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Legal inadequacies and doctrinal restraints in controlling the military

Edward F. Sherman†

Legal processes and remedies have not played a significant part in shaping, managing, and controlling the American military. The principal legal construct for the role of the military in American society, the Constitution, provides only collateral and episodic reservations and limitations concerning the armed forces. The abuses of the eighteenth century standing army were very much in the minds of the Founding Fathers, but their solution was the familiar recourse to separation of powers rather than direct constraints upon the military. The constitutional division of powers, with the President in effective control of military policy and tactics as Commander in Chief, but with ultimate control in Congress through its powers to declare war, raise and maintain the armed forces, make rules for their governance, and appropriate money for their support, was

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1. Apart from the Commander in Chief clause, art. II, § 2, cl. 1, and the congressional military powers clauses, art. I, § 8, cl. 11–16, the only express references to the military are found in the second amendment, providing: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed;" the third amendment, providing: "No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law," and the fifth amendment exempting from the right to indictment of a Grand Jury "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger . . . ."

2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." Art. II, § 2, cl. 1.

3. "The Congress shall have Power . . . To declare War, grant Letters of Marque
aimed more at preventing either branch from misusing the armed forces than at controlling the military within its own sphere. Samuel Huntington maintains that Americans have deluded themselves in the belief that civilian control of the military is mandated by the Constitution and views the Commander in Chief clause as having little to do with ensuring civilian control (having served instead as a vehicle for expansion of presidential power against Congress) and the separation of powers as actually inhibiting objective civilian control.4

The constitutional construct reflects the belief of the Founding Fathers that military abuses could be curbed by making it more difficult to enter into war, by limiting federal use of armed forces, and by diffusing control over the military between the executive and legislative branches. We now know, from the growth of the military-industrial establishment since World War II (referred to by Admiral Hyman G. Rickover as the “fourth branch of government”),5 that these structural limitations are inadequate to control the military. Indeed, a variety of other legal mechanisms—emanating from administrative law, constitutional guarantees of individual rights, and criminal procedure—now provide the principal legal constraints upon the military, although they too sometimes prove inadequate because of doctrinal and methodological limitations in the legal process.

The military is probably unique among our government bureaucracies in the degree of autonomy accorded it by the three constitutional branches of government. Occupying a special place because the protection and very survival of the nation is ultimately in its hands, it has generally been treated with considerable deference by Congress in its appropriating and regulating role6 and by the executive in its general supervisory role.7 Viewed as a society necessarily set apart because of its combat mission and its peculiar need for discipline and obedience, it has been exempted from ordinary standards of judicial

and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces . . . .” Art. I, § 8, cls. 11-14.


7. See generally C. Mollenhoff, The Pentagon: Politics, Profits and Plunder (1967); The Military Establishment, supra note 6, at 25–37; Korb, The Secretary of
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review by the courts which have frequently refused to consider cases involving constitutional disputes over the war and military powers or to interfere in its internal operations.

Legal science has never been particularly comfortable with legal issues raised in the military context. The military has generally operated outside the normal processes of civilian law, and the judiciary has taken the attitude, expressed by the Supreme Court in 1953, that "[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." Although other specialized governmental institutions which also claim exemption from certain constitutional and legal compulsions—such as juvenile courts, penal institutions, public schools, and mental institutions—have gradually been drawn into the mainstream of the legal process, the military has only been touched by a few judicial decisions, primarily during the Vietnam War. As a result, courts and lawyers often have a poor understanding of the military, both as to the institutional processes at work within it and as to the separate system of military discipline and justice which it maintains. The legal process, which in this century has assimilated economic theory into antitrust regulation and increasingly into tort and contract law, which has embraced the methodology of political science and statistics in federal regulatory law, and which has come routinely to apply sociological and psychological theories to criminal, juvenile, and family law issues, has given scant attention to social science research and analysis concerning the military.

There is a well-developed body of social science research which is relevant to the question of controlling the military through legal mechanisms. Thus it is appropriate that this Symposium should include articles by a sociologist and political scientist and case studies emphasizing the political and legislative process as well as the legal.

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One needs to understand how and why a bureaucracy and its members function before one can fully assess the propriety or effectiveness of legal controls, and to know who actually wields the power and how pressures are brought to bear before judging the impact of controls through structural circumscriptions. Sociologists and political scientists offer some valuable insights into institutional and individual behavior and into the functional role of the military within the political structure which bear directly on such legal issues as deterrence and motivation in military criminal law, the impact which imposition of civilian standards would have upon military effectiveness, and the degree to which judicial review of particular military determinations is likely to interfere with legitimate functions of a coordinate branch of government.

One of the most valuable uses of social science research to the law is in providing demonstrable evidence of actual behavior, both individual and institutional, against which judicial perceptions and estimates can be compared. Courts are increasingly testing their assumptions in such areas as regulated industries and labor relations with statistical and analytical data. However, courts still tend to accept stereotypes in dealing with the military, often based on no other support than language from prior cases or sketchy historical analysis. For example, in *Parker v. Levy* the Supreme Court accepted the description of the military as a society set apart from civilian life, with its own standards of honor which all military men appreciate, to justify the court martial offenses of "conduct unbecoming an officer and a gentleman" and "conduct to the prejudice of good order and discipline" against constitutional attack for vagueness and overbreadth. Despite general agreement today among social scientists that there has been a gradual convergence of military and civilian social structures since the Second World War due to such factors as technology and the bureaucratization of military functions, the court relied primarily upon the historical pedigree of the offenses and upon prior precedents, mostly from the nineteenth century, that they were both well under-

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11. See M. Janowitz, supra note 9; Biderman & Sharp, The Convergence of Mili-
stood and necessary to maintain discipline. Justice Stewart's dissent, although without citing the supporting social science material, observed that the "uncertain regime" of the general articles was no longer justified in the "vastly altered historic environment" of the contemporary military where members are no longer part of a "small, professional, and voluntary" cadre "isolated from the mainstream of civilian life."112

The articles in this Symposium point to a number of areas in which existing legal mechanisms appear to be inadequate to control the military. David Engdahl, a law professor, demonstrates the need to return to the constitutional construct and intent in curbing the executive's use of the armed forces in civil disorders. Lawrence Baskir, Chief Counsel to the Constitutional Rights Subcommittee of the Senate Judiciary Committee, provides a case study of the role of legislative oversight and litigation in attempting to impose constitutional restraints upon military surveillance and intelligence gathering within the civilian community. Adam Yarmolinsky, Deputy Assistant Secretary of Defense under President Kennedy, describes the complexity of attempting to bring the military appropriations and budget process under effective civilian control when the military-industrial axis commands its own power base and exerts enormous political and economic influence. Maurice Garnier, a sociologist, outlines the development of military sociology, with its insights into the behavior of servicemen in the military environment, and of military political science, with its interest in organizational and institutional structures and operations, and focuses upon the role of Congress as central to the issue of control of the military. Howard De Nike, until recently staff attorney for the Lawyers Military Defense Committee representing servicemen in the Far East and Europe, describes the spotty record of the legal and administrative processes in dealing sensitively and constitutionally with military personnel problems arising out of racial hostility, drugs, and dissent. Finally, the review of seven recent books on the military by John Lovell, a political scientist, reveals some of the institutional changes taking place in the military and the new currents and influences at work regarding personnel and institutional policies.

112. 94 S. Ct. 2547, at 2574-75.
to have a number of different origins. Sometimes they result from structural deficiencies, such as the failure of Congress to establish procedures to insure better control over military appropriations or to monitor significant military developments.\textsuperscript{13} Sometimes they result from administrative and operational weaknesses, as with the extraordinary power exercised by a few congressional committee chairmen with close alliances to the military,\textsuperscript{14} or the failure of some military officers and NCO's to carry out command policies concerning racial equality.\textsuperscript{15} Not infrequently they stem from the nature of the legal process itself.

As has already been suggested, the inability or unwillingness of courts to employ methods and knowledge from other disciplines can make them unresponsive to changed conditions in the military. The process of judicial review also imposes constraints upon the courts. In response to perceived constitutional and policy constraints, the courts have adopted threshold requirements for review such as standing, ripeness, justiciability, and exhaustion of remedies. Viewed as quintessential issues of law, these requirements have often been applied to cases in the military context without sufficient examination of traditional generalizations about the nature of the military. Thus, the D.C. Circuit Court of Appeals disposed in two sentences of one of the first cases challenging the constitutionality of the Vietnam War, declaring that "the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power."\textsuperscript{16} It observed that it was only writing an opinion at all "to make it clear to others comparably situated and similarly inclined that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands." Other litigants did not heed the warning, and within a few years a number of courts had found the issue to be justiciable, although generally ruling against the plaintiffs on the merits.\textsuperscript{17} These courts demonstrated a very different perception of the nature and institutional role of both the courts and the military from that in the former opinion, and their broader view of judicial power in reference to constitutional limitations upon executive war-

\textsuperscript{13} See note 6 supra.
\textsuperscript{14} See McGaffin & Knoll, supra note 6, at 61-101.
\textsuperscript{16} Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967).
\textsuperscript{17} Id.
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making has permitted a larger role for the courts in overseeing military policy.

