequences of their actions, since they believed that the "Corps of Cadets [was] not bound by strict interpretations of the law,"⁸⁶⁰ and therefore that cadets could take it upon themselves to pressure an honor violator into leaving the Academy.⁸⁶¹

Despite this belief in its validity, cadets have seldom found it necessary to invoke the silence, since most cadets convicted of having violated the honor code simply resign.⁸⁶² Historically, the silence has been employed, however, in contexts not involving an honor violation. For example, it has been used to pressure members of racial minorities into resigning from the Military Academy⁸⁶³ and to isolate unpopular officers.⁸⁶⁴

Cadet Honor Code, U.S.M.A., *supra* note 69, at 2-3; Charles, *supra* note 71, at 109; Forman, *supra* note 6, at 154-55. Allusions to what may have been the silence also appear in K. Banning, *West Point Today* 249 (1937), and W. Baumer, *West Point—Moulder of Men* 175 (1942). A silencing procedure similar to the modern approach appears to have existed at the Military Academy between 1910 and 1915. See Calkins, *supra* note 71, at 6-7.

⁸⁵⁵ Hearings on Service Academies, *supra* note 18, at 10,627; note 69 *supra*.

⁸⁵⁶ See, e.g., The Cadet Honor Code, U.S.M.A., *supra* note 69, at 2-3; Calkins, *supra* note 71, at 6-7; Charles, *supra* note 71, at 110-111; Lovell, *supra* note 306, at 33 n.42 ("vigilante committee").

⁸⁵⁷ Taylor, *supra* note 274, at 4.

⁸⁵⁸ Lovell, *supra* note 306, at 33. Cadets feel this way because "[i]n an organic group, the dishonor of one member is interpreted by all members as an adverse reflection on their own virtue." *Id.* at 32; see Charles, *supra* note 71, at 121.

⁸⁵⁹ The Cadet Honor Code, U.S.M.A. II (undated); U.S.M.A. Honor Guide for Officers, *supra* note 215, § 18, at II.

⁸⁶⁰ Charles, *supra* note 71, at 121.

⁸⁶¹ *Id.* at 121.

⁸⁶² Lovell, *supra* note 306, at 33 n.42; see U.S.M.A. Honor Guide for Officers, *supra* note 215, § 18, at II. One reason that the silence has fallen into disuse in more recent years is "a carefully planned administrative system which insures final approval [of an honor code violator's resignation] by the Department of the Army." U.S.M.A. Honor Guide for Officers, *supra*, § 18, at 11.

⁸⁶³ Retired Air Force Lieutenant General Benjamin O. Davis, Jr., presently Assistant Secretary for Safety and Consumer Affairs, Department of Transportation, acknowledged that during the entire four years he was a cadet at West Point (1932-36) he was silenced solely because he was black. The silence, he recalls, began the fourth day after his arrival for freshman

The silence is more than just a vestige of West Point's past for the two cadets — one a First Classman and the other a Second Classman⁸⁶⁵ — who are currently being silenced.⁸⁶⁶ Today, as in prior years, the silenced cadet is

"completely ostracized from all social intercourse with other members of the Corps"⁸⁶⁷ "for life"⁸⁶⁸ in order to force him to resign from the Academy.⁸⁶⁹ As of late the decision to silence is made by a vote of the Cadet Corps⁸⁷⁰ a referendum in

summer training with all freshmen being told by upperclassmen that "niggers" were not approved of at West Point. The silence "was 99% effective" throughout his four years at the Academy: he had no roommate and no friends. Interview with Benjamin O. Davis, Jr., Lt. Gen., U.S.A.F. (Ret.), July 28, 1972; see Ambrose, *supra* note 6, at 47-48; Howitzer, *U.S. Military Academy* (1936) (Yearbook). The first black graduate of West Point, Henry O. Flipper (Class of 1877), was also silenced throughout his four years at West Point. See Ambrose, *supra* at 232; H. Flipper, *Flipper The Colored Cadet at West Point* 120, 125 (1968). Similarly, the first black to enter West Point in the Twentieth Century, Alonzo S. Parham, Class of 1923, was silenced and otherwise harassed to such an extent as to preclude effective studying. These tactics predictably resulted in his being expelled from the Academy after one semester for academic deficiency. Interview with Alonzo S. Parham, Oct. 20, 1972. See generally Ambrose, *supra*, at 231-33 (black cadets subjected to "four years of total isolation," "few" of whom were able to graduate).

The Naval Academy appears to have adopted a similar procedure by repeatedly "putting in coventry" members of minority groups. Thus, three blacks entering that Academy in the 1860's and one during the 1930's were ostracized, physically abused and otherwise harassed by their fellow midshipmen. They were whitewashed with paint, for example, and "tree limbed" by being forced to remain in a tree while freshmen barked at them like dogs; one was tied overnight to a buoy in the Severn River. Interview with 1967-70 Assistant Professor of History and Philosophy, U.S.N.A., Feb. 10, 1973. See generally P. Benjamin, *U.S. Naval Academy* 284-97 (1900); R. Evans, *A Sailor's Log* 155-57 (1901). The yearbook picture of a midshipman put in Coventry who stood second academically in the Naval Academy's Class of 1922 was printed on a perforated page for easy removal because he was a Jew. Interview with 1967-70 Assistant Professor of History and Philosophy, U.S.N.A., Feb. 10, 1973; M. Janowitz, *The Professional Soldier* 149 n.19 (1960); see *Lucky Bag*, U.S.N.A., unnumbered page between pp. 326-27 (1922) (Yearbook).

⁸⁶⁴ Banning, *supra* note 854, at 249-50; Hall, *The Silence, The Pointer*, May 20, 1955, at 8-9 (U.S.M.A.). An informal silencing procedure has recently been employed at the Air Force Academy to pressure unpopular cadets into resigning. See Letter from 1966 Air Force Academy Graduate (undated).

⁸⁶⁵ There are four "classes" of cadets at the academies: Fourth Class (freshmen), Third Class (sophomores), Second Class (juniors), and First Class (seniors). See *Hearings on Service Academies*, *supra* note 18, at 10,253.

⁸⁶⁶ The First Class cadet's silence began on November 6, 1971. The Second Class cadet's silence began in September, 1972.

⁸⁶⁷ Lovell, *supra* note 306, at 33 n.42.

⁸⁶⁸ *Id.* at 33; accord, Charles, *supra* note 71, at 121.

⁸⁶⁹ U.S.M.A. Honor Guide for Officers, *supra* note 215, § 18, at 1 I ; see text accompanying note 216 *supra*.

⁸⁷⁰ Letter from Secretary of the Army, *supra* note 214, at Enc. Until recently, the silencing decision was made solely by the Honor Committee. See *id.* The Corps automatically upheld the Committee's decision. Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973.

which the procedures may be highly irregular,⁸⁷¹ and for which the chief consideration is anything but the possible innocence of the cadet in question.⁸⁷² Rather, the Honor Committee effectively ensures that the Corps will vote to impose the silence by explaining to each company, immediately before it votes, the reasons for the Committee's decision to impose the silence,⁸⁷³ or, in one recent instance, by framing the issue to be decided in terms of the Corps' support for the Honor Committee.⁸⁷⁴

To fully appreciate the debilitating effects of the silence and the unfair circumstances which may surround its invocation, it might prove helpful to examine in greater depth the cases of the two West Point cadets being silenced at the present time. The silence of the First Class cadet, himself an Honor Representative⁸⁷⁵ was initiated after the Superintendent chose to take no official action upon his honor conviction when he learned that some cadets hearing his case had seen a note from the Deputy Commandant of Cadets saying, "[this is] an open and shut case. Expedite."⁸⁷⁶ The Second Class cadet's honor board conviction was rejected by the Superintendent,⁸⁷⁷ acting on the findings of an officer appeal board that the "evidence . . . [d]id not support the allegation that [he had] violate[d] the Cadet

According to the 1972-73 Honor Committee Chairman, the actual decision continues to be made by the Honor Committee; the Corps is merely polled for an indication of the number of cadets willing to uphold the Committee's decision. Interview with 1972-73 Honor Comm. Chairman, U.S.M.A., Mar. 10, 1973. However, several other key cadets and officials believe the Corps-wide referendum constitutes a poll on whether to silence a cadet. E.g., Interview with Commandant of

Cadets, *supra*; Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Letter from Secretary of the Army, *supra* at Enc.

⁸⁷¹ See text accompanying notes 879-88 *infra*.

⁸⁷² See text accompanying notes 886-87 *infra*.

⁸⁷³ Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

⁸⁷⁴ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; text accompanying notes 886-87 *infra*.

⁸⁷⁵ Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973. Being selected an Honor Representative is "the greatest honor that can be bestowed on a cadet by his fellow classmates." Charles, *supra* note 71, at 125; accord, U.S.M.A. Honor Guide for Officers, *supra* note 215, at 4.

⁸⁷⁶ Affidavit of 1971-72 Honor Representative, U.S.M.A., Oct. 12, 1971; see Honor Committee Fact Sheet, U.S.M.A., at 2 (Aug. 28, 1972) (original final draft) [hereinafter Honor Committee Fact Sheet, Original Final Draft]; accord, Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for Cadets Being Silenced, Mar. 11, 1973; Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973. According to Academy officials, cadets saw the note by accident. Interview with Former Assistant Staff Judge Advocate, *supra*.

⁸⁷⁷ See Honor Committee Fact Sheet, U.S.M.A., at 2 (Aug. 30, 1972) [hereinafter Honor Committee Fact Sheet].

Honor Code."⁸⁷⁸

The method by which the decision was reached to silence this Second Class cadet amply illustrates the abuses possible in a silence referendum. The first vote was held on only a few hours notice, thus insuring that the cadet would be unable to prepare and present his case to the Corps.⁸⁷⁹ Shortly thereafter, the Chairman of the Honor Committee informed the cadets that 1159 of the Corp's votes were "unknown" but that of the 2665 votes "known," 1104 were for the silence, 1255 were against and 306 were abstentions.⁸⁸⁰ Despite the facts that of the 2665 "known" votes about 60% were against silencing the cadet,⁸⁸¹ and that the decision is to be made on the basis of a majority of the votes cast,⁸⁸² the Honor Committee held a new referendum on the silencing

issue "not to secure any particular result but rather to obtain a decisive expression of opinion and thus ensure . . . fairness."⁸⁸³ Immediately prior to this revote the cadet in question

⁸⁷⁸ Report of Proceedings of Board of Officers, U.S.M.A., at 3 (April 5-6, 1972); accord, Letter from Secretary of the Army, *supra* note 214, at 2-3; Open Letter to the Corps of Cadets from Second Class Cadet Being Silenced, U.S.M.A., Aug. 15, 1972 [hereinafter Open Letter to the corps]. The Officers Board reversed the conviction only after hearing 18 hours of testimony and deliberating for two hours. Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973. The Superintendent specifically rejected the Cadet Honor Committee's request that because it "did not address [a] question in detail;" the Officer Board reconsider their decision in the case of the Second Class cadet being silenced. See Honor Committee Fact Sheet, *supra* note 877.

⁸⁷⁹ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973. For example, someone identifying himself as Chairman of the Honor Committee called one company's Honor Representative at 1:30 a.m. instructing the Representative to hold the company vote before 7:30 a.m. that morning on whether to impose the silence. *Id.* It appears that, in any case, no provision is made to permit a cadet to offer a defense to the Corps prior to its vote on whether to impose the silence.

⁸⁸⁰ Letter from 1972-73 Honor Comm. Chairman, U.S.M.A., to Second Class Cadet Being Silenced, June 24, 1972. Votes counted under the "abstain" category include not only those abstention votes actually taken, "but also known absences." "Unknown" votes included cadets who "did not vote at all or were absent." *Id.*

⁸⁸¹ Abstentions are counted as "nay" votes. Letter from 1972-73 Honor Comm. Chairman, U.S.M.A., to Second Class Cadet Being Silenced, Aug. 2, 1972. Many of the votes for the silence were obtained only after repolling the cadets voting against the silence as many as five times. Interview with 1972-73 Honor Comm. Chairman, U.S.M.A., Mar. 10, 1973.

⁸⁸² Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Letter from 1972-73 Honor Comm. Chairman, U.S.M.A., to Second Class Cadet Being Silenced, Aug. 2, 1972.

⁸⁸³ Letter from Secretary of the Army, *supra* note 214, Enc., at 3. One of the original reasons the Honor Committee gave for holding a revote was that the first vote did not include the incoming Fourth Class and that since that Class would have to uphold the silence for two years, it was important to hold a revote to obtain its opinion. Letter from 1972-73 Honor Comm. Chairman to Second Class Cadet Being Silenced, U.S.M.A., June 24, 1972. As a matter of fact, however, the new Fourth Class was not permitted to vote when the new vote

circulated among the Cadet Corps a letter explaining his case and offering compelling evidence of his innocence.⁸⁸⁴ In response, the Cadet Honor

Committee, postponing the vote for a few days, distributed to each company an "Honor Committee Fact Sheet"⁸⁸⁵ and held a meeting of each of the four classes to emphasize that the vote amounted to a test of the Corps' confidence in its Honor Committee⁸⁸⁶ and that it did not matter whether or not the cadet in question was guilty or innocent but only that the Committee's judgment be upheld.⁸⁸⁷ Subsequently, the Corps voted 1419-1083, with approximately 300 abstentions, to silence the cadet.⁸⁸⁸

was taken "because [his] case began before they were members of the Corps." Letter from 1972-73 Honor Comm. Chairman to Second Class Cadet Being Silenced, U.S.M.A., Sept. 5, 1972.

⁸⁸⁴ See Open Letter to the Corps, *supra* note 878.

⁸⁸⁵ In reality, the "fact sheet" contains primarily moralistic arguments about why the Corps should vote to impose the silence. The Honor Committee admonished, for example, that "Ri^o expel from our society a man who cannot live up to our standards of integrity is the proper course of action. To allow him to remain as part of the Corps without any sanctions weakens our moral fiber." Honor Committee Fact Sheet, *supra* note 878, at 2.

⁸⁸⁶ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; see Honor Committee Fact Sheet, *supra* note 877. As explained by the Honor Committee to the Corps, a reason for the second vote on whether to silence the Second Class cadet was "[t]o give the Corps a final chance [i.e., after the vote against the silence] to support the Honor Committee concerning the . . . case by upholding the established practice of expelling a violater of the Code from our society." *Id.* (emphasis added). More explicitly, "[t]he vote to silence is a vote of confidence in the Honor Committee and how the Committee handled the case." *Id.* Indeed, the Honor Committee so strongly felt that a vote by the Corps not to silence reflected a lack of confidence in the Committee that, until prohibited by the Commandant, it planned to inform the Corps that it would resign en masse if the Corps did not vote to uphold the silence. Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; see Honor Committee Fact Sheet, Original Final Draft, *supra* note 876.

⁸⁸⁷ As emphasized in the "fact sheet" circulated among the Corps by the Honor Committee, "[t]he vote to silence [is] [n]ot a decision by the Corps on the man's guilt or innocence." Honor Committee Fact Sheet, *supra* note 877, at I; accord, *id.* at 2.

This attitude of unconcern with guilt or innocence is further attested to by the Second Class Cadet Being Silenced:

[The First Captain of the Corps of Cadets] stated [in front of another cadet witness] that it was my duty to resign, regardless of my guilt or innocence, because I would be a continuing source of friction and irritation to the corps. The ideal of West Point, he said, is greater than any single individual, be he wronged or not.

Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

⁸⁸⁸ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973. Thus, even after all their preparation, counting abstentions as votes against the silence, the Honor Committee won, by less than fifty votes (1.7%)—hardly an overwhelming show of confidence. *Id.* This is even more evident from the fact that many ballots were counted as votes for the silence merely because they had expressed that they wished to support the Honor Committee, even though they specifically expressed disapproval of the silence. Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973.

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Thus, two West Point cadets are currently living and eating alone, and have no discourse with their peers despite the fact that the Superintendent decided to retain them at the Academy "in good standing."⁸⁸⁹ Yet even acknowledging the pariah status of the silenced cadet fails to comprehend the full range of pressure placed upon him, for he may be the victim of a number of tortuous and even criminal acts designed to force his resignation. Until corrective action was taken recently by Academy authorities,⁸⁹⁰ the tactics employed against the two cadets currently being silenced ranged from physical assault and direct threats⁸⁹¹ to destruction of mail,⁸⁹² nondelivery of messages⁸⁹³ and theft of personal property.⁸⁹⁴ The obvious questions at this point are why do cadets inflict, and Academy authorities allow, harassment and punishment⁸⁹⁵ of cadets

⁸⁸⁹ See Interview with 1972-73 Honor Comm. Chairman, U.S.M.A., Mar. 10, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Feb. 20, 1973; Letter from Secretary of the Army, *supra* note 214, Enc.

⁸⁹⁰ When a civilian attorney advised the Commandant of Cadets in December 1972, that the cadets being silenced were victims of various acts of harassment, the Commandant promptly took action to eliminate those acts. Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973; Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for the Cadets Being Silenced, Mar. 12, 1973.

⁸⁹¹ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973. As the Second Class cadet explains he was told by the Cadet First Captain:

He further promised to dedicate himself to destroying any future I may have in the Army and, further, to "run me out" and otherwise make my cadet life unbearable. He further indicated that I

would be reassigned and isolated to a First Reg't Company where the vote was strongly against me. Said he'd cut off my finger before he'd see me wearing the West Point ring.

Id.; see Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973. Similarly, the First Class cadet being silenced received numerous telephone threats. One telephone caller, for example, said "wear that ring and you're dead;" another said "we'll get your car." Letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972, at 4.

⁸⁹² See Letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972, at 3, 4.

⁸⁹³ Id. at 4; Interview with Second Class Cadet Being Silenced, U.S.M.A., March 9, 1973.

⁸⁹⁴ These cadets have had numerous items stolen from them. See Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972, at 3.

⁸⁹⁵ The cadets being silenced have also been victimized by a variety of other harassment tactics contributing to the pressures on them to resign. The First Class cadet being silenced was required, for example, to forfeit his official position as an elected Company Honor Representative, over the protests of his company mates who so wanted to retain him that they failed to elect a new representative to replace him for over a semester after he was involuntarily reassigned to another company. His rating on the military order of merit, which determines post-graduation assignment priorities, rapidly plummeted after the silence began from the top man in his company to the bottom and, later, to the bottom man in the entire Corps. He was prohibited from attending class for 42 days, resulting in his worst semester of academic per-

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whom the Superintendent has decided should be returned to the Corps "in good standing"?⁸⁹⁶ On the cadets' part, it must be recognized that they honestly believe that the decisions of the honor board are always correct.⁸⁹⁷ They perceive nothing improper in ignoring the "legal technicality" that a cadet's conviction by an honor committee has been rejected "because of lack of sufficient legal proof"⁸⁹⁸ or a material procedural defect, such as "command influence."⁸⁹⁹ Indeed, cadets are taught from the time they enter the Academy that an individual found guilty by the Honor Committee, who nonetheless is permitted to remain at the Academy, must be silenced.⁹⁰⁰ As in earlier eras, moreover, cadets are convinced that the "Corps of Cadets [is] not bound by strict interpretations of the law"⁹⁰¹ and that, since the

formance since he had been at the Academy. He has been required to perform classroom academic

exercises individually that normally are performed in groups. His slide rule has been broken into small pieces and returned to its case and, within three months after the silence had begun, he lost 26 of his original 158 pounds of body weight, which he has not regained. Miscellaneous tactics employed to force this cadet to resign include: dousing his bed with water; putting jelly between his sheets; and soaking his clothing in a shower. Until stopped by the warning of an attorney, some cadets were arranging to have his yearbook picture appear on a perforated page, for easy removal. See Interviews with Honor Representatives, U.S.M.A., Mar. 8, Feb. 19, Feb. 18, 1973; letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972, at 3; cf. note 863 *supra*.

Cadet officers have selectively enforced regulations and otherwise harassed the Second Class cadet being silenced. He was denied permission by his Tactical Officer to study for term-end examinations with his classmates, and prohibited from visiting friends in his company area. Cadets have been prohibited by cadet officers from visiting him. He has been prohibited from attending a meeting of his company and a meeting of his class. His assigned laboratory partner in an Electrical Engineering Class has refused to work with him, forcing him to do lab exercises himself. Though he had received less than fifty demerits in his previous two years at the Academy, he received 83 demerits during the first semester of his Second Class year. Someone substituted a rusty trigger assembly for the clean one in his rifle prior to his reporting to have it inspected. See Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Letter from Personnel Officer, U.S.C.C., to Second Class Cadet Being Silenced, Jan. 13, 1973; Letter from Second Class Cadet Being Silenced to Tactical Officer, U.S.M.A., Jan. 9, 1973. According to tradition, the cadets being silenced will, instead of being congratulated, be booed by the Corps when they receive their graduation diplomas. Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for the Cadets Being Silenced, Feb. 20, 1973.

