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Military Administrative Discharges: 
Due Process in the Doldrums

HON. SAM J. ERVIN, JR.*

INTRODUCTION

Since 1967, an average of 50,000 men each year have been administratively discharged from the armed services, as compared with an average of roughly 4,000 discharged annually as a result of courts-martial.1 Many of those administratively discharged were homosexuals, many were drug users, many shirked their military duties, some failed to pay their legal debts, and others were simply unsanitary.

Of those discharged administratively, roughly 25% were labelled as "undesirable" and were returned to a civilian society to face family, friends, and prospective employers with that stigma.2 They found, too, that they were ineligible for veterans' benefits to continue their schooling, or buy a new home, or if so inclined, to begin flying lessons.

* United States Senator, North Carolina; Chairman, Senate Subcommittee on Constitutional Rights. The author wishes to acknowledge the valuable assistance of Lewis B. Snider, LL.B. University of Virginia Law School, 1969, Assistant Counsel to the Subcommittee, in the preparation of this article.

2. Id. at 5868.
The armed services have long reserved the right to discharge administratively any individual who, for one reason or another, cannot measure up to accepted standards of performance, whether or not that failure involves conduct subject to trial by courts-martial. Such discharges are processed in accordance with regulations drawn by the services, enforced by the services, and reviewed by the services. If there are abuses, they typically are not challenged judicially. But they have not gone unnoticed.

The Subcommittee on Constitutional Rights began its study of administrative discharges in 1961 in response to an increasing number of complaints that the system was unfair and left an irreparable stigma on those it affected. Exploratory hearings were conducted in 1962 and more extensive hearings were held in 1966. Several legislative proposals grew out of these hearings; however, no bills dealing with this subject have as yet become law.

Meanwhile, letters from discharged servicemen unable to find jobs, from those who cannot get the job they desire, and from those who wanted a military career but were returned to a civilian world with little marketable experience continue to reach the subcommittee. Their common complaint is that the administrative discharge system has unfairly condemned them to an inferior condition—whether it be in terms of a job or simply the respect of their family and friends—in violation of their constitutional right to due process under the law.

Those who defend our rights must not be the only citizens who are denied their protections and, as a consequence, are returned to a civilian world that holds little promise for them. We must not ignore those servicemen who are daily eliminated in administrative settings which accord less than what the due process clause of the fifth amendment guarantees and less than what we owe those who are prepared to give their lives to safeguard our freedoms and our rights.


THE EXISTING FRAMEWORK

Chapter 59 of Title 10, United States Code, provides for separation of servicemen prior to the expiration of their term of service by reason of a sentence of court-martial or in accordance with the regulations of the Secretary concerned.6

Service regulations provide for five types of discharges which implement the general language of Chapter 59—dishonorable, bad conduct, undesirable, general, and honorable. The first two are given only as a result of a sentence of courts-martial.7 The latter three are awarded as an administrative act of separation, which may or may not have been directed by an administrative board. The services further distinguish these categories by designating the first two as "punitive," and the latter three as non-punitive, or simply administrative.

Not until 1959 was there a Defense Department directive dealing with administrative discharges.8 Even then it provided uniformity only with respect to the grounds upon which separation could be based. The services by and large were left with the discharge procedures which had evolved through decades of use. In 1965, largely in response to the subcommittee's hearings, a revision of the basic directive did provide substantial uniformity both in terms of substantive grounds and the procedural processing of administrative discharges.9 It established minimum standards to govern such action, but left each service room to tailor its system to its own views and, if the service felt it desirable, to provide for more stringent procedures. The directive, with certain minor changes, remains the authority upon which administrative discharges are currently based.

The directive provides that such discharges may be given for unsuitability, unfitness, misconduct, and in the interest of national security. These categories are broken down still further.10

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7. See generally, Manual for Courts-Martial, para. 126 (rev. ed. 1969). Officers do not receive dishonorable discharges but can be dismissed by a general court-martial. Similarly, officers do not receive bad conduct discharges, but are subject to discharge as undesirable.
10. Id.

G. Unsuitability. Discharge by reason of unsuitability, with an Honorable or General Discharge as warranted by the indi-
Those discharged for unsuitability may receive only an honorable individual's military record. Such discharge may be effected when it has been determined that an individual is unsuitable for further military service because of:

1. **Inaptitude**: Applicable to those persons who are best described as in apt due to lack of general adaptability, want of readiness of skill, unhandiness, or inability to learn.
2. **Character and Behavior Disorders**.
3. **Apathy, defective attitudes, and inability to expend effort constructively**: As a significant observable defect, apparently beyond the control of the individual, elsewhere not readily describable.
4. **Enuresis**.
5. **Alcoholism**.
6. **Homosexuality and other aberrant tendencies**.
7. **Financial Irresponsibility**.

**H. Security.** Discharge, with the character of discharge and under conditions and procedures stipulated by the Secretary of Defense as set forth in reference (c) which deals explicitly with this matter, when retention is not clearly consistent with the interest of national security.

**I. Unfitness.** Discharges by reason of unfitness, unless the particular circumstances, in a given case warrant a General or Honorable Discharge, when an individual's military record in his current enlistment or period of obligated service includes one or more of the following:

1. Frequent involvement of a discreditable nature with civil or military authorities.
2. Sexual perversion including but not limited to (1) lewd and lascivious acts, (2) homosexual acts, (3) sodomy, (4) indecent exposure, (5) indecent acts with or assault upon a child, or (6) other indecent acts or offenses.
3. Drug abuse as defined in DoD Directive 1300.11.
4. An established pattern for shirking.
5. An established pattern showing dishonorable failure to pay just debts.
6. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.
7. **Unsanitary habits**.