The courts have been called upon in recent years to provide legal remedies concerning the military in two significant areas: enforcement of constitutional delegation of powers and review of the treatment and disposition of military personnel. Court decisions in these areas indicate how complex the issues are as to the appropriateness of judicial intervention, the scope of review, and the application of remedial powers. They raise fundamental issues going both to the constitutional structure of the American government and the role of the military establishment in our democratic society.

1. ENFORCEMENT OF CONSTITUTIONAL DELEGATION OF POWERS

The constitutional division of military powers between the executive and legislative branches, although not involving direct limitations upon the armed forces, is of relevance to contemporary issues of control of the military. The requirement of a declaration of war by Congress provides a check upon the power of the military, since once a crisis slips over into armed conflict, the options available to the nation are narrowed and the military assumes an immensely larger role in decisionmaking. The likelihood of public exposure and debate consequent to a congressional declaration of war provides a further check upon a self-serving alliance between the executive and the military to catapult the nation into hostilities. Similarly, the assignment to Congress of such powers as the right to call up the militia for a federal army for limited purposes,\(^{18}\) to appropriate all funds for the armed

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18. Congress is empowered to "call forth" the militia for only three purposes: "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, § 8, cl. 15. It is also empowered
to provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. Const. art. I, § 8, cl. 16. It appears that although the Founding Fathers gave Congress the power to raise and support armies and provide and maintain a navy, they did not contemplate the establishment of a standing federal army but rather that the states would maintain militia which could be called up by Congress for the three limited purposes. See Huntington, supra note 4, at 166. However, this arrangement was sorely tested by historical developments. Shortly after the ratification of the Constitution, Napoleon introduced the first nationwide system of conscription in Europe, and other countries quickly followed suit. The first national draft in the United States was instituted in the Civil War, but its constitutionality was never ruled on by the Supreme Court. But see Kneedler v. Lane, 45 Pa. 238 (1863) (holding the act constitutional). A national draft was imposed in the First World War and upheld as constitutional during wartime. Selective Service Draft Law Cases, 245 U.S. 366 (1918). It was reintroduced in 1940 and found constitutional, although the nation was not at war, by lower federal
forces and to make rules for their government, are suited to obtaining wider consideration and debate by the people's elected representatives, in short to democratizing key military decisions to prevent their exclusive appropriation by professional military men and executive officials. The history of secrecy and deception in Vietnam War decision-making revealed by the Pentagon Papers should demonstrate that the constitutional construct, although of limited value in providing day-to-day control over the armed forces, is still germane to the aim of controlling the military.

a. The War Power

Although the Supreme Court observed in 1952 that "nothing in the Constitution is plainer than that the declaration of war is entrusted to Congress," the question as to when and how such declaration is to be made has been left unresolved by the federal courts after some eight years of litigation over the constitutionality of the Vietnam War. The issue, raised in almost every conceivable way and by almost every conceivable kind of plaintiff, was never heard by the Supreme Court, which exercised its discretionary authority over jurisdiction to forestall courts. United States v. Lambert, 123 F.2d 396 (3d Cir. 1941). It remained in existence after the Second World War, except for a short period in 1948, although there were periods of minimal draft calls, and there have been no draft calls since 1973 when the "volunteer army" went into effect. Challenges to the constitutionality of the draft during the Vietnam War were unanimously rejected by lower federal courts, on jurisdictional grounds and on the merits, and the Supreme Court refused to hear all such cases. Hart v. United States, 391 U.S. 956 (1968); Holmes v. United States, 391 U.S. 956 (1968); Mitchell v. United States, 386 U.S. 972 (1967). In April 1970, the State of Massachusetts passed a statute providing that its citizens in the U.S. armed forces could not be required to serve outside the United States in armed hostilities "not an emergency" or not "initially authorized or subsequently ratified by a congressional declaration of war" according to the Constitution. In a suit by individual plaintiffs and the State as parens patriae, it was argued, inter alia, that an "army" at the time the Constitution was written was a volunteer organization, while "militia" comprised all able-bodied males who could be involuntarily required to serve when necessary. If more troops were needed than were available in the volunteer federal army, it was argued, Congress was expected to call forth the militia, but only for the three enumerated purposes (to suppress an insurrection, repel an invasion, or execute a law of Congress) or, in peacetime, in preparation for these purposes if Congress had made a policy determination that such preparation was necessary. The Vietnam War, it was claimed, did not fall into any of these categories. Amicus Curiae Brief on Behalf of the Constitutional Lawyers' Committee on Undeclared War, Massachusetts v. Laird, 400 U.S. 886 (1970). See also A. D'AMATO & R. O'NEIL, THE JUDICIARY AND VIETNAM 89-97 (1972). The Supreme Court refused to consider an original bill of complaint, and the First Circuit ultimately rejected these claims and held that congressional support of the war through legislation over a prolonged period was a constitutionally sufficient authorization. Massachusetts v. Laird, 451 F.2d 26 (1st Cir.), aff'g 327 F. Supp. 378 (D. Mass. 1971).


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review of such cases, and was denied consideration by a large majority of lower federal courts on the grounds of lack of standing or justiciability. Suits early in the war brought by citizens and taxpayers foundered on lack of standing, and challenges to the legality of the war by draft violators and servicemen were refused consideration. However, as the war dragged on, courts found standing in an inductee who was a selective conscientious objector, servicemen with orders to Vietnam or subject to possible service in Vietnam, reservists who might be activated and sent to Vietnam, and members of Congress. A number of these courts held that the issue raised a "political question" which was not proper for the courts to consider. Others considered the constitutional issue and found that Congress had authorized the war through passage of appropriations and selective service acts, but held that they could not review the propriety of the form used by the executive and legislative branches which constituted a political question.

The Supreme Court has stated that,

[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a

31. DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971). For history of cases challenging the constitutionality of the war through the middle of 1972, see A. D'AMATO & R. O'NEIL, THE JUDICIARY AND VIETNAM (1972).
judicial determination are dominant considerations.\(^{32}\)

In *Baker v. Carr*, the Court formulated six categories or situations in which it is appropriate for courts to refuse to consider cases as raising a political question.\(^{33}\) However, in *Powell v. McCormack*,\(^{34}\) the Court focused on the first category, whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Plaintiffs challenging the constitutionality of the war generally maintained that the issue as to which branch of government the Constitution committed the power to enter into the Vietnam hostilities was for the judiciary to decide and that a political question might only arise after the courts had determined that such power had been committed to a coordinate branch. The first break in the refusal of courts to consider cases challenging the constitutionality of the Vietnam War came in the summer of 1970 when the Second Circuit ruled in *Berk v. Laird*\(^{35}\) that the claim of a serviceman with orders to Vietnam met the general standard for justiciability set out in *Baker*, but remanded the case to determine whether there were judically discoverable and manageable standards to resolve the issue. On remand, the district court found that Congress had authorized the sending of troops to Vietnam by appropriations and other supportive legislation, but held that "the court would be entering the realm of politics in saying that the authorization should have been couched in different language."\(^{36}\)

On appeal, the Second Circuit consolidated *Berk* with a similar suit, *Orlando v. Laird*,\(^{37}\) and, in affirming the district court, held that "the constitutional delegation of the war declaring power to the Congress contains a discoverable and manageable standard imposing on

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33. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.


35. 429 F.2d 302 (2d Cir. 1970).


37. 443 F.2d 1039 (2d Cir. 1970). For background of these cases and excerpts from briefs, see L. FRIEDMAN & B. NEUBORNE, *UNQUESTIONING OBEDIENCE TO THE PRES-*
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the Congress a duty of mutual participation in the prosecution of war" which is judicially determinable by a court. It viewed the test as "whether there is any action by the Congress sufficient to authorize or ratify the military activity in question" and not whether there had been an express and explicit authorization as the plaintiff contended was required by the "declare war" clause. Having found that there was "some mutual participation between the Congress and the President," it would go no farther because "decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry."

The First Circuit, applying a similar approach in Massachusetts v. Laird a year later, noted that "we are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion [i.e., that the Constitution, in giving some essential military powers to Congress and others to the Executive, committed the matter to both branches, precluding the judiciary from judging "joint concord" against any specific clause in isolation], we have also addressed the merits of the constitutional issue." Thus it appears that the courts have created a sort of presumption that once any congressional action in support of the war is shown, the constitutional criterion (derived not just from the "declare war" clause but from all the military clauses) is met. This leaves a spavined "declare war" clause and weights judicial determinations of the constitutionality of undeclared military action rather heavily in favor of the Executive. It certainly means that constitutional review in the courts can provide little check upon undeclared hostilities and that, as has partially occurred with the War Powers Act of 1973, the issue will be essentially relegated to the political sphere.

