A PRAYER FOR RELIEF

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

MICHAEL T. ROSE
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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[Culture [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, courts,4 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
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

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,

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.
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).
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


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. Public pressure has, on at least two occasions, inspired Congress to pass legislation courts, and the military services 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" 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 adjudicatory 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.


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.


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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{17} Today, except at the Merchant Marine

\textsuperscript{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 bound 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.


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

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).


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.

6 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
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)\(^\text{23}\) 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.\(^\text{24}\) Thus, under the Uniform Code, cadets may be subject to general or special courts-martial,\(^\text{25}\) as well as to the administrative "Commanding Officer's non-judicial punishment."\(^\text{26}\) Military officials apparently read in authority for some academy adjudicatory rules, "particularly the punitive aspects of the cadets [sic] honor code,"\(^\text{27}\) from the UCMJ.

\(^{21}\) U.S. Const. art I, § 8, cls. 12, 13, 14.


\(^{25}\) 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. Congress has specifically vested the various armed services themselves with the responsibility for training qualified military officers and has given the academies specific powers to do so. In addition, by classifying each academy as a military institution and by designating each academy superintendent as the "Commanding Officer" of his academy, Congress may have impliedly delegated to each further power to do whatever is reasonably necessary to accomplish his "mission."

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. The President may, of course, delegate some of this disciplinary power to subordinate military authorities. One possible nonconsti-


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. § 9331(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).


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


38 See Fratcher, supra note 37, at 865.


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.


"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, and thereby possess the same authority as civilian institutions performing educational functions. Some of this power flows from explicit and implicit delegation by Congress, much as school boards or state institutions of higher learning function under implied or explicit grants of authority from state legislatures. 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. Indeed, it appears that the academies have always regarded them-

43 Id. at 55, citing Carter v. McClaughry, 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); Fauser v. Fauser, 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.\textsuperscript{54} A logical hypothesis is that through legislation creating and funding the service academies\textsuperscript{55} Congress impliedly delegated authority to promulgate those regulations reasonably necessary for the training of future officers.\textsuperscript{56} A question thus arises as to whether other sources of authority confer upon the academies regulatory power of a broader scope. With this

\textsuperscript{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).

\textsuperscript{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).

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." 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," the academies go much farther by prohibiting conduct not made unlawful by the Uniform Code, e.g., "toleration" of lying, stealing and cheating. 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. 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, the "official knowledge" 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.
lies the ratification doctrine. Virtually the only formal congressional contact
with the academies is an annual visit to each by the seven congressmen who
are members of the academies' Boards of Visitors. 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 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 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

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57 Avrech v. Secretary, No. 71-1841, at 8 (D.C. Cir. Mar. 20, 1973), quoting Papachristou v. City of
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
61 Indeed, the only public regulation concerning any academy adjudicatory code appears to be 32
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.

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.

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.


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" 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.
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. 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, the codes did not originate with cadets, but were either created by the academies' su-

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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.

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-


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.


16 officials 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

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. . . .


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,

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. 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. . . .


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.

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? 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," other courts have recognized that some rulemaking authority is also vested in the President. 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.

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 not 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).
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).

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.

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 customs as well as provisions of the Manual for Courts-Martial. Thus, while Presidential and congressional authority in this area is "correlative," 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 Executive are uncertain. The question has been clarified, however, by a well-reasoned, if somewhat obsolete, 1853 Attorney General's Opinion. 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. 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.

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. 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."

Although Cushing acknowledged that "it is not easy to draw the line between what is legislative and what is . . . administrative," 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 " 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.
94 See generally Hirabayashi v. United States, 320 U.S. 81, 93 (1943); Ex parte Quinn,i 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.  

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. Similarly, it may be that military authority cannot impose nonjudicial punishment or take "nonpunitive corrective measures" 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.

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

The Supreme Court has recently scrutinized jurisdictional requirements for criminal cases involving military personnel. In O'Callahan v. Parker 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. 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." The requisite "status" was that of "a person . . . regarded as falling within the term `land and naval Forces.' " O'Callahan supplemented the "status" criterion, however, with an additional subject matter requirement that the accused's crime be "service connected." Whether an alleged offense meeds this test for subject matter
jurisdiction must be determined by examining at least 12 specific criteria.\textsuperscript{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,\textsuperscript{106} the existence of a jurisdictional prerequisite to academy imposition of punishment can hardly be doubted. While it is clear

\textsuperscript{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.

\textsuperscript{100} 395 U.S. 258 (1969).

\textsuperscript{101} Id. at 272-73.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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 he 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," Heinl, The Collapse of the Armed Forces, Armed Forces J. June 7, 1971, at 4, col. 2.

\textsuperscript{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. 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.

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

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

25 to the special needs of the military. Courts have also encountered serious problems in defining the due process requirements for adjudicatory proceedings at educational institutions. 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 that "[t]o those in the military or naval service of the United States the military law is due process." 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. 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 process and general prejudice. 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


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 . . . nevertheless 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 banc) [hereinafter General Order On School Discipline].

121 See United States v. French, 259 U.S. 326, 335 (1922); United States v. Innes v. Hiatt, 141 F. 2d 664, 666 (3d Cir. 1944).


124 The term "military due process" was first employed in 1951 in United States v. Clay, 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. 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 prejudice[s] the substantial rights of the accused." 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; nor is it the cumulation of nonprejudicial errors in a single case; nor is it the same as general prejudice; it is not synonymous with federal civilian due process. As with constitutional due process violations in civilian courts, decisions violative of military due process are void.

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

128 Id. at 77, I C.M.R. at 77; see Wurfel, supra note 120, at 280-81.
135 Wurfel, supra note 124, at 241, 278.
137 Id. at 217, 2 C.M.R. at 123.

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 procedures 141 beyond the indirect requirement of conformity with statute—herefore 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. A cadet's failure to adhere to any such rule constitutes a conduct violation.

Conduct violations are grouped, according to the gravity of the

138 Id.

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'm'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).


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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. Punitive measures range from the mere assessment of demerits to outright expulsion and include a broad range of intermediate sanctions. 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 II 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'm'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),
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.), and, 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.


serious classes, the amount and type of punishment to be awarded,149 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).


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).


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).


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).


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 officer or instructor by completing a form designed to record all pertinent details of the infraction. 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. Each cadet reported for violating a conduct rule is notified of his alleged offense and permitted or required to explain his conduct in writing to the adjudicating authority. At three acade-
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)(l) (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(l)(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).

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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. Except at the Naval Academy, 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. 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.

Academy conduct hearings consist of formal or quasi-formal questioning of the accused cadet by the board members. 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.

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(77) (b) (1971); R.C.C.U.S.C.G.A. 5-5-08(C) (1971);

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) (1971) (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. P1620.1OG Enc. 2(3)(d)(2) (1970); id. Enc. 2(3)(b)(l)(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.


161 See Com'd't Mid'n Inst. P1620.1OG Enc. 2(e)(6)(l)(e), 2(3)(b)(1) (f) (1971); 32

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, 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. A cadet has only a limited right to remain silent. Regulations specify a variety of other minor safeguards followed by one or more of the academies, including a variety of procedures for appeal.

B. The Honor Systems

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


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 "not 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).


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. 1-4-01(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).


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


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. I(I)(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.