**J. Misconduct.** Discharge by reason of misconduct, with an Undesirable Discharge, unless the particular circumstances in a given case warrant a more favorable discharge, when one or more of the following conditions have been determined:

1. Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the Uniform Code of Military Justice is death or confinement in excess of one year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender or is placed on probation or punished in any way as the result of an offense involving moral turpitude. If the offense is not listed in the MCM Table of Maximum Punishments or is not closely related to an offense listed therein, the maximum punishments authorized by the U.S. Code or the District of Columbia Code, whichever is lesser, applies.
2. Procurement of a fraudulent enlistment, induction or period of active service through any deliberate material misrepresentation, omission or concealment which if known at the time might have resulted in rejection.
3. Prolonged unauthorized absence. When unauthorized continuous absence of one year or more has been "established."
or a general discharge, depending upon the character of their service record. Both discharges are considered "under honorable conditions." Those discharged on grounds of unfitness, misconduct, and security, however, may receive undesirable discharges, as well as honorable and general, again depending on the character of their service.

An undesirable discharge, which is administrative, carries with it the same loss of veterans' benefits as a bad conduct discharge, which is punitive. While there may be disagreement as to which carries the greater stigma,\(^1\) it is undisputed that being labelled an "undesirable" is a considerable obstacle to reckon with in one's future.\(^2\) Retired Commander Penrose L. Albright, former president of the Judge Advocates Association, has called the undesirable discharge "the scarlet letter of this generation"\(^3\) and, indeed, it is a brand which is likely to repulse employers and friends alike. Where the harm is so potentially devastating, it is imperative that undesirable discharges be bestowed only pursuant to a system which is characterized by our traditional notions of due process.

Honorable and general discharges, in contrast to the "undesirable," are both considered as discharges "under honorable conditions" and entitle their recipients to the same veterans' benefits. The directive provides that those separated for unsuitability (who

11. Statement of Maj. Gen. James S. Cheney, Judge Advocate General, Air Force, 1971 Hearings, supra note 1, at 5900: "I think you have to say legally the bad conduct discharge is more serious than the undesirable. The practical effects is [sic] something else." See also Id. at 5899, 5967; 1962 Hearings, supra note 4, at 188, 328; 1966 Hearings, supra note 5, at 293, 335.
12. Former Congressman Clyde Doyle, 1962 Hearings, supra note 4, at 328:
"[If a man is undesirable.] you don't want anything to do with him. You don't go into detail to find out what makes him undesirable. You think he may be a thief, he may be a homosexual, he may not be supporting his children, his family in the minds of some people, but he is undesirable, you don't want him around. And I think the ordinary patriotic, sound-thinking American citizen doesn't want to have anything to do with an undesirable man and that applies to an undesirable man from the military. Something has occurred there in the military for which he has gotten an undesirable discharge. It is a stigma. It is a liability and a heavy one."
See also 1971 Hearings, supra note 1, at 5835.
13. 1966 Hearings, supra note 5, at 411.
can at most receive only a "general" discharge) do not have a right
to a board hearing unless they have more than eight years of serv-
vice experience, while others facing separation for unfitness or mis-
conduct do have such a right regardless of service experience. The Defense Department contends that since a general discharge is under honorable conditions and does not deprive a serviceman of veterans' benefits, it need not be awarded under the same protec-
tions as the undesirable discharge which does result in loss of bene-
fits. This is not persuasive. There is an implied stigma which at-
taches to any discharge other than one labelled as fully "honorable." This is due in part to the fact that 97% of all discharges are indeed honorable. The public understandably reasons that there must be some defect in an individual who fails to obtain one. It is interesting to note that despite the provision in the DOD directive, the Army and to a lesser degree the Air Force both permit a board hearing in cases of unsuitability even though a general discharge is the worst that can be recommended. These services properly recognize that even a general discharge brings with it certain opprobrium.

Because servicemen facing administrative discharges receive dif-
ferent protections according to the particular branch of service which they happen to be part of, legislation is needed not only to bring discharge procedures up to a higher standard of procedural due process, but also to provide uniformity of protection to all servicemen regardless of the branch to which they belong. Uniformity is desirable not simply for uniformity's sake. To accord a Navy seaman certain rights and not accord them to an Army pri-
vate facing discharge on the same grounds raises a constitutional,
if not a moral, question of equal protection among servicemen. While Defense Department directives do provide some uniformity
and are obviously more desirable than no guidance at all, they are

15. The Department of the Air Force itself acknowledges that a "general
discharge has been found to be a definite disadvantage to an airman seeking
civilian employment." AFR 39-10, para. 8a (March 17, 1959). See also:
1966 Hearings, supra note 5, at 341; 1971 Hearings, supra note 1, at 5983,
5988; Bland v. Connally, 293 F.2d 852 (D.C. Cir. 1961).
16. 1971 Hearings, supra note 1, at 5870.
17. Everett, Military Administrative Discharges—The Pendulum Swings,
1966 Duke L.J. 44.
19. General discharge certificates, as all discharge certificates, are anno-
tated with "separation program numbers" which indicate the reason for
discharge. Employers who are aware of the codes would thus be informed
of the reason for discharge even though it is not evident from the term
"general."
subject to change at the whim of the Department, whose interests must be weighted towards operational efficiency rather than justice for the individual.

Two bills dealing with administrative discharges are currently pending before the Senate Armed Services Committee. One is H.R. 10422, introduced by Congressman Charles E. Bennett of Florida and passed by the House of Representatives on October 6, 1971. The other is S. 2247 which I proposed on July 12, 1971, during the last session of Congress. The Bennett bill deals with administrative discharges on a broader, more general level than does S. 2247, which constitutes a comprehensive and detailed legislative framework within which to deal with the problem. In order to evaluate critically what each bill attempts to do, it is first necessary to discuss the different philosophies regarding the role of the administrative discharge in a system of military justice and military personnel administration.

THE ROLE OF THE ADMINISTRATIVE DISCHARGE

Position of the Military

The military prefers to regard the administrative discharge as a purely administrative act. It is seen as a tool through which the services can rid themselves of undesirable members prior to the expiration of their terms of service. The military points to the reduced efficiency entailed by maintaining in the services those with “two left feet” who, try as they might, cannot meet minimum standards of performance, and those who are continually involved in misconduct which, whether serious or not, requires inordinate amounts of supervision and discipline. It also points to the erosion of discipline and morale among its hard-working members by retaining “troublemakers” after repeated misconduct, whether they be homosexuals or shirkers.