⁸⁹⁶ See Letter from Secretary of the Army, *supra* note 214, Enc. at 2-3.

⁸⁹⁷ The essence of silencing is that the Honor Committee is always right." Letter from 1967-68 Honor Representative, U.S.M.A., Nov. 24, 1971; see Honor Committee Fact Sheet, *supra* note 877.

⁸⁹⁸ Letter from Secretary of the Army, *supra* note 214,,,\$nc. at 2-3.

⁸⁹⁹ See Honor Committee Fact Sheet, Original Final Draft, *supra* note 876, at 2.

⁹⁰⁰ Interview with 1972-73 Honor Comm. Chairman, U.S.M.A., Mar. 10, 1973; Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972. For an explanation of this honor code "indoctrination" process, see note 172 *supra*.

⁹⁰¹ Charles, *supra* note 71, at 121.

honor code "belongs" solely to cadets,⁹⁰² it is improper for officers to interfere with cadet administration of the Code by rejecting a cadet honor board's decision.⁹⁰³

While this belief in the infallibility of the cadet honor boards may not be ascribed to Academy authorities directly, they do maintain that the "silence" constitutes "unofficial," independent, informal action by cadets⁹⁰⁴ for which they accept no responsibility.⁹⁰⁵ Moreover, the Secretary of the Army has asserted that "[t]he Code is the cadets' own and would almost surely deteriorate (if not disappear) if the system is removed from their control." Thus, while he "agree[s] . . . completely that guidance must be afforded to the Corps on the matter of their Honor Code," he has "decided that direct control [by the Academy's officials] would be incorrect."⁹⁰⁶ Furthermore, the Secretary maintains that since cadets are volunteer members of the Cadet Corps, they are subject to the unofficial standards of the Corps in addition to the official standards of the Army.⁹⁰⁷

The Secretary's argument incorporates the assumption that the Academy and the Corps of Cadets are "separate jurisdictions."⁹⁰⁸

⁹⁰² Letter from Secretary of the Army, *supra* note 214, Enc. at I; see text accompanying notes 73 & 172 *supra*.

⁹⁰³ Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; see Letter from Secretary of the Army, *supra* note 214, Enc.

⁹⁰⁴ Interview with Assistant Staff Judge Advocate, U.S.M.A., Feb. 26, 1972 (informal, but academy does accept responsibility); Interview with First Class Cadet Being Silenced, U.S.M.A., Feb. 18, 1973, citing discussion in which Commandant of Cadets expressed that because the silence was an "unofficial," "cadet-oriented," "social" practice, the Academy need not fear litigating the matter.

⁹⁰⁵ Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Letter from Secretary of the Army, *supra* note 214, at I.

⁹⁰⁶ Letter from Secretary of the Army, *supra* note 214, at I.

⁹⁰⁷ *Id.* at 2.

⁹⁰⁸ *Id.* It is difficult to perceive what legal consequences are expected to follow from this premise. The "separate jurisdiction" language may be intended as a denial of the governmental involvement necessary to invoke due process protections. If so, it is sufficient to note that the Supreme Court applies far different standards in determining whether the government has made itself a party to ostensibly private action. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); text accompanying notes 925-36 *infra*.

"Separate jurisdiction" on its face, though, suggests a different theory—that the Corps of Cadets imposes the silence as a body not subordinate to the Academy administration and hence not bound by the "official" disposition of an honor case. This proposition, however, is thoroughly inconsistent with the inherent nature of a chain-of-command; is contradictory of the official Academy position on the unofficiality and informality of the silence, see text accompanying notes 904-05 supra; is irreconcilable with the Superintendent's acknowledged supervisory power over the Cadet Honor Code, see note 909 infra; and lacks any legal support. While cadets have some input into the substantive content of the code, see *Dunmar v. Ailes*, 348 F.2d 51 (D.C. Cir. 1965) (per curiam), their power to enforce it can only arise by

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However, in terms of the honor system, such a premise is without merit. As previously discussed, the Cadet Honor System was instituted by the Academy, and official intervention is a common and necessary occurrence.⁹⁰⁹ Moreover, the Cadet Honor Committee is an official organ of the Academy⁹¹⁰ and is specifically delegated duties which might otherwise be performed by Academy officials.⁹¹¹ A finding of guilt by the Cadet Honor Committee is the virtual equivalent of expulsion.⁹¹² In the most basic sense, therefore, the Cadet Honor Committee must be considered an official arm of the Academy and its actions attributed to the Academy itself.⁹¹³ Nor does the Secretary's rationale solve the serious due process problems which the Academy's toleration of the silence raises. Primary among these is the failure of Academy authorities to follow Academy regulations, and to give them the interpretation expressed on their face. For example, one Academy regulation provides that "[a]ll combinations or joint action among cadets . . . for the purpose of expressing disapprobation or censure of any person or persons in the military service, are prohibited."⁹¹⁴ Moreover, a federal hazing statute,⁹¹⁵ as interpreted by the Academy, prohibits one cadet from exercising "unauthorized assumption of authority" over another cadet which results in the latter suffering any "indignity, humiliation,

delegation from the Academy administration, and the exercise of that power is consequently circumscribed by all applicable military regulations, congressional statutes and constitutional

prohibitions.

⁹⁰⁹ See U.S.M.A. Honor Guide for Officers, *supra* note 215, at 4 ("The Superintendent is responsible for general policies concerning the Honor Code and the effective operation of the Honor System." "Active supervision of the operation of the Cadet Honor System is delegated to the Commandant."); text accompanying notes 71-76 *supra*.

⁹¹⁰ See note 69 and text accompanying note 76 *supra*.

⁹¹¹ I.e., performing a fact-finding function leading to a cadet's resignation or trial by a court-martial or an officer board. See R.U.S.M.A. 16.04(a) (1971); Letter from Secretary of Army, *supra* note 214, Enc., at I. See also *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1965) (Cadet Honor Committee described as ". . . a student body entrusted with such matters").

⁹¹² See text accompanying note 624 *supra*.

⁹¹³ Cf. *Graham v. Knutzen*, 351 F. Supp. 642, 664 (D. Nev. 1972), citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), and *Cooley v. Board of Educ.*, 453 F.2d 282, 285 (8th Cir. 1972).

⁹¹⁴ R.U.S.M.A. 12.09 (1971). However, a former Chief of the Military Affairs Division of the Army Judge Advocate Corps has contended that the unofficial acceptance of the silence and its subsequent official recognition during the 120 year existence of the regulation vitiates any incompatibility. Memorandum of Law, U.S.M.A. 3, 8 (undated). But see text accompanying notes 919-20 *infra*. It is interesting to note that acknowledgment of the official nature of the silence directly contradicts the position maintained by Academy and Army authorities. See text accompanying notes 904 & 907-08 *supra*.

⁹¹⁵ 10 U.S.C. § 4352 (1970).

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hardship, or oppression, or the deprivation or abridgement of any right, privilege, or advantage to which he shall be legally entitled."⁹¹⁶ Since numerous acts are committed during the course of a silence which clearly violate these provisions,⁹¹⁷ and since Academy officials are well aware of the silencing procedure,⁹¹⁸ the refusal to prevent these practices appears to constitute conscious disregard for lawful regulations. In view of the language of *Smith v. Resor* that the military cannot ignore its own regulations "even where discretionary decisions are involved,"⁹¹⁹ and the warning in *Anderson v. Laird* that regulations must be given their plain meaning,⁹²⁰ either active encouragement or passive acceptance of the silence appears to be a clear violation of due process.⁹²¹

⁹¹⁶ R.U.S.M.A. 12.07(a) (1971).

⁹¹⁷ See text accompanying notes 215-16 & 895 *supra*. The 1971-72 Honor Committee Chairman, for example, violated the prohibitions against hazing when he required, by physical force and by giving an order as an upperclass cadet officer, the First Class cadet being silenced to leave an honor hearing and to give up his position as an elected company Honor Representative. See Interviews with Honor Representatives, U.S.M.A., Feb. 18, Mar. 8, 1973; text accompanying note 875 and note 895 *supra*. He was reduced, moreover, to the rank of cadet private by a cadet officer. Letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972, at 2. Similarly, the 1971-72 and 1972-73 Honor Committee Chairmen seem to have indulged in "unauthorized assumption[s] of authority" by ordering the First and Second Class cadets being silenced, respectively, not to attend dances, parades, inspections, football games, intramural athletics and other Corps functions. Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Letter from 1971-72 Honor Representative, *supra*. The cadet chain-of-command, moreover, has ordered that the First and Second Class Cadets being silenced each sit at a table by himself, in the case of the Second Class cadet, over the protest of his Company Commander and Company First Sergeant that they and other members of his company wished to sit with him and the Honor Committee's explicit approval of anyone sitting with him who wishes to do so. See Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

⁹¹⁸ E.g., Interview with Assistant Staff Judge Advocate, U.S.M.A., Feb. 26, 1972; Interview with Personnel Officer, U.S.M.A., Feb. 26, 1972; Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973; see Hall, *supra* note 864, at 8-9; Letter from Secretary of the Army, *supra* note 214, Enc. at 2; Majority Report, *supra* note 74, at 9, 12; Smith, *supra* note 327, at 37 ("The Academy officers know perfectly well what goes on. They graduated from the Academy themselves."); notes 854, 863 & 869 *supra* for publications by Academy and other military authorities describing the "silence."

⁹¹⁹ 406 F.2d 141, 145 (2d Cir. 1969); see *Nixon v. Secretary*, 422 F.2d 934, 937 (2d Cir. 1970); *Hammond v. Lenfest*, 398 F.2d 705, 715 (2d Cir. 1968); *Dunmar v. Ailes*, 348 F.2d 51, 53 (D.C. Cir. 1965) (per curiam). See 466 F.2d 283, 305 (D.C. Cir.) (per curiam) (Leventhal, J., concurring), cert. denied, 409 U.S. 1076 (1972); accord, *Conn v. United States*, 376 F.2d 878, 880, 881, 882 (Ct. Cl. 1967) (citations omitted) ("applicable regulations . . . must be honored both in letter and spirit").

⁹²¹ The Secretary of the Army justifies in part the failure of Academy officials to stop the silence because "[t]o do so would be to issue instructions impossible to enforce on the one hand, and which would fly in the face of long-standing tradition on the other." Letter from Secretary

Indeed, key Academy officials themselves have recognized that "conspiracy

is unacceptable in any military organization."⁹²² More specifically, a former officer supervisor of the Air Force Academy Honor Committee noted that imposition of the silence may be unconstitutional.⁹²³ Yet, as was noted earlier, Military Academy authorities seek to justify the practice on the grounds that it is an "unofficial" and spontaneous cadet policy over which they have no control.⁹²⁴ This reasoning is without basis in either law or fact. The regulations cited above are clearly being violated by the Cadet Corps as a direct result of the teachings and leadership of the Cadet Honor Committee, an official organ of the Military Academy,⁹²⁵ for whose actions West Point authorities must accept full responsibility.⁹²⁶ Nor can the officials evade this responsibility by asserting that since cadets are not coerced into attending the Academy, they are not being compelled to give up their constitutional rights; for even though attendance at an academy is voluntary, it cannot impose on cadets an unconstitutional restraint.⁹²⁷ Moreover, the cooperation of West Point officials has always been necessary to enable cadets to enforce certain provisions of the silence.⁹²⁸ Indeed, it is only the fact that "sanctions imposed

of the Army, *supra* note 214, Enc. at 3. The impossibility of completely enforcing a regulation does not, of course, excuse its nonenforcement. "If you were to take such a view, you'd have to abolish every [academy] regulation." Smith, *supra* note 327, at 40. Nor can a legal duty to enforce regulations be abrogated by longstanding tradition. Cf. *Anderson v. Laird*, 316 F. Supp. 1081, 1087-88 (D. D.C. 1970), *rev'd on other grounds* 466 F.2d 283 (D.C. Cir.) (*per curiam*), *cert. denied*, 409 U.S. 1076 (1972).

⁹²² Hearings on Service Academies, *supra* note 18, at 10,693 (Lieutenant General Thomas S. Moorman, Superintendent, U.S.A.F.A., speaking about Academy cheating rings).

⁹²³ As one former Air Force Academy official and West Point graduate acknowledged, "[t]he validity of 'silencing' has questionable merits with regard to the basic legal rights guaranteed to all American citizens." Charles, *supra* note 71, at 126; see text accompanying note 220 *supra*.

⁹²⁴ See Letter from Secretary of the Army, *supra* note 214, Enc. at 1-2; text accompanying notes 904-05 & 907 *supra*.

⁹²⁵ See note 69 *supra*.

⁹²⁶ See Hearings on Service Academies, *supra* note 18, at 10,627; text accompanying notes 908-13 *supra*.

⁹²⁷ See *Anderson v. Laird*, 466 F.2d 283, 295 & n.80 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972), citing, e.g., *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); cf. text accompanying notes 395-98 supra.

⁹²⁸ Indeed, Academy officials have rigorously advised members of the Honor Committee and members of the Corps to impose the silence. Interview with 1969 Military Academy Graduate, Oct. 23, 1973; Interview with Another 1969 Military Academy Graduate, July 11, 1973. Apparently, Academy officers have at times also observed the cadet proscription against speaking to the silenced cadet. See Galloway & Johnson, supra note 301, ch. 4. Harrassment by Academy officers, including selective enforcement of regulations, sometimes reinforces the pressures of the silence. The room of the Second Class cadet being silenced, for example, has

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by cadets . . . because of a violation of the Honor Code is [sic] respected . . . by the Superintendent and other Army officials at the Academy"⁹²⁹ that the silence can continue. Such administrative actions as providing separate rooms or separate tables in the dining hall for silenced cadets can hardly be thought to be solely within cadet power, yet they routinely occur.⁹³⁰ Academy officials also have provided assembly rooms in which the imposition of the silence has been discussed,⁹³¹ and voted upon. In the cases of the cadets currently being silenced, these officials transferred each from his original company, in which many other cadets refused to enforce the silence,⁹³² to a unit in which the silencing decision would be honored.⁹³³ Fi-

been inspected for items that the inspecting officer has not checked in any other room in the company. He has been penalized, moreover, for talking and other activities for which those participating in the activities with him were not punished. See Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

⁹²⁹ Letter from Secretary of the Army, supra note 214, Enc. at 2; accord, id. at 3.

⁹³⁰ See Karpatkin, supra note 215, at 12, cols. 1, 2. As a matter of fact, the number of dining hall tables assigned each company by the Regimental Supply Officer must be approved by an Academy officer supervisor assigned to the Department of Supply. Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; see Letter from 1971-72 Honor Representative, U.S.M.A., to Attorney for Cadets Being Silenced, Nov. 25, 1972.

⁹³¹ The Honor Committee has held meetings in Academy-furnished rooms to persuade the Corps to vote to impose the silence. gee, e.g., Interview with Second Class Cadet Being Silenced, U.S.M.A.,

Mar. 9, 1973; text accompanying notes 886-87 supra.

⁹³² One of the cadets now being "silenced" was so well-respected by his original company classmates that they had rated him first on their military order of merit peer rating system during his Third Class year, and had elected him their Company Honor Representative. Indeed, in the case of the Second Class cadet being silenced, only four of the 75 voting members of his company agreed to silence him. Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for Cadets Being Silenced, Feb. 22, 1972; Interview with 1971-72 Honor Representative, U.S.M.A., Feb. 18, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

⁹³³ These cadets were transferred to a company in a different regiment (First Regiment). Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for Cadets Being Silenced, Feb. 22, 1973 (cadets "transferred where silence would have its greatest effect"); see Interview with 1972-73 Honor Representative, U.S.M.A., Mar. 8, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; Special Order No. 124, U.S.C.C., Sept. 6, 1972; note 891 supra. The Regiment to which the cadets being silenced were transferred had cast more votes for the silence than any other regiment and had a traditional reputation for enforcing regulations strictly and for being the "hardest." Interview with 1972-73 Honor Representative, supra; Letter from 1970 Military Academy Graduate, Feb. 26, 1973. "Because of the honor problem," the Second Class Cadet was transferred a second time, and given a dormitory floor to himself. Interview with Second Class Cadet Being Silenced, supra; see Interview with 1972-73 Honor Representative, supra. Incident to each transfer, the cadets were required to change their class schedules. Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973; see Letter from Personnel Officer, U.S.C.C., to Second Class Cadet Being Silenced, Sept. 6, 1972. After Academy officials were threatened with a lawsuit, in

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nally, the cadets being silenced were at one time prohibited by Academy officers from participating in intramural sports or parades,⁹³⁴ and the cadets were required, after the Superintendent's decision to retain them at the Academy in good standing, to live in the "Boarders Ward"⁹³⁵ pending a decision by the Corp of Cadets—the Second Class cadet for a period of more than three months.⁹³⁶

Through passive acceptance or active encouragement, then, West Point's authorities aid in propagating a system the very existence of which raises severe constitutional questions. First, there is no authority for cadets, through

the machinery of an official organ of the academy—the Honor Committee—to impose the silence or for academy officials to condone the practice. Second, and as previously noted, the silence directly contravenes both regulations of the Academy and at least one federal statute. Third, those involved in the silencing practice—both cadets⁹³⁷ and officers⁹³⁸—may be impli-

January 1973, each cadet being silenced was transferred back to his original company in return for his "agreement" of "sworn secrecy" not to discuss these and other "official" actions with persons outside the Academy. Interview with 1971-72 Honor Representative, U.S.M.A., Feb. 18, 1973; Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973. As explained by the Commandant of Cadets to assemblies of Academy officers and each of the four cadet classes, the orders transferring the cadets being silenced were rescinded to place a "'protective umbrella' . . . over the Academy to prevent any outside sources from interfering in any way with the 'silence.'" The Commandant of Cadets was "very explicit," however, in saying he "agree[d] with the silence . . . and was in no way undoing what the cadets [had] done." Interview with 1971-72 Honor Representative, U.S.M.A., Feb. 18, 1973; accord, Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973.

The Commandant expressed to a project researcher a second reason for transferring each silenced cadet back to his former company: the original transfer had deprived their company mates, who knew them well, of the "opportunity" of improving their own "integrity" by making "hard choices" between "friendship formerly held," on the one hand, and the "value they place on integrity" and "support for their honor committee and confidence in" how it had exercised its "responsibility," on the other hand. "Integrity . . . like any muscle," he explained, "must be exercised to improve and get stronger." Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973.

⁹³⁴ Interview with Former Assistant Staff Judge Advocate, U.S.M.A., and Attorney for the Cadets Being Silenced, Feb. 22, 1973.

⁹³⁵ See text accompanying note 316 *supra*.

⁹³⁶ Interview with Second Class Cadet Being Silenced, U.S.M.A., Mar. 9, 1973; see Letter from 1972-73 Honor Comm. Chairman to Second Class Cadet Being Silenced, U.S.M.A., Aug. 2, 1972.

⁹³⁷ Proscriptions which may be violated by cadets engaging in silencing include 10 U.S.C. § 855 (1970) (cruel and unusual punishment); *id.* § 893 (cruelty and maltreatment) ("To subject . . . to improper punishment [is an example] of this offense." Manual for Courts-Martial, United States 11 172 (1969 rev. ed.)).

⁹³⁸ E.g., 10 U.S.C. § 855 (cruel and unusual punishment); *id.* § 881 (conspiracy to commit an offense under the UCMJ). See also *id.* § 877 (aiding, abetting, counseling, commanding or procuring commission of an offense under the UCMJ); *id.* § 892(3) (dereliction in the performance

of duties); id. § 893 (cruelty and maltreatment).

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cated in offenses under the UCMJ. Fourth, the procedures by which the silence is implemented and enforced seem fundamentally unfair.⁹³⁹ And finally, the very existence of such a severe penalty⁹⁴⁰ which may be imposed as a result of an honor board conviction offers a compelling argument for affording extensive and effective procedural safeguards at the cadet honor board hearing.