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,


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. Except at the Coast Guard and the Merchant Marine Academies, 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. 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.
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. 1(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

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


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

guilty may be discounted altogether or may result in the charges being terminated. Cadets found guilty of violating the honor code are usually asked to resign. 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. 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. At all academies the Superintendents 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.

185 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.
186 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).
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(l) (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 "violators 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
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, U.S.N.A., Oct. 12, 1972.

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.

The Superintendent ultimately decides whether to accept the recommendation of the cadet honor board, the Commandant of Cadets and, if convened, the officer board, that an honor violator be separated from the Academy. 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. 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.

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
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).


"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.


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)).


197 Id. I(B)(5); U.S.N.A. Inst. 1610.3 Enc. I(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).


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." Although in some service academies honor committee members are encouraged to disqualify themselves if they feel they cannot vote fairly and without bias, no academy grants to an accused an absolute right to challenge for bias one or more of the individuals assigned to hear his case. Further, although an accused cadet may present witnesses and relevant evidence in his behalf, at some academies the cadet may not remain silent or be present while other witnesses


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).


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. 5-5-01(A)(1) (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 testify in his case. Even if he is present, an accused at some academies may not be allowed to question opposing witnesses directly. 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.

The Military Academy's honor system includes a particularly interesting "unofficial," "unpublicized" yet very real feature: the "silence." 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." 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." 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.


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

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
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.

Letter from Honor Comm. Member for Chairman of Cadet Honor Comm., U.S.M.A., Dec. 15,
duct offenses. These "ethics committees" are charged with promoting high moral and ethical standards among the corps and with adjudicating alleged violations of these standards. Sanctions that may be recommended by the ethics committees include demerits, confinements, tours and restriction. One or more appointed officers act as nonvoting advisors to the ethics committees and may attend the hearing of each ethics board. 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. No criteria have been formalized for determining which matters the ethics board will consider or how the investigation or


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).


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.


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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.


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.


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, 5-4-1 I (1971); U.S.A.F.C.R. 35-6(36) (1971). See also text accompanying note 166 supra. But see text accompanying notes
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, and over public loudspeakers. In addition, the means by which a cadet has been separated from an academy may be recorded in his official military records and on his academic transcript. 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, 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


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).

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 UCMJ provides statutory authority for the imposition of nonjudicial punishment and places strict limitations on such sanctions. The questions of whether and to what extent military commanders may punish members of their command, including officers, without trial have thus been decided by Congress. Since cadets must be given all the benefits of the UCMJ'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 cadets' were thought to be authorized as inherent incidents of command. Yet Army leaders, apparently unsure about the scope and limits of such inherent powers,
repeatedly sought to have them formally codified. The initial statutory authorization of nonjudicial punishment came in 1916 and was followed in 1920 by enactment of a one-week limitation on nonjudicial withholding of privileges, restrictions and hard labor without confinement.

No distinction was drawn in either the original codification of authority or its subsequent revisions between sanctions imposed on cadets and those assessed against other members of the military. 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 and since cadets are to be treated as offi-

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


220 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.

221 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;

(ii) 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.


254 Although less frequently, the Naval and Coast Guard Academies also impose penalties violative of article 15. See Com'dt 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 I8 supra.


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
ily authorized by statute and apparently falls outside the scope of the nonjudicial penalties contemplated by Congress.\textsuperscript{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"\textsuperscript{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. P1620.1OG Enc. 5(1)(b)(c) (1970); R.C.C.U.S.C.G.A. 5-4-I0(B)(4) (1971) and U.S.-M.M.A.M.R. 031 10(l)(a) (1971).

\textsuperscript{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.


[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"\textsuperscript{259} in nature. Such arguments strain semantics to the breaking point\textsuperscript{260} 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," and since the Manual for Courts-Martial recognizes that article 15 nonjudicial punishments are themselves "primarily corrective in nature." 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, and like all governmental acts contrary to law, are violative of due process.

B. Jurisdiction

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


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.


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

See text accompanying notes 106-109 supra.

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.
The requisite "service connection" has been found to exist for an offense committed completely outside a military reservation only in limited circumstances.\textsuperscript{270} As a borderline example, the Court of Military Appeals, contrary to substantial circuit and district court precedent,\textsuperscript{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."\textsuperscript{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.\textsuperscript{273}


\textsuperscript{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)).
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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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
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.


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. In the area of adjudication, this constitutional proscription has been translated into the requirement that proceedings be "fundamentally fair." 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.\footnote{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.\footnote{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.\footnote{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.\footnote{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

\footnote{277}{Buss, supra note 5, at 551.}
\footnote{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).}
\footnote{281}{See text accompanying notes 116-42 supra.}
\footnote{282}{Lt United States v. Clay, I 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.\footnote{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. Only slightly less in point are cases involving student disciplinary adjudications at tax-supported, civilian educational institutions. Indeed, both the courts and the academies themselves 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, these distinctions should produce different results only in those cases in which the special needs of the military justify it. When the particular needs of the military academies in training fu-


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


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


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. 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.
293 Id. at 158-59.
294 382 F.2d at 812.

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. 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. The characterization of academy punishments as noncriminal would be especially misleading, since academy sanctions, unlike civilian college penalties, often take the form of imprisonment, 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.


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 . . . . [It may take place without the actual applica-
those imposed on civilian students. 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. 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. 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.
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.


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

57

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, 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 period and biannual leadership ratings of each cadet by peers, upperclassmen and academy officers. 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 rank 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. Lebby, 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).


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

leges 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 indoctrination and additional periodic discussion throughout each academy
year. Cadets, who have been trained to live by the letter of the code, understandably feel great trauma at having violated it. More importantly, a convicted cadet may be stigmatized not only while at the academy but throughout his military career. 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.


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

313 See text accompanying notes 213-20 supra and 867 infra.
314 See note 215 supra and text accompanying note 868 infra.

59 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).

Reputation is, of course, protected by due process of law. See, e.g., Jenkins v. Mc Keithen, 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).

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, and are frequently not equipped to deal with this situation. Most are minors away from home for the first time. This age and inexperience factor, when combined with the restrictive nature of the academies' curricula and training, has prompted a number of commentators, including military authorities themselves, to recognize that cadets are generally quite immature; 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. An accused cadet will have to decide whether to give a written statement to interrogators when they ask for a confession and must decide as to its contents should he choose to comply, again without adequate guidance.

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).


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. This conditioning continues throughout a cadet's tenure at the
academy, and is developed through a minutely regulated training program which includes both a vast array of "nuisance" regulations and conditioned acceptance of immediate and often arbitrary correction by cadet and officer superiors. 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 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. . .


62 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 violation 334 in order to enable an individual to
avoid inadvertently committing an offense, and to guide courts and juries in determining whether an offense has been committed. Although there is widespread agreement that the doctrine is not restricted to statutes or regulations imposing criminal sanctions, authorities sharply div-

332 See text accompanying notes 426-31 infra.
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."
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. 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. Other courts have declared equally broad school rules unconstitutionally vague. 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. 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 proscript-

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).


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—"the so-called "general articles"—have been held void for vagueness and overbreadth by two circuit courts of appeals. 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, 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.

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. 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. 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.

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


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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vision 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".

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)(l)(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 inculpate an alleged honor offender. 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."  

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. 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. 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, 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]londuct 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) ("[l]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).


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

362 See, e.g., id.
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.  

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. 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.  