20. Statement of Maj. Gen. Leo E. Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, 1971 Hearings, supra note 1, at 5865: “In the case of undesirable discharges which have been given for security, unfitness, and misconduct, we believe that this is an administrative procedure. It does not carry with it the punitive aspects of a dishonorable or bad conduct discharge.” See also, 1966 Hearings, supra note 5, at 356.
21. 1966 Hearings, supra note 5, at 356.
22. Id. at 360.
Given the alleged harm to military efficiency and morale which the retention of undesirable members entails, the military insists that it needs a simple, expeditious means to separate them. The value of a separation to the military thus decreases in inverse proportion to the length of time required for the process since the individual remains to cause problems.

These justifications for administrative discharges are understandable and might well serve as sound principles for any course in personnel management. Yet the matter does not end here. The military claims that the administrative discharge should not be considered as punishment for misconduct. It is only a determination, claim the services, that a serviceman’s record does not merit his retention. But despite the claim that administrative discharges are not punishment, the administrative board, in effect, places a sanction on acts of misconduct. It freely considers evidence of misconduct, established in no other judicial or quasi-judicial setting, and may issue an undesirable discharge resulting in the loss of substantial veterans’ benefits and the lifelong burden of the “undesirable” stigma.

Regardless of the punitive consequences of the administrative proceeding, the military insists upon its right to consider misconduct in a setting which accords less than what is required by traditional notions of due process, and further insists on its right to characterize resulting discharges as “undesirable”.

If military insistence on either of these conditions—the consideration of conduct not established in a judicial setting or the characterization of discharges as undesirable—were dropped, the administrative discharge proceeding would become far less objectionable in terms of the way in which it is conducted and the harm it does to the individual. The services’ insistence on these two points thus requires some further critical comment.

**Characterization of Discharges**

Several witnesses at the 1966 hearings raised the possibility of altering or doing away with the present system of characterizing

23. Id.
24. 1971 Hearings, supra note 1, at 5835, 5836; 1966 Hearings, supra note 5, at 87.
   The unfit, the unsuitable, should be separated from the military service. . . . The only problem we have is how do we characterize his service. It is the position of the Department of Defense that we should be allowed to characterize a man’s service as either honorable, general, or undesirable by an administrative proceeding.
This idea has been seriously considered from time to time by the services as well, but it has never been formally adopted. Although the suggestions varied, their common purpose was the elimination of the "undesirable" characterization. Such an alternative would not purify the administrative discharge procedures to the satisfaction of a constitutional stickler, but the fact that the stigma which an undesirable discharge entails might be dissipated would make the procedures more palatable because its sting would be removed.

Military spokesmen have justified characterizing discharges in terms of providing an incentive for "honorable" service and a deterrent for "undesirable" service. One of the greatest recognitions that a man can obtain, claim the services, is an "honorable" discharge, and it is a notion which the American public generally seems to accept. But since roughly 97% of servicemen receive "honorable" discharges, the real mark of distinction is not being among those who fail to obtain one. Granting the military's position, the question is whether a system can be devised which provides an incentive for honorable service and yet leaves no stigma on those who are administratively separated.

Eliminating the "undesirable" category would have the virtue of eliminating the repugnant connotations of the word "undesirable" but it might well mean that once the public becomes generally aware of the change, the stigma would only shift to recipients of the general discharge. There is evidence even now of a stigma attaching to a general discharge since it is not precisely an "honorable" one.

Another possibility would be simply to have one category of "honorable" or another more neutral term to describe an adminis-

27. Statement of Maj. Gen. Leo E. Benade, Deputy Assistant Secretary of Defense for Military Personnel Policy, 1971 Hearings, supra note 1, at 5866:
   The trouble with it [eliminating a characterization of discharges] is that it lowers the prestige. It diminishes the value of the discharge to the man who has given honorable service. You need a way to characterize the service for what it truly is. To lump them all together into one discharge, an honorable discharge, or whatever terms would apply to it, you would have no way of distinguishing or recognizing the man who has really performed his service honorably.
   See also, 1966 Hearings, supra note 5, at 88.
28. See note 15, supra.
trative discharge. But while this would eliminate the stigma, it would not provide the incentive for service that the honorable discharge affords—again, assuming the validity of that claim.

A third possibility would be to use a less colorful term than "undesirable" since that term conjures up all sorts of perverse traits and defects. An "unsatisfactory performance" discharge would be an example. This alternative might possibly prevent some of the abhorrence evoked by the adjective "undesirable," but it would still leave the recipient with a damaging label carried over to civilian life.

Compounding the problem of characterization is the matter of veterans' benefits, which attach only at the completion of "honorable" service. The award of benefits militates against a system having only one category of administrative discharge. If it is agreed that benefits should not go to one who has not earned them, and there were only one category of discharge, some system would have to be devised to separate the recipients from the non-recipients. In a system having only honorable and general discharges, veterans' benefits might attach only to honorable and not to general. This would, however, represent a change in the present structure which accords benefits to recipients of general discharges and, thus, may cause substantial headaches in terms of retroactive effect for the Veterans Administration.

In conclusion, there seems to be no completely satisfactory way to recharacterize discharges which effectively avoids the stigma effect and yet preserves the status of the discharge as an incentive to honorable service, and the consequent award of veterans' benefits.

If, then, the military is to continue to discharge servicemen as "undesirable," at least we must insure that such an onus is bestowed only in accordance with traditional notions of due process. One way this might theoretically be accomplished is to permit misconduct to be considered only in a judicial setting which already incorporates such safeguards, i.e., by courts-martial. But to have such a situation, the grounds for discharge must be brought under the Uniform Code. On this point, the military demurs on the grounds that such action is neither possible nor appropriate.