V

THE ABSENCE OF EFFECTIVE LEGAL REMEDIES

The previous sections of this report have focused on the procedural and substantive deficiencies of the adjudicatory systems of the five service academies. The mere existence of these defects, which pose severe constitutional and statutory problems, is unfortunate. However, particularly demoralizing to the cadet who has suffered inequitably as a result of such shortcomings is the absence of effective remedies by which particular injustices can be redressed and the systems set on a proper constitutional footing. The discussion which follows will explore the existing avenues for seeking relief, while underscoring the functional limitations of each. The basic point to be demonstrated is that because of the limited availability of review, one cannot expect the problems of the academies' systems to be corrected by individual appeals to administrative or judicial bodies.

⁹³⁹ See text accompanying note 277-78 *supra*.

⁹⁴⁰ Of all the service academies and officer training schools, West Point alone maintains the silence. Moreover, at least one academy has specifically rejected the practice. See text accompanying note 194 *supra*. In light of Admiral Rickover's comment that "[t]here is not two per cent difference" between the Military, Naval and Air Force Academies, *Army Navy Air Force Journal*, June 24, 1961, at 1276, col. 1, the existence of the silence arguably raises equal protection issues. Furthermore, the impact of this penalty upon the silenced cadet, with the attendant loss of "'group privileges' " and destruction of morale, is analogous to that of types of punitive segregation which have been held to be unconstitutionally cruel and unusual. See *Sostre v. Rockefeller*, 312 F. Supp. 863, 868, 871 (S.D.N.Y. 1970), *afid* in part, *rev'd* in part on other grounds, 442 F.2d 178 (2d Cir. 1971). See also *Lollis v. New York State Dep't of Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970). Indeed, the silence as well as several other academy penalties may well be unconstitutionally cruel and unusual in light of recent Supreme Court admonitions that "[o]bviously, concepts of justice change" and that the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today. *Furman v. Georgia*, 408 U.S. 238, 304, 329 (1972) (Marshall, J., concurring).

A. Mechanism of Review

1. Intra-Academy Review

As currently structured, academy regulations provide three overlapping methods for obtaining review of academy adjudications. As previously noted, each academy's conduct, honor and ethics systems include routine, formal procedures for reviewing the judgments and penalties rendered by the cadet and officer hearing boards.⁹⁴¹ The review is, however, often less than a thorough reconsideration of the merits of the case, for most of the judgments rendered by the academies' adjudicatory organs are essentially rubberstamped by the final reviewing authority.⁹⁴² This exceptional respect for the decision making process of the hearing boards likely stems from a desire of top academy officials to preserve morale among the lower-echelon adjudicators.

Aside from routine review, cadets at every academy may formally appeal conduct violations by way of a written "Reconsideration of Award" submitted to the authority immediately above the authority making the initial determination.⁹⁴³ This procedure has only limited feasibility, however, for the cadet must bring his appeal less than one day after receiving notice of his conviction.⁹⁴⁴ According to academy officials there exists a second extraordinary method of appealing conduct violations. They maintain that cadets may appeal these adjudications to the Commandant of Cadets, pursuant to academy regulations which permit a cadet who considers himself wronged by another cadet or officer to see the commandant or superintendent upon request.⁹⁴⁵ A federal court has held, however, that this procedure

⁹⁴¹ See text accompanying notes 161, 191-93 & 229-32 *supra*. In addition to the appellate procedures guaranteed by academy regulations, cadets, as members of the military, are entitled by the UCMJ to appeal penalties imposed without court-martial to the "next superior authority." 10 U.S.C. § 815(d) (1970).

⁹⁴² **E.g.**, Cunningham, *supra* note 628 (citing Interview with 1972-73 Honor Comm. Chairman, U.S.M.A.); Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972; see Hearings on Service Academies, *supra* note 18, at 10,630.

⁹⁴³ The authority who "reconsiders" the judgment and the penalty awards is the same person who finally approves them upon routine review. See Hagopian v. Knowlton, 346 F. Supp. 29, 31 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972); Com'd't Mid'n Inst. P1620.IOG Enc. 3(7) (1970); R.C.C.U.S.C.G.A. 5-4-11 (1971); R.U.S.C.C. 412(a) (1971); U.S.A.F.C.R. 35-6(8) (1971); U.S.M.A.D.S.S.O.P. 20 (1968); U.S.M.M.A.M.R. 03103(7), 03104(6), 03105(6) (1971).

⁹⁴⁴ See, e.g., Hagopian v. Knowlton, 346 F. Supp. 29, 31 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972). (required by 8:00 a.m. the morning after notification).

⁹⁴⁵ See *id.* at 32, 35; R.C.C.U.S.C.G.A. 12-1-06 (1971); R.U.S.C.C. 201(e)(1) (1971); R.U.S.M.A. 12.10 (1971); U.S.A.F.C.R. 35-6(36) (1971); U.S.M.M.A.M.R. 04407 (1971).

does not encompass claims of unjust punishment, but rather provides a cadet redress only for tortious or malicious acts.⁹⁴⁶

In cases of honor code violations, cadets may make a nonroutine appeal to a board of officers, and a *de novo* hearing may be granted.⁹⁴⁷ However, because of the coercion exerted on cadets not to appeal honor code convictions⁹⁴⁸ and the preformed judgments and personal bias held by some hearing board members,⁹⁴⁹ the procedure can be virtually meaningless.

Indeed, the social pressure placed on cadets not to appeal adverse judgments extends to conduct offenses as well as honor violations. One academy's conduct system is characterized as "correctional and educational in nature, rather than . . . legalistic and punitive;"⁹⁵⁰ and cadets might therefore be expected to accept their punishment without objection.⁹⁵¹ In fact, one federal court has observed that if a cadet does appeal, even when granted the right, he runs the risk of alienating academy officials.⁹⁵² One can only admire the exceptional cadet who is willing to accept the risk.

2. *Extra-Academy Military Review*

Cadets at every academy have available to them some limited procedures whereby academy adjudications may be reviewed by military authorities outside the academy's own chain-of-command. However, only the Merchant Marine Academy permits extra-academy review of conduct violations that do not result in dismissal from the academy;⁹⁵³ regulations of the other services allow such review only when the conduct offense causes expulsion. Indeed, no cadet may be separated from any academy, regardless of the grounds, without prior approval from the secretary concerned or his designee;⁹⁵⁴ however, approval is routinely granted.⁹⁵⁵

⁹⁴⁶ Hagopian v. Knowlton, Civil No. 72-2814, at 35 (S.D.N.Y. July 26, 1972) (supplementary opinion).

⁹⁴⁷ See text accompanying note 189 *supra*.

⁹⁴⁸ See text accompanying notes 611-24 *supra*.

⁹⁴⁹ This is true at the Air Force and Military Academies. See text accompanying notes 473-79 *supra*.

⁹⁵⁰ R.U.S.C.C. 401 (1971).

⁹⁵¹ Hagopian v. Knowlton, 346 F. Supp. 29, 31 (S.D.N.Y.), *afl d*, 470 F.2d 201 (2d Cir. 1972).

⁹⁵² *Id.*

⁹⁵³ See U.S.M.M.A.M.R. 03101(9)(c)(l) (1971) (Class I offenses appealable to the Maritime Administrator, Dep't of Commerce).

⁹⁵⁴ See text accompanying note 193 *supra*.

⁹⁵⁵ See U.S.M.A. Honor Guide for Officers, *supra* note 215, at 11, 15; note 862 *supra*.

Furthermore, when academy non-court-martial adjudications precipitate a cadet's discharge from the Armed Forces, a federal statute provides they are reviewable by a board created for that purpose by the secretary concerned.⁹⁵⁶ However, the sole remedy available from this particular review is reclassification of the discharge status.⁹⁵⁷ When there is no discharge, but the adjudicatory conviction appears on the cadet's military record, a statute provides that the secretary concerned may be petitioned to have the record amended on the grounds that it is "necessary to correct an error or remove an injustice."⁹⁵⁸ Though a fact-finding hearing must be held at which the cadet is entitled to appear in person and with counsel,⁹⁵⁹ neither of these appellate procedures results in a de novo determination of the merits of the case.⁹⁶⁰

3. Judicial Review of Academy Adjudications

The threshold question in obtaining civilian judicial review of military determinations is whether the courts have subject matter jurisdiction over the controversy.⁹⁶¹ Over the last twenty years the federal judiciary has shifted from a policy of nonreviewability to one of only slightly restrained acceptance of jurisdiction to resolve intramilitary disputes.⁹⁶²

⁹⁵⁶ 10 U.S.C. § 1553 (1970). A court-martial conviction of a cadet will be reviewed in the same manner as a conviction of any other member of the military: by a legal officer, a Court of Military Review and the Court of Military Appeals. *Id.* §§ 865-67.

⁹⁵⁷ *Id.* § 1553(b).

⁹⁵⁸ *Id.* § 1552(a). Pursuant to this statute each of the Armed Forces has created its own Board for the Correction of Military Records. See, e.g., 32 C.F.R. § 723 (1972).

⁹⁵⁹ E.g., 32 C.F.R. §§ 723.6(a)(3), 723.6(c), 724.5(b), 724.5(d) (1972); see *Van Bourg v. Nitze*, 388 F.2d 557, 564-66 (D.C. Cir. 1967).

⁹⁶⁰ *Id.* at 566. In addition to appealing adverse adjudicatory decisions, cadets have available to them a variety of procedures for obtaining redress of grievances. For example, a cadet may complain orally or in writing to the Inspector General assigned to his academy for correction of injustices and elimination of conditions detrimental to the efficiency or reputation of his respective service. See, e.g., R.U.S.C.C. 320 (1971); U.S.A.R. 20-1 (3-1) to (3-3) (1968). Moreover, as members of the Armed Forces, cadets have the right to prefer charges under the UCMJ against officers who violate the Code. See 10 U.S.C. § 830 (1970); *Manual for Courts-Martial, United States* ¶ 29(b) (rev. ed. 1969). And a cadet in the Armed Forces may also, after being denied redress by his commanding officer for an alleged wrong, file a formal complaint against his commanding officer which must be sent, with an explanation of the proceedings thereon, to the secretary concerned. See 10 U.S.C. § 938 (1970).

⁹⁶¹ See generally Hansen, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military* (1), 3 *Sel. Serv. L. Rep.* 4001 (1971); Jones, *Jurisdiction of the Federal Courts to Review the Character of Military Administrative Discharges*, 57 *Colum. L. Rev.* 917 (1957).

⁹⁶² Until the 1950's, the nonreviewability rule was widely followed. See, e.g., *Johnson v.*

Prior to about 1950, federal courts uniformly refused to hear any military dispute on the grounds that they were unfamiliar with, and therefore ill-equipped to judge, the unique needs and problems of the military.⁹⁶³ Now, however, the civilian courts are more predisposed to accept jurisdiction over the military, and such matters as the judiciary's ability to decide questions that are uniquely within the military's field of expertise are considered in resolving the merits of the dispute.⁹⁶⁴ Thus, although servicemen are often able to avail themselves of judicial relief, the federal courts still heed to some extent the Supreme Court's warning, "that judges are not given the task of running the Army."⁹⁶⁵

Nonetheless, it is well settled that the federal courts have the jurisdictional authority and competence, when a substantial federal question is presented, to review the legality of academy adjudicatory proceedings.⁹⁶⁶ To date, all of the cases resolved by the judiciary have involved academy expulsion proceedings; but there is no logical impediment to pleading that a nonexpulsionary adjudicatory proceeding has raised a substantial federal question, though the probability of obtaining relief in this type of case is more dubious than in the former ⁹⁶⁷

Eisenrager, 339 U.S. 763 (1950); *In re Grimley*, 137 U.S. 147 (1890). The shift came with *Burns v. Wilson*, 346 U.S. 137 (1953), and *Harmon v. Brucker*, 355 U.S. 579 (1958). See *Jones*, supra note 961. As a result of increasing capriciousness by the military, especially its arbitrary failure to follow its own regulations. *Hansen*, supra note 961, at 4001; see, e.g., *United States ex rel. Tobias v. Laird*, 413 F.2d 936 (4th Cir. 1969); *Bates v. Commander*, 413 F.2d 475 (1st Cir. 1969), the floodgates finally opened during the Vietnam war. *Hansen*, supra.

⁹⁶³ See, e.g., *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 343 (1922). For a summary of other reasons why civilian courts refused jurisdiction, see *Hammond v. Lenfest*, 398 F.2d 705, 710 (2d Cir. 1968).

⁹⁶⁴ See, e.g., *Hagopian v. Knowlton*, 470 F.2d 201, 209-10 (2d Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Dunmar v. Ailes*, 348 F.2d 51, 55 (D.C. Cir. 1967) (per curiam). See generally, *Hansen*, supra note 961, at 4001 n.9.

Courts may not review the propriety of those military actions which are within the scope of the military's legitimate discretionary authority. See, e.g., *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972) (duty assignments of military personnel); *Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969) (matters of national defense). But see *L. Jaffe, Judicial Control of Administrative Action* 375 (1965).

⁹⁶⁵ *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953); see *Nixon v. Secretary*, 422 F.2d 934, 939 (2d Cir. 1970); *Raderman v. Kainey*, 411 F.2d 1102, 1106 (2d Cir. 1968).

⁹⁶⁶ See cases cited in notes 6 & 9 supra. Indeed, one federal court has granted a de novo review of a Merchant Marine Academy expulsion hearing. See *Krawez v. Stand*, 306 F. Supp. 1230, 1233-34 (E.D.N.Y. 1969).

⁹⁶⁷ See *Hagopian v. Knowlton*, 470 F.2d 201, 210 (2d Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).

B. Some Practical Observations

While extra-academy military and civilian remedial procedures are available to cadets, it appears that as a practical matter the cadets have rarely sought to pursue them.⁹⁶⁸ This is undoubtedly attributable in large measure to the cadets' ignorance of the procedures and unawareness that their rights have been violated.⁹⁶⁹ Furthermore, the cadets' failure to employ these procedures is probably influenced by the atmosphere of the academies, where cadets feel that, regardless of the merits of a claim, any attempt to obtain extraordinary review of punishments would be unproductive⁹⁷⁰ and might result in adverse ratings,⁹⁷¹ penalties,⁹⁷² or even expulsion from the academy.⁹⁷³ Academy authorities appear to have inhibited cadet appeals to the judiciary through such policies as refusal to release to cadets tape recordings and other records of adjudicatory proceedings,⁹⁷⁴ and by restricting access to civilian counsel.⁹⁷⁵ It is clear that before the courts can

⁹⁶⁸ Cadets appear to have sought judicial review of academy adjudications in only six reported cases. See cases cited in notes 6 & 9 *supra*.

⁹⁶⁹ See text accompanying notes 319-26 *supra* and 1109-11 *infra*. Academy officials apparently assume, however, that cadets know their rights. See Testimony of Personnel Officer, U.S.M.A., in a cadet conduct expulsion hearing, May 1972, at 123-24.

⁹⁷⁰ See *Hagopian v. Knowlton*, 346 F. Supp. 29, 32 (S.D.N.Y.), *affd*, 470 F.2d 201 (2d Cir. 1972); *id.*, Civil No. 2814, at 43 (S.D.N.Y. July 26, 1972) (supplementary opinion); text accompanying notes 327-32 *supra*.

⁹⁷¹ See authorities cited note 1113 *infra*. Academy officers have a major role in determining a cadet's performance ratings, see text accompanying note 306 *supra*, which determine the quantum of certain benefits he will receive. See text accompanying notes 307-09 *supra*.

⁹⁷² See text accompanying notes 146, 148 & 224 *supra* and 1113 *infra*. Cadets have good reason to fear retribution by Academy authorities. There is evidence, for example, that some of the cadet plaintiffs in *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), *rev'd, per curiam*, 466 F.2d 283 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972), were severely harrassed by academy authorities for their participation in the lawsuit. See Galloway and Johnson, *supra* note 301, ch. 2 (Commandant of Cadets labeled plaintiffs as "troublemakers" before the assembled Corps of Cadets and admonished the Corps to "take care of them"). Indeed, one West Point cadet was threatened with being "arbitrarily court-martialed" for litigating the issue of compulsory chapel attendance. *Id.* See generally *Hagopian v. Knowlton*, Civil No. 72-2814, at 41-43 (S.D.N.Y. July 26, 1972) (supplementary opinion).

⁹⁷³ Academy authorities have been known to "cashier" out of an academy a cadet whom they decide they do not like. See, e.g., *Hagopian v. Knowlton*, 346 F. Supp. 29, 30 (S.D.N.Y. 1972); *Jaremko v. Knowlton*, Civil No. 72-3419 (S.D.N.Y. Aug. 11, 1972); *Brown v. Knowlton*, Civil No. 72-3184 (S.D.N.Y. Aug. 3, 1972); *Cohen v. Mack*, Civil No. 72-884-K (D.C. Md., filed Aug. 31, 1972); *Farley v. Mack*, Civil No. 72-776-K (D. Md., filed July 28, 1972); Letter from Geography Instructor, U.S.A.F.A., to Senator Edmund S. Muskie, Mar. 10, 1973, at 2 ("deals' are made to get rid of objectionable Cadets").

⁹⁷⁴ See Letter from Lt. General A.P. Clark, Superintendent, U.S.A.F.A., to Former Member of the Class of 1973, U.S.A.F.A., Sept. 5, 1972.

⁹⁷⁵ See, e.g., *Brown v. Knowlton*, Civil No. 72-3184, at 5 (S.D.N.Y., Aug. 3, 1972) (military counsel "directed . . . not to advise [e]cadet . . . as to whether or not he needed civilian counsel,

become effective instruments for reforming the adjudicatory systems, such inhibiting policies and practices of the academies must be countered. In the interim, however, primary reliance for insuring substantive and procedural propriety in the adjudicating systems must be placed upon either the President or Congress.

VI

POLICY CONSIDERATIONS AND THE NEED FOR REFORM OF THE ADJUDICATORY SYSTEMS

Thus far, this study has enumerated some of the more troublesome statutory and constitutional issues raised by the adjudicatory practices at the academies. Although this analysis has demonstrated a compelling need for modification and reform, it is equally important to consider the need for change from the policy standpoint. Policy, in terms of the service academies, is a matter of military necessity: What aspects of cadet training advance the goals for which the academies exist? The discussion which follows will examine the adjudicatory systems in general, and several aspects of the systems in particular, to identify those practices which successfully promote the goals of the academies; those practices which are so counterproductive that they should be eliminated; and those practices which, because only minimally successful, require modification.

The purpose of the service academies is easily defined: to develop honest, capable, professional career officers. However, this general statement subsumes at least three independent goals: (1) to graduate and retain the largest possible number of qualified military leaders; (2) to inculcate prospective career officers with the attitudes and values required of an American military leader; and (3) to instruct in, and gain adherence to, patterns of conduct necessary for a disciplined and efficient fighting force. The adjudicatory systems, as a part of the academy educational experience, should serve these ends.⁹⁷⁶

Concededly, the systems may effectively control cadet conduct. There are indications, however, that as to the two former goals, the

stating that [the cadet] and his parents should make that determination and that he was not going to have [the military counsel] 'embroiling the Academy in litigation.' "); Letter from Personnel Officer to Second Class Cadet Being Silenced, U.S.M.A., Nov. 17, 1972 (West Point cadet being silenced denied permission to leave Academy to visit civilian counsel).

⁹⁷⁶ See Hearings on Service Academies, *supra* note 18, at 10,680; Annual Report of the Superintendent, U.S. Air Force Academy 73 (1965).

adjudicatory systems are largely ineffectual and possibly counterproductive. This section will focus on two problems currently plaguing the military—attrition of cadets and academy graduates and the inculcation of socially undesirable attitudes among academy trained officers—and will attempt to establish the degree to which the adjudicatory systems have contributed to these unfortunate developments. Attention will then be focused on the inability of the military to perceive and correct deficiencies in the adjudicatory systems and the concomitant necessity for intervention by nonmilitary authorities into the adjudicatory affairs of the academies.

A. The Adjudicatory Systems and Their Impact on Attrition

1. The Problem of Attrition

As previously stated, a primary goal of the academies is to furnish the military with career officers. Efforts to achieve this goal have been severely undercut in recent years by growing attrition, both among cadets and among academy graduates.

Attrition from the service academies is not only alarmingly high; it is growing at an unprecedented rate.⁹⁷⁷ Some statistics may be illuminating.⁹⁷⁸ Prior to the completion of their final year, the combined 1970 Classes of the Air Force, Military and Naval Academies had been depleted by an average of 32% of their entering cadets. Losses at the Naval Academy alone exceeded 36%. After only one semester, the Military Academy's Class of 1973 experienced losses of 11.5%. Perhaps of greater significance, the rate of attrition appears to be accelerating. As of December 1969, the Air Force and Military Academies reported losses in their 1970 Classes of 27.8% and 26.6% respectively. As of this same date, the figures for the Classes of 1971 had risen to 29.8% and 28.2%, despite the fact that these junior cadets had served one year less than their immediate predecessors.⁹⁷⁹ In

⁹⁷⁷ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,360, 10,429-31, 10,55665, 10,695; Charles, *supra* note 71, at 119-120, 215-16; Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy 3 (March 1969); Lebby, *supra* note 304, at 67-68; Sterba, Dropouts Plague the Air Academy, N.Y. Times, June 3, 1973, at 1, col. 3; N.Y. Times, Sept. 5, 1971, at 36, col. 4.

