

Spring 1981

Protections against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions

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Ora Fred Harris Jr., *Protections against Discrimination Afforded to Uniformed Military Personnel: Sources and Directions*, 46 Mo. L. REV. (1981)

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MISSOURI LAW REVIEW

Volume 46

Spring 1981

Number 2

PROTECTIONS AGAINST DISCRIMINATION AFFORDED TO UNIFORMED MILITARY PERSONNEL: SOURCES AND DIRECTIONS

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I. INTRODUCTION

In 1940 General George C. Marshall, in response to Judge William H. Hastie's proposal for creation of a volunteer integrated unit in the United States Army, stated:

A solution of many of the issues presented by Judge Hastie would be tantamount to solving a social problem which has perplexed the American people throughout the history of this nation. The Army cannot accomplish such a solution and should not be charged with such an undertaking. The settlement of vexing racial problems cannot be permitted to complicate the tremendous task of the War Department and thereby jeopardize the discipline and morale.¹

Eight years later, General Omar Bradley, then United States Army Chief of Staff, expressed a substantially similar sentiment when he said, "The Army is not out to make social reforms. The Army will put men of different races in different companies. It will change that policy when the nation as a whole changes it."²

These statements reflected the general view in the armed services,³ particularly the United States Army, during World War II and a few years thereafter, concerning the policy of racial segregation and discrimination

1. R. STILLMAN, *INTEGRATION OF THE NEGRO IN THE U.S. ARMED FORCES* 27 (1968) (quoting U. LEE, *THE EMPLOYMENT OF NEGRO TROOPS IN WORLD WAR II* 140 (1966)).

2. General Bradley's statement appeared in the *Washington Post* on July 29, 1948; it was made in defiance of President Truman's issuance of Exec. Order No. 9981, three days earlier. In response, President Truman publicly rebuked General Bradley. B. BERNSTEIN, *POLITICS AND POLICIES OF THE TRUMAN ADMINISTRATION* 290 (1970).

3. The United States Navy was possibly an exception to the general rule, for the Department of the Navy issued a Directive (CNO) in June 1945, which ordered commanders to totally integrate their commands. D. NELSON, *INTEGRATION OF THE NEGRO INTO THE UNITED STATES NAVY 1776-1947*, at 181 (1948). Moreover, in 1946, the Navy announced a new racial policy that promised equality of treatment and opportunity for its black personnel in a racially integrated service. 8 M. MACGREGOR & B. NALTY, *BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS* 233 (1977). The Navy, however, was slow in implementing its policies; thus, the vast majority of enlisted black personnel remained relegated to duty as messmen. One commentator has noted that integration in the Navy "existed almost exclusively as a recommendation on paper." R.

in the military. In short, it was the widely held view that the armed services were simply a microcosm of American society and thus should reflect the social mores of that society.⁴

This Article will focus on those changes that have since been made in the military with regard to equal treatment and opportunity. In this connection, the various antidiscrimination protections that may be available to uniformed military personnel will be analyzed and evaluated, and an attempt will be made to gauge their potential application and impact.

II. THE EXECUTIVE ORDER: PRESIDENTIAL LEGISLATION

A. *Definitional Problems with the Term "Executive Order"*

Generally speaking, there are two legislative vehicles at the President's disposal: the executive order and the presidential proclamation.⁵ Interestingly, there is no consensus among writers and commentators regarding the precise distinction between the two terms. One writer has drawn the following definitional distinction: "An executive order is used primarily within the executive department and is issued by the President, directing federal government officials or agencies to take some action on particular matters. The proclamation is used primarily in the field of foreign affairs, for ceremonial purposes, and when required by statute."⁶

Regardless of the meaning accorded to the term "executive order," a more compelling fact is that it is "the most important means of presidential legislation";⁷ much of the power that has been concentrated increasingly

4. See 5 M. MACGREGOR & B. NALTY, *supra* note 3, at 168. In 1948 Kenneth C. Royall, the Secretary of the Army, voiced the view that integration should first be achieved by the people of the United States and then by the United States Army. 94 CONG. REC. 9636 (1948).

5. Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 105 (1964).

6. *Id.* at 106. The commentator does note, however, that "the very terms 'executive order' and 'presidential proclamation' are often used interchangeably by the courts, professors, and authors." *Id.* See also R. MORGAN, *THE PRESIDENT AND CIVIL RIGHTS* 3 (1970) (term "executive order" is said to designate "the proclamations of policy and directions to subordinates that are made by the President in the form of a legally binding Presidential document"; nevertheless, "term . . . is used by some writers to refer to every Presidential act authorizing or directing that an act be performed"); Note, *Presidential Power: Use and Enforcement Orders*, 39 NOTRE DAME LAW. 44, 51 (1963-1964) (executive orders defined as "directives to governmental officials and agencies"). One can reasonably conclude that "we still lack a precise definition of executive orders." Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROB. 1, 6 (Summer 1976).

7. Fleishman & Aufses, *supra* note 6, at 5. One writer has defined "presidential legislation: as acts of the President which implement the laws and policies as declared by Congress and the courts or to effect a policy which the

in the hands of the President in recent years has been exercised by executive order.⁸

B. *Legal Bases of Executive Orders*

Since an executive order is an exercise of presidential authority, the nature and extent of this authority under article II of the United States Constitution is a central issue.⁹ The resolution of this constitutional question generally entails a two-step analysis: (1) does the President have the power to legislate; and (2) if such "legislative power" exists, what issues under what circumstances may the President address by the exercise of that power?¹⁰

Resolving these intricate questions hinges on the proper interpretation of article II, specifically section 1, which provides that "executive Power shall be vested in a President of the United States";¹¹ section 2, which provides that "[t]he 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 actual Service of the United States";¹² and section 3, which provides that the President "take Care that the Laws be faithfully executed."¹³ In examining these constitutional provisions, one can reasonably conclude that presidential legislative initiatives by executive order are consonant with the Constitution when authorized, either expressly or impliedly, by an act of Congress or the Constitution.¹⁴ Thus, an executive order is subordinate to both a congressional enactment and the Constitution,¹⁵ and can be invalidated if it conflicts with the provisions of either¹⁶ or even with the implied intent of Congress.¹⁷

8. Comment, *supra* note 5, at 106.

9. R. MORGAN, *supra* note 6, at 8.

10. Comment, *supra* note 5, at 108.

11. U.S. CONST. art. II, § 1, cl. 1.

12. *Id.* § 2, cl. 1.

13. *Id.* § 3.

14. See R. MORGAN, *supra* note 6, at 8; Fleishman & Aufses, *supra* note 6, at 11.

15. R. MORGAN, *supra* note 6, at 7.

16. See, e.g., *Cole v. Young*, 351 U.S. 536 (1956) (standards prescribed by Exec. Order No. 10,450 for dismissing all federal civilian employees did not conform with provisions of the National Security Act of 1950). See also *Little v. Barrema*, 6 U.S. (2 Cranch) 465 (1804) (executive order, found to conflict with a statute, was invalidated, although in area where President had special constitutional status as Commander in Chief).

17. See *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579 (1952) (executive order was unconstitutional because Congress had refused explicitly to give President Truman the power he asserted and had provided other machinery to solve the problem of the threatened steel strike).

On the other hand, "Congress may 'ratify' by statute a prior executive order," either expressly¹⁸ or by implication. For example, the appropriation of funds by Congress to support an activity being conducted pursuant to an executive order may amount to a "ratification" of the action of the President.¹⁹ An "implied ratification" may arise when the President has pursued policies for a considerable period, with the knowledge of the Congress, and no congressional objection has been made.²⁰

When confronted with the issue, the courts have been loath to declare legislative acts of the President unconstitutional²¹ and have exercised remarkable restraint.²² They generally have refrained from exercising jurisdiction over such questions on the ground that "the challenged action is a 'political question.'"²³ In light of this judicial restraint, Presidents have been willing to legislate by executive order in areas where Congress has shown an unwillingness or inability to act, thereby doing "what Congress could not or would not do."²⁴ One writer, commenting on this phenomenon, observed: "While this may be repugnant to those who advocate a strict separation of powers, it is nonetheless quite obvious that Presidents who are considered 'great Presidents' have made the greatest use of the executive order thereby permitting the country to move forward and to solve the problems confronting it."²⁵

C. *Executive Orders: A Useful Policymaking Tool in the Field of Civil Rights*

Presidents have resorted frequently to the executive order as a policy-making tool to fill a policy void created by congressional inaction.²⁶ A graphic illustration of this has been in the field of civil rights,²⁷ where the exercise of presidential power by executive order has been a significant factor in the civil rights movement.²⁸ For example, President Roosevelt reaffirmed a policy of nondiscrimination in government employment and established a Committee on Fair Employment Practice (FEPC) to carry out the nondiscrimination policy on all defense contracts.²⁹ This was followed, in 1948, by President Truman's declaration of a policy of equal-

18. *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943).

19. *Fleming v. Mohawk Co.*, 331 U.S. 111, 116 (1947).

20. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

21. Comment, *supra* note 5, at 117.

22. R. MORGAN, *supra* note 6, at 7.

23. *Id.* In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), the Supreme Court disavowed any authority to direct presidential acts.

24. Comment, *supra* note 5, at 118.

25. *Id.*

26. See text accompanying notes 24 & 25 *supra*.

27. *Fleishman & Aufses*, *supra* note 6, at 19-25, 38.

28. See Comment, *supra* note 5, at 110-11.

29. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

ity of treatment and opportunity in the armed forces.³⁰ These initiatives were, in turn, followed by executive orders establishing a policy of nondiscrimination in federally assisted housing³¹ and in private employment involving a government contract.³² In short, Presidents were able to do by executive order what Congress would not do,³³ thus illustrating the order's utility as a significant and effective policymaking tool.³⁴

The usefulness of executive orders as policymaking tools in the field of civil rights, however, depends in large measure on the personal values of the President, his perception of the national interests, and his assessment of his responsibility to further that perceived national interest.³⁵ Commitment "to the general value of equality of treatment and opportunity for all" was a common attribute of Presidents Roosevelt, Truman, Eisenhower, Kennedy, and Johnson, each of whom used the executive order to further the cause of civil rights.³⁶ A lesser commitment probably would have made them less receptive "to specific policy proposals."³⁷

The extent to which a President has to rely on the executive order to shape civil rights policy is perhaps not as great today as it was prior to 1964.³⁸ Congress has subsequently acted to fill some of the vacuum that

30. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948) (revoked by Exec. Order No. 11,051, 3 C.F.R. 635 (1959-1963)).

31. Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963).

32. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963). Later, President Johnson issued Exec. Order No. 11,246, 3 C.F.R. 347 (1964-1965) (superseded in part by Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970)), which enhanced significantly the affirmative action obligation of government contractors with respect to enlisting minority workers.

33. Comment, *supra* note 5, at 111.

34. There are several reasons why executive orders in general, and particularly in the field of civil rights, may be useful to a President in shaping policy: First is speed. Even if a President is reasonably confident of securing desired legislation from Congress, he must wait for congressional deliberations to run their course. Invariably, he can achieve far faster, if not immediate, results by issuing an executive order. . . . Second is flexibility. Executive orders have the force of law. Yet they differ from congressional legislation in that a President can alter any executive order simply with the stroke of his pen—merely by issuing another executive order. . . . Finally, executive orders allow the President, not only to evade hardened congressional opposition, but also to preempt potential or growing opposition—to throw Congress off balance, to reduce its ability to formulate a powerful opposing position.

Fleishman & Aufses, *supra* note 6, at 38.

35. See R. MORGAN, *supra* note 6, at 78-81.

36. *Id.* at 78.

37. *Id.* at 79.