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 code 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,

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. Some due process requirements are quite clear; all criminal defendants, for example, have a right to trial. 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. 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.

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").


abrogate, within constitutional limitations, many of the procedural safeguards which would otherwise be thought necessary to insure fundamental
However, an examination of the Uniform Code of Military Justice and particularly article 15—the only UCMJ provision bearing on academy non-court-martial adjudications—reveals no such congressional attempt. Although article 15 authorizes nonjudicial punishment for minor offenses "without the intervention of a court-martial," it does not explicitly sanction summary imposition of punishment without providing an accused the opportunity to respond. 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. 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. But it is clear that even Congress must observe certain constitutional minima. Thus, legislation empowering the Commandant of the Coast Guard to "summarily dismiss" a Coast Guard Academy cadet is unconstitutional to the extent that it purports to deny a cadet these minimum safeguards. Such due process absolutes, as they have been defined by the courts, will be explored at

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


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. Some courts, in reviewing adjudications by administrative agencies, including a relatively recent student disciplinary decision, have held that a de novo appellate hearing compensates for a denial of due process at an earlier stage of the proceeding. 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.

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" 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. Second, and even more
persuasive, academy appellate re-

381 See text accompanying notes 189 & 230 supra.


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 appeal 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.

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." Historically, some courts have held that a "privilege," such as a student's enrollment in a tax-supported educational institution, might be revoked by a government agency without a hearing. Other courts, however, have construed the student's interests as "liberty" or "property" within the meaning of the fourteenth amendment 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.

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).

See text accompanying notes 609-24 infra.

See text accompanying notes 213-220 infra.


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).


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

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


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


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).

73 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, loss of privileges and reduction in rank 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-


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.), att'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. 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."

The court appears to have rendered this opinion, as have courts in other academy cases, 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. As has been shown, the sanctions for the more serious Class I and II offenses are not so slight, but reach proportions which render them more punitive than "corrective" or "educational" in effect. Thus, when all the factors are weighed, administrative burdens seem insufficient 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.

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).
evaluating hearing procedures in civilian school disciplinary cases, as well as those examining adjudicatory practices at the academies themselves. For example, an accused cadet is entitled to an effective hearing "at a meaningful time and in a meaningful manner," 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." 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, it does demand that the hearing afford the "rudiments of an adversary proceeding," and "the rudimentary elements of fair play." 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.

Before considering these specific guarantees in detail, it may be

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


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. 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. 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. While it is true that the hearing panels' findings of fact sometimes serve only as recommendations, they are intended to, and in fact do, play a crucial role in the ultimate verdict. 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, to "sound off in a full military manner," to preface and complete all


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


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.
statements with "sir" and may be required to stand at attention or parade rest throughout the proceedings. Whatever "family spirit" may exist in student adjudications at civilian institutions, then, is nonexistent at the academies, where an adversarial, formal, superior-subordinate relationship is maintained. 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. Although the precise nature of the notice required may vary with the context and circumstances of a particular case, the general requirements of notice in school adjudications are clear: a stu-

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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
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.


dent accused of an offense must be apprised, usually in writing, of the charges against him, of the grounds for such charges, of the nature of the evidence to be used against him and of the identity of all adverse witnesses. 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 Marine and Naval Academies, for example, formally notify in writing accused honor violators of the charges against them and, at the Naval Academy, 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. 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


439 See U.S. Merchant Marine 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.

79 witnesses who will present evidence against them and frequently receive
such late notification of the charges as to make the preparation of a meaningful defense impossible. 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, 39 of which resulted in verdicts of guilty. 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. 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 impartially and that legal bias on the part of the

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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
trier of fact in either a criminal or an administrative hearing constitutes a denial of due process. 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, little judicial guidance has been forthcoming as to how great this type of bias must be before the Constitution is violated. It does appear, however, that the bias must be substantial and that it must stem from a source outside the adjudicatory process.

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." 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. 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. 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. 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 administrative hearing officer.

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. Whether

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

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

such an interest is a grounds for disqualification depends upon the magnitude of the interest.\textsuperscript{460} Again here, the failure of the courts to articulate consistent and meaningful guidelines\textsuperscript{461} 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{464} The applicability of the "legal bias" concept in the context of academy adjudications is cru-
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.\footnote{Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967).} The impact of such preconceptions has been manifested by animosity toward, and harassment of, an accused cadet during the hearing\footnote{The impact of such preconceptions has been manifested by animosity toward, and harassment of, an accused cadet during the hearing.} or by consideration of improper factors in formulating a decision at its conclusion.\footnote{Despite some academy precautions to the contrary, it appears that voting members of adjudicatory hearing panels often display prejudgments and prejudices which may be of sufficient intensity to constitute legal bias.} Despite some academy precautions to the contrary, it appears that voting members of adjudicatory hearing panels often display prejudgments and prejudices which may be of sufficient intensity to constitute legal bias.\footnote{Even more serious than such personal predilections, however, may be the pervasive institutionalized bias against an accused, a}

\footnote{Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967).}

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.

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.

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.


situation which seems common in academy adjudications. 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; 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.), affd, 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.


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.
they review the honor ethic, as epitomized by the cadet honor codes, as so fundamental to their own ideals, 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. 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 prejudgment so extreme as to result in impermissible factual prejudgment 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.

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. Although the prohibition against combining such functions has not been extended to federal or state administrative cases generally, there are administrative areas in which separation of functions is clearly required. 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, 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).


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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".\textsuperscript{488} which, though perhaps satisfactory for minor sanctions for "correctional and educational discipline,"\textsuperscript{489} "does not satisfy due process or the simple needs of natural justice" when possible expulsion is involved.\textsuperscript{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


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


\textsuperscript{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.

\textsuperscript{487} 346, F. Supp. at 31.

\textsuperscript{488} Id.

\textsuperscript{489} Id. at 32.

\textsuperscript{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 officer for that officer to be able to impose nonjudicial punishment on his subordinates who fail to discharge their military duties. 492 Indeed, Congress' purpose in granting nonjudicial article 15 powers was to enable company commanders to handle disciplinary problems without resorting to a court-martial. 493 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. 494 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, 1 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).
losses than those assessed in other military situations,\textsuperscript{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,\textsuperscript{497} while cadets may receive conduct punishments for many acts not proscribed by the Uniform Code.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.
498 See text accompanying note 246, supra.
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.

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, the Academy officer who awards, approves or reviews punishments is often the same officer who originally placed the cadet on report. At the Coast Guard Academy it is possible for company officers to award penalties for charges they themselves bring against cadets, and at the Merchant Marine Academy cadet adjudicating officers sometimes informally investigate conduct offenses prior to formally hearing the case. Findings of guilt for such offenses may result, as in Hagopian, in a cadet's separation from an academy. 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-


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).


507 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.


nal defendant a right to confront and to cross-examine witnesses offering testimony or other evidence to be used against him. Due process of law also requires that these safeguards be afforded in a variety of administrative contexts. These rights are clearly fundamental and have been viewed as absolutely essential to a fair administrative hearing. Thus, an administrative agency must normally provide an opportunity for confrontation and cross-examination, even in the absence of an express congressional mandate.

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

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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, I 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).


[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).
involving protection of some of the most crucial interests at stake in cadet adjudications: liberty, reputation, pursuit of a chosen profession and attendance at an educational institution. 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.