Several cases in the last period of the war, when Congress was increasingly attempting to deescalate it and impose time limitations upon its conclusion, demonstrate the unwillingness of the judiciary to determine whether the Executive was complying with congressional guide-

38. 443 F.2d at 1042.
39. Id. (emphasis added).
40. Id. at 1043.
41. 451 F.2d 26, 33 (1st Cir. 1971).
43. For discussion of congressional actions, see 15 HARV. INT'L L.J. 143, 144 n.10, 145 n.11, 146 n.25, 147 n.26, 151 n.45 (1974).
lines. In *DaCosta v. Laird*, a serviceman with orders to Vietnam claimed that since the repeal of the Gulf of Tonkin Resolution, the legislative action in support of the war was constitutionally insufficient to authorize its continuation. The court observed that "[i]f the Executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the Legislative Branch over what is presently afforded, might well be required," but found that the two branches were engaged in a combined effort to decelerate and terminate the conflict. Having found some combined effort, the court, consistent with *Orlando*, held that the constitutional propriety of the method and means by which they mutually participate in winding down the conflict and disengaging the nation from it, is also a political question and outside of the power and competency of the judiciary.

A year and a half later DaCosta was back before the courts again, claiming that the President's May 8, 1972 orders for the mining of North Vietnamese ports and harbors and the continuation of air and naval strikes against North Vietnam constituted an escalation of the war not authorized by prior congressional actions and prohibited by the "Mansfield Amendment." This time the Second Circuit upheld the refusal of the court even to consider the issue, stating:

Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan.

44. 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972).
45. Id. at 1370.
46. Id.
   It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.
   It also urged and requested the President to implement this policy by establishing a final date for withdrawal and negotiating an immediate cease-fire and other necessary arrangements.
This decision seems to have relied particularly upon the two "functionalist" categories of political question elaborated in Baker: "a lack of judicially discoverable and manageable standards for resolving [the dispute]; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."

The difficulty of satisfying these criteria was not as great when the Vietnam War was being conducted according to a relatively steady policy, whether of escalation or deescalation. Thus, Justice Douglas, in dissenting from the Supreme Court's refusal to hear Massachusetts v. Laird in 1970, argued that there were discoverable and manageable standards for decision because the case was not challenging acts of the Executive in repelling a sudden attack but rather a war which had gone on for six years; the Second Circuit in Orlando was also able to find manageable standards for judging the constitutional adequacy of the authorization for continuation of the war in 1970.

In contrast, when there has been a dramatic change in the nature of hostilities, as with the mining of North Vietnamese harbors and increased bombing of the north in 1972, a court is put in the difficult position of having to make judgments on fast-moving events. But if constitutional reservations on war-making are to have any meaning, courts must be prepared to screen the available evidence to determine if the issue can be resolved judicially, for otherwise a President would have an automatic grace period in which to engage in or alter the nature of hostilities at will. The Second Circuit recognized as much in the last DaCosta decision in observing that we specifically do not pass on . . . whether a radical change in the character of war operations . . . might be sufficiently measurable judicially to warrant a court's consideration, i.e., might contain a standard which we seek in this record and do not find.

involving this plaintiff can be found at DaCosta v. Laird, No. 72 C (E.D.N.Y. Feb. 16, 1972), aff'd without opinion, 456 F.2d 1335 (2d Cir. 1972).


51. See note 37 supra.

52. 471 F.2d 1146, 1156 (2d Cir. 1973).
The crucial factor then becomes whether a court will conscientiously review the available evidence both as to a standard which might be found in congressional legislation and debates and as to the fulfillment of that standard or not by the new military action.

A good example of a court's retreating behind the political question doctrine and refusing to attempt to discover judicial standards and to test military action against them is the decision at the very end of the Indochina hostilities in *Holtzman v. Schlesinger*. In a suit brought in 1973 after the signing of the Paris Peace Accords, the withdrawal of all American combat forces from Vietnam, and the release of all known American prisoners of war, a Congresswoman and four Air Force officers who had refused bombing orders in Cambodia claimed that continued bombing of Cambodia lacked congressional authorization. The Second Circuit reversed the district court's grant of declaratory and injunctive relief (the first time a federal court has enjoined officials of the executive branch from combat activities) stating:

We are not privy to the information supplied to the Executive by his professional military and diplomatic advisers and even if we were, we are hardly competent to evaluate it. If we were incompetent to judge the significance of the mining and bombing of North Vietnam's harbors and territories, we fail to see our competence to determine that the bombing of Cambodia is a "basic change" in the situation and that it is not a "tactical decision" within the competence of the President.

The particularly troubling aspect of this decision is that the court found the issue of congressional authorization of the bombing non-justiciable without even considering recent evidence of legislative intent or the scope of the military action involved. Congress had been engaged for some time in debating and passing various kinds of bills to "cut-off" appropriations or limit the war effort. An appropria-

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56. See note 43 *supra*.
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tions bill passed on July 1, 1973, and signed by the President, provided that no funds could be expended for combat activities "in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia" after August 15, but its supporters had maintained that acceptance of the cut-off date would not be a recognition of authority to continue bombing up to that date. The congressional debates, although sometimes contradictory, provided significant evidence as to whether congressional appropriations could be considered to authorize continued bombing in Cambodia. Furthermore, in July, 1973, there were disclosures that the administration had engaged in secret bombing in Cambodia and Laos in 1969–71, and that reports had been falsified to keep the information from Congress and the public.

Judge Oakes, dissenting from the Second Circuit majority, observed that this new information raised doubts as to the effectiveness of prior appropriations bills to authorize the Cambodian bombing since "for authorization on the part of Congress by way of an appropriation to be effective, the congressional action must be based on knowledge of the facts."

It appears that a court could have looked to the evidence as to congressional intent and the degree to which the bombing in Cambodia constituted a "basic change" in the situation without infringing upon legitimate military and diplomatic prerogatives. The military is capable of providing manageable descriptions and analyses of the scope and objectives of particular combat missions, and there seems to be no reason that a court, sitting in camera if necessary to protect security information, is incapable of understanding and digesting such information. This would not substitute the judge for military commanders or the President in making tactical decisions any more than do other constitutional determinations that, under the particular circumstances of the case before the court, one branch of government has exceeded its constitutional authority. There are ways, as pointed out by Judge Sweigert in a 1970 decision holding that a challenge to the war was

58. See 484 F.2d 1307, 1317 (2d Cir. 1973) (Oakes, J., dissenting).
59. Id.
60. Id. at 1316. See also Mitchell v. Laird, 476 F.2d 533 (D.C. Cir. 1973) (printed in advance sheets, Withdrawn by Order of Court), dismissing an earlier challenge to the war by thirteen members of Congress on the ground that it is "a political question, or, to phrase it more accurately, a discretionary matter for Congress to decide in which form, if any, it will give its consent to the continuation of a war already begun by a President acting alone," but in which two of three judges (Bazelon and Wyzanski) stated that they were no longer persuaded that appropriations, draft extension and cognate legislation provided a valid congressional assent to the war.
justiciable, by which courts can minimize "undesirable, practical consequences of charting new requirements in constitutional law" so as not to be "called upon to decide what to do about the Vietnam War [but] only to decide the legal question" of who must authorize it and how such authority must be expressed. Even less than in, for example, reapportionment and school desegregation cases, it appears that a court's declaration of unconstitutionality of particular military actions need not involve it in making tactical decisions in the military sphere.

The tremendous litigative effort during the Vietnam War to obtain judicial enforcement of the constitutional delegation of war-making powers resulted in a healthy limitation of the political question doctrine to permit courts to consider in which branch the Constitution rests the authority to engage in particular hostilities. However, limitations placed on that review by permitting, as in Orlando, a finding of some joint action between the executive and legislative branches to preclude further review and by excluding from review, as in Holtzman, military developments on the grounds that they are "tactical decisions" considerably reduces any promise of remedy.

The issue will be substantially changed in future hostilities by virtue of Congress' assertion of war powers in an act passed, over presidential veto, in late 1973. It provides that when a President commits American troops to hostilities abroad or substantially increases the number of troops equipped for combat in a foreign country, he must report to Congress within 48 hours the circumstances, authority for, and scope of the action. He is required to stop the operation unless Congress approves it within sixty days, except that he may continue it for thirty days more if necessary to protect the American forces. Congress may order the operation stopped within that period by passing a concurrent resolution that would not be subject to presidential veto. This act provides much more precise standards for judicial review of future executive war-making which should be amenable to judicial resolution in the future.

b. The Appropriations Power

Recognizing the power of the purse, the Founding Fathers sought to limit the Commander in Chief's control over the military by giving Congress the exclusive power to appropriate funds for the support of the armed forces. The law has played little part in the enforcement

62. 318 F. Supp. at 54.
and administration of this power which has been carried out through complex interplay between executive and military budget officials and congressional committees, described in part by Adam Yarmolinsky and Maurice Garnier in their articles. The military has developed its own power base with powerful committee chairmen and members of Congress, and, with a few notable exceptions, has succeeded in obtaining appropriations with little concomitant oversight or control. Administrative law, although it could reach a variety of aspects of the executive budget process, has never been much resorted to and has virtually no place in discretionary congressional operations.