38. In 1964 Congress enunciated a comprehensive civil rights policy by enacting the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000a to 2000e (1976 & Supp. III 1979)).

previously existed.³⁹ Nevertheless, the President will probably continue to utilize the executive order as a means of providing law for the nation in the field of civil rights whenever congressional inertia makes such executive action necessary.⁴⁰

D. *The Executive Order and Military Civil Rights*

1. World War II and Cold War Policies

During World War II and the Cold War, the United States, through its armed forces, was committed to protecting individual and national rights and freedoms throughout the world.⁴¹ Yet, these same military forces were organized on the basis of race. This "not only made poor sense functionally but represented an inconsistency which damaged the nation's worldwide image."⁴²

Most individuals who were determined to end racial discrimination in the military believed that desegregation of the armed services was an essential step toward that goal.⁴³ Many leaders, in fact, espoused the view that segregation per se was evidence of discrimination, and rejected adamantly the argument that "separate but equal" could be nondiscriminatory.⁴⁴

Military leaders insisted, however, that the policy of racial segregation in the military was the proper course to follow. In 1940 General George C. Marshall wrote a letter to Senator Henry Cabot Lodge, Jr., and defended the policy of segregation in the following fashion: "It is the policy of the War Department not to intermingle colored and white enlisted personnel in the same regimental organization. . . . [This] is not the time for critical experiments, which would inevitably have a highly destructive effect on morale—meaning military efficiency."⁴⁵ This view reflected the ingrained belief of many military leaders.⁴⁶ The unwavering stance by the military

39. In addition to the Civil Rights Act of 1964, other examples of significant civil rights legislation are The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979); The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979); The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979).

40. R. MORGAN, *supra* note 6, at 85.

41. CIVIL RIGHTS AND THE AMERICAN NEGRO 384 (A. Blaustein & R. Zangrando eds. 1968).

42. *Id.*

43. R. MORGAN, *supra* note 6, at 10.

44. *Id.* at 16. The failure of national leaders to make a clear distinction between racial "discrimination" and "segregation" continually disturbed civil rights advocates because, until 1954, "separate but equal" was a constitutionally viable doctrine. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Supreme Court, however, rejected this doctrine in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and its progeny.

45. 5 M. MACGREGOR & B. NALTY, *supra* note 3, at 28.

46. The prevalent belief among some military leaders was that blacks were hindered by their status and that integration would thus undermine military effectiveness. See R. STILLMAN, *supra* note 1, at 34.

leadership insured one thing: the continuation of unequal treatment on the basis of race in the armed forces.⁴⁷

Ironically, Congress passed the Selective Training and Service Act of 1940⁴⁸ which called for nondiscrimination in the selection and training of men. The nondiscrimination provisions of the Act, however, were not interpreted as calling for an end to racial segregation, but rather as requiring the military to draft blacks "in a proportion equal to their distribution in the general population."⁴⁹ Consequently, blacks, as a general rule, were relegated to racially segregated units throughout World War II and remained victims of a policy that was "inherently unequal in terms of treatment and opportunity."⁵⁰ Thus, racial discrimination remained virtually unchanged.⁵¹

The status of blacks in the armed forces did not improve appreciably during the postwar period.⁵² There were two developments during the postwar period that had a bearing on the policy of racial segregation and discrimination in the military: the report of the Gillem Board in 1945 and the report of the President's Committee on Civil Rights in 1947.⁵³

The Gillem Board convened in 1945 to study the question of the proper utilization of black manpower in the United States Army.⁵⁴ In short, it concluded that the Army should continue its policy of racial segregation and limit the percentage of blacks in the Army to their ratio in the general population, which was determined to be ten percent. These recommendations were accepted and implemented by the Army for three years.⁵⁵

47. The existence of pervasive, disparate treatment on the basis of race in the military was confirmed by the President's Committee on Civil Rights in its report, *To Secure These Rights: Report of the President's Committee on Civil Rights* (1947) [hereinafter cited as *Civil Rights Report*]. For the Committee's specific findings, see note 56 *infra*.

48. Ch. 720, 54 Stat. 885 (terminated 1947).

49. R. MORGAN, *supra* note 6, at 80.

50. 8 M. MACGREGOR & B. NALTY, *supra* note 3, at xxix.

51. M. KONVITZ, *EXPANDING LIBERTIES* 259 (1966).

52. 7 M. MACGREGOR & B. NALTY, *supra* note 3, at xi.

53. M. KONVITZ, *supra* note 51, at 259-60.

54. The Gillem Board was composed of three Army general officers and spent more than three months studying the black personnel situation in the Army.

On December 5, 1946, President Truman issued Exec. Order No. 9808, creating the President's Committee on Civil Rights. The Committee was instructed to investigate and make recommendations on the issues of religious and racial discrimination in the United States. R. HAYNES, *supra* note 3, at 89 (citing 2 H. TRUMAN, *MEMOIRS BY HARRY S. TRUMAN, YEARS OF TRIAL AND HOPE* 180 (1955)).

55. M. KONVITZ, *supra* note 51, at 260. The Gillem Board favored the existing "separate but equal" policy of the military. On paper, it called for the utilization of black soldiers according to their individual skills. To achieve this objective within a segregated system, black units had to be created which conformed

In 1947 the President's Committee on Civil Rights issued its report. The report called attention to the fact that racial discrimination was still practiced by the armed forces.⁵⁶ In one paragraph, the Committee called for the "elimination of segregation in the armed forces."⁵⁷

The Committee's call for desegregation of the armed forces was ignored by the military leadership.⁵⁸ A responsive chord in President Truman, however, was apparently struck by this clear, concise description of the racial situation in the armed forces: "The armed forces, in actual practice, still maintain many barriers to equal treatment for all their members. . . . Morally, the failure to act is indefensible."⁵⁹

2. Segregation and Discrimination in the Military under Attack by Executive Action

The report of the President's Committee on Civil Rights contained a harsh indictment of racial discrimination in the armed forces.⁶⁰ To implement the Committee's report, President Truman sent a special message to Congress on February 2, 1948, informing it of his instruction to Secretary of Defense James Forrestal to "take steps to have the remaining instances of discrimination in the armed services eliminated as rapidly as

in general to white units. For this reason, the Army and later the Air Force experienced great difficulty in trying to carry out the recommendations of the Gillem Board; their promises of equal treatment and opportunity "floundered on the shoals of segregation." 8 M. MACGREGOR & B. NALTY, *supra* note 3, at 271.

The Gillem Board probably sensed the impracticality of maintaining racially separate units which would, in turn, provide equal opportunity for advancement. Its recommendation that "there should be experimental groups of Negro and white units" probably illustrates the Board's doubts as to the long range feasibility of the "separate but equal" policy of the military.

56. The specific findings of the President's Committee on Civil Rights, which reflected that racial discrimination was still extant in the armed services in 1947, were that (1) blacks faced an absolute bar against enlistment in any branch of the Marine Corps other than the stewards branch; (2) the Army had a ceiling of 10% for black personnel; (3) blacks were only 4.4% of the manpower of the Navy and only 4.2% of the Coast Guard; and (4) there was a gross underrepresentation of blacks in the officer corps of the various armed forces, with the Marine Corps having no black officers and the Coast Guard having only one. See *Civil Rights Report*, *supra* note 47, at 41-42; M. KONVITZ, *supra* note 51, at 259.

57. R. STILLMAN, *supra* note 1, at 37.

58. *Id.*

59. *Civil Rights Report*, *supra* note 47, at 46. Interestingly, the Committee recommended specific congressional action to create equal opportunity in the armed forces. See 8 M. MACGREGOR & B. NALTY, *supra* note 3 at 443. President Truman, however, opted officially for executive action rather than seeking congressional legislation to achieve the changes recommended by the Committee.

60. See R. HAYNES, *supra* note 3, at 89. The report was submitted to President Truman in October 1947.

possible.'⁶¹ This special message engendered a political controversy which threatened the selective service manpower legislation requested by President Truman in May 1948;⁶² thus, armed services desegregation became an important legislative issue.⁶³ A deadlock resulted, however, from the imbroglio in Congress on this issue and, as President Truman might have expected, Congress took no action.⁶⁴ Faced with this congressional inertia, President Truman resorted to executive action to eliminate discrimination in the armed services.⁶⁵

61. *Id.* (quoting President's Directive to Secretary of Defense, 1948 PUB. PAPERS 121 (1964)).

62. *Id.*

63. See R. MORGAN, *supra* note 6, at 15-16. This commentator notes that the principally contested issue in both the Senate and House of Representatives of the 80th Congress concerned segregation amendments to the manpower bill. The injection of the military segregation issue into the congressional debate surrounding the Selective Service Bill, however, had no apparent effect on President Truman's resolve to eliminate discrimination within the armed forces. He noted at a May 28, 1948, news conference that his earlier instructions to the Secretary of Defense on this issue would remain unchanged. See R. HAYNES, *supra* note 3, at 90 (citing N.Y. Times, May 28, 1948, at 1, col. 5); R. MORGAN, *supra*, at 16.

64. There were certain developments within the Senate and the House of Representatives of the 80th Congress that caused concern to the proponents of the Selective Service Bill. In the Senate, efforts were made to attach antisegregation amendments to the Bill. None succeeded. In the House of Representatives, anti-discrimination and antisegregation amendments were offered. All were rejected. Ultimately, the Bill was approved. See R. MORGAN, *supra* note 6, at 16-17.

65. Some commentators have stated that President Truman's use of executive action to eliminate discrimination and segregation in the armed forces was not motivated entirely by a feeling of egalitarianism. It has been suggested that pragmatic political considerations played a significant, if not major, part in his decision. See W. BERMAN, *THE POLITICS OF CIVIL RIGHTS IN THE TRUMAN ADMINISTRATION* 239 (1970) (President Truman's actions were "not simply an exercise in good will, but rather the product of political pressure applied by A. Phillip Randolph, Walter White, and others at a time when a presidential incumbent needed all the support he could muster in states with the greatest votes in the electoral college").

Senator Richard Russell had forewarned the Senate of the possibility of presidential action by executive order when he was trying to secure Senate approval of a "voluntary segregation" amendment to the Selective Service Bill in June 1948. Realizing the practical, political considerations that could trigger such executive action, Senator Russell

pointed out that on the eve of an election "an administration would be subjected to great pressure if it were compelled, because of the failure to abolish segregation in the armed services, to face the threat of mass civil disobedience affecting three or four hundred thousand men and perhaps one million or more votes."

R. MORGAN, *supra* note 6, at 17. See also B. BERNSTEIN, *supra* note 2, at 290.

a. Executive Order No. 9981

On July 26, 1948, ten days after winning the Democratic Party presidential nomination and the day before Congress was to reconvene, President Truman issued Executive Order No. 9981.⁶⁶ Although President Kennedy revoked the order fourteen years later,⁶⁷ its issuance marked a turning point in the struggle to end racial discrimination in the military. Executive Order No. 9981 provided that there should be "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." In addition, it created the President's Committee on Equality of Treatment and Opportunity in the Armed Services (Fahy Committee), with authority to inquire into discriminatory practices and to make recommendations for change.⁶⁸

Although a respected commentator, referring to Executive Order No. 9981, has stated that "this order ranks among the most important steps taken to end racial discrimination,"⁶⁹ a close examination of the Executive Order reveals several limitations and uncertainties. The first ostensible flaw is that the Executive Order did not speak of ending "segregation." It referred specifically to "equality of treatment and opportunity," which arguably only promised to end discrimination, not segregation, in the armed services.⁷⁰ Those individuals opposed to desegregation of the armed forces opined that integration was not the goal of the order and maintained that the "separate but equal" doctrine should apply to the military.⁷¹ This narrow interpretation prompted President Truman to state that the language of Executive Order No. 9981 was intended to compel the armed

66. 3 C.F.R. 722 (1943-1948) (revoked by Exec. Order No. 11,051, 3 C.F.R. 635 (1959-1963)). The Commander in Chief clause of the United States Constitution was the constitutional authority for the issuance of Exec. Order No. 9981.

67. Exec. Order No. 11,051, 3 C.F.R. 635 (1959-1963).

68. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948) (revoked by Exec. Order No. 11,051, 3 C.F.R. 635 (1959-1963)). One commentator makes a persuasive argument that the Committee on Equality of Treatment and Opportunity in the Armed Services [hereinafter referred to as the Fahy Committee] was the most significant achievement of Exec. Order No. 9981, for it was "an important means of stimulating discussion of military racial policies, a subject long avoided by officers." R. STILLMAN, *supra* note 1, at 43.

69. M. KONVITZ, *supra* note 51, at 260.

70. R. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES* 171-72 (1969). Henry Wallace pointedly criticized Exec. Order No. 9981 in the following fashion: "The President's order on equality of treatment in the Armed Forces says nothing, promises nothing, does nothing—and leaves segregation intact." N.Y. Times, July 28, 1948, at 4, col. 2. See also B. BERNSTEIN, *supra* note 2, at 290.

