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THE NEW "PROBLEM SOLDIER"—DISSENTER IN THE RANKS

HOWARD J. DE NIKE†

In days gone past, the professional military planner often spoke of the "problem soldier." This was the GI who was difficult to teach, who became a discipline problem, and who, in the commander's opinion, demanded an inordinate amount of attention.

With increasing frequency the "problem soldier" is viewed by command personnel within today's military as "the dissenting soldier."[1] The Vietnam era in particular witnessed a widespread interest among active duty military personnel, from all services, in the exercise of first amendment rights.

The controversy surrounding the Vietnam war also brought intense civilian interest in both the military and constitutional rights of, primarily, enlisted personnel. There have been significant court decisions which have bolstered these rights and which, consequently, are now embedded in the foundation upon which the structure of the post-Vietnam United States military will be erected.[2]

There are substantial signs that the exercise of rights of expression and association among servicemen and women has not flagged since the termination of the United States combat role in Vietnam. For the military's part, nevertheless, there has been serious discussion of a return to the so-called "brown-boot" Army, with a pre-Vietnam era emphasis on rigid discipline, austere living conditions, strict dress code, and KP. The theory espoused by the advocates of such a return is that the troops in Vietnam proved to be an unreliable fighting force, deficient in training, prone to drug use, and, at times, at the point of rebellion. Certainly the history of the enlisted man's combat role in Vietnam is replete with "fraggings,"[3] drug abuse, and combat refusals, as no other war in United States war annals has been.[4] However, it is dubious whether the practi-

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1. Military parlance seems to prefer the term "dissident." However, "dissenter" will be used in this article, since it carries a less pejorative connotation.

2. *See, e.g.,* Flower v. United States, 407 U.S. 197 (1972); Carlson v. Schlesinger, 364 F. Supp. 626 (D.D.C. 1973), *appeal docketed,* No. 73-2170, D.C. Cir., Nov. 19, 1973; Cortright v. Resor, 325 F. Supp. 797 (E.D.N.Y. 1971), *rev'd on other grounds,* 447 F.2d 245 2d Cir. 1971).

3. "Fragging," which derives from the term "fragmentation grenade," refers to an attempt against the life of an officer or senior NCO by an enlisted man.

4. *See generally* Linder, *The Demoralization of an Army: Fragging and Other*

cal remedy for the problems of the post-Vietnam military is the restoration of the "brown-boot" Army of a bygone era.

Nonetheless, there is, in the thinking of many who advocate a return to the disciplinary modes of the World War II military, a firm correlation between what they saw as "the collapse of the armed forces" and the rise of first amendment activities among military personnel.[5] To them, the GI who reads an "underground" newspaper, signs a petition seeking a withdrawal of American forces from Vietnam, or seeks counseling about conscientious objection, is the same individual who would "frag" an unpopular commander, sabotage a vessel, refuse to go on patrol, or, what is perhaps worse, spread his ideas among other troops.

Today in West Germany, where the United States maintains its greatest overseas concentration of forces (more than two hundred thousand ground personnel), so-called "underground" GI newspapers continue to publish. Though the names and places of publication are different from the original GI newspapers that appeared in West Germany several years ago,[6] there does appear to be a continuity in theme and general tone. The periodicals attempt to publish monthly, featuring, about equally, material written by local GI's and articles on broader topics[7] taken from other sources. The most noticeable difference between the current list of GI newspapers in West Germany (and elsewhere) and those of the past is the absence of the Vietnam war controversy. Now the emphasis is on the Middle East, military drug policies, living and working conditions for GI's, and amnesty for Vietnam war refusers.

The connection perceived between "underground" publications and other first amendment activities, and the problems attendant upon the role of the combat soldier in Vietnam, created and reinforced for many commanders the conception of the dissenting soldier as the new "problem soldier." The result has been an at times remarkably overt effort to suppress the exercise of free speech among the personnel in many commands.[8]

Withdrawal Symptoms, SATURDAY REVIEW, Jan. 8, 1972, at 12; S. LOORY, DEFEATED: INSIDE AMERICA'S MILITARY MACHINE (1973).