"Judicializing" Administrative Discharges

A serviceman who continually refuses to complete his assigned tasks could theoretically find himself facing a court-martial for failing to obey an order, or an administrative discharge for shirk-
In a proceeding brought under the Uniform Code of Military Justice (either non-judicial punishment or a court-martial), the likelihood of a discharge for such an offense is remote, while if the conduct were considered administratively, the likelihood of discharge is almost guaranteed. What is more important, in the administrative proceeding the serviceman finds himself immersed in a procedure which falls short of fully guaranteeing traditional rights of due process, rights which are for the most part incorporated into courts-martial procedures. At present, a commander theoretically has absolute discretion to choose either avenue to treat the offending conduct. The arbitrary use of this discretion might well be adjudged a violation of the due process clause of the fifth amendment. In fact, the subcommittee continually receives cases in which commanders have successfully recommended administrative separation when conviction and discharge by a court-martial would have been uncertain because of difficulties in meeting the legal requirements of the Uniform Code. The use of administrative process to avoid the strictures of the Code has been a perennial problem ever since the Code was enacted.

The military contends that not all conduct which may be grounds for administrative discharge can be brought under the provisions of the Code (and consequently be subject to a court-martial or non-judicial punishment), and therefore the administrative route is a necessary alternative. They point specifically to homosexual acts and drug abuse as examples of conduct which are claimed not to be punishable under the Code. Furthermore, most of the grounds for administrative discharge, says the military, are concerned with "patterns" of conduct rather than single acts of misconduct, and there is nothing in the Code that effectively allows a commander to deal with repeated instances of misconduct. The military is on shaky ground with both of

29. See note 10, supra.
30. 1971 Hearings, supra note 1, at 5864.
31. In 1960 the judges of the Court of Military Appeals warned against this method of subverting the Code in their annual report. S. 2247 would resolve the problem by prohibiting an administrative discharge based on grounds which amount to a violation of the Uniform Code. See § 943(b).
32. 1966 Hearings, supra note 5, at 361-80.
33. Id. at 367-71.
34. Id. at 365.
these contentions. Whatever difficulty there may be in “pigeon-holing” grounds for discharge as undesirable into the punitive articles of the Uniform Code is largely semantic. They might be included simply by amending the articles or perhaps by expanding the grounds of Article 134 in the Manual for Courts-Martial, which makes punishable “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces.” The issue is not simply whether it can be done, but whether it should be done.

The military contends that even if all conduct which constitutes grounds for administrative discharge could be brought under the Code, it would be either inappropriate or ineffective, or both, to do so. Their reasoning takes three primary tacks:35

First of all, the military claims that even if misconduct is repeatedly punished under the Code, a discharge—either a bad conduct or dishonorable—is highly unlikely to ensue in the vast majority of cases, and thus the serviceman will return to his duties with no more than a fine or reduction in rank.36 Without a liberalization of the award of a bad conduct discharge at courts-martial, the services contend they would have virtually37 no means of ridding themselves of undesirable personnel by sentence of courts-martial.

Second, to discharge only through courts-martial would also mean that in order for the services to consider discharge for conduct which has been the subject of civil court conviction, the serviceman would have to be tried twice for the same offense, which runs afoul of the constitutional prohibition against double jeopardy.38 The holding in O'Callahan v. Parker,39 which prohibits military trial of acts which were not “service-connected,” also mili-

35. The military contends with less justification that all misconduct should not be brought under the Code because some misconduct—homosexual acts, for example—typically cannot be proved by evidence admissible in a court-martial. They further add that some acts of misconduct which form a basis for discharge do not involve moral turpitude, but represent only an inordinate expenditure of administrative time, and therefore, a court-martial from which a federal conviction may issue, is an inappropriate and possibly too severe alternative. See generally, 1966 Hearings, supra note 5, at 360-80.
36. 1966 Hearings, supra note 5, at 84, 382.
37. Article 127(c) (B) of the Manual for Courts-Martial provides that a court-martial may authorize as an additional punishment a bad conduct discharge to servicemen who have two prior court-martial convictions on their record. The use of this provision is discouraged, however, unless the prior convictions have been for serious misconduct. Id. § 76a.
38. 1966 Hearings, supra note 5, at 84.
tates against trial by courts-martial for misconduct committed outside of military control. Yet the military feels it must have the means to discharge servicemen convicted by civil courts who must serve long prison sentences or who have brought substantial dis-credit upon their service.

Finally, discharge by court-martial, where a bad conduct dis-charge is issued, also requires review by a Court of Military Re-view under the present regulations and possibly also by the Court of Military Appeals. Furthermore, the trial process itself requires a substantial amount of time. To provide that discharges may issue only from a court-martial will mean a long period of time between initiation of the action and actual discharge. In the military view, it will negate the value of the discharge.40

To the extent that these arguments support the military's con-tentions that it must be permitted to administratively discharge “undesirables” and that such discharges cannot or should not always be based on misconduct cognizable under the Uniform Code, they are equally persuasive in showing that there is little differ-ence in the breadth of inquiry of a court-martial and an adminis-trative board, and that both occasion similar damaging conse-quences. Given this, the services cannot avoid the constitu-tional mandate requiring due process simply by calling the process “administrative,” when its real function is to try issues of fact and impose punishment for wrong-doing.

S. 2247, which I introduced in the last session of Congress, at-tempts to insure that the guarantees of due process are incorpo-rated in the military's administrative proceedings, first, by defining what may be considered by the administrative board and, secondly, by insuring that what is considered by the board is heard in ac-cordance with traditional notions of due process. The remainder of this article will deal with how S. 2247 and the Bennett bill, H.R. 10422, both now pending in the Senate Armed Services Commit-tee, attempt to deal with these problems.

THE ADMINISTRATIVE DISCHARGE BILLS

Limitations on Conduct Considered by Administrative Boards

S. 2247 restricts undesirable discharges to cases in which the

40. 1971 Hearings, supra note 5, at 5915.
serviceman has perpetrated a serious act of misconduct which was tried by other than a military tribunal, and to cases where the serviceman has demonstrated a "pattern" of misconduct or failure of performance, whether or not the repeated conduct was adjudicated by a civil or military tribunal.