71. An unnamed federal official was quoted as saying that "[i]t was his opinion that integration was not the goal of the order." N.Y. Times, July 27, 1948, at 1, col. 8. Moreover, the United States Army, unlike the other armed services, adhered adamantly to the position that Exec. Order No. 9981 did not require the end of segregation. R. DALFUME, *supra* note 70, at 175.

forces to end segregation. Indeed, emphasis in the implementation of the Executive Order was on desegregation, for this was interpreted as the "major step toward nondiscrimination."⁷²

A second apparent deficiency of Executive Order No. 9981 is that it did not establish a policy of "equality of treatment and opportunity" on the basis of sex, age, or handicap. One can reasonably conclude, therefore, that arbitrary acts of discrimination against uniformed military personnel on the basis of sex, age, or handicap did not come within its protective umbrella. In short, a potentially significant number of discriminatory acts against uniformed military personnel were simply not within the pale of the Executive Order.

Another significant attribute of executive orders, which must be considered in evaluating the nature and extent of the protection against discrimination afforded by Executive Order No. 9981, is flexibility.⁷³ In discussing how flexibility makes executive orders attractive policymaking tools, two commentators made this observation: "Executive orders have the force of law. Yet they differ from congressional legislation in that a President can alter any executive order simply with the stroke of his pen—merely by issuing another executive order."⁷⁴ President Truman apparently considered rescinding Executive Order No. 9981 when he dissolved the Fahy Committee. Nevertheless, he decided against this because he believed that "at some later date, it may prove desirable to examine the effectuation of your Committee's recommendations."⁷⁵

Notwithstanding the limitations and uncertainties of Executive Order No. 9981, it was a major development in the civil rights movement.⁷⁶ Referring to the Executive Order, one commentator has stated, "[I]t illustrates the intelligent use of executive power to change, within admittedly narrow limits, a racist social structure."⁷⁷ It should be emphasized that "[t]he order was merely a beginning."⁷⁸ The subsequent changes in the regulations and policies of the various branches of the armed forces which were promulgated in response to Executive Order No. 9981 are of equal, if not greater, significance.

72. R. MORGAN, *supra* note 6, at 24. Morgan states that, in the sense of desegregation of the armed forces, Exec. Order No. 9981 was "implemented within the decade." *Id.*

73. Fleishman & Aufses, *supra* note 6, at 38.

74. *Id.*

75. Letter from Harry S. Truman to Mr. Fahy (July 6, 1950), *reprinted in* R. DALFUME, *supra* note 70, at 197.

76. R. HAYNES, *supra* note 3, at 92.

77. W. BERMAN, *supra* note 65, at 239. *Accord*, M. KONVITZ, *supra* note 51, at 263.

78. *See* CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 41, at 385. The major significance of Exec. Order No. 9981 may be that it signaled, for the first time, movement on the part of the federal government "to support integration and desegregation of the armed forces." R. DALFUME, *supra* note 70, at 174.

b. Military Regulations and Policies Implemented in Response to Executive Order No. 9981

Military policies and regulations congruent with the stated policy of Executive Order No. 9981 did not materialize instantly, but arose out of a tedious process.⁷⁹ The Fahy Committee and Louis B. Johnson, Secretary of Defense, played significant roles in persuading the various military branches to initiate policies aimed at eliminating racial discrimination in the armed services.⁸⁰

According to one commentator, the importance of the Fahy Committee can be measured in terms of its success "in bringing civilian views into the nation's defense organization, long handicapped by the dominance of the military and its rigidity of thought on racial affairs."⁸¹ The Fahy Committee's ability to sensitize Secretary of Defense Johnson to the importance of the race issue in the military and to convince him that Executive Order No. 9981 called for desegregation of the armed services illustrates its importance to the implementation process.⁸²

Secretary of Defense Johnson, in turn, played a prominent role in implementing Truman's Executive Order when he issued a directive in April 1949, to the Secretaries of the Army, Navy, and Air Force, requesting them to review their existing personnel policies with regard to race, determine what changes should be made in those policies in view of Executive Order No. 9981, and submit, in writing, detailed proposals for ending racial segregation in their respective armed service.⁸³ The responses of the different branches of the armed services to Secretary Johnson's directive, however, were varied in terms of promptness and, to a certain degree, substance.

The Air Force made the first positive response to the directive. After only one meeting with the Fahy Committee, its plan for integration was approved by the Secretary of Defense on May 11, 1949.⁸⁴

79. B. BERNSTEIN, *supra* note 2, at 290.

80. R. HAYNES, *supra* note 3, at 90.

81. R. STILLMAN, *supra* note 1, at 44.

82. *Id.* at 45. Most members of the Fahy Committee interpreted Exec. Order No. 9981 as requiring them to strive to end racial segregation as well as racial discrimination. See R. DALFIUME, *supra* note 70, at 180-81. In adopting this position, the Fahy Committee undermined the argument that "separate but equal" service fulfilled the dictates of Exec. Order No. 9981. See 9 M. MACGREGOR & B. NALTY, *supra* note 3, at xi.

83. In substance, Secretary of Defense Johnson's directive required that the racial equality policy of Exec. Order No. 9981 be applied uniformly throughout the armed forces. R. HAYNES, *supra* note 3, at 91. This was a significant step toward accomplishing the objective of the Order. Nonetheless, "it was the harsh realities of the Korean War that accelerated the pace of integration within fighting units." CIVIL RIGHTS AND THE AMERICAN NEGRO, *supra* note 41, at 385.

84. R. STILLMAN, *supra* note 1, at 45. The swift response by the Air Force can be attributed in large measure to Stuart Symington, Secretary of the Air

Although the Navy had ended formally all forms of segregation in 1946, it still had a significant underrepresentation of black officers and an overrepresentation of black stewards.⁸⁵ After several meetings with the Fahy Committee, its detailed plan for integration was approved by Secretary Johnson on June 7, 1949.⁸⁶

The Army was the most recalcitrant branch of the armed services and fought vigorously to retain its policy of segregation.⁸⁷ The Army probably assumed this minority position because Secretary of the Army Kenneth C. Royall submitted to the views of several Army generals.⁸⁸ Despite this strong resistance, the Army officially adopted a policy of integration in January 1950.⁸⁹ It was not actually implemented, however, until 1951 as a result of the Korean War.⁹⁰

Within two years after the Korean War, the Department of Defense reported, "There are no longer any all-Negro units in the Services."⁹¹ Consequently, in the sense of complete military desegregation, the purpose of Executive Order No. 9981 was achieved within a decade. Nevertheless, equality of treatment and opportunity without regard to race or color was not fully realized.⁹² In varying degrees of efficiency, the Eisenhower, Kennedy, and Johnson administrations "wrestled with the complicated problem of providing equality for black personnel."⁹³ Equality of opportunity and treatment for black military personnel and dependents, both on base and off, became a central objective of their presidential administrations, and subsequent executive and administrative activities were directed toward that end.⁹⁴ Although President Eisenhower evinced some interest in the investigation and resolution of complaints by military personnel of

85. R. STILLMAN, *supra* note 1, at 46.

86. *Id.*

87. R. DALFIUME, *supra* note 70, at 175.

88. See text accompanying notes 1 & 2 *supra*.

89. Dep't of the Army Special Reg. No. 600-629-I (Jan. 16, 1950).

90. A particularly dramatic change in the Army's personnel policy was its agreement on March 27, 1950, to end the 10% quota on blacks within its ranks. Yet, the Korean War was the fortuitous event that compelled the military forces, particularly the United States Army, to end most of the racially discriminatory practices. R. HAYNES, *supra* note 3, at 92. "[T]his occurred only because of the foundation laid down by the Fahy Committee," for "[w]ithout a policy of rigid segregation to stop them, many commanders in Korea during the first days of the war adopted a policy of assigning desperately needed replacements without regard to race." R. DALFIUME, *supra* note 70, at 201.

91. R. MORGAN, *supra* note 6, at 10 (quoting *Integration in the Armed Services: A Progress Report Prepared by the Office of the Assistant Secretary of Defense (Manpower and Personnel)* 3 (Jan. 1, 1955)).

92. See 12 M. MACGREGOR & B. NALTY, *supra* note 3, at xxv.

93. *Id.*

94. R. MORGAN, *supra* note 6, at 25-26.

racial segregation or discrimination,⁹⁵ President Kennedy took the boldest executive initiative in this area since President Truman, when he established on June 22, 1962, a Committee on Equal Opportunity in the Armed Forces to ascertain what further measures might be required to eliminate racial discrimination in the military.⁹⁶

The Committee on Equal Opportunity in the Armed Forces (Gesell Committee) was charged with determining what measures should be employed to improve the effectiveness of existing military policies and procedures with regard to equal opportunity and treatment for persons in the armed services, and to secure equality of opportunity for military personnel and their dependents in the civilian community.⁹⁷ On the basis of interviews, listening to complaints from blacks and whites, and evaluating statistical data supplied by various executive departments, the Gesell Committee concluded in its initial report that black military personnel were still being subjected to discrimination, on base and off.⁹⁸

In response to the Gesell Committee's initial report, Secretary of Defense Robert McNamara issued a directive on July 26, 1963, requiring the armed services to issue regulations protecting military personnel from racial discrimination both on and off base.⁹⁹ The directive further provided that military base commanders were authorized, subject to approval by the civilian Secretary of the appropriate armed service, to declare as "off limits" to all military personnel any establishment that engaged in racially discriminatory practices.¹⁰⁰ This was just one of a series of administrative reforms implemented by the various armed forces in response to President Kennedy's, and subsequently President Johnson's, commitment to re-evaluate the relationship of the military with its black uniformed personnel and take whatever administrative actions deemed necessary to elevate the black serviceperson's position in the armed services.¹⁰¹

95. *Id.* at 26. It is not apparent, however, that President Eisenhower took any dramatic initiatives with regard to racial discrimination in the military.

96. *Id.*

97. R. STILLMAN, *supra* note 1, at 109.

98. *Id.* at 110.

99. R. MORGAN, *supra* note 6, at 26.

100. Comment, *supra* note 5, at 111. The pertinent parts of the directive read: "Every military commander has the responsibility to oppose discriminatory practices affecting his men and their dependents and to foster equal opportunity for them, not only in areas under his immediate control, but also in nearby communities where they may live or gather in off-duty hours." *The Pentagon Jumps into the Race Fight*, U.S. NEWS & WORLD REPORT, Aug. 19, 1963, at 49.

101. R. STILLMAN, *supra* note 1, at 115-17.

In 1967 a more far-reaching directive was given to military commanders. They were told to seek out landlords and exhort them to rent to all servicemen without regard to color, and inform them that no servicemen would be allowed to deal with them, if they refused to end racially discriminatory practices. *See* R.

Nevertheless, special problems of racial discrimination still confronted servicemen on foreign duty and in National Guard units when the President's Committee on Equal Opportunity in Armed Forces submitted its final report to President Johnson in late 1964.¹⁰² Even today, equality of opportunity and treatment without regard to race, color, or creed apparently has not been fully realized in the National Guard of every state.¹⁰³

On the other hand, in the various branches of the active armed forces a significant number of administrative antidiscrimination regulations and directives are now being vigorously enforced.¹⁰⁴ For instance, the Army has a broad Equal Opportunity Program with "two equal and complementary components": the Affirmative Actions component and the Education and Training component.¹⁰⁵ Moreover, the Army has a Deputy Chief of Staff for Personnel at the Department of the Army level who has responsibility for insuring the implementation of "all plans, policies, and actions pertaining to the Army Equal Opportunity Program."¹⁰⁶ These military regulations and directives ostensibly reflect a commitment on the part of the armed services to make "equality of treatment and opportunity" a reality for all uniformed personnel.

III. CONGRESSIONAL LEGISLATION

A. *Background: Congressional Nonfeasance*

The Constitution confers upon Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."¹⁰⁷ In ex-

MORGAN, *supra* note 6, at 26. Of course, the military's position was buttressed when federal fair housing legislation was enacted by Congress in 1968. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1976 & Supp. III 1979). The positive results of this directive were apparent from the report that "by July, 1968, 84% of the landlords throughout the nation were on the Defense Department's nondiscriminatory housing list." R. MORGAN, *supra*.