5. *Cf.* Heinl, *The Collapse of the Armed Forces*, ARMED FORCES J., June 7, 1971, at 30; R. BOYLE, THE FLOWER OF THE DRAGON: THE BREAKDOWN OF THE U.S. ARMY IN VIETNAM (1972).

6. The names of some of the original newspapers were *Propergander, Graffiti,* and *Voice of the Lumpen.*

7. Prominent are articles on "legal rights," such as search and seizure and the law of nonjudicial punishment, and a popular item: "The Pig of the Month." This feature is usually composed of a picture of an unpopular officer and a description of the conduct which has made him disliked. It is probably the most popular item in GI newspapers.

8. Such actions often contravene the express language of Department of Defense Directive 1325.6, which declares that mere possession of unauthorized publications is not punishable, and that the publication of off-post newspapers, on one's own time, with one's own materials, is not prohibited.

Complicating the handling for the military of the new "problem soldier" are the issues of race relations and drug use. The grievances of black people have long been intermeshed with dissent in the armed forces both during the Vietnam era and subsequently.[9] And the impact of drugs on life styles among the youth of society has had a major concomitant effect in the military. Thus, no discussion of dissent in today's military can take place without reference to the issues of race, drugs, and the civilian matrix of the American military.

THE SOURCES OF DISCONTENT

There is a certain irony that, contemporaneously with the formal identification of "systemic discrimination" within the armed forces by the military itself,[10] there should be a dramatic increase in the enlistment and re-enlistment of blacks in the Army.[11] Moreover, it is an increase in the face of the extensive notoriety accorded violent racial ruptures which have occurred within the military in recent times, particularly upon United States naval vessels.[12]

These outbreaks do not often bear a direct or easily identifiable relationship to dissent, either organized or diffuse, among black enlisted personnel. Rather, they appear to spring from spontaneous incidents in which black enlisted men readily unite in reaction to a particular situation. There have, indeed, been organized groups of black enlisted personnel who have come together to further their collective goals,[13] but such groups have not been described as involved in the recent violent outbursts.

In virtually every instance in which a spontaneous incident has erupted into violence, an examination of the surrounding circumstances brought to light root feelings of resentment among the black persons involved concerning unequal treatment by the command. Illustrative is a case arising on the USS *Little Rock,* the Sixth Fleet flagship in the Mediterranean. On the evening of November 8, 1973, there were several racial disturbances among the crew. Subsequently charged with riot and assault were ten black sailors and one white. In a pretrial statement issued

9. *See* W. TERRY, BLOODS: THE BLACK SOLDIER FROM VIETNAM TO AMERICA (1973).

10. *See* 1 REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 19 (1972) [hereinafter cited as TASK FORCE REPORT].

11. *Cf.* 75 U.S. NEWS & WORLD REPORT, Oct. 15, 1973, at 66, citing statistics from the Army reflecting that in the first eight months after the end of the draft, twenty-five percent of enlistees were black.

12. *See, e.g., The Navy's New Racial Crisis,* NEWSWEEK, Nov. 20, 1972, at 32.

13. Examples are Black Brothers United, a group formed in Vietnam with one of its purposes to foster drug rehabilitation among blacks, and Unsatisfied Black Soldiers, formed in Germany in 1970 seeking to improve conditions of blacks in the Army.

to the press, the ten black accuseds, who were represented by Robert S. Rivkin and William Schaap of Lawyers Military Defense Committee, claimed:

> For months prior to November 8, 1973, the younger black men had been attempting to change conditions on the ship by going to their race relations adviser, a black senior enlisted man, who would then present their grievances to the captain. Many times, the captain said he "would look into" their problems, but nothing changed. The men in the Second Division of the ship requested the removal of their immediate supervisor, a white petty officer, but this was not done. They had complained about being cheated out of liberty through juggling of the duty rosters; about blacks on sick call not receiving medical excuses from duty as easily as whites; about having to do most of the demeaning jobs on the mess deck; about not having any blacks in the serving line on the mess deck; about not being treated with respect in general.[14]

On the evening of the disturbances the immediate conciliatory efforts by the Little Rock's Captain to cool "had little impact," in the words of the statement, because, "[t]here were no reserves of good will for him to draw on."[15]

This basic scenario repeats a pattern found in Vietnam, Korea, Germany and aboard United States Navy ships, and evidences the degree to which the services have failed to implement the recommendations of the Task Force on the Administration of Military Justice[16] for attacking systemic racism.[17] Until commanders accept the need for race relations programs that are more than window dressing, until racial and ethnic turbulence is seen not as an embarrassment to be covered up, but as a sign of shortcomings to be corrected, and until star and flag rank officers exert the pressure to bring about these changes, there is little reason to expect

14. Statement of counsel, February 21, 1974, at 1–2, on file with the INDIANA LAW JOURNAL.

15. *Id.* at 2.