The majority of courts considering both types of issues has indicated that an accused should be permitted to confront witnesses. Although most of the military discharge cases that have considered the matter have also required that cross-examination be permitted, the school and college expulsion cases in the area are divided. Some have required cross-examination while others have employed a

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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).


See, e.g., Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971).

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.


Buss, supra note 5, at 598.


balancing test in holding that this procedural safeguard need not be granted. 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.\textsuperscript{525} Courts have also relied on the fact that the hearing in question was merely investigative in nature rather than adjudicative.\textsuperscript{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.\textsuperscript{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 nature\textsuperscript{528} and potentially involve a significant loss of liberty,\textsuperscript{529} expulsion from an academy\textsuperscript{530} and even discharge from the Armed Forces.\textsuperscript{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,\textsuperscript{532} for they, like all military proceedings, are by their very nature adversarial.\textsuperscript{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


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

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 superior 535 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

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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
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, Air Force, Naval and Military University Disciplinary Proceedings, 54 Calif. L. Rev. 75, 79 (1966).

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.

Beck, supra note 77, at 5. Beck, supra note 77, 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.

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.

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.

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, has 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, Military, Naval and Merchant Marine 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. 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. 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. Thus, on occasion, as many as 200 cadet observers have questioned an alleged offender, who, not having

often already been given to the honor hearing panel prior to the briefing given pursuant to the regulation. Id. 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.


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).

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.

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).


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 "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," 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." 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. Due process has similarly been employed to extend the right to assistance of counsel to numerous types of administrative adjudications, even when the hearings involved were not adversarial in nature. And the courts have also held that
the right to counsel cannot be denied in an administrative hearing without express congressional approval. 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 criminal or administrative actions, but also that the right to counsel applies during custodial interrogation and other


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.


"critical stages" of the criminal process.
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.\footnote{E.g., United States v. Wade, 388 U.S. 218 (1967) (lineups); Miranda v. Arizona, 384 U.S. 436, 473-75 (1966) (pretrial situations).} 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.\footnote{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.} 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.\footnote{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.} 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.\footnote{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 Brieant 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., 1st Sess. 4912 (1962) [hereinafter Hearings on H.R. 7656]; Miller, supra note 244, at 100-01, due to the

enemy 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.


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.


578 See text accompanying note 431 supra.

579 See text accompanying notes 146-48, 188, 224, 299, 301-17 & 402 supra.


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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, that destruction of the military discipline of the academies and of the "family spirit" of the university setting will result,
and that attorneys would begin demanding the "full panoply of procedural rights,"\textsuperscript{583} such contentions are easily answered.

First, there is substantial evidence that affording cadets the assistance of counsel will not pose undue administrative burdens.\textsuperscript{584} Sec-

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{584} As the Second Circuit observed:

\begin{quote}
[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.
\end{quote}

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).

ondly, it is clear that academy adjudicatory hearings are, by their very nature, formal and adversarial; the atmosphere is more punitive than familial.\textsuperscript{585} Finally, since cadets today are quite sensitive to adjudicatory proceedings which they perceive as unfair,\textsuperscript{586} it seems unlikely that the grant of the right to counsel could be any more disruptive to academy discipline than would its denial.\textsuperscript{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.\textsuperscript{588} However, certain general observations can be made. Each academy other than West Point\textsuperscript{589} and Annapolis\textsuperscript{590} appears to permit military legal counsel to advise and represent cadets in most types of expulsion proceedings.\textsuperscript{591} Only the Coast Guard\textsuperscript{592} and the Merchant Marine Academies,\textsuperscript{593} however, permit a legal or nonlegal counsel to represent cadets and, at the Merchant Marine Academy,\textsuperscript{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.\textsuperscript{595} At the

\textsuperscript{585} See text accompanying notes 426-31 supra.
\textsuperscript{586} See text accompanying notes 989-93 & 995-96 infra.
\textsuperscript{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").
\textsuperscript{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).


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.


100 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-


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).


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 accusors" 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

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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.\textsuperscript{604}

Although some academy officials assert that their appellate procedures can compensate for previous denials of due process,\textsuperscript{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.\textsuperscript{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 boards\textsuperscript{607} composed almost entirely of academy graduates.\textsuperscript{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.

\textsuperscript{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).


\textsuperscript{605} E.g., Interview with Honor Comm. Legal Advisor, U.S.A.F.A., Sept. 2, 1971; see text accompanying note 383 supra.

\textsuperscript{606} See text accompanying notes 487-90 & 503-06 supra.

\textsuperscript{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").

See text accompanying notes 473-79 supra.

appeal at all, but rather to "voluntarily"—and "quietly"—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.

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. The impact of this pressure on a cadet is obvious: he will probably choose not to appeal.

Courts have held such coercive practices unconstitutional since due process will not permit an individual to be coerced into waiving his right to appeal through threat of greater punishment. This principle has been held specifically applicable in military administrative proceedings where the "stark choice" facing the accused was to

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

610 Taylor, supra note 274, at 7.


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. Some cadets undoubtedly choose not to appeal because they know it is extremely unlikely that an officer appeal board would reverse their conviction. Even if a cadet's honor conviction is reversed, he knows he is likely to be ostracized and, at the Military Academy, silenced. Since the isolation process begins even during the appeal, the virtually automatic ostracism that deciding to appeal evokes deters some cadets from exercising the right at all.

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.
Military and Air Force Academy cadets appeal honor convictions to an officer appeal board. As one West Point graduate has aptly stated, in actuality, being found guilty by the Cadet Honor Committee is the virtual equivalent of expulsion. 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. This principle raises another problem with the honor systems, since at the Military and Air Force Academies, expulsion is the sole penalty for having violated the cadet honor code, with no significance attached to the gravity of the offense.

Except, perhaps,

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
beginning 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.

105 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, since expulsion may deprive him of an opportunity to pursue his education, end his military career and seriously cloud his future.

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. 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. Second, as


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.


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. 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.

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. 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."

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,


635 Salem & Bowers, supra note 634.


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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; in addition, the Air Force Academy has a third board which hears alleged ethics.

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638. E.g., Sobina v. Busby, 62 III. 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).


642. See text accompanying notes 652-57 infra.


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 he 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.

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infractions. 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.\textsuperscript{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.\textsuperscript{649} Since avoidance of unnecessary burdens, finality to litigation, prevention of needless litigation\textsuperscript{650} and, hence, the avoidance of harassment and unfairness\textsuperscript{651} 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 doctrine\textsuperscript{652} appear to bar its application at the academies. Failing to invoke res judicata when its application would cause an injustice\textsuperscript{653} when significant new evidence has been discovered\textsuperscript{654} or when new violations with no indication of harassment are present\textsuperscript{655}—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,\textsuperscript{656} even

\textsuperscript{647} See text accompanying notes 221-23 supra.


\textsuperscript{649} See text accompanying notes 663-74 infra.

For an illustration of this potential for harassment, see text accompanying notes 663-75 infra.


Sec Grose v. Cohen, 406 F.2d 823 (4th Cir. 1969); Restatement of Judgments § 70(1) (1942).


See, e.g., Title v. INS, 322 F.2d 21, 23-25 (9th Cir. 1963) (a finding in denaturalization if the statutes appear identical, so long as the policies under which they were enacted differ. 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, it is doubtful that, as limited as that power must be, it authorizes the creation of a complex of adjudicatory boards which may subject accused offenders to a multiplicity of prosecutions. 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, but in the areas of honor and ethics which represent only slightly differing degrees of moral conduct and hence, similar policy considerations.