102. R. MORGAN, *supra* note 6, at 26.

103. See, e.g., Taylor v. Jones, 489 F. Supp. 498, 500 (E.D. Ark. 1980). See also R. STILLMAN, *supra* note 1, at 121 ("Continued organizational commitment to integration exists in the regular defense establishment, but continued shared local and state powers exacerbate inequality in the National Guard and nearby off-post.").

104. See, e.g., Army Reg. No. 600-21, ¶ 1-4(a) (June 20, 1977), which states: "It is the policy of the United States Army to provide equal opportunity and treatment for uniformed members without regard to race, color, sex, religion, age, or national origin."

105. *Id.* ¶ 1-5(a)-(c).

106. *Id.* ¶ 1-6.

107. U.S. CONST. art. I, § 8, cl. 14. The Supreme Court has held that the constitutional power of the President as Commander in Chief of the armed services and the power of Congress to make regulations governing land and naval forces are distinct constitutional powers. Thus, the President cannot by military

pounding on the scope of this constitutional prerogative, it has been held that the courts have no role in this area unless the legislative or executive action purportedly taken pursuant to legislative authority is constitutionally invalid.¹⁰⁸

Congress clearly has the constitutional power to proscribe legislatively all bases of discrimination and segregation in the military. Unfortunately, it has been loath to exercise this power¹⁰⁹ and, for the most part, has demonstrated painful indifference with regard to the subject.¹¹⁰ Congress' unwillingness to legislate in the area of military civil rights and develop a national policy against discrimination within the military prompted President Truman to use the executive order to fill the void created by congressional inaction.¹¹¹

Even after the issuance of Executive Order No. 9981, Congress failed to address in a definitive manner the question of discrimination and segregation in the military. Instead, ineffectual legislative jostling, in which factions on both sides of the legal issue were unable to persuade the Congress to adopt their respective views, was as evident immediately after the issuance of the Executive Order as it had been before.¹¹² In fact, Congress has never passed any general legislation specifically proscribing

orders evade legislative regulations; Congress cannot by rules and regulations impair the authority of the President as Commander in Chief. *See, e.g., Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897).

108. *See Talbott v. United States ex rel. Toth*, 215 F.2d 22 (1954), *rev'd on other grounds sub nom. United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

109. *See Comment, Bona Fide Occupation Qualifications and the Military Employer: Opportunities for Females and the Handicapped*, 11 AKRON L. REV. 182, 186 (1977).

110. This ambivalent attitude clearly was evident when President Truman issued Exec. Order No. 9981 in 1948. President Truman had little to fear with respect to possible congressional reprisals to his executive order because "Congress had shown little inclination to either prohibit or permit segregation in the armed forces." R. MORGAN, *supra* note 6, at 27.

111. *See Fleishman & Aufses, supra* note 6, at 19. In commenting on the "inertia" that for many years accurately described the congressional response to civil rights issues, one writer stated:

[P]erhaps the least credit goes to Congress. In 1957 and 1960 it passed civil rights acts, but they were the first congressional enactments since 1875, a period of over eighty years, and these two enactments were extremely limited in scope. The enactment of 1964 is certainly one of the most important in American history; but the action of the 88th Congress does not wipe out the do-nothing record of the 44th Congress, or the 45th, right on up to the 88th.

M. KONVITZ, *supra* note 51, at 264.

112. The salient reactions to Exec. Order No. 9981 in the Congress by those who opposed or favored military desegregation are described in R. MORGAN, *supra* note 6, at 24-25.

discrimination and segregation in the military.¹¹³ Because of this congressional nonfeasance, it is essential that one scrutinize closely the antidiscrimination enactments of Congress to ascertain whether discrimination against uniformed military personnel falls within their definitional parameters.

B. *Title VII and the Military*

Congress enacted Title VII as part of the Civil Rights Act of 1964.¹¹⁴ Title VII generally prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin;¹¹⁵ its coverage was extended to "employees or applicants for employment . . . in military departments" in 1972.¹¹⁶ A question raised by the 1972 amendments is whether Congress intended to extend the provisions of Title VII not only to civilian employees of the military, but to uniformed military personnel, as well.¹¹⁷

The most significant court decision addressing this question is *Johnson v. Alexander*.¹¹⁸ In *Johnson*, an unsuccessful, black applicant for enlistment in the Army filed suit against the Secretary of the Army and others within the military structure, alleging in part that the rejection of his application for enlistment violated section 717(a) of Title VII.¹¹⁹ The application was rejected on the basis of paragraphs 2-34(a) and 2-34(b) of Army Regulation No. 40-501.¹²⁰ The essence of Johnson's complaint was that the pertinent provisions of Army Regulation No. 40-501 discriminated against black persons in their operative impact or effect.¹²¹

113. Congress has acted in a limited fashion by removing the bar to female admissions to the United States Military Academy (West Point), the United States Naval Academy (Annapolis), and the United States Air Force Academy. Otherwise, there has been no congressional enactment generally prohibiting discrimination within the military structure.

114. Pub. L. No. 88-352, 78 Stat. 253 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979)).

115. See, e.g., § 703(a), 42 U.S.C. § 2000e-2(a) (1976).

116. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (current version at 42 U.S.C. § 2000e-16 (1976 & Supp. III 1979)).

117. Some commentators have concluded that the provisions of Title VII were intended to extend only to civilian employees of the military. See *Beans, Sex Discrimination in the Military*, 67 MIL. L. REV. 19, 42 (1975); Comment, *supra* note 109, at 188.

118. 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978).

119. *Id.* at 1220.

120. *Id.* at 1219.

121. *Id.* at 1220. Johnson did not contend that the challenged paragraphs of the Army Regulation were motivated by a discriminatory purpose or that they were discriminatorily applied; his theory of discrimination was based on a disparate impact analysis of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny. Under this theory, a prima facie case of discrimination is established

Of particular concern was paragraph 2-34(a) which called "for a disclosure of arrests of the applicant by the police even though the arrests were not followed by convictions of crime."¹²² Johnson had had several encounters with law enforcement agencies, including "three adult arrests, none of which resulted in a criminal conviction."¹²³ Moreover, he had been laid-off from employment on a number of occasions.¹²⁴ When his arrest and employment record came to light, the Army rejected his enlistment application.

The United States Court of Appeals for the Eighth Circuit affirmed the federal district court's dismissal of the Title VII claim by holding that section 717(a) did not apply to uniformed military personnel of the various armed forces or to applicants for enlistment.¹²⁵ The Eighth Circuit's conclusion that neither Title VII nor its standards apply to uniformed military personnel was predicated largely on the determination that "the relationship between the government and a uniformed member of the Army, Navy, Marine Corps, Air Force, or Coast Guard" was not an employer-employee relationship which Congress intended to bring within the purview of Title VII.¹²⁶ In support of its position, the court of appeals noted that "[w]hile military service possesses some of the characteristics of ordinary civilian employment, it differs materially from such employment in a number of respects,"¹²⁷ and that courts have often acknowledged this "peculiar status of uniformed personnel of our armed forces."¹²⁸

Although the rationale of *Johnson* may be applied easily to the active armed forces of the United States, its application to the National Guard units of the fifty states may be difficult in certain factual circumstances. The most problematical situation to date has arisen when the alleged discriminatee has a dual status, both civilian and military. This arises generally when the claimant is employed by the federal government as a civilian technician to perform certain support functions for the National Guard; as a condition of this civilian employment, the employee is re-

by showing that an employment criterion, although neutral on its face, has a substantially adverse impact on the employment opportunities of a protected class. A violation of Title VII will be found if the employment practice is not shown by the employer to be justified by business necessity. *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (Supreme Court refined the effects test of *Griggs*).

122. 572 F.2d at 1220. The validity of an arrest record employment criterion under Title VII has been questioned before. *See* Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972).

123. 572 F.2d at 1221.

124. *Id.*

125. *Id.* at 1224.

126. *Id.*

127. *Id.* at 1223.

128. *Id.* at 1223-24.

quired to be a member of the National Guard pursuant to the National Guard Technicians Act.¹²⁹

In *Hunter v. Stetson*,¹³⁰ a federal district court wrestled with the problem of applying Title VII to such a factual setting. In *Hunter*, the complainant was a GS-9 Civil Service employee of the National Guard (civilian status) and a Master Sergeant in the National Guard (military status). After he had assisted a civilian employee of the National Guard with a discrimination claim, a Colonel reduced his military rank on "a military pretext."¹³¹ The Colonel also had a dual status and served as the complainant's superior in both the military and civilian spheres. Hunter commenced an action under Title VII, alleging impermissible retaliatory action. The defendants contended that since the alleged retaliatory action "took the form of a reduction in the plaintiff's military rank," Title VII was not applicable because "the military is not an 'employer' within the meaning of the statute."¹³² The trial judge, assuming that the military was not an employer under the statute, held that "in the context of the peculiar factual situation presented . . . the complaint states a cause of action cognizable under Title VII."¹³³

In *Hunter*, the "peculiar factual situation" was a perverted military decision that had the purpose and effect of impacting the plaintiff's civilian sphere of employment. In this limited factual context, Title VII was deemed to apply. One, however, can reasonably argue that the rationale of *Hunter* does not extend beyond its "peculiar facts," and that a bona fide military decision which affected a dual status guardsman's civilian sphere of employment would not invite the protections of Title VII.¹³⁴ Thus, absent the "peculiar facts" of *Hunter*, the rationale of *Johnson v. Alexander* would apply in a National Guard discrimination case and thereby foreclose the possibility of a remedy under Title VII.¹³⁵ Consequently, the broad protections against discrimination afforded by Title VII are not available in most instances to uniformed military personnel.

129. 32 U.S.C. §§ 709(b), 709(e)(1) (1976).

130. 444 F. Supp. 238 (E.D.N.Y. 1977). The district court conceded that vexing questions arise from the "dual status of the Guard's employee-members." *Id.* at 240.

131. *Id.* at 239.

132. *Id.*

133. *Id.* at 240.

134. For a discussion of this possible factual limitation of *Hunter*, see text accompanying notes 155 & 162 *infra*.

135. See *Vance v. Arizona Army Nat'l Guard*, No. 74-329 (D. Ariz. Sept. 3, 1975) (state or federal military force is not an employer within the meaning of Title VII).

C. *The Civil Rights Act of 1866: A Statutory Alternative*

The Civil Rights Act of 1866¹³⁶ (section 1981) has been interpreted by the courts as prohibiting discrimination on the basis of race, including racial discrimination in employment.¹³⁷ But it has been construed as not applying to discrimination on the basis of sex.¹³⁸ The principal source of uncertainty with regard to the antidiscrimination protection afforded by section 1981 is whether it applies to discrimination based on national or ethnic origin.¹³⁹ Courts are divided on this issue.¹⁴⁰ In some instances, Title VII and section 1981 embrace "parallel or overlapping remedies against discrimination."¹⁴¹

The relevant question in the context of section 1981 vis-à-vis the military is whether its protections against racial or ethnic discrimination embrace uniformed military personnel of the armed forces. This question is particularly significant to uniformed military personnel because, as noted earlier, they are generally not covered by Title VII.¹⁴²

Once again, *Johnson v. Alexander*¹⁴³ must be the focal point. The United States Court of Appeals for the Eighth Circuit implicitly approved the lower court's determination that, although uniformed military personnel are not covered by Title VII, the protections against racial or ethnic discrimination afforded by section 1981 are available, provided there is proof of a discriminatory intent or purpose.¹⁴⁴ In *Johnson*, there was no violation of section 1981 because "the screening criteria involved . . . were not designed to keep racial or ethnic minorities out of the armed services."¹⁴⁵

136. 42 U.S.C. § 1981 (1976).

137. See, e.g., *Johnson v. REA, Inc.*, 421 U.S. 454 (1975).

138. See, e.g., *League of Academic Women v. Regents of the Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972). For a list of cases holding that § 1981 does not pertain to sex discrimination, see B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 610 n.22 (1976).

139. B. SCHLEI & P. GROSSMAN, *supra* note 138, at 139 (Supp. 1979).

140. See *id.*

141. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1973).

142. See text accompanying notes 118-35 *supra*.

143. 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

144. 424 F. Supp. 490, 493 (E.D. Mo. 1977), *aff'd*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978). See *Taylor v. Jones*, 495 F. Supp. 1285, 1291 (E.D. Ark. 1980).