16. *See* TASK FORCE REPORT, *supra* note 10.

17. The Task Force on the Administration of Military Justice was commissioned on April 5, 1972, by Secretary of Defense Melvin R. Laird. It was composed of civilian lawyers and jurists and the Judge Advocate Generals of each of the Armed Services. Nathaniel R. Jones, General Counsel of the National Association for the Advancement of Colored People, and C.E. Hutchins, Jr., First Army Commander, were its co-chairmen. The Task Force produced an extensive list of recommendations, covering not only changes in the military justice system but also in such areas as equal opportunities programs, regulation of personal appearance, job assignment and testing, and administrative discharges. *See* TASK FORCE REPORT, *supra* note 10.

that the number of incidents such as that aboard the USS *Little Rock* will not continue to grow.

If one assumes that the effort to recruit an all-volunteer force will result in a military heavily composed of black personnel,[18] the next question is what impact, if any, this will have on the level of dissent. Certainly there are cogent reasons to expect that the stridency in which many blacks of the sixties and early seventies grew of age will be translated into demands for equal opportunity and treatment by new black enlistees.

There is every sign not only that this is occurring, but also that the slogan employed by Navy recruiters—"You Can be Black and Navy Too!"—is receiving a stringent test throughout the armed forces by enlistees intent upon expressing themselves individually in terms of their race. The Lawyers Military Defense Committee in Germany received frequent complaints from black enlisted personnel ordered to remove symbols of racial pride from their personal living areas of the barracks. One man had a black, red and green pennant removed from his bunk, another was ordered to take down from his locker a drawing of a black man with the world on his shoulders. A black private was actually court-martialed for "dapping disrespectfully."[19] These manifestations of command reaction range from insensitivity to overt prejudice and involve what some might in the past have characterized as nonessential (*i.e.*, nonmilitary) minutiae. In fact, they portray a pervasive set of critical elements at play between the minority enlisted man and his commander.

For example, in July 1973, Private (E-2) Raymond Olais was court-martialed for willfully disobeying an order to remove a poster of Che Guevara from his barracks living area.[20] At his trial he testified that as a Mexican-American he felt a strong identification with Latin-American revolutionary figures, that his grandfather had fought with Emiliano Zapata in Mexico, and that his identification with "Che" was in this same tradition. In addition, he argued that no one had ever protested to him concerning the poster. Olais' commanding officer testified that, while it was true there were no complaints, he could not allow the poster because if he were to do so, "then the blacks would put up posters of Malcolm X," which in turn would cause some whites to put up posters featuring the

18. *See generally* Janowitz, *The Social Demography of the All-Volunteer Armed Force*, 406 ANNALS 86 (1973).

19. Special Court-Martial, United States v. Danforth, convened January 16, 1973, Headquarters, U.S. Forces Support District, Baden-Württemberg, APO 09154, Convening Orders Nos. 36, 31, and 15. "Dapping" is an elaborate handshake exchanged by black GI's.

20. Special Court-Martial, United States v. Olais, convened July 6, 1973, Headquarters, U.S. Army Combat Equipment Group, Europe, APO 09166, Convening Orders Nos. 29 and 28.

Grand Wizard of the Ku Klux Klan.[21] Thus, Olais' commanding officer's attitude toward the poster was merely a reflection of his overall view of the viability of individual expression of racial and ethnic identity in the military.