The Constitution does contain several provisions intended to provide a check upon the congressional appropriations power. A clause requiring that appropriations of money for the support of the army be limited to two years (borrowed from an English parliamentary limitation imposed in 1689 as a restraint against a standing army) is no longer an effective limitation.\textsuperscript{64} No modern military which must depend upon ongoing weapons research and technology could function under such a burden, and the appropriation of "no year" funds without limitation as to year of expenditure has been used to circumvent it.\textsuperscript{65}

Two other constitutional provisions aimed at assuring congressional independence of the military and at making appropriations public to enable voters to oversee Congress' exercise of that power were dredged out of obscurity by litigants during the Vietnam War. In \textit{United States v. Richardson},\textsuperscript{66} a federal taxpayer sought a declaratory judgment that the Central Intelligence Agency Act,\textsuperscript{67} which permits the CIA to account for its expenditures "solely on the certificate of the Director," violated the constitutional provision that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."\textsuperscript{68} In \textit{Schlesinger v. Reservists Committee to Stop the War},\textsuperscript{69} taxpayer members of an antiwar organization sought to require the Secretary of Defense and service secretaries to strike from the reserves some one hundred members of Congress on the grounds that their holding of reserve commissions violated the "Incompatibility Clause" stating that "no Person holding any Office under the United States, shall be a Member of either House during his

\textsuperscript{64} Art. I, § 8, cl. 12.
\textsuperscript{66} 94 S. Ct. 2940 (1974).
\textsuperscript{68} Art. I, § 9, cl. 7.
\textsuperscript{69} 94 S. Ct. 2925 (1974).
Continuance in Office.”

The plaintiffs succeeded in the lower courts, but on June 25, 1974, the Supreme Court reversed the circuit court opinions in both cases on the grounds that the plaintiffs lacked standing. The Supreme Court had stated in *Baker v. Carr* that the test for standing was whether the plaintiff “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues...” and in *Flast v. Cohen* that the question was whether the taxpayer had established a relationship with his claim under the taxing and spending clause so as to assure that “the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor...” It would be curious to question the sense of adverseness of the plaintiffs in *Richardson* and *Reservists Committee*; they were strong opponents of the war and of the particular congressional action they were challenging. Nevertheless, Chief Justice Burger’s majority opinion found that they lacked standing because they had shown no “injury in fact” and their claims constituted only a “generalized grievance” in which the impact upon them was “undifferentiated and ‘common to all members of the public.’”

The impact of these decisions on federal litigation in general may be considerable, and there is not space here to discuss the intricacies of the standing doctrine in a more general context. But there was language in Burger’s decision in *Reservists Committee* indicating that the subject matter of these cases contributed to the narrow decision as to standing. In being asked to undertake constitutional litigation, he stated, a court must consider that here plaintiffs “seek an interpretation of a constitutional provision which has never before been construed by

70. Art. I, § 6, cl. 2.
72. 369 U.S. 186, 204 (1962).
73. 392 U.S. 83, 106 (1968).
the federal courts” and that “the relief sought would, in practical effect, bring about conflict with both coordinate branches.”76 This seems to be another instance of judicial reluctance to enforce constitutional reservations against coordinate branches of government in the military and appropriations powers area.

Burger distinguished recent cases which found standing as to private competitive injury to a business association76 and as to injury to enjoyment of natural resources to an environmental group77 as involving specific, concrete injury while here citizens were attempting to “call on the courts to resolve abstract questions.”78 However, the dissenters had no difficulty in finding that the plaintiffs had sufficiently direct and personalized interests to seek enforcement of these constitutional provisions. Dissenting in Richardson, Justice Douglas argued that “no one has a greater ‘personal stake’ in policing this protective measure than a taxpayer” since it was inserted in the Constitution to give the public knowledge of the way public funds are expended.79 Justice Stewart maintained that the clause created an enforceable affirmative duty on the government with respect to all taxpayers and citizen-voters to make a public report of all receipts and expenditures.80 In Reservists Committee, Justice Marshall argued that the plaintiffs have a right under the Incompatibility Clause to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the reserves,81 while Justice Douglas claimed that they had a personal stake in “keeping the Incompatibility Clause an operative force in government by freeing the entanglement of the federal bureaucracy with the Legislative Branch.”82

The Richardson and Reservists Committee decisions represent a significant withdrawal of the availability of the courts to enforce the constitutional delegation of powers as to military affairs. It means that certain clauses in the Constitution may not be judicially enforceable. Justice Burger’s response to the plaintiff’s arguments that if they did not have standing, it was doubtful that anyone would, was:

Our system of government leaves many crucial decisions to

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75. 94 S. Ct. 2925, 2932 (1974).
78. 94 S. Ct. 2925, 2933 (1974).
82. 94 S. Ct. 2925, 2936, at 2938 (Douglas, J., dissenting).
the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.83

There is a certain disingenuousness in referring citizens to the political branches for enforcement of constitutional limitations in cases involving violations of those very branches. Although, over the years, hundreds of members of Congress have accepted commissions in the reserves, the Congress has not enforced the Incompatibility Clause against any member since 1916.84 And, as Justice Douglas stated in Richardson, the necessity for citizens to enforce their constitutional right to information about expenditures “only through the ‘slow, cumbersome and unresponsive’ electoral process” can hardly have been what the Founding Fathers intended in putting this express provision in the Constitution.85 Recent disclosures of large expenditures by the CIA in support of clandestine political and revolutionary activities in foreign countries raise further questions as to the wisdom of insulating the requirement to provide information as to Congress’ appropriation function from judicial scrutiny.86

c. The Civil–Military Relationship

The Constitution, as David Engdahl points out so well in his article, was drafted in light of certain extant concepts and practices concerning the role of the military in civilian society. Notions of limiting the military to its proper sphere, some of them deriving from English precedents, are particularly relevant to the “militia” clauses of Article I, but also inhere in other clauses, both expressly as in the third amendment’s prohibition on quartering of troops, and by implication in the military powers clauses and the due process clause of the fourteenth amendment. However, there has been a trend since World War I away from the traditional American distrust of the military and towards the centralization of extraordinary military powers in the Commander in Chief to deal with a variety matters not directly related to warfare itself. Senator Charles M. Mathias, Jr. of Maryland notes with alarm:

As a consequence of presidential proclamations of national emergency during the past 40 years, Congress has passed or

83. 94 S. Ct. at 2935.
85. 94 S. Ct. 2940, 2958.
86. See N.Y. Times, Sept. 8, 1974, at 1, col. 1.
recodified over 470 statutes delegating to the president prerogatives that it previously had reserved for itself. It has not established any means to withdraw that authority once the emergency has passed. . . . The fact that emergency statutes in the United States are loosely drafted and obscurely worded gives executive officials acting under an emergency proclamation dangerously broad discretion. 87

Lawrence Baskir, David Engdahl, and Howard De Nike describe two areas in which there is doubt as to the propriety of recent military involvement in the civilian sphere—surveillance and intelligence-gathering among civilians, and use of military forces in civil disturbances, particularly as proposed under broad and open-ended Civil Disturbance Regulations. However, there is some doubt as to whether these practices can be challenged in the courts. Even if, as Professor Engdahl argues, a good case can be made that the proposed Civil Disturbance Regulations are unconstitutional, it may well be that judicial review cannot be obtained.

The Supreme Court's 1972 decision in the military surveillance case, Laird v. Tatum, 88 provides a good example of the barriers to judicial review in this area. It arose out of an order by President Johnson in 1967, pursuant to a statute empowering the President to use the armed forces to suppress insurrection and domestic violence, 89 that the army assist local authorities in gathering data for use in civil disorder situations. The military operations mushroomed until thousands of military agents were conducting surveillance and intelligence-gathering, including maintaining files on the membership and practices of virtually every activist political group in the country, infiltrating groups to reach their confidential files, and using a variety of photographic and electronic equipment for clandestine surveillance. A number of individuals and organizations subjected to surveillance brought a class action to enjoin these activities, raising questions as to the President's authority under the statute to order such extensive intelligence-gathering, the constitutionality of such activities by the military in the civilian sphere, and the propriety of such activities under the first amendment. However, the Supreme Court, in a majority opinion by Chief Justice Burger, held that the plaintiffs lacked standing, finding that they had not shown any direct injury and that mere

88. 408 U.S. 1 (1972).
knowledge of military investigative activity which might be broader than necessary and might in the future take other and additional action detrimental to them fell short of a "chilling" of first amendment rights.\textsuperscript{90}

It seems likely that government surveillance does tend to inhibit citizens from joining groups and engaging in conduct which are known to be under surveillance, but the Court considered such effects uncertain and speculative. It clearly felt that the usual liberal standing rules as to the "chilling" of first amendment rights must be tempered in a situation such as this involving military activities in the sensitive area of national security. Burger's opinion charged that plaintiffs were simply seeking

a broad scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination to probe into the Army's intelligence-gathering activities

and that the logical end would be for the federal courts to become "continuing monitors of the wisdom and soundness of Executive action."\textsuperscript{91} Thus basic to the Court's holding was judicial reluctance to permit a collateral aspect of a law suit, the discovery process, to be used to delve into secret military operations.