145. 572 F.2d at 1224. Other cases requiring proof of discriminatory purpose or intent include *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978); *City of Milwaukee v. Saxe*, 546 F.2d 693 (7th Cir. 1976); *Arnold v. Ballard*, 448 F. Supp. 1025 (N.D. Ohio 1978); *Lewis v. Bethlehem Steel Corp.*, 440 F. Supp. 949 (D. Md. 1977); *Crooker v. Boeing Co.*, 437 F. Supp. 1138 (E.D. Pa. 1977). See also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)

Although *Johnson* is to be commended for not totally foreclosing the possibility of a statutory remedy against discrimination for uniformed military personnel, the statutory remedy under section 1981 is not as inclusive as that under Title VII and requires, according to *Johnson* and a number of other cases, a more stringent standard of proof. Nevertheless, it is a source of statutory protection against racial or ethnic discrimination that is apparently available to uniformed military personnel. This, in itself, is dramatic. The question whether section 1981 will be a more potent antidiscrimination tool in the hands of uniformed military personnel in the future depends, in large measure, on how the United States Supreme Court ultimately decides the legal issue of whether the Constitution or Title VII sets the appropriate standard for deciding section 1981 actions.

D. *Age Discrimination and the Military*

The Age Discrimination in Employment Act¹⁴⁶ (ADEA) prohibits discrimination in employment because of age against individuals between the ages of forty and seventy.¹⁴⁷ The section of the ADEA relevant to the analysis in this Article is section 633a.¹⁴⁸ As was the case in the earlier analysis of Title VII,¹⁴⁹ the apposite question is whether uniformed military personnel come within the pale of this statutory protection. In *Lear v. Schlesinger*,¹⁵⁰ the United States District Court for the Western District of Missouri held that uniformed members of the armed forces are not protected by the ADEA prohibition.¹⁵¹

The federal district court recognized that the language of the ADEA was strikingly similar, if not identical, to that of Title VII. Adhering to the principle that "similarly-worded statutes should be consistently

(delineated some appropriate tests for determining whether discriminatory intent exists); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979) (Court further refined concept of discriminatory intent by essentially adopting a two-step analysis); *City of Mobile v. Bolden*, 100 S. Ct. 1490 (1980) (plurality opinion) (successful fourteenth amendment challenge of at-large method of electing city directors requires proof of purposeful discrimination).

146. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

147. The protected age class was raised from age 65 to 70 pursuant to the 1978 amendments. In the case of federal employees, "there is no upper age limitation, except for those individuals whose retirement is required or otherwise authorized by statute." G. GINSBURG & J. KORESKE, *CASES AND MATERIALS ON EQUAL EMPLOYMENT* 155 (Supp. 1978). See 29 U.S.C. § 631(a)-(b) (Supp. III 1979).

148. It should be noted that the language used in § 633a of the ADEA is identical to that used in § 717(a) of Title VII.

149. See text accompanying notes 114-35 *supra*.

150. 17 Empl. Prac. Dec. (CCH) ¶ 8472, at 6470 (W.D. Mo. 1978).

151. *Id.* at 6474-75.

construed,"¹⁵² the court compared the ADEA to Title VII and concluded that the Title VII reasoning adopted previously by the Eighth Circuit in *Johnson v. Alexander*¹⁵³ was applicable to the ADEA. Therefore, the court held that the language of section 633a did not apply to uniformed military personnel.¹⁵⁴

In *Lear*, the plaintiff, a dual status employee in the National Guard, lost his civilian technician job when he was discharged as a member of the National Guard. He never argued, however, that technicians are protected by the ADEA because they are civilian employees of the National Guard as well as military members. This contention, however, was made in essentially the same factual situation in *Simpson v. United States*.¹⁵⁵ In rejecting it, the United States District Court for the Southern District of New York held that the ADEA does not cover bona fide military personnel actions, even though those actions may have a detrimental impact or effect on the civilian sphere of employment of an otherwise covered individual.¹⁵⁶ In citing *Hunter v. Stetson*,¹⁵⁷ a Title VII case, the court noted that "[t]his does not mean that action in the military sphere affecting a technician's civil employment can never be challenged under the ADEA."¹⁵⁸ Thus, one can reasonably infer that *Simpson* probably would have been decided differently if the military decision—separation from the National Guard—had not been based on bona fide military reasons. The protective provisions of the ADEA, however, are generally not within reach of uniformed military personnel.

E. Title VI and the Military

Senator Hubert H. Humphrey, during the course of debate on the Civil Rights Act of 1964, stated, "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."¹⁵⁹ This view was the principal underpinning for Title VI of the Civil Rights Act of 1964.

152. *Id.* at 6474.

153. 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

154. 17 Empl. Prac. Dec. (CCH) ¶ 8472, at 6475.

155. 467 F. Supp. 1122 (S.D.N.Y. 1979).

156. *Id.* at 1128.

157. 444 F. Supp. 238 (E.D.N.Y. 1977). The court found that the existence of a bona fide military personnel decision was the decisive fact that distinguishes *Simpson* from *Hunter*. In *Simpson*, there was no allegation of military pretext with the intent of furthering goals in the civilian realm. 467 F. Supp. at 1125 n.11.

158. 467 F. Supp. at 1125 n.11.

159. 110 CONG. REC. 6543 (1964) (remarks of Sen. Humphrey) (quoting from President Kennedy's message to Congress, June 19, 1963).

In the context of antidiscrimination protections afforded to uniformed military personnel, Title VI may have a profound impact on the Army and Air National Guards, which are organizations receiving federal financial assistance.¹⁶⁰ In assaying the potential impact of Title VI on the member-Guard relationship, careful attention should be given to court decisions which have defined the nature and scope of the antidiscrimination protection which it provides. A central question is whether Title VI's statutory mandate is applicable to personnel decisions of the National Guard affecting membership, discipline, training, promotion, demotion, and the like. These personnel actions are analogous to what are commonly referred to in the civilian sector as employment practices. The apposite provision of Title VI is section 604,¹⁶¹ and the focus of the following discussion will be on those judicial decisions interpreting its meaning and application.

In *Otero v. Mesa County Valley School District No. 51*,¹⁶² the United States District Court for the District of Colorado recently elaborated on the

160. The various Army and Air National Guard units are under the control of the fifty state governors and state adjutant generals; the District of Columbia has a Guard unit also. In times of war or national emergency, "the President is authorized to take control of these units." Thus, the Guard is normally "a state responsibility fulfilling state needs." R. STILLMAN, *supra* note 1, at 95.

The federal government allocates a "substantial amount" of federal dollars for National Guard operations. *See id.* The fact that the National Guard is a federal funds recipient subject to Title VI's antidiscrimination mandate is strongly confirmed by the Guard's own regulations. *See, e.g.*, Nat'l Guard Reg. No. 600-23 (Dec. 30, 1974); Air Nat'l Guard Reg. No. 30-12 (Dec. 30, 1974) (both were issued to assure compliance with Title VI of the Civil Rights Act of 1964).

With respect to the regular armed forces of the United States—the Army, Air Force, Navy, Marine Corps, and Coast Guard—Title VI's protective provisions probably do not apply, although they were likewise supported by congressional appropriations. This conclusion is buttressed implicitly by the Supreme Court's discussion of Title VI in *Chrysler Corp. v. Brown*, 441 U.S. 281, 305 n.35 (1979). The same conclusion probably holds true for the reserve components, as distinguished from the National Guard. In *Simpson v. United States*, the federal district court made the following distinction:

The Army Reserve, like the Army National Guard, is not a full-time active force. The principal difference between the two is that the National Guard is a state militia, subject (unless called to active federal service) to the control and direction of the Governors of the various states, whereas the Army Reserve is a component of the "land and naval Forces" of the United States . . . under the command of the President.

467 F. Supp. at 1128.

161. 42 U.S.C. § 2000d-3 (1976). This section raises the fundamental question whether the Army and Air National Guards are "employers" within the meaning of § 604, and, more importantly, whether they come within the exception embodied in the statute. To date, no court appears to have decided this question expressly.

162. 470 F. Supp. 326 (D. Colo. 1979).

parameters of section 604. Comparing Title VI to Title VII, the court stated:

Title VI . . . is completely different from Title VII. Title VI only applies "to discrimination under any program or activity receiving federal financial assistance." . . . It does not cover "any employment practice of any employer . . . *except where a primary objective of the federal financial assistance is to provide employment.*" Title VI is not a sweeping substitute for Title VII, and Title VI applies only when there is proof a primary objective of federal financial assistance [is] to provide employment.¹⁶³

The restrictive language of section 604 thus evinces "Congress's specific desire not to diffuse authority over employment discrimination among federal agencies other than the EEOC."¹⁶⁴

Nevertheless, the limited exception to the general rule enunciated in section 604 may be applicable when the National Guard receives federal financial assistance from the Department of Defense. Federal financial assistance primarily supports all elements of military training by the National Guard,¹⁶⁵ and uniformed members are an integral part of that training. Hence, it follows that a "primary objective" of federal financial assistance to the National Guard is to provide "employment" to its uniformed personnel, thereby insuring the accomplishment of its military mission. Thus, the antidiscrimination mandate of Title VI appears to encompass personnel decisions stemming from the member-Guard relationship.¹⁶⁶

163. *Id.* at 329. In *Otero*, the court did not find a federally funded program within District No. 52 which would trigger the application of § 604.

In an earlier case, *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), the court added another exception to the general rule of Title VI's nonapplication to employment practices, *i.e.*, "where discrimination in employment causes discrimination to the beneficiaries." *Id.* at 1083. Furthermore, in *Caulfield v. Board of Educ.*, 583 F.2d 605 (2d Cir. 1978), the court rejected an argument by the New York City Board of Education that the Office of Civil Rights was precluded from garnering statistical evidence about the ethnic and racial composition of the teaching staff because of § 604. The court of appeals held the Office of Civil Rights' "concern with discriminatory employment practices was motivated by the unfortunate effect that these practices exercise on minority school children," the intended beneficiaries of the federal financial assistance. *Id.* at 611. It seems exceedingly difficult, however, to make a cogent argument that racial or ethnic discrimination in employment by the National Guard would trigger the exception to the general rule enunciated in *Frazer* and *Caulfield*.

164. *NAACP v. FPC*, 520 F.2d 432, 442 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976).

165. See note 160 *supra*.

166. For a case applying Title VI in an employment discrimination context, see *Association Against Discrimination In Employment, Inc. v. City of Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979). The court held that the city had violated Title VI "by engaging in a policy and practice of discriminating against

Given this assumption, the focus shifts to the proof requirements and enforcement mechanisms inherent in a Title VI cause of action. To determine the proper standard of proof in a Title VI action, guidance can be found in *Regents of the University of California v. Bakke*,¹⁶⁷ where the Supreme Court arguably held that the standards for establishing impermissible racial discrimination under Title VI were coterminous with those that must be met when establishing racial discrimination violative of the fifth or fourteenth amendment to the United States Constitution.¹⁶⁸ In other words, there must be proof of a discriminatory intent or purpose,¹⁶⁹

black and hispanic persons with regard to entry-level employment in the Bridgeport Fire Department." *Id.* at 111. The pivotal factor was "that federal funds have been received by the City and expended in the Fire Department," with no determination whether the primary objective of those funds was to provide employment. Therefore, § 601, prohibiting discrimination in any program or activity receiving federal financial assistance, was perceived as being the statutory provision dispositive of the Title VI question. *See also* *Guardians Ass'n v. Civil Serv. Comm'n*, 466 F. Supp. 1273, 1281 (S.D.N.Y. 1979) (Title VI did apply to the employment practices of New York Police Department "because the NYPD has received and expended federal funds to pay the salaries of policemen and trainees and to finance recruitment programs").

An analogous situation probably exists when the National Guard receives federal financial assistance. Some primary objectives of these grants are to pay the salaries of Guard members, finance recruitment campaigns, and provide necessary military training. Hence, an exception to the general rule of nonapplicability of Title VI to a federal funds recipient's employment practices seems evident in the case of the Army and Air National Guards.

167. 438 U.S. 265 (1978) (plurality opinion). *See also* *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). For a detailed discussion of the possible meaning and ramification of *Bakke*, see Maltz, *Commentary: A Bakke Primer*, 32 OKLA. L. REV. 119 (1979).