Perhaps ultimately of greater consequence to the question of increased enlistment of blacks is its impact upon possible uses of the United States military forces in the future. "What would black American soldiers do when confronted with black African guerrillas?" was the query raised by one commentator.[22]

This question was anticipated by at least one American soldier in West Germany during 1973. Private First Class Larry Johnson read an account of the guerrilla war being waged against Portuguese forces in Mozambique.[23] He was impressed by the article, particularly by the descriptions of atrocities and suggestions that the United States gave its support to the Portuguese against the guerrillas. Johnson's commanding officer rebuffed Johnson's attempts to dig deeper into the questions raised by the article. The upshot of the episode was that Johnson ultimately submitted a symbolic "resignation," refusing to wear his uniform, salute, or report for work, in order to protest what he concluded to be United States' support for colonialism in Africa and the indifference of his command to the issue.

The Army, in its turn, court-martialed Johnson upon seven specifications of violation of Articles 86, 89, and 90 of the *Uniform Code of Military Justice*.[24] Johnson had sought repeatedly in the early stages of the controversy to end the matter short of court-martial. The ultimate incapacity of the Army to achieve such a resolution is revealing in terms of its response to dissent of this type.

Johnson's initial action in raising the question of Portuguese colonialism at the base race relations council indicated his willingness to stay within recognized channels, and for two months this was his approach.

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21. The military judge granted a defense motion for a finding of not guilty on the grounds that the commanding officer's reasons were too attenuated to meet the military standard applicable to the exercise of rights under the first amendment, *i.e.*, "a clear danger to military loyalty, discipline, or morale." This standard appears to have derived from United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972); *see also* United States v. Daniels, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970); United States v. Gray, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); and United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970). The "clear danger" standard is now embodied in USAREUR Cir. 600-85 at § 14d(4).

22. Rogers, *The Volunteer Army: Black Misgivings*, 90 THE CHRISTIAN CENTURY 252 (1973).

23. *The Quiet War in Mozambique*, EBONY, Feb. 1973, at 92.

24. Special Court-Martial, United States v. Johnson, convened June 18, 1973, Headquarters, Kaiserslautern Army Depot, APO 09054, Convening Orders Nos. 15, 14, 12, and 3.

His commanding officer did not believe that the United States could be supporting Portugal with NATO-supplied weapons, as Johnson asserted. His comment was that Johnson should devote further study to the matter. Johnson, who had taken black literature and history courses offered by the Army in Germany, went back to the base library. There he found what he felt to be ample substantiation of the charge of American support. He returned with this documentation to his commanding officer, and was partially able to convince him that what he was saying had merit. The commanding officer suggested that Johnson write to his Congressman about his objection to United States policy. Johnson felt this was merely an effort to blunt his criticism, but he said he would do so, if the commanding officer would write also. The Captain responded that this was impossible since his intention was to make the Army his career. Johnson then said he believed it would be necessary to take stronger measures to communicate his protest and mentioned a possible refusal to report for work. The commanding officer, thereupon, ordered Johnson to report for a psychiatric examination. The results of the examination were negative. The point is that the reaction of Johnson's commanding officer, which is not atypical, inevitably proved to be an inadequate response to the phenomena of dissent.[25] Although the military jury returned a verdict of conviction on six of the specifications, they were apparently sufficiently impressed with Johnson and the evidence he presented in support of his stand, that the sentence imposed was merely thirty days confinement.[26] Moreover, the jury took the rare action of recommending an expeditious General Discharge, which was interpreted by those viewing the trial as an implicit endorsement of Johnson's "resignation."[27]

COMMAND RESPONSES

Counter-Dissidence

The degree of frustration of the commander as he continues to grapple with dissent, as exemplified by the Johnson and Olais cases, is sug-

25. Johnson's court-martial generated widespread attention among black servicemen in West Germany. During the two days of trial, spectators overflowed the courtroom—a situation virtually unheard of in the military, where most courts-martial are a private convocation of the judge, the accused, and two military lawyers.

26. The maximum sentence imposable in the case was six months confinement at hard labor.

Johnson's conviction was reversed by the convening authority who "disapproved the findings" of the court-martial on the grounds that the military judge had improperly failed to disqualify himself from the trial.