As Mr. Baskir points out, discovery was an important objective of the suit, and particularly so for the Senate subcommittee whose attempts to obtain such information through the process of legislative investigation had been thwarted. Thus Burger's concern that the suit was a "fishing expedition" was not entirely unjustified. However, the plaintiffs had rather clear justifications for further discovery. They might well have been able to show personal injury had they been permitted to discover the dossiers maintained on them, dossiers which, without meaningful limitations upon their use, might be used to their prejudice in the future in anything from an application for federal government employment to obtaining a security clearance for a job with a private employer. If the principal concern of the Court was to protect security information not relevant to the law suit, it could have ordered the lower court to conduct an \textit{in camera} examination of the army's files to prevent disclosure of information not relevant to the suit or limited disclosure to the individual plaintiffs rather than the

\textsuperscript{90} 408 U.S. 1, 13-14 (1972).

\textsuperscript{91} Id. at 14-15.
class. Instead the Court's decision effectively rendered allegedly unconstitutional actions of the military immune from judicial review, consigning litigants to the "Catch 22" situation of being denied standing because of lack of proof of real injury, yet being incapable of using judicial discovery processes to force disclosure of the very information which could demonstrate such injury. This result was a critical blow to judicial enforcement of constitutional limitations upon the military.

2. Review of Treatment and Disposition of Military Personnel

Civilian courts have traditionally acknowledged that they lack jurisdiction to interfere with determinations by the military concerning its own personnel. It has been asserted that this doctrine is required by the constitutional delegation of powers over the armed forces to the executive and legislative branches and by the need for military autonomy in maintaining internal discipline and order. With respect to review of court-martial decisions, American law followed the English concept that military courts provide an autonomous system of jurisprudence which, due to the exigencies of military life, should not be reviewed or interfered with by the civil courts. However, the unavailability of civil court review of courts-martial does not extend to habeas corpus jurisdiction. The policy reasons for habeas corpus as a last remedy for a petitioner in unlawful custody were as ancient and compelling as the policy of noninterference with the military, and when the two interests collided, habeas corpus was the victor.

a. Court-Martial Jurisdiction

Habeas corpus jurisdiction was originally limited to the issue of whether the court-martial had proper jurisdiction over the person and the offense. Thus, in the 1866 case of *Ex parte Milligan*, the Supreme Court ruled that a civilian could not be tried by a military court, ordering the release of a Southern sympathizer who had been condemned to death for treason by a Union court-martial. The *Uniform Code of Military Justice (UCMJ)*, passed by Congress in 1950,
provided for court-martial jurisdiction over all crimes committed by servicemen (no matter when or where) as well as by certain civilians. However, the Supreme Court began chipping away at this expansionist view of military jurisdiction with its 1955 decision in *United States ex rel. Toth v. Quarles* in which it held that jurisdiction over discharged servicemen was unconstitutional. Justice Black, writing for the court, found that a number of fundamental rights which are provided a criminal defendant in a trial in a federal court established by article III of the Constitution—such as a jury chosen from different walks of life and independent judges protected by life tenure—are not available in a court-martial. Considering the disciplinary nature of court-martial, he concluded that

conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.100

He found little military necessity for denying civilian ex-soldiers a trial in a civilian court for offenses committed while they were on active duty, and expressed reservations concerning broad court-martial jurisdiction:

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.101

After *Toth*, the Supreme Court also struck down court-martial jurisdiction over civilian dependents accompanying the armed forces outside the United States in peacetime and civilian employees of the military overseas in peacetime.102 However, with the Vietnam War, the military dusted off Article 2(10) of the UCMJ, which provides

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100. *Id.* at 17.
101. *Id.* at 22.
for court-martial "in time of war [of] persons serving with or accompanying an armed force in the field," and obtained court-martial convictions abroad of a number of civilian military employees. But in 1969, a merchant seaman being held for trial for murder in a court-martial in Vietnam petitioned for a writ of habeas corpus. The District of Columbia Circuit held in *Latney v. Ignatius* that an expansive interpretation of Article 2(10) would be unconstitutional and thus Article 2(10) had to be read as not reaching this civilian seaman, employed by a private shipping company, and in no closer physical proximity or duration to the armed forces than a seaman in port for a short period, living on his ship and under the discipline of his civilian captain while waiting for it to turn around, not assimilated to any military personnel in terms of living quarters or conditions, who had been arrested for a crime committed in a bar frequented by civilians in port.

A year later the Court of Military Appeals held in *United States v. Averette* that Article 2(10) only applied in wars formally declared by Congress, thus beating a judicious retreat on the lower military court's claim of court-martial jurisdiction over a civilian employee charged with larceny of government property in Vietnam and effectively ending the military's attempt to try civilians accompanying the forces abroad by court-martial.

In 1969, in the landmark case of *O'Callahan v. Parker*, the Supreme Court held that "status" as an active duty serviceman was not itself sufficient to make exercise of court-martial jurisdiction constitutional and that courts-martial may only exercise jurisdiction over servicemen's offenses which are "service-connected." Thus it found no court-martial jurisdiction to try a sergeant for housebreaking, assault, and attempted rape committed in a hotel in Honolulu while he was off-duty and in civilian clothes. Justice Douglas' opinion specifically held that court-martial jurisdiction over non-service-connected offenses deprives a serviceman of his fifth amendment right to indictment by grand

jury and his right under the sixth amendment and article III, section 2 to trial by jury. However, he also expressed fundamental doubts as to the fairness of the military justice system, echoing the sentiments of Justice Black in *Toth*, stating, "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."\(^{108}\) The military were especially offended by the sweeping indictment of the quality of military justice presented by Justice Douglas in a somewhat one-sided opinion with little factual and authoritative support.\(^{109}\) However, *O'Callahan*'s critique of military justice has gained considerable support as later articles\(^{110}\) and studies\(^{111}\) have reached similar conclusions, and as the dire effects upon military discipline, efficiency, and administration did not materialize.

One might have expected the Supreme Court in applying *O'Callahan* to adopt the principle enunciated by Justice Black in *Toth* that military tribunals should be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."\(^{112}\) However, in the first post-*O'Callahan* decision to reach the Court, *Relford v. Commandant*, the unanimous opinion

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108. *Id.* at 265.


by Justice Blackmun took a decidedly less hostile tone towards military justice and indicated that service-connection might be found even when the offense is a civilian one or many of its incidents were civilian rather than military. The actual holding, that the kidnapping and rape on a military post of the sister of another serviceman was service-connected, was easy to accept. But some of the factors listed by Justice Blackmun as significant, such as "the absence of any flouting of military authority" and of any "threat to a military post," suggest expanded situations in which court-martial jurisdiction over civilian-type offenses would be appropriate.

This trend was even more evident in the Court's 1973 decision in Gosa v. Mayden\(^\text{115}\) which denied retroactive effect to O'Callahan. Rejecting the argument that O'Callahan was a "jurisdictional" decision which determined that military courts lack power over non-service connected offenses,\(^\text{116}\) Justice Blackmun, writing for a 6-3 majority, found it had only determined the "appropriate exercise" of jurisdiction. The serviceman had argued that the absence of rights to grand jury and jury and the disciplinary and command-dominated structure of the court-martial infected the "integrity of the truth-determining process" and thus that the fairness of his pre-O'Callahan conviction was in doubt.\(^\text{117}\) In an apparent departure from the philosophy expressed in Toth and O'Callahan, Justice Blackmun described the rights to grand jury and jury as only playing "some role in assuring the integrity of the truth-determining process," and court-martial proceedings as "not basically unfair."\(^\text{118}\) He further noted that retroactive application of

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114. They are:
1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offense's being among those traditionally prosecuted in civilian courts.

Id. at 365.


116. Id. at 673-75.


O'Callahan would require "wholesale invalidation of convictions rendered years ago," resulting in inability to retry many persons because of unavailability of witnesses and evidence, which society could not tolerate given that courts-martial provide "essential justice."  