168. The conclusion that *Bakke* adopts the *Washington v. Davis*, 426 U.S. 229 (1976), "intent to discriminate" equal protection standard as the benchmark for Title VI cases is predicated on Justice Powell's statement in *Bakke* that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U.S. at 287. *See Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979).

169. In *Harris v. White*, 479 F. Supp. 996 (D. Mass. 1979), the court held that proof of discriminatory intent was an "essential element" of a Title VI claim in view of *Bakke*. The *Harris* decision is exceedingly helpful in delineating the parameters of the "equal protection intent" requirements of *Washington*, *Arlington Heights*, and *Feeney*. *But see* *Guardians Ass'n v. Civil Serv. Comm'n*, 466 F. Supp. at 1286 (court held that "Justice Powell's pronouncement . . . does not indicate a view contrary to *Lau*," and thus concluded that Title VII's disparate impact standard was applicable to Title VI cases).

In *Board of Educ. v. Harris*, 444 U.S. 130 (1979), Justice Blackmun, in dictum, stated:

There thus is no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the con-

a more stringent standard than the disparate impact theory of *Griggs v. Duke Power Co.*¹⁷⁰

Aside from the possible problems associated with proving a Title VI claim, there are complex questions with respect to the enforcement mechanisms available to insure compliance with the statutory mandate. One such question is whether there is an implied private right of action under Title VI; the Supreme Court recently answered this question in the affirmative in *Cannon v. University of Chicago*.¹⁷¹

In view of the fact that a private remedy is available under Title VI, the pertinent question then raised is whether a victim of discrimination from a violation of Title VI can gain immediate access to an appropriate judicial forum without exhausting administrative remedies.¹⁷² A number of lower federal courts have wrestled with the issue, and the results have been mixed. The majority of cases has refused to impose any strict-exhaustion requirement on an alleged discriminatee when termination of the discriminatory conduct, not the cutoff of federal funds, was the remedy sought.¹⁷³

stitutional standard. . . . [T]hat issue would be necessary only if there were a positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive.

Id. at 149 (citation omitted). Consequently, the proper standard for determining discrimination in Title VI causes of action may still be in doubt.

170. 401 U.S. 424 (1971). The Supreme Court in *Washington v. Davis* refused to apply the Title VII disparate impact enunciated in *Griggs* to a constitutional discrimination claim under the fifth or fourteenth amendment. Instead, the Court adopted the "intent to discriminate" standard as the proper basis for evaluating constitutionally based claims of discrimination.

171. 441 U.S. 677 (1979) (there was an implied private remedy under Title VI; consequently, a similar remedy also existed under Title IX of the 1972 Education Amendments, which was the issue before Court). In *Bakke*, the Supreme Court simply had assumed that Title VI granted a private right of action in favor of an aggrieved individual. Thus, *Cannon* was the Court's first definitive pronouncement on the issue. See also *Association Against Discrimination In Employment, Inc. v. City of Bridgeport*, 479 F. Supp. 101, 111 (D. Conn. 1979) (*Cannon* noted approvingly).

172. In *Bakke*, the Supreme Court avoided the exhaustion question by holding that it "need not pass upon . . . [the] claim that private plaintiffs under Title VI must exhaust administrative remedies." 438 U.S. at 284. See *Lau v. Nichols*, 414 U.S. 563 (1974) (exhaustion question was never discussed). In *Bakke* and *Lau*, the private litigants were allowed to pursue their Title VI claims without exhausting their administrative remedies.

173. In *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978), the court decided that, in the situation where an aggrieved individual is seeking to enjoin discriminatory practices in violation of Title VI, rather than attempting to obtain "the same type of relief which could be had under the administrative apparatus provided under Title VI," the administrative mechanisms outlined in Title VI would be "counter-productive"; hence, there should be no requirement that the

Although the Supreme Court expressly avoided the exhaustion issue in *Bakke*, it may have obliquely shed light on the issue in *Cannon*. To find that allusion, however, requires an exacting examination of Justice Stevens' majority opinion. In one footnote, Justice Stevens outlines the various positions that HEW has taken on the question of exhaustion of administrative remedies in the context of Title IX, ultimately determining that HEW now rejects any strict-exhaustion requirement in favor of a more flexible approach.¹⁷⁴ In alluding to the weaknesses of the administrative enforcement of Title IX, Justice Stevens stated, "[W]e are not persuaded that individual suits are inappropriate in advance of administrative remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion."¹⁷⁵

Notwithstanding the fact that the Court's discussion of this question is restricted to Title IX, a cogent argument can be made that the same rationale would likewise apply to Title VI, since Title IX is patterned after it.¹⁷⁶ If so, then one could reasonably argue that the Supreme Court in *Cannon* implicitly rejected a strict-exhaustion requirement under Title VI. A more prudent interpretation of *Cannon*, however, is that the exhaustion of administrative remedies issue with regard to Title VI remains an open question.

Regardless of how the Supreme Court ultimately resolves the issue whether the federal courts or the appropriate federal agencies have primary jurisdiction over Title VI violations, the nature and scope of the remedies available to insure compliance will continue to be an extremely important subject. There are essentially two enforcement mechanisms available: administrative and judicial. The administrative enforcement apparatus is outlined in section 602 of Title VI.¹⁷⁷ It provides essentially that the appropriate federal agency can effectuate compliance by either "the termination of or refusal to grant or to continue assistance" to a program or activity operating inconsistently with the mandates of Title VI and the rules and regulations promulgated pursuant to it¹⁷⁸ or "by any

private litigant exhaust administrative remedies prior to commencing a Title VI action. *Id.* at 20-21. In *Rios*, the district court noted several lower federal court decisions that had imposed an exhaustion of administrative remedies requirement as a precondition for bringing suit under Title VI. According to the court, the common element of these cases, however, was that administrative relief already available under Title VI was being sought. *Id.* at 20.

174. 441 U.S. at 687 n.8.

175. *Id.* at 706 n.41 (citation omitted).

176. The similarity of Title VI and Title IX was the cornerstone of the Supreme Court's decision in *Cannon* on the implied private right of action issue. See note 171 and accompanying text *supra*.

177. 42 U.S.C. § 2000d-1 (1976).

178. *Id.*

other means authorized by law."¹⁷⁹ The appropriate federal agency or department must meet, however, "comprehensive procedural requirements . . . before Federal financial assistance can be terminated."¹⁸⁰ As to the federal government's right to seek judicial enforcement, it should be noted that this prerogative is not specifically provided for in Title VI's statutory enforcement scheme. Yet, some courts have recognized that the federal government may have an inherent right "to bring suit to require the recipient of federal grants to comply with terms and conditions of the grant."¹⁸¹ In the context of Title VI, the term or condition of the grant would be to refrain from using federally allocated funds to perpetuate racial or ethnic discrimination.¹⁸² In short, a judicial remedy to enforce the antidiscrimination terms of a federal grant or loan may rest inherently with the federal government.

In the case of private litigants, the administrative remedy outlined in section 602 can be ignited by filing a complaint with the appropriate federal agency or department, thus allowing it to investigate and seek compliance with the Act, and, failing that, to order a cutoff of federal funding.¹⁸³ In the judicial enforcement realm, a private plaintiff can obtain a court order requiring the federal funds recipient "to terminate the offending discrimination."¹⁸⁴ Moreover, private plaintiffs can sue the appropriate federal government officials under Title VI and secure "orders requiring those officials either to aid recipients of federal funds in devising nondiscriminatory alternatives to presently discriminatory programs, or to cut off funds to those recipients."¹⁸⁵

The most troublesome remedial question is whether private plaintiffs can recover monetary damages in a Title VI action. Some lower federal courts have been confronted with the question, but as yet, no definitive ruling has been made. *Chambers v. Omaha Public School District*¹⁸⁶ illustrates the noncommittal stance that some courts have taken. The United States Court of Appeals for the Eighth Circuit noted that "[w]e ex-

179. *Id.* This vaguely formulated catch-all provision could provide an array of administrative enforcement mechanisms under Title VI.

180. *Bakersfield City School Dist. v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979).

181. *United States v. Frazer*, 317 F. Supp. 1079, 1084 (M.D. Ala. 1970).

182. *See Lau v. Nichols*, 414 U.S. at 569, where the Supreme Court expressed a similar view.

183. The possible inadequacy of the administration remedy alternative to a private litigant under Title IX was noted by the Supreme Court in *Cannon v. University of Chicago*, 441 U.S. at 706 n.41. By analogy, the rationale should apply equally in the context of Title VI. *See* note 171 and accompanying text *supra*.

184. 441 U.S. at 711.

185. *Id.* at 696 n.21. *See also* *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill. 1975); *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 608 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1975).

186. 536 F.2d 222 (8th Cir. 1976).

press no view on the propriety of permitting money judgments in § 2000d actions."¹⁸⁷ In *Rendon v. Utah State Department of Employment Security Job Service*,¹⁸⁸ however, a federal district court did reject the contention that general and punitive damages could be recovered in a private action under Title VI. The *Rendon* court observed:

The clear concern and aim of Title VI is the prohibition of various forms of discrimination in federally funded programs in the manner specifically provided by the statute and to the limited extent recognized by judicial decision. It is not the purpose of Title VI to duplicate the means of relief already available and to provide a means of compensation for every conceivable injury or adverse reaction that arguably is in consequence of a violation of the provision.¹⁸⁹

The court, however, did take notice of *Gilliam v. City of Omaha*,¹⁹⁰ a federal district court decision that had previously countenanced money judgments in Title VI cases, but noted that the damages sought in *Gilliam* were distinguishable from those being sought in the action before it.¹⁹¹ Thus, the court reiterated that "[t]he issue of whether a monetary judgment can be obtained under Title VI has not been definitively resolved."¹⁹²

The pertinent inquiry with respect to the application of Title VI's anti-discrimination protections to the member-National Guard relationship is twofold: (1) does it even embrace the relationship; and (2) if so, what is the nature and scope of the enforcement remedies available? The future viability of Title VI as an antidiscrimination protection to uniformed military personnel of the Army and Air National Guards hinges completely on how the courts resolve these questions.

F. Other Statutory Protections

There are other federal statutory enactments that conceivably may be a part of the set of legislative antidiscrimination protections afforded to uniformed military personnel. The first such statutory provision inviting careful attention is 42 U.S.C. § 1983.¹⁹³ Although section 1983 does not create any substantive rights, it does indeed provide "a private cause of action for violations of rights found elsewhere,"¹⁹⁴ either in the United

187. *Id.* at 225 n.2.

188. 454 F. Supp. 534 (D. Utah 1978).

189. *Id.* at 536-37.

190. 388 F. Supp. 842 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975).

191. 454 F. Supp. at 537 n.3.

192. *Id.* (quoting *Chambers v. Omaha Pub. School Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976)).

193. (Supp. III 1979).

194. *Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979) (citing *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979)).

States Constitution or the United States Code,¹⁹⁵ under color of state law.¹⁹⁶ Thus, all claims that are based on discrimination imposed by state and local public agencies and officials¹⁹⁷ in official violation of federally protected rights come within the ambit of section 1983.¹⁹⁸

As was the case with Title VI, section 1983 conceivably may be an effective antidiscrimination tool in the hands of uniformed members of the Army and Air National Guards. Hence, many of the issues that were previously addressed in the Title VI discussion are also relevant in the context of section 1983.

The first question warranting some consideration is whether discriminatory acts by National Guard officials, performed in their official capacities, are committed "under color of state law," thereby coming within the pale of section 1983. As the federal district court noted in *Syrek v. Pennsylvania Air National Guard*:¹⁹⁹

It is elemental, of course, that conduct alleged to be in violation of the Civil Rights Act must occur under color of state law; and that if the conduct is practiced by a citizen or organization acting privately and not under color of state law, or by a citizen or organization *acting under color of federal law*, then there is no § 1983 claim and § 1343 does not confer jurisdiction on federal district courts.²⁰⁰

In *Syrek*, the plaintiffs held dual status as federal civilian technicians for and uniformed members of the Pennsylvania Air National Guard. Their superior officers in the National Guard disciplined them in their federal civilian sphere of employment for failing to adhere to military hair regulations. In defense to claims founded on section 1983, the defendants argued that the federal district court was without jurisdiction "because the alleged discrimination occurred under color of federal law."²⁰¹ In rejecting this contention, the court stated, "[T]he defendants were acting under

195. See *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), where the Supreme Court held expressly that § 1983 encompasses not only claims based on federal constitutional violations, but those founded solely on federal statutory violations, as well.