27. On August 7, 1973, Johnson was discharged administratively with a General Discharge under Honorable Conditions. An application is now pending before the Army Discharge Review Board to up-grade the discharge to fully Honorable status.

gested in a scheme such as the short-lived 8th Infantry Division Counter-Dissidence Program, which was promulgated on July 23, 1973, from the Division Headquarters in West Germany.[28] In its basics the Counter-Dissidence Program created a system whereby each unit commander in the division was to send "[i]nformation on dissident activities . . . by the most expedient methods to local counterintelligence agents of the 8th MI [Military Intelligence] Company."[29] Among the activities singled out as "[i]ndicators of [d]issidence" were "[c]omplaints to NCO's [noncommissioned officers], officers, IG [Inspector General], news media, or Congressmen about living conditions, harassment, unfair treatment, etc."[30] The list also included such activities as "[f]requent circumvention of the chain of command," attendance at unauthorized meetings or "authorized meetings with controversial topics," distribution of unauthorized publications, and "serious incidents . . . with racial overtones or motives . . . ."[31] Annex C to the program provides a backdrop to the entire scheme by defining "Dissidence" as "Manifestation of a rejection of military, political, or social standards."[32]

Clearly, contemporary conditions caused, at least, the command of the 8th Infantry Division to feel justified in expanding the conception of "dissidence" worthy of official cognizance. The result was the inclusion of such fundamental first amendment rights as those of communication with Congressmen, association to discuss grievances, and publication of newspapers.[33]

Anti-Drug Campaign

Intertwined with the subject of dissent within today's military is the issue of drug use and control.[34] The origins of the drug problem in the military, at least insofar as the military has acknowledged it as a dis-

28. The highly questionable legality of the program (and, one suspects, its nervous tenor) proved sufficiently discomfiting to the Army that it was publicly withdrawn on the day following an article in the *New York Times* disclosing its existence. *See* N.Y. Times, Aug. 10, 1973, § 1, at 1, col. 2. *Cf. id.*, Aug. 8, 1973, § 1, at 4, col. 3.

29. Reg. No. 381-25, 8th Infantry Division, *Counter-Dissidence Program*, July 23, 1973, on file with INDIANA LAW JOURNAL [hereinafter cited as *Counter-Dissidence*].

30. *Id.*, Annex B.

31. Annex A, *Counter-Dissidence, supra* note 29. The list also expressly enumerated such traditional types of "dissidence" as sabotage, subversion, and breach of security. *Id.*

32. Annex C, *Counter-Dissidence, supra* note 29.

33. Curiously, when withdrawing the program, the Army took the occasion to announce that it was inappropriate, not due to legal infirmities, but rather, in part, "because soldier dissent within the command is presently at a very low level." N.Y. Times, Aug. 10, 1973, § 1, at 1, col. 2.

34. The discussion of drugs is approached vis-à-vis the lower enlisted grades and does not address the use of alcohol, nor the military's response to that specific problem.

tinctly identifiable problem, are to be found in the Vietnam war years. As the war became subject to mounting doubt in the United States, the American forces called upon to fight it began to exhibit increased disenchantment with the task. A widespread troop use of marijuana was eventually transmuted into a much more perilous involvement with heroin.

When this practice was reported, the alarm was immediately shocking to a Congress already viewing the war with disfavor. Amended Title 10, section 1071, *United States Code,* was the result of the congressional reaction. This enactment charges the various military departments to

> prescribe and implement procedures, utilizing all practical available methods . . . [to] identify, treat, and rehabilitate members of the Armed Forces who are drug or alcohol dependent persons . . . .[35]

Thereafter, an unparalleled Army program against drug usage began to appear in December 1972 throughout European bases. The new approach was remarkably hard-line, all-encompassing, and explicitly punitive. Typical features of the campaign as it initially appeared at American bases in Germany included such measures as removal of the doors of the rooms of known or suspected drug users and requirements that doors of known or suspected drug users remain unlocked. Those soldiers identified as suspected or known drug abusers were forbidden to wear, and in some cases possess, civilian clothing; known or suspected drug users were ordered to surrender to their commanding officers their driver's licenses and privately owned vehicle registration plates; known or suspected drug users were prohibited from leaving the post at all; whole companies of soldiers were assembled, strip searched, and had their clothing and wallets searched; drug detector dogs were used to "inspect" billets, including soldiers' beds; and rooms of known or suspected users were stripped bare of all but essential items, *e.g.,* beds, lockers, and military clothing.[36]

These "drug control" measures, and others like them, prompted a flood of complaints to be brought to the Lawyers Military Defense Committee office in Heidelberg, West Germany, in the first months of 1973, and, subsequently, the filing of *Committee for GI Rights v. Callaway.*[37]

35. 10 U.S.C. § 1071 (Supp. II 1972).