By providing for administrative discharges for cases involving serious misconduct tried by civilian authorities, whether the conduct is cognizable under the Uniform Code or not, the bill recognizes the military's contention that it must have a means of discharging those committing serious acts of misconduct where those acts are tried by civilian authorities. This avoids the double jeopardy issue which is raised if discharges were only to issue as a result of courts-martial. The provision has the added advantage of insuring that the misconduct was adjudicated in a procedural setting which accorded due process. It would be the province of the military administrative board to decide only if the undesirable discharge is warranted.

The bill also limits the administrative board's consideration to "patterns" of conduct as opposed to single acts of misconduct. It provides that no administrative discharge will issue for an act of misconduct which constitutes an offense under the Uniform Code (except those tried by civilian authorities). On the other hand, it provides that administrative discharges may issue for unfitness on grounds of (1) frequent involvement of a discreditable nature with civil or armed force authorities, (2) sexual perversion, (3) an established pattern for shirking official duties and responsibilities, and (4) an established pattern showing dishonorable failure to pay debts or to contribute adequate support to dependents, or failure to comply with orders, decrees, or judgments of a civil court concerning support of dependents.

These provisions should be read as complementary rather than contradictory. They seek to do three things. First, they seek to insure that commanders will not be able to avoid bringing charges under the Code to punish misconduct. This means that servicemen will be entitled to all of the due process guarantees which a courts-martial offers, and will not be subject to a punishment (discharge) harsher than what a court-martial might give. Secondly, they recognize the military's view that there must be some means of getting rid of those servicemen who demonstrate their unfitness for military service by repeated misconduct or failure to per-

41. S. 2247, 92d Cong., 2d Sess. § 964(c) (1971).
42. Id. § 944(b).
43. Id. § 964(c).
form. Thirdly, they implicitly recognize that all misconduct cannot or should not be brought under the Code, since they allow acts of misconduct which establish a "pattern" of behavior to be considered by the administrative board.

Since the bill was first introduced as Title I of the proposed omnibus Military Justice Act of 1967, it has been reviewed by a number of experts in military law. Those reviews have raised a number of questions which remain to be resolved in any future hearings on the bill. For instance, the question of who decides whether certain conduct contributes to a pattern or stands alone to be processed under the Code is unanswered by the bill. The commanding officer must obviously make this determination initially. But should the serviceman be able to raise such an objection to an administrative board? If so, who should rule on the matter? 44

Further problems are posed initially to the commander, and could subsequently be posed to a board, by the relative vagueness of the grounds specified in the bill upon which the discharge must be brought. The phrase "frequent involvement of a discreditable nature," for instance, must at the very least mean convictions in military and civilian courts, e.g., for offenses less serious than those which provide for one year imprisonment or a punitive discharge. But should it also include non-judicial punishment? Letters of reprimand? Oral reprimands? Traffic tickets?

The phrase "sexual perversion" also offers semantic difficulty to the conscientious commander or the administrative board. Does it mean one act of sexual perversion or a pattern of conduct which establishes a condition of sexual perversion? And what is sexual perversion in the first place?

Although these terms are taken from existing service regulations and presumably incorporate the practice which has developed over the years, the questions illustrate areas for further legislative perfecting. However, the basic objectives sought by these provisions of the bill, which represent a balance between operational efficiency and the protection of the serviceman's interests, are nonetheless valid.

44. Section 946 of the bill provides for the detail of a legal advisor to the administrative board who would make such a determination. The role of the advisor will be discussed in detail later in this article.
It is to be noted that the Bennett bill, H.R. 10422, makes no attempt to define what kinds of conduct represent an appropriate basis for convening an administrative board. On the contrary, it provides that in four specific situations misconduct automatically requires undesirable discharge—the respondent is entitled to no hearing whatsoever. In my opinion, these provisions are unwise, and may well be unconstitutional since the basic right to a hearing is summarily denied. S. 2247, in each of these cases, would require a board to determine whether the circumstances, however grievous, justified an undesirable discharge.

**Due Process in the Administrative Proceeding**

In addition to limiting the type of misconduct which can be used as a basis for convening the administrative board, S. 2247 also prescribes procedures which seek to incorporate many of the traditional features of due process into the administrative proceeding. To a considerable extent it merely incorporates into statutory language procedural requirements already provided by regulations of the services. Defense Department regulations, for instance, already provide that a respondent appearing before an administrative board has the right to be represented by the counsel of his choice, to submit any sort of statement in his behalf, to question any witnesses who are present, and to remain silent if he chooses. Evidence is admissible if reasonably relevant, competent, and material. Beyond this, however, other rights of procedural due process rest precariously upon the judicial knowledge and integrity of the board, which in the vast majority of cases is composed of officers with little or no training in law.

**Rights Prior to Hearing:**

All branches of service now provide that notice of a forthcoming board hearing be given the respondent. The Bennett bill provides only that the notice be "reasonable" and that it state the grounds upon which the proposed discharge is based. S. 2247 provides that notice of a hearing will be given at least 15 days in advance and that the notice must include the nature of the hearing, a statement of the allegations and evidence against the respon-

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45. H.R. 10422, 92d Cong., 2d Sess. § 1161(a) (3-6) (1971).
48. H.R. 10422, supra note 45, § 1161(b) (1971).
dent, the applicable law, a statement of his rights before the board, and the possible actions which may be taken by the board.\textsuperscript{49} S. 2247 also has a special provision for notification of the parents of respondent if he is under 21, or for any other reason is unable to appreciate the nature of the proceedings against him.\textsuperscript{50} This provision would be an important safeguard against an imprudent waiver of the board proceeding in favor of an immediate discharge. It is not uncommon for young, immature servicemen who are dissatisfied with their present assignment to seek administrative discharge to escape their immediate situation without regard for the consequences in ensuing years. In many cases, the immature serviceman is incapable of appreciating his predicament and is easily persuaded to waive his rights and accept a discharge which will be detrimental to him for the rest of his life. Even the advice of a JAG officer is often perfunctory and has little impact on the young serviceman's decision. This safeguard against improvident waiver of rights is worth the small clerical act it would require.