196. See *id.* at 2504.

197. Section 1983 is available for suits against a state or any of its agencies. "But § 1983 is assuredly not available for suits against the United States . . ." *Cannon*, 441 U.S. at 700 n.27.

198. This private cause of action against acts of discrimination under color of state law which contravene federal constitutional and statutory law encompasses discrimination on a variety of bases, *e.g.*, race, color, sex, religion, national origin, age, or handicap, just to name a few.

199. 371 F. Supp. 1349 (W.D. Pa. 1974), *rev'd on other grounds*, 537 F.2d 66 (3d Cir. 1976).

200. *Id.* at 1350 (emphasis added). Since official actions of the armed forces of the United States are done under color of federal law, their actions do not seem to come within the ambit of § 1983.

201. *Id.*

color of state law, exercising authority vested in them by the Commonwealth of Pennsylvania."²⁰² It is significant to note that *Syrek* and its progeny were concerned with the applicability of section 1983 to a factual circumstance involving a guardsman-technician complainant. Certainly, if the "color of state law" requirement is met in this factual context, then it should likewise be fulfilled when the alleged discriminatee has the single status of uniformed member of the National Guard. Clearly, arbitrary discriminatory conduct against such individuals by National Guard officials is done under color of state law.

Given this, the next inquiry centers on the standard for establishing discrimination under section 1983. Again the question is whether the "effects" test or the "intent to discriminate" test is the appropriate standard. In *Personnel Administrator v. Feeney*,²⁰³ a case brought pursuant to section 1983 challenging the constitutionality of the Massachusetts veterans' preference statute on the basis that it discriminated against women, the United States Supreme Court held that insofar as one seeks to redress a violation of the equal protection clause of the fourteenth amendment there must be proof of a discriminatory intent or purpose to establish a section 1983 claim.²⁰⁴ Unable to find the requisite intent, the Supreme Court held that the Massachusetts veterans' preference statute did not deprive women of equal protection of the laws and thus rejected plaintiff's section 1983 claim.²⁰⁵ So even assuming that discrimination claims of uniformed members of the National Guard come within the umbrella of section 1983, an extremely difficult standard of proof will still pose a significant problem for a complainant.

Another troublesome question in the section 1983 context, particularly with regard to uniformed military personnel of the National Guard, is whether exhaustion of administrative remedies is a prerequisite for commencing a section 1983 action. The rule generally adhered to with respect to an exhaustion of administrative remedies requirement vis-à-vis section 1983 is that a plaintiff need not exhaust state administrative remedies before seeking redress in the courts.²⁰⁶ Thus, the relevant question

202. *Id.* at 1351. Other cases adopting this position are *Lasher v. Shafer*, 460 F.2d 343 (3d Cir. 1972); *NeSmith v. Fulton*, 615 F.2d 196 (5th Cir. 1980). *Contra*, *Vargas v. Chardon*, 405 F. Supp. 1348 (D.P.R. 1975).

203. 442 U.S. 256 (1979).

204. *Id.* at 274. For a case interpreting *Feeney* as clearly adopting the "intent to discriminate" standard of discrimination for § 1983, see *Mescall v. Burrus*, 603 F.2d 1266 (7th Cir. 1979). See also *Harris v. White*, 479 F. Supp. 996 (D. Mass. 1979) (subscribed to "intent to discriminate" rationale).

205. *Feeney* is highly significant, for it arguably makes federal, state, or local veterans' preference laws virtually unassailable, absent proof of discriminatory intent.

206. See *Monroe v. Pape*, 365 U.S. 167 (1961) (overruled in part in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978)). See also *Meyer v. Frank*, 550 F.2d 726 (2d Cir. 1977); *Archon Gardens, Ltd. v. Brooklyn Center Dev. Corp.*,

becomes whether this rule similarly applies in a military context when the National Guard is sued by a uniformed member pursuant to section 1983 for impermissible discrimination. Since no court decision seems to have responded squarely to the issue, it is necessary to consider those court decisions which have examined the exhaustion of administrative remedies requirement in relation to the military, albeit in a slightly different factual context.

As noted earlier,²⁰⁷ the various branches of the armed forces of the United States, as well as the Army and Air National Guards, have promulgated regulations outlining the military administrative procedures within the military chain of command for filing, investigating, conciliating, and remedying meritorious discrimination complaints of uniformed military personnel.²⁰⁸ Must one exhaust these administrative remedies before a court can exercise jurisdiction over a section 1983 claim? In *Sanders v. McCrady*,²⁰⁹ a section 1983 case, the United States Court of Appeals for the Fourth Circuit announced a general rule with respect to exhaustion of administrative remedies in the military by stating that "courts will not review military actions until administrative remedies have been exhausted."²¹⁰ *Sanders* dealt with allegations that the plaintiff wrongfully had been convicted of cheating and forced to resign his captain's commission in the South Carolina National Guard, thus depriving him of federally protected rights.²¹¹ The court of appeals rejected the plaintiff's contention that the strict exhaustion principle did not apply to section 1983 cases.²¹² While conceding that *Monroe*-type cases "reflect the judgment that the advantages of exhaustion are outweighed by the importance of providing a federal forum for adjudication of federal constitutional and statutory rights,"²¹³ the court of appeals decided that it was not inconsistent with this stated policy to require "a litigant to present his federal complaint initially to a federal administrative board [the Army Board for the Correction of Military Records²¹⁴] created by Congress to consider his claim."²¹⁵ Hence, the plaintiff's complaint, according to the court, was properly dismissed because of a failure to exhaust available ad-

468 F. Supp. 609 (S.D.N.Y. 1979); *Snyder v. Altman*, 444 F. Supp. 1269 (C.D. Cal. 1978); *Reynolds v. Dukakis*, 441 F. Supp. 646 (D. Mass. 1977); *Gonzalez v. Calero*, 440 F. Supp. 989 (D.P.R. 1977).

207. See notes 104-06 and accompanying text *supra*.

208. See, e.g., Nat'l Guard Reg. No. 600-23 (Dec. 30, 1974); Air Nat'l Guard Reg. No. 3012 (Dec. 30, 1974).

209. 537 F.2d 1199 (4th Cir. 1976).

210. *Id.* at 1200.

211. Specifically, the plaintiff contended that he had been denied procedural due process. *Id.*

212. The plaintiff relied principally on *Monroe v. Pape*.

213. *Id.* at 1201.

214. For a discussion of the composition of the ABCMR, see *id.* at 1200.

215. *Id.* at 1201.

ministrative remedies.²¹⁶ It is significant to note that the existence of a federal administrative forum, the Army Board for the Correction of Military Records, was a controlling factor in the *Sanders* decision.²¹⁷ Thus, it is conceivable that, when there is no available federal administrative forum, the nonexhaustion rule of *Monroe v. Pape* and like cases applies.²¹⁸

Nevertheless, one cannot ignore the rule that was echoed in *Von Hoffburg v. Alexander*,²¹⁹ a recent decision of the United States Court of Appeals for the Fifth Circuit. Quoting *Mindes v. Seaman*,²²⁰ the court stated:

Although federal courts are not totally barred from barracks and billets, "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures"²²¹

It should be underscored that *Von Hoffburg* and *Mindes* were not section 1983 cases, for the actions precipitating the judicial complaints were done under color of federal, not state, law. In fact, neither plaintiff pleaded section 1983 as a basis for recovery.²²² Thus, one can plausibly contend that their rules on exhaustion of remedies conceivably do not apply in a section 1983 action involving allegations of discrimination against the National Guard, a state function, by its uniformed members.²²³ Even if one

216. *Id.* at 1200.

217. Another Fourth Circuit decision imposing an exhaustion requirement in the context of the military is *Sherengos v. Seamans*, 449 F.2d 333 (4th Cir. 1971). *But see* *United States ex rel. Brooks v. Clifford*, 412 F.2d 1137 (4th Cir. 1969). The distinction drawn by the *Sanders* court between *Clifford* and *Sanders* is that "Sanders' interest in seeking judicial relief before exhausting his administrative remedies was substantially less than Brooks'." 537 F.2d at 1201.

218. The *Sanders* court noted that "the fact that the adjutant general is a state officer is immaterial" on the exhaustion issue because a federal faculty "initiated the action that ultimately led to Sanders' resignation of his commission." 537 F.2d at 1200. Thus, the nonexhaustion rule of *Monroe v. Pape* and its progeny was not relevant.

219. 615 F.2d 633 (5th Cir. 1980) (military discharge on ground of homosexual tendencies; failed to exhaust administrative remedies).

220. 453 F.2d 197 (5th Cir. 1971).

221. 615 F.2d at 637 (quoting *Mindes*, 453 F.2d at 201).

222. In *Von Hoffburg*, the plaintiff alleged "the deprivation of rights guaranteed by Article IV, § 1 and the First, Fourth, Fifth, Eighth, and Ninth Amendments of the Constitution of the United States and 28 U.S.C. §§ 1738 and 1739." *Id.* at 641 n.16. In *Mindes*, the thrust of the plaintiff's allegation was denial of due process. *See* 453 F.2d at 202.

223. For an extensive list of cases and law review articles which have dealt with the exhaustion issue in the military context, see *Poe v. Kuyk*, 448 F. Supp. 1231, 1234 n.5 (D. Del. 1978).

assumes for the sake of argument that the exhaustion rules of *Von Hoffburg* and *Mindes* do apply, a cogent argument could be made that exhaustion of administrative remedies would be either futile²²⁴ or inadequate;²²⁵ hence, an exception to the rules calling for exhaustion might exist. Nevertheless, the question whether a uniformed member of the National Guard must exhaust available military administrative remedies before seeking judicial relief pursuant to section 1983 remains unsettled and awaits further elucidation by the courts.

Further illumination by the courts may also be needed with respect to constitutional questions which may surface when the focus shifts to the remedial enforcement mechanisms available under section 1983; especially, when the inquiry centers on those remedies which are available to uniformed military personnel who have been impermissibly discriminated against by officials of the National Guard.

Section 1983 provides that "every person" who engages in official acts of impermissible discrimination under color of state law "shall be liable to the party injured *in an action at law, suit in equity, or other proper proceeding for redress.*"²²⁶ On its face, it offers the prospect of a broad remedy encompassing monetary, declaratory, or injunctive relief.²²⁷ When the section 1983 action implicates a state or a state agency, however, the relief that federal courts can award is subject to the constitutional constraints of the eleventh amendment.²²⁸ In this instance the present rule of law seems to be that a federal court may, consistent with the eleventh amendment, award prospective injunctive and declaratory relief,²²⁹ and

224. The existence of a pattern of racial discrimination in the Arkansas National Guard was graphically illustrated recently in *Taylor v. Jones*, 489 F. Supp. 498 (E.D. Ark. 1980). In a subsequent opinion, *Taylor v. Jones*, 495 F. Supp. 1285, 1291 (E.D. Ark. 1980), the court alluded to the possible futility of attempting to exhaust one's administrative remedies for racial discrimination in the Arkansas National Guard in view of the racial climate.

225. Interestingly, no provision is made in the various military regulations and directives for awarding retrospective monetary damages. The awarding of such monetary damages in a § 1983 action raises a substantial eleventh amendment federal constitutional question when such damages have to come from state treasury funds. See note 228 *infra*.

226. 42 U.S.C. § 1983 (Supp. III 1979) (emphasis added).

227. See, e.g., *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980).

228. See *Quern v. Jordan*, 440 U.S. 332 (1979). The Supreme Court held that Congress in enacting § 1983 did not abrogate the state sovereign immunity embedded in the eleventh amendment. Thus, a "federal court's remedial power," under § 1983, "consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Id.* at 338.

229. See *id.* at 336; *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). See *Nevada v. Hall*, 440 U.S. 410, 442 n.19 (1979).

relief deemed as ancillary to prospective relief,²³⁰ but not a "retroactive award which requires the payment of funds from the state treasury,"²³¹ which is usually in the form of retrospective monetary damages.²³² In short, a uniformed member of the National Guard filing a section 1983 discrimination action in federal district court generally would be precluded from obtaining a potentially significant component of relief.