36. *See* Committee for GI Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974).

37. On January 14, 1974, Judge Gesell granted relief to plaintiffs on each of the complaints mentioned in the text. Committee for GI Rights v. Callaway, 370 F. Supp. 934 (D.D.C. 1974). Subsequently, following a Notice of Appeal filed by the Army, the Court of Appeals for the District of Columbia stayed the order of the district court pend-

This lawsuit is a class action on behalf of approximately 145,000 Army enlisted men below the grade of E-5 stationed in Europe. It seeks to enjoin the Army on constitutional grounds from enforcing the drug control program in these principal aspects: the punitive use of evidence seized in "inspections" without probable cause; the imposition of "administrative sanctions" based upon alleged drug use without hearing; the dissemination of drug use intelligence to nonmilitary agencies; and the prohibition of the display in barracks of posters and other items which in the commander's estimation might constitute "a clear danger to military loyalty, discipline, or morale."[38]

Among those servicemen who protested the anti-drug program most openly and vociferously were undoubtedly some who did so for self-serving reasons. But, in any event, the protestations were not pro-drug; rather, they were directed at the inequities seen in the scheme, *i.e.*, the lack of a comparable program against alcohol abuse, the exclusive applicability of the program to the grades E–5 and below, and the ease with which the program allowed the commander to deprive the enlisted person of his or her newly gained prerogatives of the modern volunteer Army.

Military Intelligence and Military Dissent

A new interest among GI's in joining together to make their collective voices heard against the anti-drug program quickly rose to the surface. At numerous bases ad hoc groups and committees were formed.[39] In April 1973 in Heidelberg, an open meeting was held in which more than seventy enlisted men and civilian supporters joined to discuss the program.

In *Berlin Democratic Club v. Schlesinger*,[40] filed by the American Civil Liberties Union Foundation and the Lawyers Military Defense Committee, it was alleged that at the Heidelberg meeting, the United States Army Intelligence command in Germany had conducted an intensive operation. The contention was that operatives infiltrated the meeting with

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ing the appeal, which was ordered expedited. Committee for GI Rights v. Callaway, *appeal docketed,* No. 74–1285, D.C. Cir., Feb. 25, 1974. The Appellees' motion for reconsideration was denied en banc on April 5, 1974.

38. For the developmental background of this standard *see* cases cited note 21 *supra*. Whether the level of drug use among American forces in West Germany justified the Army's new program, or whether the program was designed to allow commanders the range of options they desired to begin reshaping the post-Vietnam Army, is a subject of underlying debate, not yet resolved. What is not challenged, at the moment, is the occurrence of two phenomena after the program went into effect: an upsurge in both dissent and the use of opiates among enlisted men.

39. Neu Ulm, Butzbach, Stuttgart, and Mainz were some of the locations of American bases where these groups were formed. It was from them, as well as others, that the eighteen named class representatives in *Committee for GI Rights v. Callaway* were drawn.

40. Civil No. 310–74 (D.D.C., filed Feb. 19, 1974).

hidden recording devices, that Army photographers surreptitiously photographed the participants at that counseling seminar as they entered and left meetings, and that operatives assigned to attend the meeting sought through "dirty tricks" to deflect the course of GI dissent in a provocative and debilitating manner.

The suit focuses on the intense interest exhibited during 1973 by Army Intelligence in the activities of American civilians supporting American service personnel who were seeking to exercise constitutionally protected rights. It claims that these activities contravene the United States Constitution, violate the Army's own regulations, and are not justified by legitimate military necessity.

As an example of the type of action which the suit asks to have declared unlawful and enjoined, it is claimed that the Berlin Democratic Club in May 1973 circulated a petition among American military personnel in Berlin, calling for the impeachment of the President of the United States. The petition was ultimately mailed to the Speaker of the House of Representatives with approximately 350 signatures.