Under the Defense Department regulations, the respondent, having been notified of the board hearing and having consulted with counsel, may waive his rights to a hearing and accept a discharge in lieu of the board proceeding.\textsuperscript{51} This provision is carried over in both of the proposed bills.\textsuperscript{52} S. 2247, however, provides in addition that no waiver can be made within 24 hours of the notice of the hearing, and that the waiver may be rejected by the convening authority if he considers it improvident. It furthermore provides that where the hearing is waived, the ensuing discharge cannot be an undesirable one, unless the board action would have supported it. These are additional safeguards against improvident waivers of rights.

Under present procedures, oral and written depositions may be obtained with the permission of the convening authority for use by the board.\textsuperscript{53} There are no formal procedures, however, which apply specifically to depositions for administrative boards. Presumably, the requirements may be less stringent than those used at

\textsuperscript{49} S. 2247, supra note 41, § 952.
\textsuperscript{50} Id. § 953.
\textsuperscript{52} H.R. 10422, supra note 45, § 1161(a)(2); S. 2247, supra note 41, § 955(c).
courts-martial, since the evidentiary requirements themselves are less stringent.

Depositions are not a commonly used device at administrative proceedings primarily because the boards allow *ex parte* statements to be admitted into evidence. Why go through getting both sides together to question a witness who will be unavailable at the hearing, when one side may simply introduce his uncontested statement if it so desires? S. 2247 prohibits the use of *ex parte* statements altogether, thus making the deposition a much more important device in the administrative setting.

S. 2247 provides for the taking and use of oral and written depositions by the administrative board, forbidden only for good cause, as prescribed by the Secretary of Defense. The Bennett bill provides only that the secretaries of each branch of service will prescribe regulations to govern the taking and use of depositions.

The liberal use of depositions to preserve or discover evidence comports with the practice in federal courts and administrative agencies. There is perhaps an even greater need for such a device to preserve evidence in a military setting since servicemen are continually subject to transfer and termination. Use of depositions should reduce the number of personnel on administrative hold.

At present, administrative boards do not have the power to subpoena witnesses and real evidence. They may invite a witness to attend if he is reasonably available and his testimony materially adds to the case. Civilian witnesses cannot be compelled to attend at all and military witnesses appear only if their commander permits. Both proposed bills provide the administrative board with subpoena power. They provide that both sides will have equal access to subpoenas, and that the provision will be implemented by regulation of the services.

The objection of the military to such a provision in the past has been that the respondent could block prompt administrative action by requesting numerous unnecessary witnesses or documents to de-

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56. See *Fed. R. Civ. P.* 30(a), and *Fed. R. Crim. P.* 15(a). See also, 16 C.F.R. 3.33(a) and 18 C.F.R. 124(a), (c), as examples of liberal deposition procedures in federal agencies.
58. H.R. 10422, *supra* note 45, § 1161(b) (2); S. 2247, *supra* note 41, § 960 (a).
lay the proceeding. The fact that the implementation of the subpoena rules would be left to the services, which thereby implicitly allows them to require a showing of necessity in order to obtain a subpoena, has caused the military to drop an objection which was not well founded in the first place.

The subpoena and deposition provisions together assure the respondent of a means of obtaining and preserving evidence in his favor as well as discovering that lodged against him.

Rights at the Administrative Hearing:

Both bills provide that the respondent has the right to present evidence in his own behalf, to examine witnesses and all documentary evidence presented to the board, and to remain silent if he so chooses. He also has the right to be represented by legal counsel of his choice. These rights are largely accorded by present regulations, and thus their incorporation in statute should occasion no opposition from the services.

The bills also provide that rules of evidence in administrative discharge procedures will be drawn and reported to the Congress. S. 2247 provides that the Secretary of Defense will prescribe such regulations but specifies that the evidence admitted must be relevant, material, and probative. The only change this represents in the present rule is the addition of the word "probative." The bill goes further by prohibiting four specific uses of certain evidence regardless of their relevancy, materiality, or probative value.

The first limitation is a restriction of evidence considered by a board to those actions which took place three years prior to the date the board was convened, or from the date of the current enlistment or tour of duty, whichever is longer. The limitation is

60. H.R. 10422, supra note 45, § 1161(c); S. 2247, supra note 41, § 952.
61. DoD Directive 1332.14, Sec. IX(C) (1965). Army Regulation 635-212, Sec. 17(c); Bureau of Naval Personnel Manual, Part C, § C-10311(5); Air Force Manual 39-12, § 3-6(c).
62. S. 2247, supra note 41, § 959(d).
64. S. 2247, supra note 41, § 959(a).
thought necessary to protect the serviceman from having to defend himself against actions which occurred far in the past. It is based on the requirement presently contained in service regulations that the character of an administrative discharge may be determined only on the serviceman’s record during the current enlistment. Since an administrative discharge is presumably based on repeated conduct which establishes a pattern or condition, such a pattern or condition should be established over a defined period of time. Otherwise, it should not be the basis for discharge.

The second limitation complements the first. It provides that misconduct occurring in a previous enlistment or tour of duty may be considered if the second enlistment or tour of duty was fraudulently obtained.65

The third limitation bars the admission of evidence relating to acts for which the respondent has been acquitted or cannot be tried again by reason of former jeopardy.66 The purpose of the provision is simply to prevent the services from attempting to separate servicemen administratively on the same grounds as an unsuccessful court-martial. In the past, the subcommittee has seen numerous instances in which a commander has ordered successive administrative board hearings in a determined effort to separate a serviceman. This provision is designed to guard against such patent abuses of the discharge process.

The last prohibition has three features: (1) no information adverse to the respondent may be presented to a board over objection unless the respondent has had an opportunity to confront and cross-examine the source of the information; (2) no investigative report may be presented unless the respondent has an opportunity to cross-examine the person making the report and has an opportunity to rebut; and (3) no classified information can be presented unless first released to the respondent.67 These provisions insure that the respondent will have ample opportunity to confront and rebut all adverse evidence presented to a board. It applies the simple justice of the sixth amendment.