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).

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").

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 question had been heard and adjudged by an honor board not to be an honor offense. One such attempt was successful. 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. Similarly, the Merchant Marine Academy plans 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. Furthermore, only a federal court order 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.

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 System has been established only since Aug. 9, 1972. See note 69 supra.


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," thereby permitting the cadet, pursuant to regulation, to remain at the Academy "in good standing." 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. 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. 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

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.


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.

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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
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. 11, 1973; Letter from Honor Comm. Legal

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,
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]
yany 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," 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," i.e., to choose freely not to speak at all, 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. Article 31's prohibition against compulsory self-incrimination embodies the principle of, yet is broader than, the fifth amendment privilege. 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.
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).


114 observed that the test for whether a case is "criminal" within the purview of the fifth amendment is not the name given 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 "inculpation" rather than "criminality," the Court extended the protection of the fifth amendment to any proceedings at which fault will be determined and pun-


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.\textsuperscript{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"\textsuperscript{694} to protect "any disclosures which the witness may reasonably apprehend could be used in

\textsuperscript{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).

\textsuperscript{688} See, e.g., text accompanying notes 144, 183, 223 supra.

\textsuperscript{689} Cf. In re Gault, 387 U.S. 1, 49-50(1966).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{692} See text accompanying note 297 supra.

\textsuperscript{693} See Bowles v. Trowbridge, 60 F. Supp. 48 (N.D. Cal. 1945) (citations omitted).

\textsuperscript{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).
Thus, drawing from the criminal case law, the privilege against self-incrimination applies in civil administrative proceedings, 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. This is in accord with the Supreme Court's teaching that the fifth amendment right is to be given a liberal construction and that it protects the individual against self-incrimination "in any manner." 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. Thus, an individual is protected against making any disclosure in any setting which may "tend" to incriminate him by providing a link in a chain of evidence which might reasonably lead to a later criminal prosecution.

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. 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, a contingency which is specifically authorized by regulation. 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).
E.g., id.


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.


Text accompanying note 611 supra.

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. 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, with "penalty" defined not merely as fine or imprisonment but as "the imposition of any sanction which makes assertion of the Fifth Amendment
privilege `costly.' Thus, threatening a public employee or other person in public trust 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. 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.


709 Id. at 515.

710 Id.


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: (I) 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. In most conduct, honor, ethics and separation hearings, however, cadets are required to answer fully and truthfully all questions asked them. Indeed, cadets at the Military Academy must report unintentional acts which if intentional would violate the honor code; for failure to do so, the cadet will automatically receive demerits which can accumulate so as to result in loss of class standing, privileges or even expulsion from the Academy. Furthermore, knowing failure to report an unintentional violation of the honor code is itself an intentional honor violation which may result in expulsion. Cadets, are also required to state in writing whether their conduct offenses are "intentional" or "unintentional." 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).

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. 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").


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 "nonmarriage" statement. Letter from Legal Officer, U.S.C.G.A., Oct. 27, 1972.

725 See text accompanying note 302 supra.


on-going activities, which require regular inspection to insure compliance. 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), 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.

\[\textit{b. Confessions}--\textit{Since} the 1700's, a basic principle of Anglo-American law has been that a confession obtained from an accused by one in authority under pressure sufficient to create}

\[\textit{727 Shapiro v. United States, 335 U.S. 1,33(1948); Wilson v. United States, 221 U.S. 361, 380 (1911).}
\]

\[\textit{728 See O'Neill v. Dent, Civil No. 71-1480 (E.D.N.Y. July 16, 1973); note 838 and text accompanying notes 829-32 infra.}
\]

\[\textit{729 See text accompanying note 94 supra. The Supreme Court has recognized in other contexts that requiring individuals to submit documents incriminating themselves violates the fifth amendment. E.g., wagering, tax and gun registration requirements, Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Marchetti v. United States, 390 U.S. 39 (1968); information about the Communist Party, Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).}
\]

\[\textit{730 Under the early view, a "confession" was "an acknowledgement in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it." 3 Wigmore, Evidence § 821, at 308 (Chadbourn rev. ed. 1970) (emphasis removed from original). Under the modern view, "an admission . . . by an accused . . . should. . . be treated as if it were a confession for purposes of invoking the exclusionary rules which apply to confessions." Id. § 821, at 326.}
\]

\[\textit{731 The doctrine of confessions applies only to an accused, not to a witness or a civil party. Id.}\]
§ 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).

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;" an accused has a


735 See, e.g., Wong Sun v. United States, 371 U.S. 471, 485-87 (1963); Herman, supra note 733, at 458-62.


737 See, e.g., Malloy v. Hogan, 378 U.S. 1, 6-7 (1964).


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 he 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." Interpreting this broad guideline has not been easy, for, as the Supreme Court itself has recognized, there is no "single litmus-paper test." Rather, legal voluntariness must be determined "from the totality of the relevant circumstances of a particular situation." In deciding which cases meet this standard, the Court has relied on a wide range of factual elements, 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,\textsuperscript{749} the length of time he has been interrogated\textsuperscript{750} or held incommunicado,\textsuperscript{751} his lack of food\textsuperscript{752} or sleep,\textsuperscript{753} and whether or not he has been moved from place to place.\textsuperscript{754} The factors in the second category on which the Court has relied include the number\textsuperscript{755} and hostility\textsuperscript{756} of the interrogators, their failure to advise an accused of his rights\textsuperscript{757} or allow him access to an attorney or other assistance,\textsuperscript{758} and their attempts to influence him through advice, promises, assurances or deceptions.\textsuperscript{760} Such factual considerations must be weighed in each case to determine whether the conviction under review was based "in whole

\textsuperscript{745} Malloy v. Hogan, 378 U.S. 1, 8 (1964).

\textsuperscript{746} Culombe v. Connecticut, 367 U.S. 568, 601 (1961); see 3 Wigmore, supra note 730, § 826, at 352.

\textsuperscript{747} 367 U.S. at 606.

\textsuperscript{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 ¶ I40a (rev. ed. 1969); Comment, 33 Neb. L. Rev. 507, 508 (1954).

\textsuperscript{749} E.g., Reek v. Pate, 367 U.S. 433 (1961) (19-year-old boy).


\textsuperscript{751} E.g., Haynes v. Washington, 373 U.S. 503 (1963) (16 hours).


\textsuperscript{754} E.g., Ward v. Texas, 316 U.S. 547 (1942) (moved to several different locations).


\textsuperscript{756} E.g., Ashdown v. Utah, 357 U.S. 426, 430 (1958) (interrogators were "temperate and courteous").

\textsuperscript{757} E.g., Clewis v. Texas, 386 U.S. 707 (1967); Haynes v. Washington, 373 U.S. 503
or in part" upon a confession obtained by any degree of trick, fraud, threat, promise, fear, hope or other improper inducement. 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* the Court reasoned that police interrogation is a "critical" stage of the criminal process, since at that point suspicion has already focused 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. 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" and would render the right to a lawyer at trial essentially meaningless.

Two years after *Escobedo*, the court articulated in its landmark decision *Miranda v. Arizona* 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


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, 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").


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).


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.