⁹⁷⁸ These figures have been calculated on the basis of data provided in the Association of Graduates Newsletter, U.S. Air Force Academy, April 28, 1970, at 30.

⁹⁷⁹ Statistics compiled by the individual academies reveal that high attrition is not confined to the Air Force, Military and Naval Academies. At the Coast Guard Academy, for example, the Class of 1970 had, on Feb. 14, 1969, the same percentage of attrition (50%) as did the Class of 1969. The Class of 1971 was close behind with an attrition rate of 43%. See United States Coast Guard Academy Enrollment and

March 1969, the Air Force Academy reported a "significant increase in attrition for the Class of 1972 as compared to the last three Classes"⁹⁸⁰

Attrition among academy graduates is also a matter of increasing concern.⁹⁸¹ For example, as of September 1970, 22% of the Air Force Academy Class of 1959 had resigned their commissions in the seven years following their obligated service.⁹⁸² By way of comparison, 20% of the Class of 1964 had left the military as of this same date, although these graduates had had only two years of non-obligatory service in which to tender their resignations. Indeed, resignation data on Air Force Academy graduates show successive increases from the Class of 1959 to the Class of 1963, even though each successive class served one year less of nonobligatory duty than the class before it. Indeed, a higher percentage of the Class of 1963 had resigned than had the Class of 1959, even though the former had only three but the latter had seven years in which to do so.⁹⁸³

The rate of attrition among academy cadets and graduates is, of course, alarming. The cost of a four-year academy education has risen to over \$40,000 at the Military, Air Force and Naval Academies today⁹⁸⁴—an enormous investment of tax dollars substantially lost through high attrition rates.

Economic considerations aside, there is a still greater reason for concern with unnecessary losses of officer talent. As military authorities have themselves recognized, a large portion of the Armed Forces

⁹⁸⁰ Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy 3 (March 1969). Official attrition projections for the Class of 1974 run as high as 48.7. See Letter from Director, Legislative Liaison, U.S.A.F., to Senator Hugh Scott, May 8, 1973, attach. I, at 3.

⁹⁸¹ See generally Leiby, *supra* note 304, at 68-70; Moskin, *Who Would Ever Go to West Point Today?*, *Look*, Oct. 6, 1970, at 38; *N.Y. Times*, April 16, 1961, § 6 (Magazine), at 88.

⁹⁸² Air Force Academy graduate resignation data is provided in Letter from the U.S. Air Force Academy Association of Graduates to All Graduates, Sept. 29, 1969, attach. 1. See Hearings on Service Academies, *supra* note 18, at 10,695; Annual Report of the Superintendent, U.S. Air Force Academy, Appendix F (1969).

⁹⁸³ Data compiled as of September 1972, reveal that of those Air Force Academy graduates eligible to resign, 42% had done so. See Thayer, *AFROTC and USAFA: Time for a Change*, *The Association of Graduates Magazine II* (Sept. 1972).

⁹⁸⁴ See Hearings on Service Academies, *supra* note 18, at 10,368, (Air Force Academy: \$50,933; Military Academy: \$48,697; Naval Academy: \$40,200); Letter from Director, Legislative Liaison, U.S.A.F., to Senator Hugh Scott, May 8, 1973, attach. 1, at 4 ("Estimated average cost per U.S.A.F.A. graduate 1973 is \$62,100."). See also *Return to Petition for Writ of Habeas Corpus and Conditional Counter-Claim, McCullough v. Seamans*, Civil No. S-2127 (E.D. Cal. Aug. 17, 1972) (Air Force unsuccessfully claimed that Academy graduate who subsequently became a conscientious objector owed Air Force \$53,575 for his Academy education).

is close to collapse.⁹⁸⁵ Plagued by pandemic drug addiction, racial tension, sedition, common crime, refusal of combat duty, widespread assaults and murders of officers and noncommissioned officers, rapidly increasing desertion and decreasing reenlistments,⁹⁸⁶ that have brought on what the Chief of Naval Personnel calls "a personal crisis . . . that borders on disaster,"⁹⁸⁷ morale within the American military is possibly the lowest in its history.⁹⁸⁸ In this era, while leadership is desperately needed, the academies can ill afford to ignore those irritants and injustices which exacerbate the attrition problem.

2. The Source of Academy Attrition—The Changing Nature of the Cadet

Although there are no doubt many independent variables which account for the excessive attrition among cadets and academy graduates, academy officials readily recognize that one explanation lies in the changing nature of the entering cadet. As an Air Force Academy study conducted in response to the Academy's attrition problem concluded, newly entering cadets are far more "abstract" than their predecessors.⁹⁸⁹ They are more open-minded and flexible; have increased tolerance of ambiguity, increased creativity under stress, greater ability to think and act in terms of hypothetical situations; and are less prone to form and generalize impressions of others from incomplete information.⁹⁹⁰

The changing nature of the cadet is readily apparent at the academies.⁹⁹¹ As academy officials have noted, the "new," psychologically "different" cadet manifests "a less ready acceptance of military disci-

⁹⁸⁵ Heinl, *supra* note 107, at 30; see Ayres, *Army is Shaken by Crisis in Morale and Discipline*, N.Y. Times, Sept. 5, 1971, at 36, cols. 1-2.

⁹⁸⁶ See, e.g., Heinl, *supra* note 107; Linden, *The Demoralization of an Army: Fragging and Other Withdrawal Symptoms*, Saturday Review, Jan. 8, 1972, at 12; E. King, *The Death of the Army* (1972); N.Y. Times, Nov. 10, 1972, at 1, cols. 6-7.

⁹⁸⁷ Heinl, *supra* note 107, at 36, quoting Admiral Elmo R. Zumwalt, Jr.

⁹⁸⁸ *Id.* at 30; see Ayres, *supra* note 985.

⁹⁸⁹ See Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy 1-3 (March 1969).

⁹⁹⁰ *Id.* at 1, 3; see Kaats, *Developmental Changes in Belief Systems During a Service Academy Education*, reprinted in the Proceedings, 77th Annual Convention, American Psychological Association 651-52 (1969). Indeed, the study showed that the Class of 1972 as freshmen were already almost as abstract as the Class of 1969 as seniors. Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy I (March 1969). According to a subsequent study, Air Force Academy freshmen are even more abstract and show greater gains in abstractness than do their counterparts at civilian colleges and universities. Letter from Former Psychology Professor, U.S.A.F.A.,

Jan. 27, 1972.

⁹⁹¹ See Lebbby, *supra* note 304, at 68.

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pline."⁹⁹² He exhibits a greater ability to perceive injustices in the military and is less reluctant to react openly. The more abstract cadet is less likely to silently tolerate frustration and disillusionment. In general, the "new" cadet is less willing to accept and adhere to seemingly purposeless and unfair rules and procedures.⁹⁹³

3. The Direct Impact of the Adjudicatory Systems on Attrition

One obvious source of attrition in the academies is the loss of cadets who are separated from an academy as a result of having been found guilty of an offense—what may be termed "direct" attrition.⁹⁹⁴ As academy officials readily concede, the incidence of conduct and honor offenses at the academies has increased gradually during the last 10 years.⁹⁹⁵ Not unexpectedly, this increase has developed during a period in which, owing to their changing attitudes, cadets have become less receptive to the academy honor codes.⁹⁹⁶ Although it cannot be conclusively established, a relationship between the changing nature of the cadet and the growing number of honor expulsions is not difficult to postulate: The adjudicatory systems rigidly proscribe a broad range of behavior. The more thoughtful and sensitive cadet, however, resists institutionalized definitions, assigning to himself the task of determining what is proper and honorable. Inevitably, personal perceptions of morality will clash with those deemed acceptable by academy officials; and the cadet, by following his conscience, will find himself violating the honor code.

Although this relationship between "direct" attrition and the

⁹⁹² Lebbby, *supra* note 304, at 68; see, e.g., Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy 1, 2, 18, 19 (March 1969); Fleming, West Point Cadets Now Say "Why, Sir?", N.Y. Times, July 5, 1970, § 6 (Magazine), at 14; U.S. News and World Report, Nov. 9, 1970, at 46, 49; cf. Bigart, Cadets No Longer Submit to Petty Rules, N.Y. Times, May 31, 1972, at 35, cols. 1-4.

⁹⁹³ See Honor Concept, *supra* note 69, at 2, 12; Lebbby, *supra* note 304, at 67; Ninth Conference of Superintendents of the Academies of the Armed Forces, Appendix B, at 3 (July 27-28, 1967). Cf. Sherman, Justice in the Military, in J. Finn, *Conscience and Command* 47 (1971).

⁹⁹⁴ As an indicator of the amount of cadet attrition attributable to the academies' adjudicatory systems, 6.6% of the Air Force cadets in the Class of 1972 who left the Academy during their first year left because they were honor code violators; 1.2% left for conduct deficiency. Follow-Up Study of Former Cadets, Class of 1972, Who Departed During the Period I July 1968 through 30 June 1969 2 (Apr. 5, 1971).

⁹⁹⁵ Ninth Conference of the Superintendents of the Academies of the Armed Forces I (July 26-28, 1967); see Hearings on Service Academies, *supra* note 18, at 10,911; Charles, *supra* note 71, at 214-15; U.S.M.A. Honor Guide for Officers, *supra* note 215, at 1.

⁹⁹⁶ See Cunningham, *supra* note 628, at II, cols. 1-5; Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 21.

adjudicatory systems is conjectural, there is evidence that two aspects of the adjudicatory systems—the single expulsion penalty and the toleration clause—contribute significantly to the number of honor expulsions. A comparison of the Air Force, Military and Naval Academies' honor separation statistics may be enlightening.⁹⁹⁷ As of December 1969, these academies reported losses to their 1971 Classes of 8.6%, 14.3%⁹⁹⁸ and 0.4% respectively. For the Classes of 1972 the figures were 13.1%, 16.4% and 3.8%, and a comparison of still other years reveals an identical pattern. In light of the significantly smaller rate of "direct" honor attrition at the Naval Academy,⁹⁹⁹ it is appropriate to detail the material differences between that academy and the land service academies.

In the adjudicatory context, the primary difference between the Naval Academy and the land service academies resides in the distinction between the Naval Academy's honor concept¹⁰⁰⁰ and the Air Force and Military Academies' honor code. Unlike the honor concept, the honor codes provide expulsion as the sole penalty for an honor violation.¹⁰⁰¹ In addition, the codes contain a "toleration" proscription, making a substantive offense the failure to report to academy officials an honor violation committed by a fellow cadet.¹⁰⁰² The effect of these two additional provisions on "direct" attrition is obvious. The single expulsion penalty results in loss to the academy, and ultimately to the military, notwithstanding the severity of a particular honor offense. The toleration clause contributes to the number of honor separations directly both by creating yet another ground for expulsion,¹⁰⁰³ and by requiring that even the most minor transgressions be reported.¹⁰⁰⁴ In light of growing dissatisfaction with the toler-

⁹⁹⁷ *The percentages which follow were computed from statistics reported in the Association of Graduates Newsletter, U.S. Air Force Academy, April 28, 1970, at 30.*

⁹⁹⁸ In reality, the Military Academy has many more honor code violators than its statistics reflect, for many acts which patently constitute honor violations are frequently punished instead as conduct violations. See text accompanying note 665 *supra*.

⁹⁹⁹ See Hearings on Service Academies, *supra* note 18, at 10,910. Attrition for honor offenses at the Coast Guard and Merchant Marine Academies is negligible. See United States Coast Guard Academy Enrollment and Attrition Summary As of 14 February 1969; Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972.

¹⁰⁰⁰ The Coast Guard and Merchant Marine Academies also have an honor concept. See text accompanying note 169 *supra*.

¹⁰⁰¹ See text accompanying note 627 *supra*.

¹⁰⁰² See text accompanying note 171 *supra*.

¹⁰⁰³ Many cadets are separated from the Military and Air Force Academies for tolerating. See, e.g., Hearings on Service Academies, *supra* note 18, at 10,360, 10,746; Charles, *supra* note 71, at 225; Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 22.

¹⁰⁰⁴ The toleration proscription further increases direct attrition by contributing to viola-

ation proscription¹⁰⁰⁵ and the increasing number of honor convictions, its impact cannot be minimized.

Because of the significant costs stemming from continued high attrition,¹⁰⁰⁶ it seems reasonable to question the necessity of retaining the single expulsion penalty and the toleration clause. In support of their abolition, the unhampered ability of the sea service academies to successfully graduate capable military officers is persuasive. Although the training requirements of the academies may differ,¹⁰⁰⁷ integrity and personal honesty are essential traits for officers of all services.¹⁰⁰⁸ And there is nothing to indicate that the sea service academy graduates, trained without the threat of automatic expulsion and without the compulsion of a toleration clause, are of less integrity than their fellow land service academy graduate officers.¹⁰⁰⁹

4. The Indirect Impact of the Adjudicatory Systems on Attrition

While the effect of the adjudicatory systems on direct attrition is obvious, such is not the full extent of their impact on the general attrition problem. As previously noted, cadets entering the academies are more resistant than their predecessors to arbitrarily imposed standards of honor and justice. It seems more than likely that at least some of the 16.8% of the Air Force Academy Class of 1970 or the 20.8% of the Naval Academy Class of that same year who voluntarily left the academies¹⁰¹⁰ did so because of perceived injustice in the

tions of other parts of the Honor Code. See text accompanying note 1081 *infra*.

¹⁰⁰⁵ See note 75 *supra*. The toleration clause is probably the most controversial single matter at an Academy. See *Toleration and the Cadet Honor Code (A Selection of Rival Opinions)*, Department of English, U.S. Air Force Academy.

¹⁰⁰⁶ The Air Force Academy's 1965, 1967 and 1972 cheating scandals alone cost the American taxpayer over 6.5 million dollars. See Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 20.

¹⁰⁰⁷ But see Vice-Admiral Hyman G. Rickover's comment in 98 *Army Navy Air Force Journal* 1276 (June 24, 1961): "[T]here is not two percent difference" between the Military, Naval and Air Force Academies.

¹⁰⁰⁸ As stated by one Congressional Subcommittee recently investigating the academies, "we wonder [why] one academy can put out a qualified officer under one [honor] system and yet it is not considered adequate at one of the other academies." *Hearings on Service Academies*, *supra* note 18, at 10,677; accord, *id.* at 10,746; see *id.* at 10,757, 10,783.

¹⁰⁰⁹ Settles Letter, *supra* note 322, at 30, col. 4; see *Hearings on Service Academies*, *supra* note 18, at 10,677, 10,746, 10,757. Indeed, there is nothing to indicate that service academy graduates are more honorable as a result of their training than alumni of any high caliber civilian college. See Calkins, *supra* note 71, at 41.

¹⁰¹⁰ These percentages are computed from statistics on the number of resignations for a reason other than academic deficiency or a violation of the honor code, as reported in the *Association of Graduates Newsletter*, U.S. Air Force Academy, April 28, 1970, at 30.

adjudicatory systems.¹⁰¹¹ As recognized by one West Point professor-graduate, seemingly purposeless rules breed resentment.¹⁰¹² Inequitable adjudicatory procedures would appear especially disillusioning. As recognized by the officer-in-charge of the Air Force Academy's honor and ethics committees, conviction for an honor violation, when guilt is established by an unjust procedure, is "a most embittering experience."¹⁰¹³ The impact of adjudicatory practices on "indirect" attrition is borne out by a 1967 study which revealed that reforms in Air Force honor code procedures were reflected in a drop in the overall attrition rate.¹⁰¹⁴

The honor and ethics systems also appear to have contributed to attrition among academy graduates. Throughout their training, cadets are indoctrinated with high principles of honor—standards which vary widely from those accepted by the civilian population.¹⁰¹⁵ Upon graduation, however, they are disillusioned to learn that their superior moral training is inappropriate in the military. As one Air Force Academy graduate explained to Academy researchers upon resigning:

I hear leaders talking about integrity and spirit and intent, but I see few who live by their preaching. I have even had superiors indicate that my Academy training is not compatible with their outlook There are other reasons for my resignation . . . but they all come back to honesty and integrity. That's what USAFA teaches, and it means something in my life—more than promotion or career progression.¹⁰¹⁶

¹⁰¹¹ See Washington Post Parade Magazine, Oct. 15, 1972, at 27, col. 1; cf. Sherman, *supra* note 581, at 95, 103; Ward, UCMJ—Does it Work? Evaluation at the Field Level, 18 Month's Experience, 6 Vand. L. Rev. 186, 192 (1953).

¹⁰¹² Mott, West Point: A Criticism, Harpers Magazine 467, 469-70 (March 1934) (author was an Army colonel and Military Academy professor); see Report of the Board of Visitors, U.S. Air Force Academy 8-10 (1970); Washington Post Parade Magazine, Oct. 15, 1972, at 27, cols. 1, 2.

¹⁰¹³ Beck, *supra* note 77, at 3. It should be remembered that those upon whom regulations have an impact—i.e., cadets—are uniquely qualified, even more than academy officials, to judge their effect. See *Anderson v. Laird*, 466 F.2d 283, 294 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972).

¹⁰¹⁴ *Id.* at 12-13; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 13. Although one might be tempted to explain this decrease in terms of fewer adjudicatory expulsions, honor convictions were on the increase during this same period. See text accompanying note 995 *supra*.

¹⁰¹⁵ Cadets are taught that the principles of their honor codes are merely a "minimum standard" upon which they will build when *they* become graduates. See, e.g., Hearings on Service Academies, *supra* note 18, at 10,786.

¹⁰¹⁶ Factors Influencing USAF Academy Graduates to Resign from the Air Force,

Indeed, the failure of the military to live up to the high standards inculcated among cadets appears to be an explanation frequently offered by academy graduates upon resignation. Of 10 reasons given for separation by graduates polled in a recent study by Air Force Academy researchers, the third most significant was the "lack of integrity in the Air Force."¹⁰¹⁷

Nor are feelings of disillusionment restricted to graduates. An Air Force psychiatrist reporting on conditions following that Academy's 1965 cheating scandal observed that "young people's idealism is enhanced by the Academy's emphasis on honesty. Cadets are therefore very sensitive to behavior by officers that is less than forthright."¹⁰¹⁸ Another Air Force psychiatrist has concluded, after working with cadets for two years, that unethical conduct in both the military and in the civilian government has been a significant factor in cadet resignations.¹⁰¹⁹

U.S.A.F.A. Association of Graduates 10-I 1 (1969); accord, J. Heise, *The Brass Factories* 18385 (1969); Letter from U.S.A.F.A. Graduate to U.S.A.F.A. Association of Graduates, Jan. 29, 1965: Minority Report, *supra* note 6, at 14-15.

¹⁰¹⁷ Factors Influencing USAF Academy Graduates to Resign from the Air Force, U.S.A.F.A. Association of Graduates 5 (1969). The Secretary of the Academy's Association of Graduates noted that several resigning graduates "mentioned the 'accusations' by their immediate commanders that they were too idealistic with regard to personal integrity." *Id.* Excerpts of comments by resigning graduates include:

For me to say that there is a lack of integrity in the Air Force is a serious accusation, so [let me] offer an explanation. An example of [lack of integrity] at the highest level . . . is the Pueblo situation . . . I could cite examples of cheating on tests, cheating on 5BX, lying about flying time, lying about mission accomplishments, shirking responsibilities, stealing supplies and equipment, and so on. . . everyone knows that they go on and that they are not just isolated instances. . . few attempt to do anything about it.

I am leaving . . . due to a complete disillusionment with the integrity of the officer corps.

When stan-evals are in progress, it is understood that anything goes so long as the base looks good.

To enter active duty with the intent of not lying, stealing, or cheating is to automatically limit your promotional potential [and] to affect the wartime mission. *Id.*, attach. 15, at 1-2.

¹⁰¹⁸ Morgenstern, *supra* note 74, at 4. Describing cadet reaction to clearly untruthful press statements released by Academy officials, Morgenstern further noted that it is "difficult to describe the exquisite sensitivity of the cadet wing to behavior of questionable morality. For [cadets] any deviation from rigorous and even tedious honesty is pathogenic." *Id.* at 5.