The Gosa opinion raises some doubt as to the Court's continued adherence to the O'Callahan rationale, a doubt emphasized by Justice Rehnquist's statement in his concurring opinion that O'Callahan was wrongly decided. The military courts only reluctantly accepted O'Callahan and have generally interpreted it so as to retain as much court-martial jurisdiction as possible. A number of federal courts have disagreed with the position of the Court of Military Appeals that drug offenses committed off-post are "service-connected," and the Supreme Court has granted certiorari on a case raising the issue. A reversal of or major retreat from O'Callahan, based on a rationale that there is little constitutionally significant difference between civilian trials and courts-martial, would be an unfortunate setback both for servicemen's rights and for legal control of the military. The O'Callahan rule has brought the United States into conformity with most European nations which provide either for civilian trial of servicemen for all offenses (as in West Germany, Sweden, Austria, and Denmark) or for offenses which affect the person or property of a civilian (as in the United Kingdom). Broad military court jurisdiction is often a sign of stunted democratic procedures in a country. In the Republic of South Vietnam, for example, military courts which began in the 1950's as emergency and temporary institutions to try local military-related offenses gradually expanded their jurisdiction until, by the mid-1970's, they had become the major instrument of judicial power in the coun-

119. Id. at 685.
120. Id. at 692.
try. A 1970 Vietnamese Supreme Court decision that military field courts were unconstitutional was ignored as military courts extended their authority over cases, such as prosecutions of civilians for criticizing government policies, which were previously within the purview of civilian courts. Similarly, military courts were given a broad jurisdiction by the North Vietnamese and the Vietcong, often being used to insure "political homogeneity" and repress "political offenders and anti-revolutionary elements." American military courts have neither the same flagrant history of usurping civilian court functions nor the lack of due process found in Vietnam, but the absence of rights such as the right to trial by jury and the all-military administration make them subject to some of the same concerns. O'Callahan might well be viewed as essentially a civil-military relations case, interpreting and implementing the concerns expressed in the Constitution that military authority be limited to prevent undue influence in the civilian sphere.

b. Constitutional Rights in Courts-Martial

Even though civilian courts traditionally accepted cases on habeas corpus challenging court-martial jurisdiction, they have not always considered claims that the court-martial proceedings were unconstitutional in other ways. However, in 1953 in Burns v. Wilson, a case in which convicted servicemen claimed they had been unconstitutionally held incommunicado and interrogated after their arrest by military police, the Supreme Court decided for the first time that a federal court could go beyond the jurisdictional issue and consider whether there had been a denial of constitutional rights which the military had failed to consider. Since Burns, there has been disagreement among federal courts as to how broad the Supreme Court intended habeas corpus review of courts-martial to be, and the Supreme Court has not spoken again on the issue. Some circuits have held that if a court finds that the court-martial and military appeals courts gave "full and fair consideration" to the serviceman's claims that his constitutional rights had been denied, it must deny the writ even if it believes that he was deprived of a constitutional right. Other courts, which seem to be gaining adherents among the circuits, have held that review should extend to all claims of denial of constitutional rights in the court-martial process. Following

127. Id.
130. Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972); Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967).
131. Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), rev'd, 94 S. Ct. 2547 (1974);
this standard, federal courts have reversed court-martial convictions on grounds that the defendant was not provided adequate counsel or was denied other constitutional rights not clearly inapplicable in the military setting.\textsuperscript{132}

The Vietnam War brought a rash of new legal challenges to court-martial practices. Although the military appeals courts, headed by the civilian Court of Military Appeals, have a good record for keeping military due process rights abreast of expanding civilian constitutional doctrine, especially in such areas as search and seizure and self-incrimination, they have been generally unresponsive to constitutional challenges to basic features of the court-martial system as established in the \textit{Uniform Code of Military Justice}. One of the most concerted challenges to fundamental court-martial practices arose out of the convictions of Vietnam war dissenters for military offenses which were vague or constituted a direct infringement on free speech. Article 88,\textsuperscript{133} forbidding officers from uttering "contemptuous words against the President" and certain other public officials, was invoked for the first time since 1951 in the 1965 court martial of Lt. Henry Howe for carrying a sign critical of the President in an off-post peace rally while in civilian clothes.\textsuperscript{134} A sizable number of servicemen were court-martialed for expressing opposition to the war in forms which are constitutionally protected in civilian society—such as passing out leaflets,\textsuperscript{135} talking in a bull session,\textsuperscript{136} or publishing a newspaper\textsuperscript{137}—under the "general articles," Article 133\textsuperscript{138} forbidding "conduct unbecoming an officer and a gentleman" and Article 134\textsuperscript{139} proscribing "disorders and neglects to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces."

The constitutional attack on these military offenses, first in the military appeals courts and later on habeas corpus in the federal courts, questioned the necessity for the military to use vague and overbroad offenses, still phrased in eighteenth century terminology, in the changed


\textsuperscript{133} See, e.g., \textit{In re Stapley}, 246 F. Supp. 316 (D. Utah 1965); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965).


CONTROLLING THE MILITARY

Conditions of the contemporary armed forces. The military courts routinely rejected the claims of unconstitutional vagueness simply by citing prior precedents and turned back first amendment free speech arguments with conclusory statements that criticism of the military or the war by servicemen undermines morale and discipline. However, a number of federal courts were willing to overcome traditional judicial deference towards the military and to examine the military's policy arguments. In 1972, the District of Columbia District Court, in Stolte v. Laird, reversed the court-martial conviction of two soldiers for passing out an anti-war leaflet on post, holding that the specification under Article 133 under which they were charged (making "disloyal statements") was unconstitutionally vague and overbroad. The court said that it was not prepared to accept historical precedents and early court-martial practices as justifying "the flaunting of modern and well-defined constitutional standards." It rejected the argument that "every statement critical of a military program or policy can have an effect on attitudes and morale, which can arguably affect in turn order and discipline," stating that "[m]otivation is too intangible a concept to suffice to meet the directness required for a prejudice to order to override the First Amendment." Finally, although the court observed that political discussions by servicemen on the drill field or on duty were not appropriate, it found that

in their off-duty hours, in barracks, "bull sessions," and even in leaflets, they can express their views on political issues, so long as they do not directly prejudice good order and discipline. While soldiers can be compelled to obey orders; they cannot be compelled to an ideological orthodoxy prescribed by their superior officers.

The army did not appeal the Stolte decision, and several months later, in an opinion written by retired Supreme Court Justice Tom Clark, the District of Columbia Circuit held Article 134 unconstitutionally vague and overbroad in reviewing the court-martial conviction of a serviceman for handing out an antiwar leaflet. Shortly thereafter, the Third Circuit similarly held both Articles 133 and 134

142. Id. at 1406-07.
143. Id. at 1406.
144. Id. at 1403.
unconstitutional in reversing the conviction of Captain Howard Levy for criticizing the war to other servicemen.\textsuperscript{146} However, the victories were short-lived; in the summer of 1974, the Supreme Court reversed both decisions. Justice Rehnquist, writing for a 5–3 majority in \textit{Parker v. Levy},\textsuperscript{147} found that there was sufficient elaboration in the \textit{Manual for Courts-Martial},\textsuperscript{148} military cases, and military custom to give a serviceman notice of what was criminal. Given the need of the military to impose limitations on conduct different from those applicable in civilian life, he found that a presumptive validity should be given to Congress' use in the general articles of imprecise language which sweeps more broadly than is permissible in civilian statutes. He conceded that there might be marginal applications where the general articles would infringe on first amendment rights of servicemen, but held that Captain Levy had actually urged enlisted men to refuse to obey orders to combat and that this was not protected free speech. Thus, it is possible that the general articles may still be found unconstitutional in a case in which the speech is protected by the first amendment.

It is instructive to note the sources on which the \textit{Levy} opinion relied for its generalizations about military life. In support of the proposition that "the military is, by necessity, a specialized society separate from civilian society," Justice Rehnquist relied on random quotes from Supreme Court cases dating from 1890 to 1955.\textsuperscript{149} The quote from the 1890 case read: "An army is not a deliberative body. It is an executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."\textsuperscript{150} Rehnquist then quoted at length from cases dated 1857, 1886, 1893, and 1897 to show that "long-standing customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134."\textsuperscript{151} Finally, he made the remarkable statement that the UCMJ "cannot be equated to a civilian criminal code" since it regulates conduct unregulated in the civilian sphere, concluding therefrom that it need not meet the same procedural due process standards as to vagueness.\textsuperscript{152} Thus he concluded that the proper standard for review of a vagueness challenge to a military offense is not that applicable to normal criminal offenses, but to criminal statutes regulating economic affairs in which, presumably

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147. 94 S. Ct. 2547 (1974).
150. \textit{Id.} at 2556, \textit{quoting from In re Grimley}, 137 U.S. 147, 153 (1890).
151. \textit{Id.} at 2557–58, 2557.
152. \textit{Id.} at 2558.
\end{flushright}
because the purpose is regulatory and the penalty often economic, the same high standard of definiteness is not required and there is a strong presumptive validity of sufficiency of notice.153

One need only to have read sparingly in contemporary literature about the military to have doubts about these assumptions. The invocation of absolute obedience, if not laid to rest by Nuremberg154 and military cases which have upheld a serviceman's right to question orders for clarification and to disobey them if illegal,155 has been rejected in contemporary military teaching. Military leadership doctrine now favors persuasion over authoritarian domination and views the commander's objective as instilling high initiative and morale rather than discipline.156 The proposals of the Military "Young Turks" (described

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153. The Supreme Court, however, has not been willing to diminish constitutional due process rights in criminal proceedings in which the defendant, as in a court-martial, can receive a jail sentence. See Argersinger v. Hamlin, 407 U.S. 25, at 37 (1972), holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial;" Wyman v. James, 400 U.S. 309, at 326 (1971), holding that home visitation by welfare workers was "a reasonable administrative tool" not violating the fourth amendment, but distinguishing criminal cases in which the constitutional right would apply.