However, it is alleged, before it reached the Speaker, the petition was intercepted by Army Intelligence, photographed, and the names of the signatories then "recorded . . . in military intelligence files on 'dissident persons.' "[41]

Following a series of disclosures by former Army Intelligence personnel in 1970 concerning Army intelligence-gathering activities in the United States[42] and a legal challenge directed against those activities,[43] the Army promulgated regulations[44] prohibiting, among a variety of activities, "electronic surveillance of any individual or organization except as authorized by law;" "covert or otherwise deceptive surveillance or penetration of civilian organizations unless specifically authorized by the Under Secretary of the Army;" attendance by Department of Defense personnel at public or private meetings and demonstrations for the purpose of information-gathering without specific prior approval of the Under Secretary of the Army; or the maintenance of computerized data banks relating to civil disturbances, individuals or organizations not affiliated with the Department of Defense, without specific prior approval by the Under Secretary of the Army. The position of the Army was that

41. Complaint at 15, Berlin Democratic Club v. Schlesinger, Civil No. 310-74 (D.D.C., filed Feb. 19, 1974).

42. *See, e.g.*, Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASHINGTON MONTHLY, Jan. 1970, at 4.

43. Laird v. Tatum, 408 U.S. 1 (1972).

44. USARINT Reg. 381-100 (June 1, 1971), promulgated pursuant to Department of Defense Directive 5200.27 (March 1, 1971).

these prohibitions do not apply outside the geographic United States.[45]

The weighty questions raised in *Berlin Democratic Club v. Schlesinger* are whether the plaintiffs can overcome the problems of "ripeness" which were fatal to the claims by the plaintiffs in *Laird v. Tatum*,[46] and whether the Constitution follows the United States passport to protect the lawful political activities of American citizens abroad from the "chilling effect" of military intelligence surveillance. Because of a past correlation between civilian support and dissent among the lower enlisted ranks, and the failure of *Laird v. Tatum* to clarify the permissible range of military intelligence activities where civilians are involved, *Berlin Democratic Club* may well furnish a basis for gauging the direction and extent of future dissent in the military.

CONCLUSION

While in Vietnam, the Philippines, and Germany during 1971–1973, this author represented military personnel who wished to engage in a wide variety of political actions.[47] In each instance the client faced prosecution, threat of prosecution, direct harassment and intimidation or some lesser indirect form, predicated upon his or her political actions.

The increased level of expectation, in terms of treatment, benefits, and opportunities of contemporary enlistees, coupled with a growing military role for blacks (and other minorities) and women, point toward an expanding potential for dissent in the military during the years ahead. The capacity of the military, particularly the Army, to meet this prospect and maintain a necessary morale level will depend upon the willingness of the military establishment to adapt itself to the expression of a broader spectrum of opinion among its members and to permit full expression of such opinions through newly developed channels, as well as by giving practical effect to those outlets already authorized.

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45. Letter from Robert W. Berry, General Counsel, Department of the Army, to Robert S. Rivkin, counsel, Lawyers Military Defense Committee, Sept. 11, 1973, on file with the INDIANA LAW JOURNAL.

46. 408 U.S. 1 (1972). For discussions of the problem, see 41 GEO. WASH. L. REV. 385 (1972), 47 TUL. L. REV. 426 (1973), and 18 VILL. L. REV. 479 (1973). In contrast to plaintiffs in *Laird v. Tatum*, who alleged merely a generalized fear of being subjects of military intelligence, the plaintiffs in *Berlin Democratic Club* alleged loss of employment, threats of deportation from the Federal Republic of Germany, breach of lawyer-client confidentiality, and invasion of privacy, as well as being the actual subjects of a variety of military intelligence activities.

47. Such "political actions" included petitioning for the withdrawal of American forces from Vietnam, petitioning to halt American bombing in Southeast Asia, calling for the impeachment of the President of the United States, petitioning for the legalization of marijuana, participation in news conferences, publication of off-post newspapers and distribution of such newspapers both on and off post.

The emergence of an all-volunteer fighting force should not permit loss of sight of the long-standing challenge which the traditional American view of its military has assumed.[48] As Chief Justice Earl Warren stated:

> The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.[49]

The "citizen-soldier" remains both an ideal and a realistic goal which a modern democratic society can and should steadfastly pursue.

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48. P. BARNES, PAWNS: THE PLIGHT OF THE CITIZEN-SOLDIER (1972).
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