¹⁰¹⁹ Interview with 1970-72 U.S.A.F.A. Psychiatrist, April 2, 1973. The cadets who have internalized the values of honor professed at the academies may resign because of disillusionment and cynicism resulting from their perceiving duplicity and unethical conduct by those in

B. The Effect of the Adjudicatory Systems on the Attitudes of Those Who Remain in the Military

A second function which the service academies serve is the inculcation among cadets of those values and attitudes which the nation perceives as desirable in the professional career officer. Concededly, the adjudicatory

systems are an important and for the most part successful mechanism for instructing in and gaining adherence to these accepted values. Nevertheless, the adjudicatory systems, particularly those of the Air Force and Military Academies, must accept blame for simultaneously imbuing in the cadet attitudes which are undesirable from a policy standpoint. The purpose of this section is to identify those socially unhealthy attitudes developed at these two Academies and to demonstrate their relationship to the adjudicatory systems.

1. The Systems in General

*a. Desired Attitudes--*The various components of the adjudicatory systems each seek to instruct cadets in distinct yet overlapping patterns of behavior. The conduct systems, for example, identify and require adherence to patterns of personal demeanor, not only to facilitate instruction at the academies but to establish patterns of conduct which the potential military officer will follow throughout his career. The honor and ethics systems seek to develop in cadets personal integrity¹⁰²⁰ to enable members of the military to trust one

authority. *Id.* As expressed recently by one Air Force Academy graduate and faculty member, "[I]t is [Academy officials'] own double standards and lack of creditability that destroy a cadet's opinion of the Air Force and his incentive to make it a career." Letter from Geography Instructor, U.S.A.F.A., to Senator Edmund S. Muskie, Mar. 10, 1973, at 2. For those who follow what academy officials do instead of what they say, such unethical conduct has been identified by the psychiatrist as a major cause for cheating. See Mutschler, *supra* note 312.

The amount of duplicity cadets confront cannot be overemphasized. Cadets see a gross inconsistency, for example, in their being honor bound not to ask a roommate how to spell a word or otherwise obtain assistance in writing an essay once their pen has touched paper, and several Academy professors "changing all around" cadets' Rhodes Scholarship applications, see, e.g., Interview with History Professor, U.S.M.A., June 1, 1972; Galloway & Johnson, *supra* note 301, ch. I. Cadets are taught, moreover, that "[t]here can be no shading, no equivocation, no quibbling among honorable men." Annual Report of the Superintendent, U.S. Air Force Academy 65 (1965). Compare this standard with Charles, *supra* note 71, at 237; and text accompanying notes 1058-63 *infra*.

¹⁰²⁰ See, e.g., U.S.A.F.C.W.M. 30-2(l) (1965); U.S.A.F.A. Honor Code, (Draft, Apr. 3, 1958); U.S.M.A. Honor Guide for Officers, *supra* note 215, at 4 ("primary means of achieving . . . character development"); Lough & DePaul, *supra* note 20, at 17, 22 (same) (citation omitted).

another in their everyday dealings and to prepare prospective officers for the mutual reliance often made necessary by military contingencies.¹⁰²¹ The conduct systems appear to be at least partially successful in instilling desired conduct, at least for those who successfully graduate and go on to military careers. Despite occasional assertions to the contrary,¹⁰²² the honor and ethics systems also perform part of their function:¹⁰²³ there is little doubt that

unethical and dishonest behavior is reduced at the academies,¹⁰²⁴ and among academy graduates in the military as well.¹⁰²⁵ Moreover, cadets and graduates alike have frequently affirmed the value of the moral training they received at the academies, often commending the honor system as "very effective" and as "the best thing at the Academy."¹⁰²⁶ However, before lauding the systems from a policy standpoint, those undesirable attitudes equally a product of the adjudicatory systems must be analyzed and weighed.

*b. Undesirable Attitudes Engendered by the Adjudicatory Systems--*Despite the merits of the adjudicatory systems in inculcat-

¹⁰²¹ See, e.g., Hearings on Service Academies, supra note 18, at 10,746. The following statement of former Secretary of War Newton D. Baker is often quoted as justification for the honor systems: .

Men may be inexact or even untruthful, in ordinary matters, and suffer as a consequence only the disesteem of their associates, or even the inconveniences of unfavorable litigation, but the inexact or untruthful soldier trifles with the lives of his fellow men, and the honor of his government In the final analysis . . . character is the most precious component [of the product of the academies' leadership program]. Quoted in, e.g., Charles, supra note 7, at 253; Forman, supra note 6, at 155 n.47; Taylor,

supra note 274, at 2-3; see Hearings on Service Academies, supra, at 10,811.

¹⁰²² See, e.g., Calkind, supra note 71, at 40-41.

¹⁰²³ See Hearings on Service Academies, supra note 18, at 10,802.

¹⁰²⁴ Numerous educational studies have established that college honor systems effectively reduce incidents of cheating. See, e.g., W. Bowers, Student Dishonesty and Its Control in College (N.Y. Bureau of Applied Social Research, Columbia Univ. 1965); Dabney, Cheating Can Be Stopped, Saturday Review, May 21, 1966, at 77; Muuss, Classroom Incident: What Would You Have Done?, NEA Journal, Nov. 1965, at 56. See generally Charles, supra note 71, at 74-75, 102-104.

¹⁰²⁵ U.S.M.A. Honor Guide for Officers, supra note 215, at 7.

¹⁰²⁶ Clelland, supra note 69, at 27, 29; see, e.g., Hearings on Service Academies, supra note 18, at 10,358; 10,694; 10,741-42; 10,793; Charles, supra note 71, at 126, 224; U.S.M.A. Honor Guide for Officers, supra note 215, at 3; U.S.A.F.A. Superintendent's Report, supra note 73, at 6; White, supra note 309, at 91; N.Y. Times, Aug. 23, 1959, at 34, col. 1. But see Heise, Farewell to Duty, Honor, Country, supra note 6, at 21 (indications that acceptance of Honor Code by Air Force cadets is going down). In evaluating favorable statements made by cadets and graduates concerning their training, Vice Admiral Rickover once remarked: "[I]f you asked a Chinese coolie whether he liked rice he'd probably say 'Yes.' How could he answer otherwise, he doesn't know how well he likes rice until you give him a beefsteak." Hearings Before a Subcomm. of the House Comm. on Appropriations, 88th Cong., 2d Sess. 503 (1964).

ing desirable attitudes, it is equally evident that the systems are no without unfortunate consequences. The following discussion will focus on three undesirable by-products of the adjudicatory systems a sense of "gamesmanship" in dealing with military discipline; the destruction of individual judgment; and the overinternalization of academy values.

A not uncommon cadet reaction to the adjudicatory system, which minutely detail what a cadet may and may not do, is extreme discontent and a sense of cynicism.¹⁰²⁷ The mere quantity of disciplinary rules and regulations and the number of means in which they are enforced has been said

to create a game of "cops and robbers" between officers and cadets.¹⁰²⁸ As one cadet advised a congressional subcommittee, there is an atmosphere of constant conflict, "cadets against officers," with the officers trying to "nail [the cadet] to the wall every time [he] breaks a minor regulation."¹⁰²⁹ For some, this sense of fear and powerlessness, and the need to constantly fight to survive the system are not worth the effort,¹⁰³⁰ and they choose or are forced to resign.¹⁰³¹ However, for the many who remain at the

¹⁰²⁷ See, e.g., Letter from a First Class Cadet to Dean of the Academic Board, U.S.M.A., Sept. 28, 1971; Mott, supra note 1012, at 470. Indeed, "[t]here is a tired, depressive atmosphere at the Academy. The gaiety and lightheartedness found at other good universities . . . is missing." Report of the Board of Visitors, U.S. Air Force Academy 21 (1965) (concurring and additional views of Burt L. Talcott). See also Calkins, supra note 71, at 48; U.S.A.F.A. Superintendent's Report, supra note 73, at 34, 36; Compion, West Point's "Suppe": No "Potted Palm," N.Y. Times, Feb. 27, 1955, § 6 (Magazine), at 17.

¹⁰²⁸ See, e.g., DoD House Appropriations Hearings, 1966, supra note 12, at 39; U.S.A.F.A., Follow-Up Study of Former Cadets, Class of 1972, Who Departed During the Period I July 1968 through 30 June 1969, at 15 (Apr. 5, 1971); Minority Report, supra note 6, at 6; Morgenstern, supra note 74, at 2, 5; Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973.

¹⁰²⁹ Hearings on Service Academies, supra note 18, at 10,769.

¹⁰³⁰ See, e.g., Galloway & Johnson, supra note 301, ch. 2; Smith, supra note 327, at 34, 40; Letter from First Class Cadet to Dean of the Academic Board, U.S.M.A., Sept. 28, 1971; Letter from 1973 Naval Academy Midshipman, Oct. 3, 1972; Letter from 1972 Air Force Academy Graduate, supra note 839; text accompanying notes 327-31 supra. See also Boroff, supra note 321, at 96.

¹⁰³¹ While at an academy, many suffer nervous disorders. See Bedinger, The Goose Step at West Point, The New Republic, Sept. 24, 1930, at 144, 145 (U.S.M.A. psychiatrist's report). A few have attempted or committed suicide. See, e.g., Bedinger, supra at 145 (two West Point cadets in 1920); Coleman, Untitled Dissertation 33 (1972) (author was Air Force Academy psychiatrist during 1970-72) (two Air Force cadets in 1970). Indeed, fourteen cadets in the Air Force Academy's Class of 1974 attempted suicide during their first semester at the Academy, at least one of them successfully. See Letter from Geography Instructor to Senator Peter H. Dominick, Feb. 20, 1973, at 2. But see Letter from Director, Legislative Liaison, U.S.A.F., to Senator Hugh Scott, attach., at 5 ("five suicide attempts or gestures by members of the Class of 1974").

academy and ultimately enter the military, discipline becomes a matter of "gamesmanship":¹⁰³² A cadet learns that to avoid losing the game is virtually impossible and that losing may involve receiving only minor punishments. For many, academy discipline warps the individual's sense of values. The cadet is encouraged to feel that circumventing regulations is not unconscionable but is merely playing the game. If these perceptions and attitudes are carried with the cadet, the impact on the military, as well as on the public it protects, is obvious. The basic checks on which an effective fighting force must depend—control and discipline—are extensively undermined.

A second unfortunate by-product of academy training under the present adjudicatory systems is the deemphasis on personal judgment and discretion.

By extensively detailing for the cadet how his life is to be lived, little room is left for the personal growth that comes with responsibility and independence. Certainly many military contingencies require the professional officer to act without hesitation, to obey without exercising personal judgment. Nonetheless, leadership requires judgment and seasoned deliberation—something the adjudicatory systems leave the graduated cadet ill prepared to provide.¹⁰³³

Perhaps most undesirable are certain attitudes which are developed because of an internalization of military values, a process which to a significant degree is the product of the honor and ethics systems.¹⁰³⁴ It must be remembered that the academies perceive as one of their roles indoctrinating cadets with an ideology¹⁰³⁵ which has as its heart the concept of military honor.¹⁰³⁶ By a comprehensive resocialization process¹⁰³⁷ designed to instill within cadets those attitudes deemed desirable in military officers, the academy ideology of honor is internalized. Though superficially a salutary process, internalization tends to create a sense of superior moral virtue and super-loyalty

¹⁰³² For examples of cadet strategems, see Beck, *supra* note 77, at 11.

¹⁰³³ Galloway & Johnson, *supra* note 301, chs. 1, 4. West Point's Honor System, for example, leaves cadets unable to differentiate between insignificant moral problems and those of great moment. Adherence to rules replaces the exercise of judgment. *Id.*

¹⁰³⁴ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,785.

¹⁰³⁵ See Galloway & Johnson, *supra* note 301, chs. I, 4; Lovell, *supra* note 306, at iii; Masland & Radway, *supra* note 648, at 170.

¹⁰³⁶ Janowitz, *supra* note 863, at 215, 225 (1971). "Honor" has been viewed as "the basis of the military belief system," Leiby, *supra* note 304, at 47, citing Janowitz, *supra* at 215; and as an "integral part of the military tradition" and as a requisite for military leadership, Fowler, *supra* note 71, at 6. See Hearings on Service Academies, *supra* note 18, at 10,812. For discussion of the aristocratic origins of military "honor," see generally, *id.*; Janowitz, *supra* at ch. II; Lovell, *supra* note 306, at 33 n.42.

¹⁰³⁷ See text accompanying notes 310-11 & 327-32 *supra*.

to military institutions—attitudes which are not only undesirable, but which may pose a threat to the fundamental concept of civilian control of the Armed Forces.¹⁰³⁸

Feelings of superior moral virtue develop soon after the cadet arrives at the academy. Because of the athletic, leadership and academic competition he has overcome,¹⁰³⁹ he is justifiably proud to have won an appointment. His feelings of self-esteem are magnified, however, by repeated statements by academy officials that he is the "cream of the crop."¹⁰⁴⁰ After being reminded time and again of rapidly decaying morals among the civilian population, especially among his peers at civilian colleges,¹⁰⁴¹ he is made to appreciate the superior moral training the academy will provide by way of its honor and

ethics systems.¹⁰⁴² The country can be saved, he is taught, only if he and his fellow cadets have the moral courage to teach the nation by their example.¹⁰⁴³ This sense of morality is intensified at the Military and Air Force Academies¹⁰⁴⁴ because of particular, reinforcing

¹⁰³⁸ Cf. C. Ackley, *The Modern Military in American Society* 316 (1972).

¹⁰³⁹ As of 1965 each class of less than 1000 cadets entering the Air Force Academy was screened from approximately 40,000 applicants. *The New Republic*, Feb. 13, 1965, at 10.

¹⁰⁴⁰ See, e.g., Galloway & Johnson, *supra* note 301, chs. I, 2.

¹⁰⁴¹ As General Westmoreland informed cadets of the Military Academy:

You're going to be dealing with just ordinary people. . . all people aren't honest. Many have low, if any, sense of duty . . . many citizens go to extremes to avoid any type of military service or any type of service to their country. I feel that West Pointers must be different, and that is why as a group they have been universally and uniquely successful throughout history.

E. Furgurson, *Westmoreland The Inevitable General* 288-93 (1968); see Clelland, *supra* note 69, at 27; *Final Report of the Superintendent's Ad Hoc Attrition Committee*, U.S. Air Force Academy 18 (1969); Galloway & Johnson, *supra* note 301, chs. 1, 2, 4; Honor Concept, *supra* note 69, at 12; Interview with History Professor, U.S.M.A., June 1, 1972; Masland & Radway, *supra* note 648, at 199; cf. DoD House Appropriations Hearings, 1966, *supra* note 12, at 42. See also Letter from Geography Instructor, U.S.A.F.A., to Senator Peter Dominick, Feb. 20, 1973 ("Four times in a twelve minute Commander's Call address in 1971, General Clark reminded the Academy's officers of the moral decay of American society and cautioned them to guard against its influence in the Cadet Wing."); Letter from Geography Instructor, U.S.A.F.A., to Senator Edmund S. Muskie, Mar. 10, 1973, at 2.

¹⁰⁴² See, e.g., Letter from U.S.A.F.A. Graduate to Association of Graduates, U.S.A.F.A., Jan. 29, 1965 (honor code sets cadets apart from civilian peers).

¹⁰⁴³ As expressed in Galloway & Johnson, *supra* note 301, ch. 1, the cadet "is taught to regard himself as a standard-bearer; a self-sacrificing leader whose mission is to protect the weaker members of society whose social and moral ideas are inferior." See Furgurson, *supra* note 1041, at 288-93. See also Annual Report of the Superintendent, U.S. Air Force Academy 65 (1965); Galloway & Johnson, *supra* note 301, chs. 2, 4; Janowitz, *supra* note 863, at 22829, 231.

¹⁰⁴⁴ For an appreciation of this intensity, see, e.g., Affidavit of Brig./Gen. Walter T. Galligan, Commandant of Cadets, U.S.A.F.A., *Rose v. Department of the Air Force*, Civil No. 72-1605 (S.D.N.Y., Dec. 19, 1972); Memorandum of Law for Defendants, *Rose v. Depart-*

honor practices: the single expulsion penalty; the toleration clause; ostracism of honor code violators; and perhaps most important, indoctrination that an honor code is something to be possessed and vigorously guarded from outside influences¹⁰⁴⁵—factors which make cadets view their honor systems as something "sacred and holy,"¹⁰⁴⁶ "akin to the virtue of [a] mother or [a] sister."¹⁰⁴⁷ Ultimately, cadets believe their moral training gives them an "uncommon standard" which makes them "uncommon men."¹⁰⁴⁸

While it is certainly desirable that the academies produce men of virtue and integrity, the practice of fostering self-perceptions of superior moral virtue poses considerable dangers. Cadets learn and develop a distrust for those civilians who do not share their ideology, and by the time they become officers, often feel genuine contempt for the judgment of those civilians who have not had the benefit of their superior moral training.¹⁰⁴⁹ These are hardly

characteristics desirable among military leaders who are to subordinate themselves to civilian authority.

Another attitude of dubious value produced by the honor codes, and especially by the toleration clause of the Air Force and Military Academies' honor codes, is a particularly intense form of loyalty.¹⁰⁵⁰

ment of The Air Force, Civil No. 72-1605, at 12 (S.D.N.Y. Sept. 28, 1972); Hearings on Service Academies, supra note 18, at 10,754-55, 10,758, 10,768; Letter from Separated 1971-72 Honor Representative, U.S.A.F.A., to Sen. Charles H. Percy (undated).

¹⁰⁴⁵ See Hearings on Service Academies, supra note 18, at 10,758, 10,768; text accompanying notes 1055-56 & 1102-04 infra.

¹⁰⁴⁶ Galloway & Johnson, supra note 301, ch. 4; see Charles, supra note 71, at 279, quoting M/Gen. James B. Lampert, Superintendent, U.S.M.A. ("sacrosanct"); U.S.M.A. Honor Guide for Officers, supra note 215, at 4.

¹⁰⁴⁷ E.g., Lovell, supra note 306, at 32, quoting Letter from President Dwight D. Eisenhower to Superintendent, U.S. Military Academy.

¹⁰⁴⁸ E.g., Report of the Board of Visitors, U.S. Air Force Academy 3 (1972); see Address by General Joseph T. McNarney entitled "The Uncommon Man," U.S.A.F.A., Nov. 21, 1955, cited in Calkins, supra note 71, at 7.

¹⁰⁴⁹ This distrust of civilians has been recognized by several commentators. See, e.g., Galloway & Johnson, supra note 301, chs. I, 2, 4; Janowitz, supra note 863, at 231; Lovell, supra note 306, at 19. See also Palmer, Should West Point Be Charged?, 53 World's Work 585, 586 (1927). Academy graduates, for example, may feel that civilian leaders do not grasp the moral dimensions of political decisions. See, e.g., The Sun (Colorado Springs), Oct. 17, 1972, at 21, cols. 2-3 (Superintendent of U.S.A. F.A. tells audience, as a criticism of Presidential Candidate George S. McGovern's policies re Viet Nam, that "we got into Vietnam for *honorable* purposes. . . . We must get out *honorable [sic]* . . . I can't see the United States extricating in a manner that would bring *dishonor* for 100 years. If we leave *dishonorably* it will be on our consciences as long as we can remember.") (emphasis added).

¹⁰⁵⁰ Equally applicable to all academies is the goal of the Military Academy recognized by the district court in Hagopian v. Knowlton, 346 F. Supp. 29, 30 (S.D.N.Y.), alTd, 470 F.2d

It has long been recognized that a primary purpose of inculcating honor in military personnel is to develop loyalty to higher military authority.¹⁰⁵¹ Subordinates must feel and display loyalty to their commanders if the military is to operate effectively. As taught by the academies, however, "a major aspect of military honor comprises a sense of brotherhood and intense group loyalty [which] is an end in and of itself."¹⁰⁵² As internalized by the cadet in the intense and isolated environment of the academies, loyalty to the military supplants loyalty to the Constitution, the Government and the nation.¹⁰⁵³ Since institutional loyalty is intense and definitionally narrow, it serves to widen the gulf between the military and those on the outside.¹⁰⁵⁴ Demonstrating the effects of military loyalty, academy officials and cadets have actively sought to keep outsiders,¹⁰⁵⁵ including the Congress,¹⁰⁵⁶ uninformed about, and to prevent their interfer-

201 (2d Cir. 1972): "[t]he placing of loyalty to Service above self-interest, or loyalty to friends or associates,

is a paramount goal of [U.S. Military Academy] training."