These proposals effectively eliminate all adverse hearsay and ex parte statements from consideration by the board. They have been criticized as “too severe” because the military may be unable to locate the person who made the statement or, if out of the service, he could not be compelled to appear.68 Furthermore, it is ar-

65. Id.
66. Id. § 959(b).
67. Id. § 959(d).
68. Lane, Evidence and the Administrative Discharge Board, 55 Mil. L. Rev. 105 (1972).
gued, the provision would only encourage delay on the part of the respondent in hopes that certain evidence would not be available.\textsuperscript{69} The arguments may have some surface merit, but they do not account for certain factors peculiar to the administrative setting. Allowing hearsay and \textit{ex parte} statements does not give a respondent fair opportunity to rebut the evidence against him. It raises due process issues because of the consequent denial of the right of confrontation and cross-examination. What is worse, the present rules encourage the presentation of such evidence by the military. One alternative which has been suggested is to allow only hearsay which would be admissible in a court-martial.\textsuperscript{70} But this would require a highly technical knowledge of the law of evidence and would necessitate a legally qualified representative to the board to make such determinations. It may also lead to the necessity for legally qualified advocates on both sides to argue the evidentiary points. Perhaps a rule which allows for the admission of hearsay and \textit{ex parte} statements but which provides that the decision of the administrative board cannot be based solely upon them is a preferable alternative.\textsuperscript{71} But this too would be a meaningless protection if the board's decision were not subjected to review by a legally-qualified officer or review board, which now does not exist.

The use of hearsay and \textit{ex parte} statements of any type is less important in an administrative discharge proceeding than in a court-martial and it poses even more of a potential injustice. Misconduct which establishes a pattern or condition will often have been adjudicated in a prior proceeding,\textsuperscript{72} such as a court-martial, civil trial, or non-judicial punishment. In these cases, extraneous evidence relating to other acts will often simply not be required. In cases where the discharge is not predicated upon prior proceedings, there is typically no way to rebut hearsay allegations other than with simple denials. There is no means of offering contradictory proof. For example, allegations of homosexual

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} This standard is incorporated into the administrative procedures statute of California. \textit{Cal. Gov. Code Ann.} § 11513\textsuperscript{(c)} (West 1966).
\textsuperscript{72} 1966 Hearings, supra note 5, at 86. Maj. Gen. Kenneth J. Hodson, then Assistant Judge Advocate General, Department of the Army, called this the "typical" case.
acts performed in private cannot be disproved, since there are typically no witnesses other than the participants and no tangible evidence of the act. Similarly, allegations of a failure to pay just debts are difficult to disprove since only the parties typically have knowledge of the transaction. Allowing hearsay and *ex parte* allegations which the respondent cannot rebut with proof or cast doubt upon by questioning his accuser, leaves him at the mercy of anonymous accusers, rumors and vague accusations. Given the difficulties presented by allowing hearsay and *ex parte* statements under some limitations, it is preferable to simply rule out such evidence altogether and force the military to present its case in testimony or by deposition.

In addition to the evidentiary restrictions specified in S. 2247, there are other compelling limitations which, if not included in the statute, should be included in service regulations. For example, no evidence obtained by an illegal search or seizure should be admissible before an administrative board. The Supreme Court has already applied this principle to the administrative arena\(^73\) and it should be applied as well to administrative discharge boards. Discharge regulations now allow such evidence to be admitted and this often induces the commander to elect to separate administratively because he knows that a conviction by court-martial cannot be obtained with illegal evidence. The commander who seizes drugs or contraband illegally should not be able to avoid the strictures of the fourth amendment simply by a resort to the administrative board. Not only does this violate fair play and simple justice but it subverts the integrity of the court-martial as well.

A similar problem is presented by the practice of admitting into evidence self-incriminating statements obtained in violation of Article 31 and the fifth amendment. This practice has been justified on the basis that Article 31 and the fifth amendment guarantee apply specifically to "criminal" trials alone.\(^74\) This may be technically true, but this argument avoids the reality of a board proceeding which indeed pronounces a judgment on acts of misconduct. To adopt a restriction on self-incriminating statements in board proceedings would bring them in line with an important constitutional precept.

A third restriction which deserves consideration is the prohibition of evidence which relates to conduct which is not "service-con-

\(^73\) Camara v. Municipal Court, 387 U.S. 523 (1967).

nected." The case of O'Callahan v. Parker\(^7\) established the principle that the military cannot try a man for misconduct which is not "service-connected." Can he nonetheless be discharged for such conduct? There is no disagreement that the services can and should use civil convictions as a basis for discharge, but the introduction of evidence relating to conduct not connected with the service presents a more compelling question. S. 2247 does not provide such a limitation and, in fact, provides that boards may consider conduct which took place within three years prior to the convening of the board. This may well mean that conduct could be considered which took place prior to the serviceman's entry into active duty.

Whatever evidentiary restrictions are incorporated into statute or regulation, there must be some authority or some body to determine if proposed evidence violates these standards. Both bills answer this need by providing for the appointment of a legal advisor to the administrative board to rule on such questions. The Bennett bill makes such appointment mandatory except where physical exigencies do not permit.\(^7\) S. 2247 provides that the appointment is mandatory when requested by the respondent or the board, unless compelling reasons for refusing the request are present. Otherwise, the appointment is discretionary with the convening authority.\(^7\)

The military was initially opposed to the concept of a legal advisor because it would further drain the supply of legal officers. They contended that the right to legal representation offered the respondent adequate protection at the hearing.\(^7\) At the House hearing on the Bennett bill, however, the Defense Department dropped its opposition and affirmatively proposed such a provision.\(^7\) The House committee added the provision for a legal advisor to the original bill after the hearings were completed.\(^8\)

There may indeed be cases where there are no evidentiary questions, no motions, no challenges, and no other legal issues for a legal

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\(^7\) 395 U.S. 258 (1965).
\(^8\) H.R. 10422, supra note 45, § 1161 (d).
advisor to rule upon. This situation may well be obvious prior to the hearing. The convening authority, under the provisions of S. 2247, may thus refuse a request for the appointment of a legal advisor. In this sense, S. 2247 actually comes closer than the Bennett bill in limiting the requirement for legally qualified personnel for detail to board proceedings to those instances in which one is necessary.