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 way 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.\textsuperscript{771} Any statement obtained from a person who has not been given these prior warnings, the Court concluded, may not be used against him.\textsuperscript{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.\textsuperscript{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.\textsuperscript{774} The court has held, moreover, that the \textit{Miranda} requirements must be met in military criminal cases.\textsuperscript{775} Indeed, some of the \textit{Miranda} safeguards were extended by Article 31 of the UCMJ to accused military personnel 16 years before \textit{Miranda} was decided.\textsuperscript{776} Article 31 prohibits any person subject to the Uniform Code from

\begin{itemize}
  \item \textsuperscript{770} Id. at 444. As a consequence, \textit{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).
  \item \textsuperscript{771} 384 U.S. at 467-69, 471, 473.
  \item \textsuperscript{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. . . .
  \item \textsuperscript{773} Id. at 468.
  \item \textsuperscript{774} Id. at 461.
\end{itemize}


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.

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 permitted 778 that a confession is vitiated if there is a "fair risk" that the method of interrogation employed makes it unreliable 779 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 persuasive 782—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
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.


Id. at 530, 26 C.M.R. at 310 (1958) (dictum).

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.


"[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).


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. Cadets are generally required to answer truthfully and completely, for example, all questions asked of them under the intense moral persuasion of their honor code and the threat of expulsion for its violation. 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 cadets and by assuring cadets that if they "told the truth" they would be "treated fairly." 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. 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.

With the help of more than 40 additional

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.
cadet officers and Honor Committee members, cadets implicated by this informant, and many other cadets subsequently implicated, were awakened in the middle of the night and told to proceed to an "important meeting." By morning between 75 and 125 suspects, had been placed in rooms where they were guarded, forbidden to talk to anyone, including each other, and, in some cases, uninformed for hours as to why they were being held. Each cadet was interrogated, some for as long as six hours, by five to 12 cadet investigators, some of whom required the accused cadets to stand at a "brace" and to answer all questions with "sir." Some accused cadets were held and questioned throughout the night and into the following day, sleeping, if they could, in chairs. The interrogators were hostile in the extreme; the suspects were bombarded with


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).

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.


The experience of one accused cadet, apparently typical, is related in Heise, Farewell

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. The cadets were also threatened with a variety of other reprisals; 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; and otherwise harassed. 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.

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.


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."

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).

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.

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. These massive official interrogations conducted for such lengthy periods were "inherently coercive" and therefore, the confessions obtained were "invalid." 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.\footnote{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.\footnote{812} Despite such considerations Air Force Academy officials sanction
these improper interrogation methods and continue to fail to give article 31
and Miranda warnings.\footnote{813} The Air Force has offered two justifications. First,
almost unbelievably,

\footnote{809} 

\footnote{810} See Spano v. New York, 360 U.S. 315, 322 (1959); Ashcroft v. Tennessee, 322 U.S. 143, 154
(1944).

\footnote{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.

\footnote{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.


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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 way 819—"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 74.


817 See text accompanying notes 297-300 & 682-93 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 factors stressed in Miranda and in the Court of Military Appeals' cases 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. 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 constitutional and common law restrictions on interrogation, as well as those of article 31, may depend upon whether the proceedings in question are thought to be "criminal" or "civil." 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. 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.\textsuperscript{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 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.\textsuperscript{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. While courts often require that administrative or school regulations be "reasonable" or "reasonably related" to a legitimate goal, the traditional deference of courts to military discretion requires only a showing that there has been a "rational exercise of discretion."

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


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).


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).

133 military officers. 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.

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." More, "First Classmen [must], prior to or during June Week, write to their Congressmen expressing their appreciation for the opportunity to attend West Point." Coast Guard Academy freshmen are instructed that "[f]ourth classmen must not discuss interclass or Academy affairs outside the reservation." The Air Force and Military Academies proscribe "sitting in [a] parked car." 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
(“[ulse 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. 1-5. 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-

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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 acts 840 as asking a
roommate how to spell a word to be used in a research paper 841 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.

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. 1, 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

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

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).

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." Furthermore, as argued, but not addressed by the court in Hagopian v. Knowlton, 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.

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 convicted by an honor board but who has not been separated from the Academy. An examination of this practice might best begin with a glance at its historical origins. The silence appears to have origi-

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.
346 F. Supp. 29 (S.D.N.Y.), aH'd, 470 F.2d 201 (2d Cir. 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. 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 Academy and to isolate unpopular officers.

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.

Hearings on Service Academies, supra note 18, at 10,627; note 69 supra.

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").

Taylor, supra note 274, at 4.

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.

The Cadet Honor Code, U.S.M.A. II (undated); U.S.M.A. Honor Guide for Officers, supra note 215, § 18, at II.

Charles, supra note 71, at 121.

Id. at 121.

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.

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

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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 Classman — who are currently being silenced. Today, as in prior years, the silenced cadet is
"completely ostracized from all social intercourse with other members of the Corps" in order to force him to resign from the Academy. As of late the decision to silence is made by a vote of the Cadet Corps 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).


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.

which the procedures may be highly irregular, and for which the chief consideration is anything but the possible innocence of the cadet in question. 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, or, in one recent instance, by framing the issue to be decided in terms of the Corps' support for the Honor Committee.

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 Representative, 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." The Second Class cadet's honor board conviction was rejected by the Superintendent, 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
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." Immediately prior to this revote the cadet in question

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.

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. 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.

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.


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. In response, the Cadet Honor
Committee, postponing the vote for a few days, distributed to each company an "Honor Committee Fact Sheet" 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 Committee 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. Subsequently, the Corps voted 1419-1083, with approximately 300 abstentions, to silence the cadet.

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.

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 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.

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.

As emphasized in the "fact sheet" circulated among the Corps by the Honor Committee, "[t]he vote to silence [is] not a decision by the Corps on the man's guilt or innocence." Honor Committee Fact Sheet, supra note 877, at 1; 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.
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 threats 891 to destruction of mail, 892 nondelivery of messages 893 and theft of personal property. 894

The obvious questions at this point are why do cadets inflict, and Academy authorities allow, harassment and punishment 895 of cadets


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.


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-

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
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, Enc. at 2-3.

899 See Honor Committee Fact Sheet, Original Final Draft, supra note 876, at 2.


901 Charles, supra note 71, at 121.
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 cadets for which they accept no responsibility. 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." 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.

The Secretary's argument incorporates the assumption that the Academy and the Corps of Cadets are "separate jurisdictions."

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902 Letter from Secretary of the Army, supra note 214, Enc. at 1; see text accompanying notes 73 & 172 supra.
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.
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

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. Moreover, the Cadet Honor Committee is an official organ of the Academy and is specifically delegated duties which might otherwise be performed by Academy officials. A finding of guilt by the Cadet Honor Committee is the virtual equivalent of expulsion. 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. 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." Moreover, a federal hazing statute, 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.


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.


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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.

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."\textsuperscript{922} More specifically, a former officer supervisor of the Air Force Academy Honor Committee noted that imposition of the silence may be unconstitutional.\textsuperscript{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.\textsuperscript{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,\textsuperscript{925} for whose actions West Point authorities must accept full responsibility.\textsuperscript{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.\textsuperscript{927} Moreover, the cooperation of West Point officials has always been necessary to enable cadets to enforce certain provisions of the silence.\textsuperscript{928} Indeed, it is only the fact that "sanctions imposed

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{924} See Letter from Secretary of the Army, supra note 214, Enc. at 1-2; text accompanying notes 904-05 & 907 supra.