¹⁰⁵¹ See Beck, *supra* note 77, at 2; Charles, *supra* note 71, at 194; Clelland, *supra* note 69, at 29; Galloway & Johnson, *supra* note 301, chs. 1, 4; Leiby, *supra* note 304, at 47, citing Janowitz, *supra* note 863; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 8.

¹⁰⁵² Janowitz, *supra* note 863, at 220-21; see King, *supra* note 986, at 174-75 (1972); Leiby, *supra* note 304, at 47-49.

¹⁰⁵³ As expressed by one Military Academy graduate now serving as a West Point professor, "In my system of values, West Point comes first, the Army comes second, and the country comes third." Galloway & Johnson, *supra* note 301, ch. 1, quoting Col. Roger H. Nye, Class of 1946, U.S.M.A.; see *id.* chs. I, 4, quoting, e.g., Assembly, U.S. Military Academy 45 (Summer 1970).

¹⁰⁵⁴ See DoD Appropriations Hearings, 1966, *supra* note 12, at 38, 39; Janowitz, *supra* note 863, at 221.

¹⁰⁵⁵ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,900 (part of White Committee Report on 1965 U.S.A.F.A. honor scandal destroyed over member's protest, to keep from the public); Galloway & Johnson, *supra* note 301, ch. 4 (1965 U.S.A.F.A. and 1966 U.S.M.A. honor scandals); Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 20 (1972 U.S.A.F.A. honor scandal); Minority Report, *supra* note 6, at 1, 12; cf. Charles, *supra* note 71, at 222 (1965 U.S.A.F.A. honor scandals). Two weeks after researchers visited West Point, its Honor Committee circulated a paper among cadets warning them not to discuss the honor system with noncadets, "to avoid pressures from outside interests [such as] [g]roups who would want to bring our honor code and system under their control or legal review." U.S.M.A. Talking Paper, Confidential Nature of Honor Cases 4, 5 (1972).

¹⁰⁵⁶ See text accompanying notes 61-66 *supra*. Especially disturbing is the negative attitude academy officials and cadets have toward Congress "interfering" with academy affairs. See, e.g., Hearings on Service Academies, *supra* note 18, at 10,677, 10,755-68. As explained by the Dean and echoed by the Superintendent of the Air Force Academy when warning their subordinates not to reveal information about the Academy's 1965 honor scandal, "[w]e do not want members of Congress to interfere with this thing." Quoted in J. Heise, *The Brass Factories* 44-45 (1969); see Galloway & Johnson, *supra* note 301, ch. 4; Heise, *Why the Cadets Cheat*, *The Nation*, May 15, 1967, at 626 (Dean tells faculty to "'stay in the Academy family' ") [hereinafter Heise, *Why the Cadets Cheat*]; Letter from Geography Instructor, U.S.A.F.A., to Senator Peter Dominick, Feb. 20, 1973 (writing elected official considered "disloyal act").

ence with, internal academy affairs.

This intense institutional loyalty has yet more serious ramifications. Cadets are taught at the academies that they will neither lie, steal, cheat nor tolerate those who do because, as future military commanders, lives, resources and ultimately the nation depend on their integrity. The protection of the nation, the cadet learns, demands loyalty to its very foundation—that which has saved it in numerous wars and is currently protecting its way of life—the military. By a process of unconscious transference, loyalty to country is perceived as loyalty to the military, particularly that service of which the cadet is a member.¹⁰⁵⁷ Lying, stealing or otherwise violating the tenets of the honor code become permissible as long as the intent is to protect the military and thereby the nation¹⁰⁵⁸—the sole reason for the existence of the honor code.¹⁰⁵⁹

The effects of institutionalized super-loyalties are grounds for extreme concern. These attitudes may well account for the academy graduates' commission or toleration of acts in obvious contradiction to the ethical principles taught at the academies.¹⁰⁶⁰ They may similarly explain the

military's ability to overlook deceit, gross derelictions of duty, and blatantly unethical conduct,¹⁰⁶¹ and for its lack of

¹⁰⁵⁷ As explained to the Cadet Wing by a former Commandant of Cadets of the Air Force Academy in justification of the toleration clause of the Cadet Honor Code:

We all love our country, and we support the constitution—but we need something more concrete on which to hang our loyalties. Thus we love our Air Force, our Wing, our squadron, and our fellows that make up these units. Our allegiance to country is realized through these subordinate loyalties.

Charles, *supra* note 71, at 313, quoting Brig./Gen. Louis T. Seith.

¹⁰⁵⁸ At West Point "cadets learn by example that deceit and deception are 'standard operating procedure' when the image of West Point or the Army is at stake." Galloway & Johnson, *supra* note 301, ch. 4; see Mutschler, *supra* note 312.

¹⁰⁵⁹ Annual Report of the Superintendent, U.S. Air Force Academy 65 (1965).

¹⁰⁶⁰ Military Academy's Superintendent obtaining White House intervention in behalf of Academy in mandatory chapel attendance case, (*Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), *rev'd per curiam*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972)), see Letter from Brig./Gen. James D. Hughes, U.S.A.F., Military Asst. to the President, to Superintendent, U.S.M.A., reprinted in [Annapolis] Evening Capitol, July 28, 1971, at 1, cols. 3-4; untruthful statements to the press by top academy officials, see Minority Report, *supra* note 6, at 1, 12, 13, 14-15; Morgenstern, *supra* note 74, at 4-5; top ranking Academy graduate Army officers ignore and cover up noncommissioned officer club frauds, see Naughton, Ex-Sergeants Say Army Wouldn't Uncover Noncom Club Frauds, N.Y. Times, May 9, 1973, at 18, cols. 4-8. See generally Galloway & Johnson, *supra* note 301, ch. 4. For alleged violations by academy officials of honor code principles, see, e.g., Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 24-25; Heise, Why the Cadets Cheat, *supra* note 1056; Mutschler, *supra* note 312.

¹⁰⁶¹ E.g., alleged fabrication of body counts and enemy strength by military officials, see, e.g., Arnold, Ellsberg Witness Asserts Military Falsified Reports, N.Y. Times, Mar. 7, 1973,

belief in the sincerity and honesty of those who speak out or who refuse to conform.¹⁰⁶² Indeed, they have perhaps been the basis on which presumably sincere, high-ranking academy graduates have attempted to conceal some of the major debacles in American military history.¹⁰⁶³

Vice Admiral Hyman A. Rickover seems to have warned of the threats posed by the process of internalization of academy values when he testified before a congressional subcommittee:

No institution can depart too much from the norms of its particular society and function effectively as part of that society. The service academies have set themselves apart from their society. This has resulted in strains and is one of the chief reasons why officers are not able to identify the new forces which are exerting influence on the military. The academies should, as soon as possible, stop setting themselves up as a higher ethical society by the use of honor codes, etc. If they continue to do this they will inevitably broaden the gulf between the military and reality.¹⁰⁶⁴

The General Goal

The mere cataloguing of difficulties that have been compounded by the academies' adjudicatory systems falls well short of a blueprint

at I, cols. 1-2; King, *supra* note 986, at 25, 28; military virtually ignores Air Force Lieutenant General's carrying out air strikes in contravention of explicit orders from military superiors, see, e.g., N.Y. Times, June 11, 1972, at 2, 14, cols. 2, 1; Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 26; out of court pressure applied by court-martial judge against counsel for Naval Academy graduate claiming to be a conscientious objector, see Anderson, Washington Merry Go Round, Washington Post, Sept. 9, 1972; at B7, col. 7. See generally King, *supra* at 25, 28, 42, 46, 75, 96-108, 158.

¹⁰⁶² See, e.g., *United States ex rel. Donham v. Resor*, 436 F.2d 751, 754 (2d Cir. 1971); Hearings on Service Academies, *supra* note 18, at 10,899; Janowitz, *supra* note 863, at 222; Lovell, *supra* note 306, at 32, 39-40; note 479 *supra*.

¹⁰⁶³ See, e.g., S. Hersh, *Cover-Up* (1972); N.Y. Times, June 4, 1972, at 31, col. 5 (My Lai Massacre covered up "at every level in the America! Division," commanded by a Military Academy graduate). Indeed, "cover-ups have become part of the accepted method of operation throughout all command levels of the United States Army." King, *Who Needs West Point?*, N.Y. Times, April 29, 1972, at 31, col. 5.

¹⁰⁶⁴ DoD House Appropriations Hearings, 1966, *supra* note 12, at 38; see *id.* at 39. See also Letter from Geography Instructor, U.S.A.F.A., to Senator Peter Dominick, Feb. 20, 1973, at 3 ("The most dangerous consequence of the present administration of the Academy is that [it is restricted] to an extremely narrow band of intellect well to the right side of the normal spectrum of human thought.").

for reform. Certain general observations, however, can be made. The problems of attrition on the one hand and overindoctrination on the other reflect the polarizing impact that an honor code pressed to its rigorous extreme has on cadets. Some resign, either out of disenchantment with perceived arbitrariness or out of disillusionment with the inability of the military to conform to its own model. Those cadets who stay lose sight of moral considerations through preoccupation with labyrinthine rules and regulations. They transcend principles of honor and ethics, adhering instead to what is perceived as the fundamental moral precept—loyalty to the military in *all* circumstances. And they internalize feelings of moral superiority vis-a-vis the society they serve. The overall result is a failure to promote those ends for which the academies were created.

A starting point for reform is the recognition that it is neither feasible nor desirable to maintain in the Armed Forces ethical standards far surpassing societal norms. To a degree, the exigencies of military operations demand a

level of truthfulness and institutional loyalty not normally encountered in civilian affairs. Without attempting to calibrate this point on the moral spectrum, it is evident that the Air Force and Military Academy honor codes go beyond it. In this realm of ethical overkill, the laudable abstraction of honor translates itself into the practical consequences noted above.

Thus, the general goal of reform must be to harmonize the academies' notions of honor with those of the society they serve, as well as to administer the systems according to common conceptions of basic procedural fairness. By reformulating academy principles along those lines, decreased dissatisfaction with the adjudicatory systems could be expected to lead to greater retention of cadets and graduates. Decreased disillusionment with military realities would also have a favorable impact on attrition, since the academies would be indoctrinating cadets with principles and standards which the military could live up to.

Such a modification in the academy adjudicatory systems would dictate greater reliance upon the good judgment and honorable instincts of cadets than upon rigid codes of honor and conduct.¹⁰⁶⁵ Through a reemphasis upon responsibility and discretion, and a deemphasis upon chauvinistic loyalty and blind adherence to rules and regulations, ¹⁰⁶⁶ cadets would be better prepared to accept military

¹⁰⁶⁵ This is precisely the approach taken by the honor concepts of the sea service academies. See note III and text accompanying note 169 supra.

¹⁰⁶⁶ In addition to particularly strong bonds of brotherhood and loyalty, cadets learn from

realities without losing touch with their public responsibilities. Disturbed but not revolted by cover-ups and dishonesty within the military, academy

graduates would be less likely to voluntarily resign out of frustration and disillusionment, choosing instead to work for the improvement of the Armed Forces.¹⁰⁶⁷ In this manner, an institutional check would be injected into the military, thus insuring for the public continued, effective civilian control.

2. Specific Problem Areas

Wide-ranging proposals framed in general terms have a tendency to stimulate reaction rather than action. In this context, therefore, it is particularly important not to lose sight of the trees while surveying the forest. While general approaches to honor training can be fairly debated, certain specific aspects of the academy adjudicatory systems are so counterproductive that the need for reform is undeniable.

a. The Toleration Clause—A primary difference between civilian morality and the morality of the Air Force and Military Academies is presented by the toleration proscription. Cadets are instructed that it is equally wrong to tolerate one who lies, steals or cheats as it is to commit a substantive offense itself. Degrees of wrongfulness are not recognized; the cadet is obligated to report the major violation and the minor infraction alike. As it sets apart academy graduates from both nongraduates and civilians, the toleration clause bears a good measure of responsibility for the overinternalization of certain academy values.¹⁰⁶⁸ Because it exacts almost ethical perfection from the cadet, it contributes to their sense of superior moral virtue; since it requires subjugation of friendships to military authority and is perceived as cleansing an elite of those who cannot achieve perfection,¹⁰⁶⁹ it intensifies the cadet's overriding sense of loyalty to military institutions and of affinity for academy-trained officers.

The continuing existence of the toleration proscription is in large

the honor codes to associate their individual standards of integrity with obedience to the rules military

authorities have set for them. See Leiby, *supra* note 304, at 45, quoting S. Huntington, *The Soldier and the State* 73 (1957). See also Galloway & Johnson, *supra* note 301, ch. 4; Letter of 1972 Air Force Academy Graduate, *supra* note 839.

¹⁰⁶⁷ Such a proposal might also serve to break down the hostility with which the military responds to criticism from within, by inculcating among cadets greater tolerance of conflicting opinions. See Hearings on Service Academies, *supra* note 18, at 10,899; Janowitz, *supra* note 863, at 22; Lovell, *supra* note 306, at 32, 39-40.

¹⁰⁶⁸ See, e.g., U.S.A.F.A. Superintendent's Report, *supra* note 73, at 10.

¹⁰⁶⁹ See Hearings on Service Academies, *supra* note 18, at 10,810-14.

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measure attributable to its antiquity. While the exact date of its inception cannot be determined, the clause appears to have always been part of the West Point Honor System.¹⁰⁷⁰ Like most other aspects of the Air Force Academy's training program, the toleration clause was adopted wholesale from the Military Academy by top Air Force Academy officials,¹⁰⁷¹ most of whom were and are Military Academy graduates.¹⁰⁷² The toleration clause, along with the bulk of the "Thayer System," has probably been perpetuated at both academies largely because Military Academy graduates on the faculty and staff¹⁰⁷³ have assumed that it is an essential part of academy training. ¹⁰⁷⁴

The academies defend this provision on the grounds that it is essential in teaching cadets allegiance to higher authority rather than to self or peers,¹⁰⁷⁵ a quality considered desirable in military officers,¹⁰⁷⁶ and that it preserves the substantive aspects of the honor codes.¹⁰⁷⁷ In fact, it does neither. As academy officials readily admit, the toleration proscription is somewhat counterproductive in securing

¹⁰⁷⁰ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,249, 10,563; Annual Report of the Superintendent, U.S. Military Academy 18 (July 1, 1966 - June 30, 1967). It has been impossible to determine the exact origins of the toleration clause because the Military Academy has prohibited project researchers from using materials in its Archives.

¹⁰⁷¹ Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 24; see, e.g., Hearings on Service

Academies, *supra* note 18, at 10,757, 10,783; Calkins, *supra* note 71, at 14; Charles, *supra* note 71, at 181,256.

¹⁰⁷² Galloway & Johnson, *supra* note 301, ch. 4; see U.S. Air Force Academy Catalog 12952 (1972).

¹⁰⁷³ Most West Point faculty and staff members are themselves graduates of the Military Academy. See, e.g., Lovell, *supra* note 306, at 3.

¹⁰⁷⁴ See Annual Report of the Superintendent, U.S. Military Academy 18 (July 1, 1966-June 30, 1967); Charles, *supra* note 71, at 124; cf. Interview with Commandant of Cadets, U.S.M.A., March 9, 1973 (the silence). The single expulsion penalty similarly owes its continued existence in large measure to its traditional place in the honor system. See generally text accompanying notes 625-37 *supra*.

¹⁰⁷⁵ Hearings on Service Academies, *supra* note 18, at 10,746; see Address by General Omar Bradley, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, May 16, 1967, quoted in Charles, *supra* note 71, at 248; Beck, *supra* note 77, at 2-3; White, *supra* note 309, at 16; 67-70. Indeed, this is the primary purpose of the toleration clause. See, e.g., Denver Post Empire Magazine, April 2, 1965, at 16, col. 2; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 10. The toleration clause is considered the "backbone" of the Honor Code. E.g., Hearings on Service Academies, *supra* note 18, at 10,801.

¹⁰⁷⁶ See, e.g., White, *supra* note 309, at 67-70; note 1050 *supra*.

¹⁰⁷⁷ Hearings on Service Academies, *supra* note 18, at 10,801-02, 10,812; Charles, *supra* note 71, at 245; Interview with 1972-73 Honor Comm. Chairman, U.S.A.F.A., Aug. 22, 1972. Air Force and Military Academy officials often point to what they perceive as lower standards and resulting relative ineffectiveness of the Naval Academy's honor concept as evidence of the necessity of the toleration clause of their honor codes. See, e.g., Minority Report, *supra* note 6, at 9. But see text Calkins, *supra* note 7, at 41.

adherence to the honor code. Many cadets do not accept or experience great difficulty in accepting the toleration aspect of their codes.¹⁰⁷⁸ Indeed, discontented Air Force cadets have tried in recent years to vote out the toleration clause but have met stern resistance from Academy officials.¹⁰⁷⁹ As one federal court observed, "honorable students do not like to be known as snoopers and informers against their fellows."¹⁰⁸⁰ Having chosen to commit the offense of tolerating, a cadet may feel considerably less compulsion to obey those substantive aspects of the code he considers unduly harsh or unreasonable.¹⁰⁸¹ In effect, the toleration clause has resulted in dissatisfaction with, and disrespect for, even the salutary aspects of the

honor system. Furthermore, the toleration principle would appear unnecessary and possibly ineffectual as a means of either deterring or uncovering serious offenses. The Military and Air Force Academy cheating scandals have been detected only after dozens of cadets became involved,¹⁰⁸² while the sea service academies, which have no

¹⁰⁷⁸ See Clelland, *supra* note 69, at 28; Final Report of the Superintendent's Ad Hoc Attrition Committee, U.S. Air Force Academy 15 (March 1969); Minority Report, *supra* note 6, at 6; Price, Role Conflict at the Air Force Academy 10 (1964) (U.S.A.F.A. psychologist reports that 57.8% of cadets who took test would not report a friend for violating the Cadet Honor Code); Report of the Board of Visitors, U.S. Military Academy 4 (1966). Those cadets who do accept the toleration clause often do so only as a result of intensive indoctrination by officers and upperclass cadets after arrival at an academy. See, e.g., Beck, *supra* note 77, at 15; The Cadet Honor Code, U.S.M.A., *supra* note 69, at 12; Clelland, *supra* note 69, at 28; Denver Post Empire Magazine, April 2, 1967, at 16, col. 1. The Honor Committees impede voluntary rejection of the toleration clause by carrying out its official responsibility to "[g]uard against practices . . . inconsistent with the Honor Code" as it exists. See e.g., U.S.A.F.C.W.M. 30-1(3)(d) (1966), reprinted in Hearings on Service Academies, *supra* note 18, at 10,817.

¹⁰⁷⁹ See text accompanying note 75 *supra*.

¹⁰⁸⁰ *Zanders v. Louisiana State Bd. of Educ.*, 281 F. Supp. 747, 759 (W.D. La. 1968), quoting *State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 110, 171 S.W.2d 822, 826 (1942). This view has been expressed by one of the Military Academy's most prominent graduates, General Douglas MacArthur, when disobeying orders to disclose the names of cadets guilty of hazing him: "[M]y father and mother have taught me these two immutable principles—never to lie, never to tattle." Denver Post, Jan. 31, 1965, at 1, col. 1.

¹⁰⁸¹ See U.S.A.F.A. Superintendent's Report, *supra* note 73, at 18. An Air Force psychiatrist assigned to investigate the causes of the Air Force Academy's 1965 cheating scandal reported:

Pressure to be part of a group was important, as were strong friendships and the consequent dilemma involved in informing Academy authorities. The crucial step was often learning a friend or roommate cheated and "tolerating" it; having thus violated the honor code the decision to cheat became relatively easy.

Morgenstern, *supra* note 74, at 3-4.

¹⁰⁸² See Hearings on Service Academies, *supra* note 18, at 10,757, 10,783. These academies have had five reported and one unreported major honor scandal, see *id.* at 10,581; Galloway & Johnson, *supra* note 301, at ch. 4; notes 167 *supra*.

toleration clause, have experienced no such mass violations.