154. The Fourth Principle of the Nuremberg Charter and Judgment formulated by the International Law Commission, 5 U.N. General Assembly Official Records, Supp. 12, at 12, U.N. Doc. A/1313 (1950), reads: "The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him." In the "Subsequent Proceedings" war crimes trials conducted at Nuremberg by the United States under Control Council Law No. 10, superior order was raised and rejected as a defense to shooting of hostages, United States v. List (the Hostages Case), XI Trials of War Criminals 759–1326, and to extermination programs, United States v. Ohlendorf ("Einsatzgruppen Case"), IV Trials of War Criminals 3–598. In the "Einsatzgruppen Case," the Tribunal stated:

The obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and is not expected to respond, like a piece of machinery. It is a fallacy of wide-spread consumption that a soldier is required to do everything his superior officer orders him to do.

Id. at 470, quoted in United States v. Kinder, 14 C.M.R. 742, 776 (AFBR 1953). See also DEPT OF THE ARMY, THE LAW OF LAND WARFARE, FM 27–10 (1956), para. 509a:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

155. See, e.g., United States v. Presley, 18 U.S.C.M.A. 474, 40 C.M.R. 188 (1969), holding that response "in a negative way" of enlisted man to officers' orders to move out of camp and engage Viet Cong units was, under the circumstances, "not an expression of defiance of their authority, but an effort to obtain reconsideration and relief from their respective orders;" United States v. Ashley, 8 C.M.R. 810 (ABR 1953), holding enlisted man's remonstrance that he had a right to be in mess hall upon being ordered to leave by an NCO was not disobedience since his actions in attempting to explain the situation were not unreasonable.

156. See, e.g., OFFICE OF THE DEPUTY CHIEF OF STAFF FOR PERSONNEL & THE UNITED STATES MILITARY ACADEMY, PROCEEDINGS FOR THE JUNIOR OFFICER LEADERSHIP
in John Lovell's book review157) for a pluralistic military and relaxed standards of discipline in the "supporting" forces reflects a widely-shared feeling today that rigid discipline and obedience often undercut, rather than promote, morale and efficiency in the armed forces. The tremendous changes in treatment of military personnel which came in the late 1960's and early 1970's, involving higher pay, greater recognition of individuality as in hair styles, provisions for greater privacy in military quarters, and expanded resort to off-base housing,158 make references to nineteenth century military customs and usages of doubtful relevance today. Greater diversity and pluralism among military personnel today make it especially difficult for all servicemen to appreciate the meaning of vague offenses like "conduct unbecoming an officer and a gentleman."

As far as the characterization of the military as an executive arm, it has long been accepted that courts-martial perform judicial functions and, although not article III courts, are bound by constitutional and judicial policy restraints.159 The military maintains that the UCMJ is indeed the equivalent of a modern civil criminal code, offering servicemen equivalent procedural rights to those available in civilian courts.160 Military law contains some substantive offenses not found in civil criminal codes, but civil codes also differ in substantive law from state to state and, in fact, sometimes limit certain offenses to certain groups, such as juveniles, state licensees, or homeowners. As Justice Stewart observed in dissent,

[t]he question before us is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally


punished for violating them.\textsuperscript{161}

Based upon "these very significant differences between military law and civilian law and between the military community and the civilian community," Justice Rehnquist not only approved a lower standard of specificity and definiteness in military criminal offenses, but concluded that there were "weighty countervailing policies" undercutting the usual broad doctrine of standing in first amendment cases.\textsuperscript{162} Thus, he held that Levy, having 'clearly engaged in nonprotected speech, had no standing to challenge the overbreadth of the articles as applied in other contexts. Missing was any analysis of first amendment policies or the causes of dissent in the military, such as are found in Howard De Nike's article, which reflect legitimate concerns to which free speech can provide valuable correctives in a democratic society.

Social science research should not be touted as an infallible guide to the decision of military cases. As in most nonphysical sciences dependent upon imperfect research models and human judgments, the evidence is often inconclusive and the conclusions conflicting. But assumptions like Justice Rehnquist's, based upon no more than a judge's own predispositions buttressed by equally unverified quotations from prior cases and historical analogies, seem particularly inadequate for dealing with complex issues of control of the contemporary military establishment.

A number of other features of the court-martial system have been challenged in federal habeas corpus actions, most of them with little success. Attacks upon the method of selection of the military jury (the commander makes the selection from among his officers or, if requested by the defendant, from at least one-third enlisted men, on the basis of whom he believes is best qualified by reason of age, education, training, experience, length of service, and judicial temperament)\textsuperscript{163} have not been successful, the courts continuing to find no sixth amendment right to trial by jury in a court-martial.\textsuperscript{164} A few commanders, however, have been persuaded to use a method of random selection which results in a largely enlisted-man jury, and social science and statistical data have been used to show the practical feasibility and to assuage commanders' fears of misuse.\textsuperscript{165} Several federal courts have

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\item \textsuperscript{161} 94 S. Ct. 2547, 2570 at 2577 (1974).
\item \textsuperscript{162} 94 S. Ct. 2547, at 2564, 2559-60.
\item \textsuperscript{163} 10 U.S.C. § 823 (1970).
\item \textsuperscript{165} \textit{Seaman Facing a Court-Martial Upsets Judge Selection System}, Washington
\end{enumerate}
\end{footnotesize}
held that summary courts-martial (in which the summary court officer serves as judge, jury, prosecutor, and defense counsel) violates servicemen's constitutional rights to due process and defense counsel, according to the Supreme Court's decision in *Argersinger v. Hamlin*, requiring a lawyer as defense counsel whenever a defendant could receive a sentence of confinement. Thereafter the Army and Navy changed their procedures to require lawyer defense counsel in summary courts where confinement could be given. However, suits challenging the continued refusal of the Navy and Marine Corps to provide lawyer counsel have resulted in conflicting decisions among the lower courts.

**c. Military Personnel Actions**

Despite the doctrine that habeas corpus was the only vehicle for obtaining review of military determinations, various federal remedies have gradually been applied in the military context, and there are now limited categories in which collateral review is possible. The Vietnam war resulted in a flood of suits in federal courts seeking judicial relief from military personnel actions claimed to be illegal, unconstitutional, arbitrary, or unjust. They challenged inductions and activations; orders to Vietnam and transfers to other posts; refusals to discharge for medical or other reasons; pending courts-martial and less-than-honorable discharges; methods of training and discipline; and refusals to permit meetings, distribution of literature, and other exercises of free speech. Early in the war, the courts generally dismissed such suits, quoting from a 1953 Supreme Court decision which denied review of a serviceman's assignment with the blunt words, "[j]udges are not given the task of running the army."

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The first substantial break in this nonreviewability doctrine had occurred in suits by ex-servicemen challenging less-than-honorable discharges. In the 1958 case of Harmon v. Brucker, the Supreme Court held that the Secretary of the Army had exceeded his authority in giving a serviceman with a good record an undesirable discharge because of allegedly subversive activities before his induction and ordered that an honorable discharge be issued. Since then, federal courts have extended their review to less-than-honorable discharges where servicemen were not accorded proper procedural rights under military regulations or the Constitution. In a particularly galling case for the military, a federal court ruled in 1970 that allegations that Private Andy Stapp (founder of the American Servicemen’s Union and vigorous critic of the military) had close associations with members of the Communist Party and was a member of the Workers World Party were insufficient grounds for an undesirable discharge since they did not indicate misconduct in the performance of his military duties.

These precedents were significantly expanded in the Vietnam War when federal court review was extended for the first time to servicemen who claimed that they were entitled to be discharged. Such cases involve considerably more interference with the day-to-day operations of the military than did the cases involving review of court-martial convictions and less-than-honorable discharges, since here the courts are asked to overturn military decisions that men should not be discharged, thus directly affecting military manpower levels.