\textsuperscript{925} See note 69 supra.

\textsuperscript{926} See Hearings on Service Academies, supra note 18, at 10,627; text accompanying notes 908-13 supra.

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 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.

Letter from Secretary of the Army, supra note 214, Enc. at 2; accord, id. at 3.

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.

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.,
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.

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

nally, the cadets being silenced were at one time prohibited by Academy officers from participating in intramural sports or parades, and the cadets were required, after the Supreintendent's decision to retain them at the Academy in good standing, to live in the "Boarders Ward" pending a decision by the Corp of Cadets—the Second Class cadet for a period of more than three months.

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 cadets\textsuperscript{937} and officers\textsuperscript{938}—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 he exercised to improve and get stronger." Interview with Commandant of Cadets, U.S.M.A., Mar. 9, 1973.


\textsuperscript{935} See text accompanying note 316 supra.


\textsuperscript{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.)).

\textsuperscript{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
icated in offenses under the UCMJ. Fourth, the procedures by which the silence is implemented and enforced seem fundamentally unfair. And finally, the very existence of such a severe penalty 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), aff'd 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{945} A federal court has held, however, that this procedure

\textsuperscript{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).
\textsuperscript{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.A., Aug. 10, 1972; see Hearings on Service Academies, supra note 18, at 10,630.
\textsuperscript{944} See, e.g., Hagopian v. Knowlton, 346 F. Supp. 29, 31 (S.D.N.Y.), affd, 470 F.2d 201 (2d Cir. 1972). (required by 8:00 a.m. the morning after notification).
does not encompass claims of unjust punishment, but rather provides a cadet redress only for tortious or malicious acts.\textsuperscript{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.\textsuperscript{947} However, because of the coercion exerted on cadets not to appeal honor code convictions\textsuperscript{948} and the preformed judgments and personal bias held by some hearing board members,\textsuperscript{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;"\textsuperscript{950} and cadets might therefore be expected to accept their punishment without objection.\textsuperscript{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.\textsuperscript{952} One can only admire the exceptional cadet who is willing to accept the risk.

\textbf{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;\textsuperscript{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;\textsuperscript{954} however, approval is routinely granted.\textsuperscript{955}

\textsuperscript{946} Hagopian v. Knowlton, Civil No. 72-2814, at 35 (S.D.N.Y. July 26, 1972) (supplementary opinion).
\textsuperscript{947} See text accompanying note 189 supra.
\textsuperscript{948} See text accompanying notes 611-24 supra.
\textsuperscript{949} This is true at the Air Force and Military Academies. See text accompanying notes 473-79 supra.
\textsuperscript{951} Hagopian v. Knowlton, 346 F. Supp. 29, 31 (S.D.N.Y.), afl d, 470 F.2d 201 (2d Cir. 1972).
\textsuperscript{952} Id.
\textsuperscript{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).
\textsuperscript{954} See text accompanying note 193 supra.
\textsuperscript{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. However, the sole remedy available from this particular review is reclassification of the discharge status. 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." Though a fact-finding hearing must be held at which the cadet is entitled to appear in person and with counsel, neither of these appellate procedures results in a de novo determination of the merits of the case.

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. 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.

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).
Until the 1950's, the nonreviewability rule was widely followed. See, e.g., Johnson v. 962

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

Eisentrager, 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.


965 Orloff v. Willoughby, 345 U.S. 83, 93 (1953); see Nixon v. Secretary, 422 F.2d 934, 939 (2d Cir. 1970); Radnerman v. Kainey, 411 F.2d 1102, 1106 (2d Cir. 1968).

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. This is undoubtedly attributable in large measure to the cadets' ignorance of the procedures and unawareness that their rights have been violated. 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 unproductive and might result in adverse ratings, penalties or even expulsion from the academy. 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 and by restricting access to civilian counsel. It is clear that before the courts can

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

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 harassed 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).


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

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 [the cadet] . . . as to whether or not he needed civilian counsel.

976 Concededly, the systems may effectively control cadet conduct. There are indications, however, that as to the two former goals, the
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. Some statistics may be illuminating. 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.
March 1969, the Air Force Academy reported a "significant increase in attrition for the Class of 1972 as compared to the last three Classes".\textsuperscript{980}

Attrition among academy graduates is also a matter of increasing concern.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 today—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


\textsuperscript{981} See generally Lebby, 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.


\textsuperscript{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).

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, that have brought on what the Chief of Naval Personnel calls "a personal crisis . . . that borders on disaster," morale within the American military is possibly the lowest in its history. 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. 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.

The changing nature of the cadet is readily apparent at the academies. As academy officials have noted, the "new," psychologically "different" cadet manifests "a less ready acceptance of military disci-

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Footnotes:

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.
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.,
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.  

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. As academy officials readily concede, the incidence of conduct and honor offenses at the academies has increased gradually during the last 10 years. 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. 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

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991 See Lebby, supra note 304, at 68.
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).
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. As of December 1969, these academies reported losses to their 1971 Classes of 8.6%, 14.3% 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, 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 concept 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. 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. 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, and by requiring that even the most minor transgressions be reported. In light of growing dissatisfaction with the toler-
ation proscription and the increasing number of honor convictions, its impact cannot be minimized.

Because of the significant costs stemming from continued high attrition, 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, integrity and personal honesty are essential traits for officers of all services. 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.

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 academies did so because of perceived injustice in the

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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.


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. As recognized by one West Point professor-graduate, seemingly purposeless rules breed resentment. 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."

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.

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. 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.


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

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.

Factors Inculcated Among Cadets

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 integrity to enable members of the military to trust one another in their everyday dealings and to prepare prospective officers for the mutual reliance often made necessary by military contingencies. 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, the honor and ethics systems also perform part of their function: there is little doubt that...


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unethical and dishonest behavior is reduced at the academies, and among academy graduates in the military as well. 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." 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.


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 o 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. The mere quantity of disciplinary rules and regulations and the number of means in which the' are enforced has been said
to create a game of "cops and robbers' between officers and cadets. 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." For some, this sense of fear and powerlessness, and the need to constantly fight to survive the system are not worth the effort and they choose or are forced to resign. However, for the many who remain at the

academy and ultimately enter the military, discipline becomes a matter of "gamesmanship": 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 ideology which has as its heart the concept of military honor.\(^{1035}\) By a comprehensive resocialization process 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 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

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\(^{1032}\) For examples of cadet stratagem, 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," Lebby, 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.
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. This sense of morality is intensified at the Military and Air Force Academies because of particular, reinforcing ethics systems. 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. This sense of morality is intensified at the Military and Air Force Academies because of particular, reinforcing ethics systems.

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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.


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-

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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 influences—factors which make cadets view their honor systems as something "sacred and holy," "akin to the virtue of [a] mother or [a] sister." Ultimately, cadets believe their moral training gives them an "uncommon standard" which makes them "uncommon men."

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. 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.\textsuperscript{1050}

\textsuperscript{1050} See Hearings on Service Academies, supra note 18, at 10,758, 10,768; text accompanying notes 1055-56 & 1102-04 infra.