Nor does the clause effectively substitute allegiance to the military for peer group loyalty. On the contrary, two unreleased Air Force Academy studies reveal that as a cadet progresses through the Academy, he becomes increasingly loyal to his fellow cadets and increasingly detached from Academy officials and other military authorities.¹⁰⁸³ Moreover, even if the toleration clause were successful in inculcating cadets with a sense of primary duty to the military, it is doubtful whether this training would be relevant outside the academies. As an officer, a cadet will not be expected to report an individual for any offense short of a felony,¹⁰⁸⁴ unless he is exercising immediate command over a subordinate. More importantly, toleration *is* practiced in the military.¹⁰⁸⁵ Air Force Academy graduates have expressed disillusionment over the overt hostility with which their efforts to report and prosecute minor military offenses have been met; military superiors frequently interpret such efforts as overly idealistic and out of tune with the "real" Air Force.¹⁰⁸⁶

As yet another drawback, the toleration clause minimizes the importance of exercising judgment and discretion. Unlike the honor

¹⁰⁸³ Letter from Former Psychology Professor, U.S.A.F., Oct. 19, 1971; Price, *supra* note 1078 (57.8% of cadets tested would not report a friend for having violated the Honor Code); see Baldwin, *The Academies; Old Ideals, New Methods*, N.Y. Times, April 16, 1961, § 6 (Magazine), at 32. See also Minority Report, *supra* note 6, at 6 (U.S.M.A.). Indeed, the greater loyalty to subgroups and peers than to the Academy and other institutions has been a major factor in the Military and Air Force Academies' major cheating scandals. See, e.g., U.S.A.F.A. Superintendent's Report, *supra* note 73, at 20 (1965 U.S.A.F.A. scandal), 22-23, 32-33 (1967 U.S.A.F.A. scandal); Army, Navy Air Force Journal, Sept. 8, 1951, at 54, col. 3 (1951 U.S.M.A. scandal).

¹⁰⁸⁴ See Hearings on Service Academies, *supra* note 18, at 10,361. No provision of the UCMJ proscribes misprison. The only civilian federal proscription of misprison is 18 U.S.C. § 4 (1970), which proscribes misprison of felony and applies to military personnel by incorporation through the first and third clauses of 10 U.S.C. § 934 (1970). See *United States v. Ragan*, 14 U.S.C.M.A. 119, 122, 33 C.M.R. 331,

334 (1963); *United States v. Maclin*, 27 C.M.R. 590, 592 (1958). But see *Levy v. Parker*, Civil No. 71-1917 (3d Cir. Apr. 18, 1973) (Article 134 unconstitutionally vague); *Avrech v. Secretary*, Civil No. 71-1841 (D.C.Cir. Mar. 20, 1973) (same).

¹⁰⁸⁵ See, e.g., text accompanying note 1061-61 & 1063 *supra*.

¹⁰⁸⁶ See, e.g., *Factors Influencing USAF Academy Graduates to Resign from the Air Force*, Association of Graduates, U.S. Air Force Academy, attach. 15, at 2 ("When I complained of inaction concerning student cheating, [my commander] told me that Academy graduates were too idealistic and unable to cope with the real Air Force."). First Class Cadets in one Air Force Academy squadron were cautioned shortly before graduation by their Air Office Commanding, himself an Academy graduate, not to take the honor code seriously in the "Real Air Force," and told "how 'ridiculous' " it had been for an Academy graduate to turn in his bomber crew for cheating on a written proficiency test. Letter from 1967 Air Force Academy Graduate, Oct. 3, 1972.

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concepts of the sea service academies, which leave to a cadet responsibility for considering the severity of the offense, the offender's intent and other circumstances relevant to a decision to report conduct, the toleration clause requires only unthinking application. Sensitivity to the nuances of a situation and maturity which comes from exercising sound discretion are therefore discouraged.¹⁰⁸⁷ Yet these are the very qualifications which a capable military leader must possess.

In light of its increase of attrition and retardation of personal growth, its tendency to dangerously overinternalize certain academy values, and its substantial failure to further the specific ends for which it was designed, the toleration clause should be abolished.

b. Rules of Conduct--As previously noted, multitudes of seemingly purposeless rules cause resentment among cadets and increase attrition. In recognition of this, many military and civilian authorities have recommended that the academies abolish counterproductive rules, especially the "prep school" requirements of the Fourth Class System.¹⁰⁸⁸ As recognized by the

1970 Air Force Academy's Board of Visitors, a cadet can function responsibly without "a complex, completely arbitrary set of controls which [govern] his every thought and action during every waking hour."¹⁰⁸⁹ The streamlining of academy disciplinary rules is supported by a recent study of authoritarian versus nonauthoritarian methods of training recruits of the Los Angeles police department.¹⁰⁹⁰ The study concluded that those recruits who were not at all pressured during their initial months of training greatly outperformed, both during and after the training, those who underwent authoritarian training similar to that of freshmen at the academies.¹⁰⁹¹

c. Unlawful or Unjust Procedures--It must be remembered that future positions of high command will be filled by academy graduates,¹⁰⁹² that these graduates will set the standards of behavior

¹⁰⁸⁷ See Galloway & Johnson, *supra* note 301, chs. 1, 4.

¹⁰⁸⁸ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,741 (comments of Vice Admiral Rickover).

¹⁰⁸⁹ Report of the Board of Visitors, U.S. Air Force Academy 9 (1970). See also Bedinger, *supra* note 1031, at 145.

¹⁰⁹⁰ H. Earle, *An Investigation of Authoritarian Versus Non-authoritarian Training in the Selection and Training of Law Enforcement Officers* (1972) (Ph.D. dissertation presented to University of Southern California).

¹⁰⁹¹ *Id.* at 205. For evidence of just how clearly the training methods used by the "authoritarian" group in the study resemble those of the academies' fourth class systems, compare the picture of the police recruit being screamed at with his "chin in" in *Time*, July 31, 1972, at 44, with that of a Fourth Classmen under similar conditions in *Look*, Oct. 6, 1970, at 36.

¹⁰⁹² Academy graduates have dominated the upper echelons of the Military, see text ac-

for the entire military profession,¹⁰⁹³ and that they will carry with them the sense of justice and fairness learned at the academies. If subordinates are to be afforded fair and lawful treatment by their commanders, it is anomalous to inculcate future leaders with a perception of justice which bears little

semblance to law.¹⁰⁹⁴ Two important changes in academy policy are required. First, the academies must cease the evasive maneuvering by which they seek to avoid the impact of both judicial and congressional pronouncements.¹⁰⁹⁵ In essence, the academies must recognize the rule of law by acknowledging that the military is not an independent entity, but rather is merely a part of a larger civilian government, subject to civilian scrutiny and civilian control. Departure from the principles which govern the society-at-large is justified only when a valid military exigency exists; absent such necessity, the academies must recognize their duty, as any other governmental instrumentality, to adhere to the rule of the law.

Secondly, academy adjudicatory systems must be conformed to fundamental notions of due process. For the protection of subordinates under the command of academy graduates, cadets must gain an understanding of fundamental fairness by living with equitable procedures at the academies.¹⁰⁹⁶ Nor is it sufficient for the academies

companying note 2 *supra*. With academy graduates expected to comprise an increasing percentage of the regular officers, see *Business Week*, Mar. 27, 1965, at 132; Fowler, *supra* note 71, at ii, this condition is likely to continue. See also J. Heise, *The Brass Factories* 12 (1969).

¹⁰⁹³ Charles, *supra* note 71, at 66; see Janowitz, *supra* note 863, at 127.

001 It is of great importance that those men who will in the future be charged with the administration of the Army and its system of justice be educated within a legal and administrative framework which guarantees the preservation of . . . basic rights.

¹⁰⁹⁴ Letter from Senator Sam J. Ervin, Jr., to the Secretary of the Army, April 25, 1972, at 2; see *Anderson v. Laird*, 466 F.2d 283, 313 (D.C. Cir. 1972) (Bazelon, C.J., concurring), cert. denied, 409 U.S. 1076 (1972); Heise, *Farewell to Duty, Honor, Country*, *supra* note 6, at 22; cf. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); DoD House Appropriations Hearings, 1966, *supra* note 12, at 38.

¹⁰⁹⁵ See text accompanying notes 61-66 & 1055-56 *supra* and 1102-04 *infra*.

¹⁰⁹⁶ The counter-productive effect of unjust and unrealistic academy disciplinary practices has been well expressed by a Military Academy graduate and former Academy professor: [The West Point disciplinary system] gives to the impressionable young cadet a false notion as to how he must

exercise the function of discipline when he becomes an officer and is dealing, not with other cadets, but with the various kinds of human beings he is going to find in a company of soldiers. The method of teaching and enforcing discipline employed at West Point has no application anywhere except at West Point. . . .

Mott, *supra* note 1012, at 467-68; cf. Leiby, *supra* note 304, at 233. Since the academies' adjudicatory systems are the primary vehicles through which a cadet learns how to administer

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to reform their practices piecemeal, as under the compulsion of court order. Such previously documented procedures as the failure of a cadet adjudicatory board to follow precedent,¹⁰⁹⁷ the selective prosecution of cadets disliked by academy officials,¹⁰⁹⁸ the imposition of excessively long-term punishments¹⁰⁹⁹ and the de facto presumption of guilt at some academies by those who adjudicate conduct offenses¹¹⁰⁰ serve as the basis for the cadet's perception of procedural fairness. If procedural due process is to be accorded in the military-at-large, fair procedures must first be instituted at the academies.

3. The Need for Civilian Implementation of Change

It is evident that, at the very least, the academy adjudicatory systems are in dire need of reexamination and modification, and that certain adjudicatory practices which serve no legitimate training function should be purged from the academies' curricula. The question naturally arises: Who should be responsible for reform? Should it be the academies themselves, because of their recognized expertise in military training; the courts, because of their ability to delicately weigh competing interests and to protect constitutional liberties from overreaching governmental action; or the Congress, in fulfilling its representative duty to establish and control the military establishment? The answer does not come easily since the alternatives each

have merit. Nevertheless, one fact is apparent: Reform cannot be expected to come from within the military itself, for the Armed Forces are so steeped in tradition as to be both incapable of perceiving the need for reform and unprepared to yield to it.

military justice as an officer, see R.C.C.U.S.C.G.A. 5-1-02(c) (proposed 1971), especially disturbing is the philosophy underlying the conduct systems taught cadets at the Coast Guard Academy:

Just as a parent, and the commanding officer of a ship have somewhat broad, discretionary, and sometimes *arbitrary* powers of discipline, so also does the Commandant of Cadets have broad, discretionary, and sometimes *arbitrary* authority to discipline the Cadets under his charge.

R.C.C.U.S.C.G.A. 5-1-02(B) (1971) (emphasis added).

¹⁰⁹⁷ See text accompanying notes 352 *supra* & 1134 *infra*.

¹⁰⁹⁸ See text accompanying notes 928 & 972-73 *supra*.

¹⁰⁹⁹ See text accompanying notes 254-55 & 301 *supra*.

¹¹⁰⁰ See text accompanying notes 471-72 *supra*. Other arbitrary procedures at the academies include e.g., lack of confrontation of witnesses at Coast Guard and Military Academy honor hearings; imposition of the silence at the Military Academy; coerced confessions in Air Force Academy honor investigations. See text accompanying notes 547-48, 790-808 & 853-940 *supra*.

*a. The Military's Inability to Perceive the Need for Reform of the Adjudicatory Systems--*For a variety of reasons, academy officials are unwilling to acknowledge, despite compelling evidence, that their adjudicatory systems are plagued with problems. Quite typical is the reaction of the Superintendent of the Air Force Academy, who was asked after the Academy's *third* major honor scandal came to light whether the honor code should be modified or dropped. His reply: "Not at all. [W]e would be a great deal more worried if these things didn't surface."¹¹⁰¹

The reasons for the academies' attitudes toward reform of the adjudicatory systems are twofold. First, cadets and academy officials are openly hostile to and suspicious of "outsiders," preferring to trust only in the

judgment of fellow military men.¹¹⁰² They rebel at

¹¹⁰¹ U.S.A.F.A. Press Conference, *supra* note 609, at 3; accord, Newton, *Making the Man at the Air Force Academy*, Report No. 68B-18, at 6 (1968) (research report by an Air Force Chaplain, on file at the Air University) (1965 & 1967 U.S.A.F.A. honor scandals); Army Navy Air Force Journal, Aug. 11, 1951, at 1438, col. 3 (1951 U.S.M.A. scandal); Leviero, *Honor Code Binds Cadets for Life; Officers See it Upheld in Scandal*, N.Y. Times, Aug. 4, 1951, at 5, col. 2. But cf. *Hearings on Service Academies*, *supra* note 18, at 10,781 (Congressman asserts U.S.A.F.A. honor code "broke down" during honor scandal). There are other instances of the academies refusing to acknowledge internal problems. For example, rather than heed numerous formal recommendations that the honor and Fourth Class systems be modified to curb rising attrition, the Air Force Academy, rejecting these factors as a significant cause of attrition, followed instead a "hard-out policy" by which incoming freshmen could not resign from the Academy except in extreme circumstances. See *Final Report of the Superintendent's Ad Hoc Attrition Committee*, U.S. Air Force Academy 11-12, 14, 15, 26 (1969); Letter from U.S.A.F.A. Psychiatrist, Mar. 28, 1973; Report of the Board of Visitors, U.S. Air Force Academy 8-9 (1970). Similarly, despite a recent letter from the Chairman of the Air Force Academy's Board of Visitors stating that "there is a feeling by some Board members that there is a strong correlation between the attrition rate and the harassment of the fourth class in the dining hall" and that such harassment is worse now than ten years ago, the Dean of Faculty attributed, a week later, attrition to an increase in cadet privileges and opportunities to mix with the civilian community. The Academy is responding to its high attrition rate by making resignation more difficult for cadets, in part by roughly doubling the number of "counseling sessions" a cadet must have before he can leave the Academy. Another proposed measure consists of admitting freshmen as GS-1 civil servants rather than cadets so their departures would not count as "cadet" attrition. Letter from Geography Instructor, U.S.A.F.A., to Senator Edmund S. Muskie, Mar. 10, 1973, at 2. See also *Follow-Up Study of Former Cadets, Class of 1972, Who Departed During the Period 1 July 1968 through 30 June 1969*, at 15, 16, 20 (April 5, 1971).

¹¹⁰² See, e.g., *Hearings on Service Academies*, *supra* note 18, at 10,755-756, 10,760-761. Applicable to all the academies is Professor Lovell's observation that

there has been a tendency in the past for Military Academy officials to adopt a defensive, outsiders-really-don't-understand-our-problems, tone rather than to introduce changes to meet the criticisms. Thus, the most vehement defenses of the Thayer System have come at times when the existing system of Academy administration was experiencing the most severe criticism.

Lovell, *supra* note 306, at 44. The inability of the public to understand properly the Cadet

the thought of providing information concerning academy affairs to civilians,¹¹⁰³ even though dispassionate outside observers are probably in a

superior position to evaluate the efficacy of adjudicatory practices. As one former West Point cadet described the attitude of West Point officials, "the people here at the Point think this is their own little world and no one has any right tampering with it."¹¹⁰⁴ Secondly, key academy officials, including those directly responsible for administering the adjudicatory systems¹¹⁰⁵ have been for the most part academy graduates.¹¹⁰⁶ They closely identify with the academies and the training they received as cadets, and therefore, they tend to regard "any challenge to the current validity of the System [as] heresy."¹¹⁰⁷ The role of tradition at the academies can be aptly described as the practices of the past dictating the practices of the future merely because they were the practices of the past.¹¹⁰⁸

Honor System is one underlying reason Air Force Academy officials gave for denying researchers information sought in *Rose v. Department of the Air Force*, Civil No. 72-1605 (S.D.N.Y. Dec. 19, 1972) (a suit to compel disclosure of information essential to the preparation of this project). See Affidavits of Lt./Gen. Albert P. Clark, Superintendent, U.S.A.F.A., at 3-4, and 1971-72 Honor Comm. Chairman, U.S.A.F.A., at 3; *Rose v. Department of the Air Force*, *supra*; Letter from Executive for Honor and Ethics, U.S.A. F.A., Oct. 15, 1972.

¹¹⁰³ See, e.g., *Rose v. Department of the Air Force*, Civil No. 72-1605 (S.D.N.Y. Dec. 19, 1972); Moore, Silence Warning Addressed to All Cadets, *Denver Post*, Jan. 26, 1965, at I, col. I; Letter from Geography Instructor, U.S.A.F.A., to Senator Peter Dominick, Feb. 20, 1973.

Military Academy cadets are regularly cautioned not to disclose information concerning that Academy's adjudicatory systems. As cadets were recently told in a paper circulated by the Cadet Honor Committee:

[W]e should all recognize that it is unreasonable to expect information leaked outside of the Corps to be fairly or accurately reported. This is true simply because it is impossible for anyone but us to understand the honor code and system completely.

U.S.M.A. Talking Paper, Confidential Nature of Honor Cases 4 (March 1972).

¹¹⁰⁴ *N.Y. Times*, May 22, 1964, at 8, col. 5.

¹¹⁰⁵ For example, all officers-in-charge of the Air Force Academy's honor and ethics committees have been academy graduates, see Beck, *supra* note 77, at 1, 26; Charles, *supra* note 71, at 2; the Commandants of Cadets at each academy directly responsible for the administration of the Honor Code, note 909 *supra*, have been academy graduates, see, e.g., U.S. Military Academy Catalog 111 (1971).

¹¹⁰⁶ Several commentators have noted this inbreeding at the academies. See, e.g., DoD House

Appropriations Hearings, 1966, supra note 12, at 35; J. Heise, *The Brass Factories* 131 (1969); Mott, supra note 1012, at 467; King, *Who Needs West Point*, N.Y. Times, April 29, 1972, at 31, col. 6.

¹¹⁰⁷ Lovell, supra note 306, at 39; see Palmer, supra note 1049, at 585.

¹¹⁰⁸ Even as prominent a military figure as former superintendent General Douglas MacArthur met with stiff resistance to implementing reforms at the Military Academy that he complained that "conceits, sentiment, [and] blind worship have sustained outmoded offshoots of tradition too long." Janowitz, supra note 309, at 157 quoting Ganoë, *MacArthur Close-Up* 30-31 (1962).

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For similar reasons, those who are aggrieved by unjust or unnecessary adjudicatory practices—the cadets—are unable to perceive, or incapable of speaking out against, defects in the systems.¹¹⁰⁹ Throughout their stay at the academies, cadets are indoctrinated in the belief that any liberalization of academy discipline will cheapen "the symbolic value that identification as a 'West Pointer' has for an Academy graduate."¹¹¹⁰ As a result, many cadets regard with disfavor fundamental changes in the academy system, and often press instead for making honor and conduct standards even more rigorous.¹¹¹¹ For those cadets who reject this logic, there is limited opportunity to expose inequities in the adjudicatory systems. Cadets are afraid to express openly constructive criticisms,¹¹¹² since those who do are frequently ostracized, separated from the academy, or otherwise penalized.¹¹¹³ Moreover, superiors view—and cadets are taught to

¹¹⁰⁹ The academies are adroit at using misnomers in an attempt to disguise unlawful actions. Punishments, for example, are labeled "non-punitive," see text accompanying note 258-59 supra; the "silence" is characterized as "unofficial," see text accompanying notes 924-36 supra. Similarly, forced runs are called "motivational runs," see *Hearings on Service Academies*, supra note 18, at 10,827; Letter from 1972 Air Force Academy Graduate, April I, 1972; Fourth Class punishment periods are called "remedial training," see, e.g., U.S.A.F.C.W.M. 50-1(19) (1968); Letter from 1972 Air Force Academy Graduate, April I, 1972. The military in general is also fond of misusing the language, calling the invasion of Cambodia an "incursion," and the Cuban blockade a "quarantine." The results on cadets of such Orwellian terms is particularly evident from the Academy's emphasis on characterizing its adjudicatory procedures as

"administrative" to justify denying due process; as a result, a cadet learns to believe that "almost anything is 'legal' under administrative procedure." See Letter from Geography Instructor, U.S.A.F.A., Mar. 10, 1973.

¹¹¹⁰ Lovell, *supra* note 306, at 39-40. Cadets are brought up to regard the prior accomplishments of academy graduates as sufficient proof of the current validity of the assumptions upon which their training programs are based. *Id.* at 40.

¹¹¹¹ *Id.* at 40 n.52; see Report of the Board of Visitors, U.S. Air Force Academy 16 (1967).

¹¹¹² See Hearings on Service Academies, *supra* note 18, at 10,743 (Air Force Academy cadet indicates cadets fear retribution for writing Congressman); Heise, Farewell to Duty, Honor, Country, *supra* note 6, at 21.