The type of case to which the courts were first willing to extend review involved servicemen who had been refused discharge as conscientious objectors. In 1967, Charles A. Hammond, who had enlisted in the U.S. Naval Reserve four years before when he was 17 years old, submitted a request for a CO discharge, stating that he had become a member of the Society of Friends and could no longer participate in good conscience in war in any form. His request for discharge was refused by the Chief of Naval Personnel, and when he failed to attend reserve drills, he was ordered to report for two years active duty. He filed a petition for a writ of habeas corpus with the U.S. District Court for Connecticut, claiming that there was no “basis in fact” for the military’s finding that he was not entitled to discharge as a conscientious objector.

tious objector, thus depriving him of his rights to due process and equal protection of the laws under the Constitution. The district court dismissed, but the Second Circuit held that federal court review of a refusal of the military to discharge a serviceman was appropriate.\textsuperscript{176} The impact of the Hammond decision was immediate and dramatic. Four other U.S. Circuit Courts accepted its position in short order,\textsuperscript{177} and federal district courts around the country began ordering servicemen to be discharged when they found no basis in fact for the military's refusal to discharge them as CO's. Some courts extended review to other situations in which military regulations provide for discharge, ordering the discharge of servicemen who claim they should have been discharged because of medical or psychiatric disqualifications, dependency of others upon them, and personal hardship.\textsuperscript{178}

The federal courts also expanded review during the Vietnam War to cases in which servicemen claimed they had been improperly inducted or drafted, or, in the case of reservists, improperly activated. Many individuals were ordered discharged because their draft boards failed to follow regulations, violated their constitutional rights in the process of classifying and inducting them, or denied them a deferment without good reason.\textsuperscript{179} Despite the hostility of many district courts towards challenges to selective service procedures, draft boards were increasingly found to have engaged in improper or shoddy practices. By the latter part of the war, it was not uncommon for a number of individuals in each group reporting for induction to have their attorneys simultaneously filing writs of habeas corpus for their discharge in the local federal court and for basic training classes to be substantially reduced by court-ordered discharges. This was one of the most extraordinary phenomena of the war, as the federal courts played a key role in reviewing, and ultimately in making almost unenforceable, the selective service system as it was then constituted. It is one of the best examples of increased judicial control of one phase of the military establishment in response to public opposition to the draft and heavy resort to litiga-

\textsuperscript{176} Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).
\textsuperscript{177} United States \textit{ex rel.} Sheldon v. O'Malley, 420 F.2d 1344 (D.C. Cir. 1969); Bates v. Commander, 413 F.2d 475 (1st Cir. 1969); United States \textit{ex rel.} Brooks v. Clifford, 409 F.2d 700, \textit{petition for rehearing denied}, 412 F.2d 1137 (4th Cir. 1969); In re Kelly, 401 F.2d 211 (5th Cir. 1968) (dictum).
\textsuperscript{179} See, \textit{e.g.}, Lewis v. Secretary of the Army, 402 F.2d 813 (9th Cir. 1968); Powers v. Powers, 400 F.2d 438 (5th Cir. 1968); United States \textit{ex rel.} Wilkerson v. Commanding Officer, 286 F. Supp. 290 (S.D.N.Y. 1968).
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tion by draftees. The demise of the draft as a result of Congress’ move to a volunteer army was certainly due in part to the federal courts.

The final critical jump was for federal courts to grant review of military rules, practices, and conduct which were arbitrary or resulted in denial of constitutional rights. The cases prior to the Vietnam War were crystal clear that courts should not get involved in such matters. However, the deprivation of rights in some cases was simply too great for courts to go on ignoring what the military did, and there was a modest break away from this rule during the Vietnam War. Federal courts began to grant review in cases where it was shown that the military had failed to follow its own regulations, that its conduct constituted a gross abuse of discretion, or that constitutional rights were violated. A serviceman who claimed that he had been assigned to duties for which he was not medically qualified obtained a court order that he be given a job which would not require stooping or prolonged standing. The transfer of a serviceman to Vietnam was cancelled by a court where the military had failed to consider that the health of his son would be adversely affected. Servicemen who had been reassigned to other bases or to Vietnam on account of their anti-war activities were able to obtain restraining orders preventing their transfer pending determination of their cases on the merits (they were generally unsuccessful on the merits).

Some courts, however, have continued to follow a strict nonreviewability rule as to duty assignments. A suit brought by a serviceman who claimed he had received orders to Vietnam because of making antiiwar statements to a newspaper reporter was dismissed, the court stating that duty assignments of one properly inducted were not reviewable. The Second Circuit, in a suit by a member of the army band at Ft. Wadsworth, New York, who received orders to Texas after he and other band members signed a petition calling for immediate

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181. Schatten v. United States, 419 F.2d 187 (6th Cir. 1969); United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968).
withdrawal from Vietnam and after some of their fiancees and wives had attempted to march with the band carrying antiwar signs in a 4th of July parade, held that judicial review of duty assignments was appropriate only where there is a strong case that the military has exceeded its authority or violated first amendment rights.\[187\] It observed that his transfer may have been justified to avoid disorder or a repeat of the 4th of July incident. In a suit by reservists who objected to orders to march in a V.F.W. parade three months before the 1972 election, brought on the grounds that it was a partisan political demonstration, relief was denied; the judge stated that orders to march in holiday parades are legal.\[188\] Courts have been especially hesitant to review cases involving military personnel problems not related to civil rights. A court dismissed a suit by an officer who claimed he had been discriminated against by the commander's failure to inflate ratings as other commanders did, causing him to be denied a promotion.\[189\] In a highly publicized case, Captain Marcus Arnheiter challenged his removal from the command of a destroyer escort ship as discriminatory.\[190\] The court refused relief on the grounds that the record showed that his removal was an internal, administrative matter involving the judgment of a military commander.

Suits by servicemen claiming violations of their rights to free speech have been among the most difficult cases for courts during the Vietnam War because they involved highly controversial matters and conduct which the military viewed as a serious threat to the armed forces. Courts were occasionally willing to step in to prevent flagrant violations of rights. For example, in 1969, the Fourth Circuit found that black soldiers who had organized an antiwar group at Ft. Jackson (known as the "Ft. Jackson 8") were being improperly confined in the stockade pending court-martial on account of their antiwar views and ordered them released (the court-martial charges, based on their attempts to hold a meeting to discuss the war, were later dropped after adverse publicity and pressure from black Congressmen).\[191\] However, courts were generally unwilling to interfere with limitations on antiwar dissent through restrictive regulations and threats of courts-martial while the war was still on. Suits during the war challenging military

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190. Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970).
regulations forbidding distribution of literature on-post without prior approval of the commander, public meetings on post to discuss political issues, participation in off-post demonstrations in uniform, and wearing of hair beyond required lengths were unsuccessful.\textsuperscript{192}

After the war was ended, two federal courts struck down military regulations giving commanders broad powers to forbid distribution of written materials on post without prior authorization.\textsuperscript{193} These decisions followed earlier precedents requiring the military to permit civilians to enter “open military posts” and engage in reasonable first amendment activity. In 1970, the Seventh Circuit held that a civilian employee of the army could not be excluded from the post because she had distributed antiwar literature there.\textsuperscript{194} In two significant cases in 1972, the federal courts ruled that opponents of the war and antiwar presidential candidates (one was Dr. Benjamin Spock) could not be prevented from distributing literature and from campaigning on military bases which are generally open to the public.\textsuperscript{195} Thus, although the courts failed to respond to challenges to military surveillance and intelligence activities in the political sphere, they did open up the military environment itself to limited political activity.

One of the strongest post-war cases demonstrating the expanded role of federal courts in overseeing the military’s personnel practices arose out of the drug abuse program instituted by the army in 1973 in Europe described in Howard De Nike’s article. Designed to identify drug pushers and users, provide users with medical assistance, counseling, and rehabilitation, and eliminate confirmed users from the service, the program sanctioned mandatory inspections of soldiers’ rooms property, clothing, and bodies for drugs or indications of drug use.\textsuperscript{196} A group of soldiers sued in the District of Columbia federal court, and Judge Gerhard Gesell found a number of the practices unconstitutional.\textsuperscript{197}


\textsuperscript{194} Kiiskila v. Nichols, 433 F.2d 145 (7th Cir. 1970).


The special drug inspections authorized without probable cause are made in a most intrusive manner solely to ferret out drugs and are not analogous to the Army's traditional preparedness inspections . . . . Such distinguishing features as the use of dogs, strip skin examinations and detailed intrusion into a soldier's personal effects take this procedure out of the narrow exemption from traditional Fourth Amendment restrictions that has been carved out for legitimate inspections.

He rejected the military's defense of "military necessity," stating that it "does not embrace everything the military may consider desirable" and concluded that although the drug problem was serious, it was not of "epidemic proportions" such as to warrant ignoring constitutional safeguards.108

Conclusion

Despite their reluctance, federal courts have become an increasingly significant force for controlling the military. The mammoth test case litigation challenging the legality of the Vietnam War met with little success in the courtroom, but reduced the previous intractability of the judiciary towards review of such issues and established a new public credence in the efficacy of constitutional litigation for resolving such momentous issues. The expanded willingness of federal courts to provide remedies for violations of rights of servicemen introduces a new factor into military personnel policies. Federal judges who ten years ago had virtually no contact with the military establishment are now used to dealing with requests for temporary restraining orders and injunctions to prevent reassignments, discharges, disciplinary actions, and courts-martial, raising diverse issues of constitutional and administrative law. Prediction of the demise of the nonreviewability doctrine would be premature, and recent standing and political question cases indicate continued doctrinal restraints upon judicial review in the military context. Nevertheless, it seems clear that there has been a lessening of both individual and doctrinal reluctance in the judiciary to interfere with military actions. This is a healthy development, offering both greater protection for individuals against arbitrariness and injustice within the military and a needed check upon the operations and role of the military in our democratic society.

198. Id. at 940.