It has long been recognized that a primary purpose of inculcating honor in military personnel is to develop loyalty to higher military authority.\textsuperscript{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."\textsuperscript{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.\textsuperscript{1053} Since institutional loyalty is intense and definitionally narrow, it serves to widen the gulf between the military and those on the outside.\textsuperscript{1054} Demonstrating the effects of military loyalty, academy officials and cadets have actively sought to keep outsiders,\textsuperscript{1055} including the Congress,\textsuperscript{1056} uninformed about, and to prevent their interfer-
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; Lebby, 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); Lebby, 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. 1, 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").

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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,\textsuperscript{1061} and for its lack of

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{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,

\begin{center}
\textbf{C. Prospects for Reform}
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belief in the sincerity and honesty of those who speak out or who refuse to conform.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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. Through a reemphasis upon responsibility and discretion, and a deemphasis upon chauvinistic loyalty and blind adherence to rules and regulations, 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 anddishonety 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.\textsuperscript{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.

\textit{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.\textsuperscript{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,\textsuperscript{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
authorities have set for them. See Lebby, 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.

176 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.


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.


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, while the sea service academies, which have no

1076 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-I(3)(d) (1966), reprinted in Hearings on Service Academies, supra note 18, at 10,817.

1077 See text accompanying note 75 supra.

1078 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.\textsuperscript{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,\textsuperscript{1084} unless he is exercising immediate command over a subordinate. More importantly, toleration is practiced in the military.\textsuperscript{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.\textsuperscript{1086}

As yet another drawback, the toleration clause minimizes the importance of exercising judgment and discretion. Unlike the honor

\textsuperscript{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).


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
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." 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. 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.

**c. Unlawful or Unjust Procedures**--It must be remembered that future positions of high command will be filled by academy graduates, that these graduates will set the standards of behavior for the entire military profession, 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. 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. 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. 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).

Charles, supra note 71, at 66; see Janowitz, supra note 863, at 127. 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.


See text accompanying notes 61-66 & 1055-56 supra and 1102-04 infra.

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. Lebby, supra note 304, at 233. Since the academies' adjudicatory systems are the primary vehicles through which a cadet learns how to administer 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, the selective prosecution of cadets disliked by academy officials, the imposition of excessively long-term punishments and the de facto presumption of guilt at some academies by those who adjudicate conduct offenses 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.


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.

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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."\textsuperscript{1104} Secondly, key academy officials, including those directly responsible for administering the adjudicatory systems\textsuperscript{1105} have been for the most part academy graduates.\textsuperscript{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."\textsuperscript{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.\textsuperscript{1108}


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:

\begin{quote}
[We 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.
\end{quote}


\textsuperscript{1104} N.Y. Times, May 22, 1964, at 8, col. 5.

\textsuperscript{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).

\textsuperscript{1106} Several commentators have noted this inbreeding at the academies. See, e.g., DoD House

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 Ganoe, 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.


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. 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. Nevertheless, both academies have now chosen to retain the penalty, the Naval Acad-

1114 As observed by Vice-Admiral Hyman G. Rickover:
[1] If 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.


1116 Interview with Hono, 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.


1118 See interviews cited note 1117 supra. For additional reasons for abolishing tours, see, e.g., text
emy abandoning its experiment.\textsuperscript{1119}

With respect to lawfully suspect adjudicatory procedures Academy officials resist application of even the most obvious requirements of the law, to which they contempitiously refer as "legalisms,"\textsuperscript{1120} if perceived to threaten the academy status quo.\textsuperscript{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"\textsuperscript{1112} and as is inherent in a "staff" role, they may only advise the Superintendent on legal matters.\textsuperscript{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.\textsuperscript{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 staffs of 20 and 16, respectively,\textsuperscript{1125} such flagrantly unlawful procedures as the silence and coercive interrogation have been allowed to continue.

\textsuperscript{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.
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.

See, e.g., text accompanying notes 1125-26 supra.


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.


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. Ultimate responsibility must be assumed by Congress and the Executive, not by delegating the duty to former high-ranking academy graduates, as they have done to some extent in the past, but by the direct scrutiny and intervention of wholly disinterested parties. 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,

See text accompanying notes 611-24 & 968-75 supra.
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.

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.

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?


not suggested. For authority is the foundation upon which the whole institution is built."
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. 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 untrained 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.”

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 18.

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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.\textsuperscript{1134}

At the same time, the concept of a cadet-controlled honor sys-

\begin{footnotesize}
\begin{enumerate}
\item 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.
\end{enumerate}
\end{footnotesize}

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. 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.

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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

## ABBREVIATION

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>2 Cadet Honor Proc.,</td>
<td>Cadet Honor Committee Military Academy)</td>
</tr>
<tr>
<td>C.O.I.</td>
<td>Commandant's Operating (U.S. Air Force Academy)</td>
</tr>
<tr>
<td>Com'd't Mid'n Inst.</td>
<td>Commandant of Midshipment's Instruction (U.S. Naval Academy)</td>
</tr>
<tr>
<td>JAGA</td>
<td>Judge Advocate General of the Military Affairs Division</td>
</tr>
<tr>
<td>Mid'n Reg's</td>
<td>Midshipmen Regulations (U.S. Military Academy)</td>
</tr>
<tr>
<td>R.C.C.U.S.C.G.A.</td>
<td>Regulations for the Corps of (U.S. Coast Guard Academy)</td>
</tr>
<tr>
<td>R. U. S.C.C.</td>
<td>Regulations for the Corps of (U.S. Military Academy)</td>
</tr>
<tr>
<td>10 R.U.S.M.A.</td>
<td>Regulations for the U.S. Military</td>
</tr>
<tr>
<td>&quot; U.S.A.F.</td>
<td>U.S. Air Force</td>
</tr>
<tr>
<td>&quot; U.S.A.F.C.R.</td>
<td>U.S. Air Force Cadet Regulation</td>
</tr>
<tr>
<td>11 U.S.A.F.C.W.M.</td>
<td>U.S. Air Force Cadet Wing</td>
</tr>
<tr>
<td>&quot;&quot; U.S.A.F.R.</td>
<td>U.S. Air Force Regulation</td>
</tr>
<tr>
<td>9 U.S.A.R.</td>
<td>U.S. Army Regulation</td>
</tr>
<tr>
<td>U.S.C.C.</td>
<td>U.S. Corps of Cadets</td>
</tr>
<tr>
<td>21 U.S.C.G.</td>
<td>U.S. Coast Guard</td>
</tr>
<tr>
<td>zz U.S.C.G.A.</td>
<td>U.S. Coast Guard Academy</td>
</tr>
<tr>
<td>3 U.S.M.A.</td>
<td>U.S. Military Academy</td>
</tr>
<tr>
<td>U.S.M.A.D.S.S.O.</td>
<td>U.S. Military Academy System Standing Operating</td>
</tr>
<tr>
<td>3R U.S.M.A.R.</td>
<td>U.S. Military Academy</td>
</tr>
<tr>
<td>U.S. M. M.A.</td>
<td>U.S. Merchant Marine Academy</td>
</tr>
<tr>
<td>3R U.S.M.M.A.M.R.</td>
<td>U.S. Merchant Marine Academy Midshipmen Regulations</td>
</tr>
<tr>
<td>U.S.M.M.A.S.I.</td>
<td>U.S. Merchant Marine Academy Superintendent Instruction</td>
</tr>
</tbody>
</table>

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30 U.S.N. | U.S. Navy |
3 U.S.N.A. | U.S. Naval Academy |
1z U.S.N.A. Inst. | U.S. Naval Academy Instruction |