¹¹¹³ See, e.g., Motion for Temporary Restraining Order, Appellants' First and Second Motions] for Show Cause Order and for Modification of Order of January 30, 1970, *Anderson v. Laird*, 316 F. Supp. 1081 (D.D.C. 1970), *rev'd per curiam*, 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972); text accompanying note 971-73 *supra*. Constructive cadet criticism is also undoubtedly stifled by often well publicized retaliatory measures commonly taken against academy and nonacademy officers who express such criticism. See, e.g., Hearings on Service Academies, *supra* note 18, at 10,899-900, 10,905-06; King, *supra* note 986, at 76; Moore, *supra* note 1103 (accused cadet cheaters threatened with courts-martial and possible dishonorable discharges for talking to anyone, including parents, about the scandal); Letter from Geography Instructor, U.S.A.F.A., to Senator Birch Bayh, Mar. 23, 1973 (U.S.A.F.A. graduate " 'fired' from the faculty of the Air Force Academy as the result of having written letters to . . . Congressmen."); Letter from Senator Birch Bayh to General John D. Ryan, Chief of Staff, U.S.A.F., Mar. 28, 1973, at 2.

view—any act of nonconformity to prevailing standards as an indication of lack of aptitude to be an officer, a ground for expulsion from the academy.¹¹¹⁴

Because of an obtuse division of labor, legal problems within cadet-run adjudicatory boards are unlikely to come to the attention of academy officials. The Chief of Staff of the Air Force Academy related that the Academy's Superintendent "never worries about" the legal propriety of Honor Committee proceedings because he relies on the Committee's legal advisor to bring to his attention any problems that arise.¹¹¹⁵ The legal advisor maintained, however, that since he is an officer and the Cadet Honor Code

"belongs" to cadets, he advises the committee only upon their request.¹¹¹⁶ Committee procedures, therefore, come to the attention of the legal advisor, and in turn to the Superintendent, only sporadically, and the cadets are essentially free to run their adjudications in any manner they may choose.

*b. The Military's inability and Refusal to Reform Acknowledged Problem Areas--*Aside from their frequent inability to perceive the need for change, academy officials appear equally reluctant to alter adjudicatory practices they recognize or suspect as being unproductive or unlawful. For example, it has been suggested at the Coast Guard Academy that the sanction of walking penalty tours is a "hell of a nonproductive form of punishment" and the Naval Academy went so far as to abolish them for one year.¹¹¹⁷ Nevertheless, both academies have now chosen to retain the penalty,¹¹¹⁸ the Naval Acad-

¹¹¹⁴ As observed by Vice-Admiral Hyman G. Rickover:

[I]f sensitivity is discovered in a midshipman or cadet it is generally considered to be incompatible with a military career; this is probably responsible for a goodly portion of the "misfits" found at the service academies. In higher realms of the intellect, sensitivity is recognized as an important characteristic. Unfortunately, in examining a young midshipman or cadet, military officers generally look only to the one simple quality of so-called "leadership" because they know no other.

DoD House Appropriations Hearings, 1966, supra note 12, at 38.

¹¹⁵¹ *Interview with Chief of Staff. U.S.A.F.A., Sept. 2, 1971*. Soon afterwards, the 1971-72 Honor Committee Chairman expressed the same lack of concern for the same reason. Interview with 1971-72 Honor Comm. Chairman, U.S.A.F.A., Sept. 2, 1971.

¹¹¹⁶ *Interview with Honor Comm. Legal Advisor, U.S.A.F.A., Sept. 2, 1971*. This laissez-faire attitude is so extreme that the Honor Committee legal advisor explained that, since the Honor Code belonged to cadets, it would be inappropriate for him to intervene to prevent an honor board from "play[ing] cards," "throw[ing] dice [or otherwise] hold[ing] a kangaroo court" to find a cadet guilty of violating the honor code. *Id.*

¹¹¹⁷ See Interview with Commandant of Cadets, U.S.C.G.A., Aug. 10, 1972; Interview with Performance Officer, U.S.N.A., July 24, 1972. For appreciation of what walking a penalty tour entails, see, e.g., R.U.S.C.C. 415(c)(3) (1971).

¹¹¹⁸ See interviews cited note 1117 supra. For additional reasons for abolishing tours, see, e.g., text

emy abandoning its experiment.¹¹¹⁹

With respect to lawfully suspect adjudicatory procedures Academy officials resist application of even the most obvious requirements of the law, to which they contemptuously refer as "legalisms,"¹¹²⁰ if perceived to threaten the academy status quo.¹¹²¹ Moreover, those on the academies' staff who are most likely to recognize unlawful aspects of the systems—the military lawyers—are kept at a distance and are afforded positions of relative impotence. Academy lawyers are considered merely members of the Commander's "staff"¹¹¹² and as is inherent in a "staff" role, they may only *advise* the Superintendent on legal matters.¹¹²³ Furthermore, all advice must be funneled through the head of the academy legal department, who in the four academies which retain their own lawyers, is an academy graduate himself. It is well recognized that information gradually becomes more palatable as it passes up a hierarchical chain-of-command.¹¹²⁴ Thus, the information which reaches the Superintendent is often what the attorneys consider he wants to hear and would be willing to accept. It is thus not surprising that at both the Air Force and Military Academies, which maintain legal staff's of 20 and 16, respectively,¹¹²⁵ such flagrantly unlawful procedures as the silence and coercive interrogation have been allowed to continue.

¹¹¹⁹ Interview with Performance Officer, U.S.N.A., July 24, 1972. Similarly, the Air Force Academy continues to penalize "gross violation[s] of cadet regulations" with lengthy restrictions "to specific and narrow cadet limits," despite its recognition "that extended restriction [is] not a deterrent to misbehavior; in fact, [it is often a] catalyst to continued misbehavior and [results in] loss of motivation for a career as a member of the Cadet Wing." Letter from B/Gen. Walter T. Galligan, Commandant of Cadets, U.S.A.F.A., June 19, 1972.

¹¹²⁰ See, e.g., Hearings on Service Academies, *supra* note 18, at 10,911; Affidavit of Captain William F. Belcher, *Brown v. Knowlton*, Civil No. 3134 (S.D.N.Y. Aug. 3, 1972); Report of the Board of Visitors, U.S. Air Force Academy 15 (1967); text accompanying notes 478, 500 & 950 *supra*. Academy officials stress avoiding a "legalistic approach" which would require strict definitions of Honor Code offenses. They seem to fear that the "spirit" of the adjudicatory systems would be destroyed by cadets searching for "loopholes" in the definitions. See, e.g., Hearings on Service Academies, *supra* note 18, at 10,784, 10,800, 10,911; Beck, *supra* note 77, at I 1-12; Charles, *supra* 71, at 53-54; U.S.A.F.A. Superintendent's Report, *supra* note 73, at 22. It seems obvious, however, that perceived unfairness in the systems would destroy their spirit to a far greater degree than clear definition of offenses and adherence to the procedural requirements of the law.

¹¹²¹ See, e.g., text accompanying notes 1125-26 *supra*.

¹¹²² See, e.g., U.S. *it* Force Academy Catalog 2 (1972).

¹¹²³ Even when advice is given to cadets about how to conduct their adjudicatory proceedings, it may be blatantly incorrect. See, e.g., text accompanying note 814 *supra*. See also note 195 *supra*.

¹¹²⁴ See, e.g., Gonzles & Rothchild, *The Shriver Prescription: How the Government Can Find Out What It's Doing*, *The Washington Monthly*, Nov., 1972, at 34.

¹¹²⁵ Note 584 *supra*.

What becomes evident from this discussion is that both the structure and the tradition of the academies militate against assigning to these institutions the primary responsibility for reforming the adjudicatory systems. Judicial review of academy practices has been a salutary development. However, courts can only act on complaints, and the military has been successful in dissuading cadets from challenging unjust or unlawful procedures.¹¹²⁶ Ultimate responsibility must be assumed by Congress and the Executive,¹¹²⁷ not by delegating the duty to former high-ranking academy graduates, as they have done to some extent in the past,¹¹²⁸ but by the direct scrutiny and intervention of wholly disinterested parties.¹¹²⁹ For as one West Point graduate observed, after spending several years on the West Point faculty, "the call must come from above and, at first, the change must be exacted,

¹¹²⁶ See text accompanying notes 611-24 & 968-75 *supra*.

¹¹²⁷ DoD House Appropriations Hearings, 1966, *supra* note 12, at 35 (remarks of Vice-Admiral Rickover). Without outside interference, Rickover explains, there is an "inevitability of gradualness. . . necessary in making changes in an organization as inbred as the Air Force Academy." *Id.*

¹¹²⁸ Retired academy graduates have served as members, and even as chairmen, of various boards charged with investigating and evaluating the academies. See, e.g., Coleman, *supra* note 103, at 7; Galloway & Johnson, *supra* note 301, ch. 4. As a result, the reports of the boards have been biased and ineffective. For example, the Air Force Academy's 1972 Board of Visitors recognized, during its annual inspection following the Academy's 1972 cheating scandal, the impropriety of the Honor Committee's investigation procedures during the scandal. One Board member, a retired Air Force Lieutenant General and a West Point graduate, recalls that, in order to criticize those procedures in a "nice" way, he wrote in the Board's Report that the "Air Force and Air Force Academy should insure that the Cadet Wing, in the administration of the Honor Code, *continue* to be watchful that the individual rights of the cadets undergoing investigation be scrupulously protected." The obvious implication of his sentence that cadet rights *had* been protected during the scandal was, he said, inadvertent. *Interview with Benjamin O. Davis, Jr., Lt./Gen., U.S.A.F. (ret.), July 28, 1972* (emphasis added); see Report of the Board of Visitors, U.S. Air Force Academy 2-3 (1972). Compare Letter from Benjamin O. Davis, Jr., Lt./Gen., U.S.A.F. (ret.), to Senator Jacob K. Javits, April 19, 1973, with Letter from 1966 Air Force Academy Graduate to Senator Floyd K. Haskell, April 30, 1973.

¹¹²⁹ Vice-Admiral Rickover makes it clear who he thinks should scrutinize the academies:

[Only Congress] can be counted upon to initiate the corrective action that is so sorely needed.

You cannot depend upon an organization to inspect itself properly. That never happens. Only an outside agency will do the job right. In the case of the military the proper outside agency is Congress. You are the only organ of Government which is directly responsible to the people.

To whom else can the people go?

Hearings Before a Subcomm. of the House Comm. on Appropriations, 88th Cong., 2nd Sess. 514-515 (1964).

not suggested. For authority is the foundation upon which the whole institution is built."¹¹³⁰

CONCLUSION

The purpose of this report has been to explore the multitude of legal problems connected with the adjudicatory systems of the five federal service academies. Though proposals for change have been implicit in much of the earlier critical discussion, it is the purpose of this conclusion to offer general guidelines for congressional or executive reform.

In approaching the task of reforming the adjudicatory systems, one must acknowledge the central shortcomings in the design and administration of the present systems: a lack of understanding of, and insensitivity to, the legal process. As previously explained, these institutional attributes have numerous manifestations. Those adjudicatory systems administered by academy officers, viz, conduct systems, operate, both procedurally and substantively, to best expedite academy policy, at the expense of protecting the rights of those subject to the process. The cadet-administered systems, viz, honor and ethics, have been turned over wholesale to the corps of cadets without effective official control of the process by which adjudications are conducted and substantive rules formulated and applied.¹¹³¹ As a result, the systems are generally plagued by both procedural inequities and an intolerable lack of specificity and predictability.

Effective reform, no matter what shape it takes, must address these recurring problems. A logical first step would be to take from academy officials and cadets their plenary control over the adjudicatory systems. As noble as the concepts of cadet control and academy autonomy may be, it is no more reasonable to permit the untrained¹¹³² to devise and implement a system of justice than to permit

¹¹³⁰ Mott, *supra* note 1012, at 473; cf. Bedinger, *supra* note 1012, at 144; Brown, *supra* note 32, at 153-57.

¹¹³¹ "Honor business is left to the honor committee of the corps of cadets to about a 99% level."

Hearings on Service Academies, *supra* note 18, at 10,630; see, e.g., Charles, *supra* note 71, at 125; Letter from Former Assistant Staff Judge Advocate, U.S.M.A., May 9, 1973. At some academies officers are not even aware when a cadet honor hearing is in progress. See Interview with 1971-72 Honor Comm. Chairman, U.S.M.A., Feb. 26, 1972; Interview with 1972-73 Honor Comm. Vice-Chairman, U.S.M.M.A., Aug. 10, 1972.

¹³² Cadets may be required to take one or two introductory courses surveying basic legal principles. They receive no other legal training. See Hearings on Service Academies, *supra* note

them to dispense medical assistance. Responsibility for the design and maintenance of fair adjudicatory systems belongs with qualified attorneys—men attuned to the legal process and equally sensitive to the needs of the accused and of the accuser. Detachment from the ideology and the traditions of the academies is required in order to assess the impact of the adjudicatory systems on vital individual interests and to weigh the need for change. Yet it is dubious that, at the present, academy lawyers are sufficiently free from the stifling pressures of command influence and academy custom to bring to bear the independence of judgment so vitally needed for change. It is imperative that, by either executive order or congressional enactment, the development and supervision of fundamentally fair adjudicatory practices be made a separate command function of the Judge Advocate Generals, explicitly delegating these responsibilities to academy attorneys.¹¹³³

The tasks before these attorneys are numerous. The procedures by which the conduct, honor and ethics systems operate must be placed on a proper constitutional footing. Substantively, the multitude of proscriptions contained in the conduct systems must be streamlined, redrafted to eliminate problems of vagueness, and coordinated with the legitimate goals of the academies. The honor and ethics systems are in more dire need of reform. Assuming their open-ended prohibitions are retained, prior decisions must be codified

and, if predictability is to be injected into the system, the cadet committees be made to respect their own precedents.¹¹³⁴

At the same time, the concept of a cadet-controlled honor sys-

18, at 10,549-550. The only training received by the nonlawyer officer advisors to the cadet adjudicatory systems is that they may have received as a cadet. See, e.g., U.S. Air Force Academy Catalog, 147 (1971); Register of Graduates, U.S.A.F. 53 (1972).

¹¹³³ Similarly, Secretary of Defense Melvin R. Laird, in response to a Report of the Task Force on the Administration of Military Justice in the Armed Forces, has recently directed the Military Departments to place defense counsel under the authority of the Judge Advocate Generals. Memorandum for the Secretaries of the Military Departments from Secretary of Defense Melvin R. Laird, Jan. II, 1973.

¹¹³⁴ Recognizing the necessity of achieving consistency and predictability in the determination of whether an "almost infinite variety of activities" violates a "code as far-reaching as that governing cadet Honor," a list of precedents of the Military Academy's Honor Committee was compiled at one time. Official records also indicate that from time to time authorities at the Academy have "taken [other] appropriate action" in an effort to obtain "uniform interpretations of the Code." U.S.M.A., The Honor System at West Point 5 (1945). Similarly, the officer-in-charge of the U.S. Air Force Officer Training School's Honor Code—himself an Air Force Academy graduate—has begun codifying Honor Committee interpretations. Interview with Officer-in-Charge of Honor Comm., U.S.A.F. Officer Training School, Lackland Air Force Base, Texas, June 14, 1972.

tern—so dear to academy officials and cadets—need not be sacrificed. Cadets should contribute to the interpretation of honor code proscriptions and adjudicate alleged offenses by exercising a fact-finding function. The training benefits of cadets' believing their codes "belong" to them—more efficient enforcement and enhanced acceptance of its principles—need not be lost if cadets are taught the value and necessity of active legal supervision of adjudicatory procedures. But perhaps most important, academy officials would no longer feel reluctant to curb specific abuses, such as the silence, since the pretense of complete cadet control would be recognized as an unneeded fiction.

We close then with a suggested approach to reform, no panacea to be sure, but an attempt to address the major problems currently plaguing the academy adjudicatory systems. This is not to suggest that there are not a great many praiseworthy aspects of the adjudicatory systems of the five federal service academies. Rather, the attempt has been to examine an aspect of academy life which has lasting effects on the perception of fairness and justice that an academy-trained officer will carry for his entire military career.¹¹³⁵ Such an undertaking, though likely to be met with hostility by the military establishment, is not improper; for as the Chief Judge of the Court of Military Appeals has observed:

As conditions change . . . [i]t is the responsibility of the critic to articulate the change and suggest the alternatives of action that may be feasible and effective to meet the new conditions.

Learned criticism, in all its varied forms, contributes materially to the continuing development of the law. The *Uniform Code of Military Justice* is not the final answer to the government of our armed forces.

Congress, the executive, and the courts fashion the rules, but it remains for the individual to appraise their consequential value to society.¹¹³⁶

¹¹³⁵ See DoD House Appropriations Hearings, 1966, *supra* note 12, at 38; text accompanying note 12 *supra*. See also Hearings on Service Academies, *supra* note 18, Appendix B, at 118. Cf. *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943). The lasting effects of an academy education seem to have been in the mind of an Air Force psychiatrist assigned to investigate the Air Force Academy after its 1965 honor scandal when he concluded in his report that "One cannot visit the Academy for even a few days without feeling it deserves one's best efforts." Morgenstern, *supra* note 74, at 7.

¹¹³⁶ Quinn, *The Role of Criticism in the Development of Law*, 35 *Mil. L. Rev.* 47, 58 (Jan.

It is, then, the role of critic that this paper has essayed; and it is, in the final analysis, not only to Congress, the courts or the executive, but to the American people that it is most appropriately addressed.

ADDENDUM

While this project was in the later stages of preparation, the United States Military Academy simplified its complex conduct regulations, and the Cadet Honor Committee voted to abolish the silence. The Naval Academy has also amended its conduct regulations so that no restriction in excess of two weeks may be imposed without a hearing. Overall, no period of restriction in excess of two months has been assigned at Annapolis since June 1973. While these measures are welcome, they fall far short of the thorough reforms which are necessary. The problems outlined in this study still demand immediate attention.

1967). Chief Judge Quinn continued:

New methods can be devised to handle old situations more effectively than existing procedures: and new rules are required to order and harmonize new and different circumstances. No less than his civilian colleague, the military lawyer must be alert to the currents of his time. Like his civilian colleague, he should not fear to criticize existing precedent and practice, in the pursuit of justice, and its fair and effective administration.

Id. See also id. at 51, 52, 58.

APPENDIX

ABBREVIATIO

Bu Pers. Inst.	Bureau of Naval Personnel Instruction (U.S. Navy)
² Cadet Honor Proc., C.O.I.	Cadet Honor Committee Military Academy) Commandant's Operating (U.S. Air Force Academy)
Com'd't Mid'n Inst.	Commandant of Midshipment's Instruction (U.S. Naval
Honor Oper. Inst., U.S.A.F.A.	Honor Operating Instruction Force Academy)
JAGA	Judge Advocate General of the Military Affairs Division
Mid'n Reg's	Midshipmen Regulations (U.S. Academy)
R.C.C.U.S.C.G.A.	Regulations for the Corps of (U.S. Coast Guard Academy)
R. U. S.C.C.	Regulations for the Corps of (U.S. Military Academy)
¹⁰ R.U.S.M.A.	Regulations for the U.S. Military
" U.S.A.F.	U.S. Air Force
¹² U.S.A.F.A.	U.S. Air Force Academy
" U.S.A.F.A.R.	U.S. Air Force Academy
" U.S.A.F.C.R.	U.S. Air Force Cadet Regulation
¹¹ U.S.A.F.C.W.M.	U.S. Air Force Cadet Wing
" U.S.A.F.C.W.S.C.	U.S. Air Force Cadet Wing
U.S.A.F.M.	U.S. Air Force Manual
¹³ U.S.A.F.R.	U.S. Air Force Regulation
⁹ U.S.A.R.	U.S. Army Regulation
U.S.C.C.	U.S. Corps of Cadets
²¹ U.S.C.G.	U.S. Coast Guard
zz U.S.C.G.A.	U.S. Coast Guard Academy
²¹ U.S.C.G. Pers.	U.S. Coast Guard Personnel
^{zJ} U.S.M.A.	U.S. Military Academy
U.S.M.A.D.S.S.O	U.S. Military Academy System Standing Operating
^{zR} U.S.M.A.R.	U.S. Military Academy
U.S. M. M.A.	U.S. Merchant Marine Academy
^{zR} U.S.M.M.A.M.R.	U.S. Merchant Marine Academy Midshipmen Regulations
U.S.M.M.A.S.I.	U.S. Merchant Marine Academy Superintendent Instruction

³⁰ U.S.N.	U.S. Navy
" U.S.N.A.	U.S. Naval Academy
¹² U.S.N.A. Inst.	U.S. Naval Academy Instruction