**Post Hearing Rights:**

Under present regulations, the findings and recommendations of an administrative board are typically sent through the chain of command to the discharge authority, who may or may not follow the board's recommendation and who may or may not receive a legal opinion on the validity of the board proceeding.81

The pending bills both provide for some type of review of the board's determination before final action is taken by the discharge authority. The Bennett bill provides that the Judge Advocate General of each service will establish review boards to which the serviceman may appeal the board's decision.82 S. 2247 provides that the Secretary of Defense will provide by regulation that all administrative board decisions recommending a less than honorable discharge be subject to a mandatory review for legal sufficiency. It further provides that the Court of Military Appeals will establish grounds for discretionary appeal of administrative decisions.83 Both bills provide that a decision on review may not be less favorable than that adjudged by the administrative board.

Until the 1971 hearings, the military had consistently opposed any review of administrative board decisions on the grounds that there already exist instrumentalities to review discharges, namely, the Discharge Review Boards and Boards for Correction of Military Records found in each branch of service.84 The difficulty with this argument was that review took place after the serviceman had been discharged, and often took as long as two years after application for review was filed. What is more, these boards did not have the power of reinstatement and could not give complete relief even in clear cases of improper discharges.

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82. H.R. 10422, supra note 45, § 1161(e).

83. S. 2247, supra note 41, § 966.

84. 1966 Hearings, supra note 5, at 89.
The military claimed that review would only delay the discharge still longer and further reduce its value as a personnel tool.\textsuperscript{85} They further argued that appeals of administrative decisions should be kept out of the judicial sector of the military which has little knowledge of the administrative area and which has too burdensome a workload without this added responsibility.\textsuperscript{86}

The military has now dropped its opposition to review of administrative board decisions by legally-qualified personnel.\textsuperscript{87} It has in fact supported a proposal to establish three-man boards which would review board decisions as a matter of law. The review board under the Defense Department’s proposal would be restricted to consideration of the verbatim record of the hearing and written legal arguments, but may, in its discretion, require a hearing. The military’s new approach to this issue is to be applauded. While some delay in obtaining the discharge is inevitable, the delay need not be any longer than what is now often required for review by the staff judge advocate of the convening authority or higher levels of command where it is in fact performed. Pre-discharge review provides additional safeguards for the respondent and assures that the procedures established by regulation and statute will be conscientiously observed.

The military still continues to balk at the judicial review of administrative boards’ actions, even on a discretionary basis, provided for in S. 2247. They react negatively to the additional time required for such review\textsuperscript{88} and the injection of the administrative proceeding into the criminal justice structure which they claim neither has the time nor the expertise to deal with such problems.\textsuperscript{89}

The latter objection is not convincing in light of the testimony of Chief Judge Quinn of the Court of Military Appeals who candidly stated at the 1966 hearings that the workload of the court was not heavy, and that the court possessed sufficient expertise—especially in regard to issues of due process—to consider appeals from a review board’s decisions.\textsuperscript{90}

\textsuperscript{85} 1971 Hearings, supra note 1, at 5925-26.
\textsuperscript{86} 1966 Hearings, supra note 5, at 89.
\textsuperscript{87} 1971 Hearings, supra note 1, at 5837.
\textsuperscript{88} Id. at 5915.
\textsuperscript{89} Id. at 5910.
\textsuperscript{90} 1966 Hearings, supra note 5, at 283-87.
Court of Military Appeals review will involve further delay of the discharge. But the time could be shortened by providing that petition for discretionary review be made first to an intermediate Court of Military Review or the boards established under S. 2247 or the Bennett bill rather than directly to the Court of Military Appeals.

The discretionary nature of the review authorized by S. 2247 is designed to minimize the number of cases which run the entire appellate process. Only those cases will be chosen which present novel or compelling issues of law. It is common knowledge that the court has always handled its caseload expeditiously and seldom has a backlog.

The Court of Military Appeals review enables a superior military court of distinguished quality and unquestioned integrity to ensure that the rules of all the services comport with the statutory requirements and that the board hearings are conducted according to applicable law. Only by means of such an ultimate judicial review can we assure the necessary conformity contemplated by the Department of Defense directives and the statutory reforms. Review by the Court of Military Appeals would go far to assure servicemen and the general public alike that the administrative discharge process is indeed operated fairly and justly. It would obviate the need for special injunctive intervention by federal courts into the administrative process and do much to restore the often tarnished reputation of the administrative discharge process. While S. 2247 does not specifically require review by "legally-qualified" personnel at the intermediate stage, it does provide that the board's decision will be reviewed for legal sufficiency. Review by legally-qualified personnel is therefore implied but not obligatory. At some stage, and certainly at the final stage, undesirable discharges must be subject to review by a fully competent judicial body. Absent this, there is the danger that all the protections ostensibly granted by statute and regulation may be lost in practice.

CONCLUSION

Former Assistant Secretary of Defense for Manpower Thomas D. Morris made the following statement in his testimony before the Subcommittee on Constitutional Rights in 1966:

The Department of Defense, no less than this committee, holds that military service in the Armed Forces of the Nation should not abridge or deprive any American citizen of the substance of constitutional rights to which he would otherwise be entitled as a private citizen, insofar as this is compatible with his status as a member of the Armed Forces. We further recognize that our
system of military justice must be responsive to the special condi-
tions of current military service as well as to constitutional es-
sentials. Our administrative discharge and separation procedures
likewise should be guided by the sense of justice and fairplay
that every American has a right to expect from his Government.91

It is this very sense of "justice and fair play," tempered by the
recognized necessity for a strong and efficient military, which S.
2247 attempts to bring to an area which has been riddled with
abuse and inconsistency. The military has demonstrated, if at times
reluctantly, that it is amenable to change in the interests of pro-
tecting the constitutional rights of its members. It is time now
for the Congress to at last take the initiative to insure that the
guarantees of the Constitution are not slighted by the military
administrative discharge procedure.

91. Id. at 12.