This, in turn, raises the question whether the same result would follow if that same section 1983 discrimination action were brought in a state court.²³³ As noted earlier, there is no eleventh amendment problem when "an action is brought in a state court since the amendment, by its terms, restrains only the Judicial power of the United States."²³⁴ Thus, any claim of sovereign immunity by the state would be predicated on either a state statutory²³⁵ or constitutional provision,²³⁶ or the English common law.²³⁷ Given the existence in a forum state of any of these sources of state govern-

230. See *Quern v. Jordan*, 440 U.S. at 349 (modified notices to the class members were deemed to be "ancillary to the prospective relief already ordered by the court"). Beyond *Quern*, it is exceedingly difficult to determine what other forms of relief would be viewed by the Supreme Court as "ancillary to prospective relief" and thus not foreclosed by the eleventh amendment.

231. *Id.* at 347. If the dictum in *Quern* means that a state is not a "person" within the meaning of § 1983, then, unlike a municipality, it cannot be joined as a party defendant in a § 1983 action. Justice Rehnquist seems to read *Alabama v. Pugh*, 438 U.S. 781 (1978), much to the dismay of Mr. Justice Brennan, in that exact fashion. 440 U.S. at 340.

232. Significantly, in *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980), the Supreme Court did indicate that attorneys' fees could be obtained from the state treasury in § 1983 actions pursuant to the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976). Although *Thiboutot* was a § 1983 action commenced in a Maine state court, and thus not subject to eleventh amendment constraints, the Court painted a picture broader than *Thiboutot's* facts by stating that "the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court." *Id.* at 2507. The eleventh amendment also does not preclude the awarding of retrospective monetary damages in § 1983 actions against a state official who is sued in his or her individual capacity. See *Scheuer v. Rhodes*, 416 U.S. 232, 235-38 (1974). A practical problem attendant to this course of action is that a state official may be judgment-proof. Moreover, the state official may enjoy a qualified "good faith" immunity when sued under § 1983. See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975).

233. See *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980).

234. *Id.* at 2506 n.7.

235. See W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 659 (6th ed. 1976).

236. See, e.g., ARK. CONST. art. 5, § 20, which succinctly provides, "The State of Arkansas shall never be made [a] defendant in any of her courts." In all of the states, some form of consent to sue has been given. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 975 (4th ed. 1971).

237. See W. PROSSER, *supra* note 236, at 975.

mental immunity, the section 1983 action probably would fail. A different result, however, likely would be obtained if the section 1983 action arose in a forum state that had abrogated the state sovereign immunity doctrine.²³⁸

A more complex problem arises when one slightly changes the facts:

Sergeant X, a black member of the State A National Guard, is on military maneuvers with his National Guard unit in State B. While in State B, Captain Y, the company commander, demotes Sergeant X because of his race. The unit then returns to State A. State A still has state sovereign immunity, while State B has totally abrogated the doctrine. State B has a statute that provides: "A court of this State may exercise jurisdiction on any basis not inconsistent with the United States Constitution."

In view of this scenario, can Sergeant X successfully maintain a section 1983 action in a state court of State B against the State A National Guard? Must State B respect State A's sovereign immunity defense? The United States Supreme Court decision in *Nevada v. Hall*²³⁹ may provide some insight for resolving these complex questions.

In *Hall*, the plaintiffs, California residents, brought suit in California Superior Court against the state of Nevada and others, seeking to recover damages for severe injuries that were suffered in an automobile collision in California. The driver of the other automobile involved in the collision was employed by the University of Nevada, an entity of the state of Nevada, and was engaged in official business at the time of the accident. The state of Nevada and the university were served with court process "pursuant to the provisions of the California Vehicle Code authorizing service of process on nonresident motorists."²⁴⁰

After a series of court rulings that were primarily unfavorable to the state of Nevada, the case reached the United States Supreme Court. Mr. Justice Stevens stated that the relevant question for the Court's determination was "whether a State may claim immunity from suit in the courts of another State."²⁴¹ The Supreme Court decided that neither the full faith and credit clause to the United States Constitution²⁴² nor any other provision of the Constitution²⁴³ required "California to surrender jurisdiction or

238. See, e.g., *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963) (completely abolished the doctrine of governmental immunity from tort liability).

239. 440 U.S. 410 (1979).

240. *Id.* at 412 n.1.

241. *Id.* at 414. Nevada claimed that California was required, as a matter of full faith and credit, "to respect the limitations on Nevada's statutory waiver of its immunity from suit." *Id.* at 421.

242. U.S. CONST. art. IV, § 1.

243. In *Hall*, the Supreme Court alluded to U.S. CONST. art. I, § 8 and art. IV, § 2, but concluded that immunity from suit enjoyed by one state in the courts of a sister state was simply recognized as "a matter of comity" and was not constitutionally compelled. 440 U.S. at 425.

to limit respondents' recovery to the \$25,000 maximum of the Nevada statute."²⁴⁴ In other words, California did not have to respect the sovereign immunity defense of Nevada.

Applying the principles of *Hall* to the hypothetical situation and the concomitant questions which were posed above, one can plausibly argue that Sergeant X can bring a section 1983 action against State A in State B; State B can, consistent with the United States Constitution, reject the sovereign immunity defense of State A and thus provide a full measure of relief, including retrospective monetary damages.²⁴⁵

In addition to section 1983, the Rehabilitation Act of 1973²⁴⁶ and its provisions relating to rights of the handicapped may have some impact on the issue of antidiscrimination protections which are available to uniformed military personnel. For purposes of the analysis in this Article, sections 501²⁴⁷ and 504²⁴⁸ are the central statutory provisions of the Rehabilitation Act.

When considering the question whether uniformed members of the armed forces of the United States²⁴⁹ are afforded statutory protection against discrimination on the basis of handicap, section 501²⁵⁰ is the focal point; the fundamental question is whether the legislation and regulations which prohibit discrimination by the federal government on the basis of handicap pertain "to the military department in terms of policies for military personnel."²⁵¹ Viewing the matter in a pragmatic manner, one writer has concluded:

244. 440 U.S. at 424.

245. In personam jurisdiction over State A poses the biggest problem for such an action. A forceful argument could be made that the commission of a constitutional tort of racial discrimination against Sergeant X within the geographical boundaries of State B is sufficient to satisfy the "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and thus renders the exercise of in personam jurisdiction consistent with the due process clause of the fourteenth amendment. *But see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

246. 29 U.S.C. §§ 701-796 (1976 & Supp. III 1979).

247. *Id.* § 791 (Supp. III 1979).

248. *Id.* § 794.

249. The armed forces of the United States include the Army, Navy, Air Force, Marines Corps, Coast Guard, and their reserve components. Except when federalized by the President in times of an emergency, the various Army and Air National Guard units are functions of the fifty states. Thus, they are not considered in this Article as part of the armed forces of the United States.

250. 29 U.S.C. § 791 (Supp. III 1979). *See Ryan v. Federal Deposit Ins. Corp.*, 565 F.2d 762, 763 (D.C. Cir. 1977). *See also Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979) (discussing "the employment of handicapped individuals by the Federal Government"). Other provisions offering protection for the handicapped are 5 U.S.C. § 7204 (Supp. III 1979); 29 C.F.R. §§ 1613.701-710 (1980).

251. Comment, *supra* note 109, at 198.

It is manifest that these regulations and the legislation which prohibit such discrimination against the handicap do not apply to the military department in terms of policies for military personnel. Since physical fitness is a key element of military training and all branches of the service emphasize such physical training, it is easy to see that a person with a handicap could not compete in a regiment which included everything from . . . [riflery] to obstacle courses.²⁵²

This view is probably correct. It is evident from the language used throughout section 501 that Congress probably did not intend to embrace the uniformed military member-armed forces of the United States.²⁵³ Most likely, the protective provisions of section 501 only extend to civilian employees of the various military departments.²⁵⁴

Nevertheless, the possible application of section 504 of the Rehabilitation Act of 1973²⁵⁵ to uniformed members of the respective state National

252. *Id.*

253. In general, the Civil Service Commission plays a central role in § 501's statutory enforcement scheme regarding discrimination in federal hiring on the basis of handicap. *See* 29 U.S.C. § 791(a)-(d) (Supp. III 1979). The Civil Service Commission has no regulatory control over the policies and practices of the armed forces of the United States with respect to their uniformed military personnel. *See, e.g., Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.) (Title VII case), *cert. denied*, 439 U.S. 986 (1978). Of some importance is the fact that the various military regulations and directives mandating equality of opportunity do not proscribe discrimination on the basis of handicap. *See, e.g., Army Reg. No. 600-21; Air Force Reg. No. 30-2.*

254. *See Johnson v. Alexander*, 592 F.2d 1219 (8th Cir.) (distinction between uniformed military personnel and civilian employees of the military departments; Title VII's protective provisions apply only to civilian, not military, personnel of the various armed forces), *cert. denied*, 439 U.S. 986 (1978). The *Johnson* reasoning should be similarly applicable in the context of § 501 of the Rehabilitation Act of 1973. For an in-depth discussion of all relevant issues concerning military employment of the handicapped, see Comment, *supra* note 109, at 197-202.

255. 29 U.S.C. § 794 (Supp. III 1979). Section 504 is manifestly patterned after Title VI of the Civil Rights Act of 1964, substituting "handicap" in place of "race, color, or national origin," and Title IX of the Education Amendments Act of 1972, inserting "handicap" in place of "sex." Moreover, the enforcement of § 504 is bolstered by Exec. Order No. 11,914, 3 C.F.R. 117 (1977), which outlines the administrative enforcement procedures available to HEW to achieve nondiscrimination in federally assisted programs.

An interesting question, however, is whether § 504 embraces uniformed military personnel of the armed forces of the United States. The specific issue is whether the various national armed forces are programs or activities conducted by an executive agency, the Department of Defense, thus bringing uniformed military personnel of the various national military departments within the ambit of § 504. *See Coleman v. Darden*, 595 F.2d 533, 538 (10th Cir. 1979). The problem is compounded by the fact that the term "executive agency" is nowhere de-

Guards is still a viable topic for discussion. As was the case with Title VI, discrimination on the basis of handicap by the National Guard quite possibly invites the protective umbrella of section 504 because the Guard is a "program or activity receiving Federal financial assistance."²⁵⁶

This proposition is borne out to some extent by a recent Arkansas Army National Guard Regulation which provides, in pertinent part:

It is also the policy of the Arkansas ARNG to provide equal opportunities and reasonable accommodation for handicapped individuals as required by section 504 of the Vocational Rehabilitation Act of 1973 . . . provided that nothing in this regulation shall be construed to supersede, amend, or overrule any existing regulations which establish reasonable criteria for participation, in . . . physical/mental capacity-related terms, when such regulations have as their intent the achievement of the ARNG's express statutory and constitutional objective to provide a trained and ready militia to mobilize at the call of the President of the United States or the Governor of Arkansas²⁵⁷

In view of the probable applicability of section 504 to the National Guard's personnel practices and policies with respect to its uniformed military members, *Southeastern Community College v. Davis*,²⁵⁸ the Supreme Court's sole interpretative decision on section 504, is an extremely noteworthy case.

In *Southeastern Community College*, the Supreme Court, speaking through Justice Powell, addressed this issue: "[w]hether § 504 of the Rehabilitation Act of 1973, which prohibits discrimination against an otherwise qualified handicapped individual in federally funded programs 'solely by reason of his handicap,' forbids professional schools from imposing physical qualifications for admission to their clinical training programs."²⁵⁹ The Supreme Court, reversing a decision of the United States Court of Appeals for the Fourth Circuit, held that Southeastern Community College could, consistent with section 504, deny admission into its Associate Degree Nursing Program to a person suffering from a serious hearing disability.²⁶⁰

The most profound significance of *Southeastern Community College* probably does not lie in its ultimate holding; rather, the potential impact

fined in the Rehabilitation Act. *See generally* *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

256. *See* discussion at note 160 *supra*.

257. Ark. Army Nat'l Guard Reg. No. 600-21, ¶ 1-4(b) (Oct. 1, 1979). To date, this is the only military regulation which, to this writer's knowledge, refers to handicap discrimination.

258. 442 U.S. 397 (1979). The Supreme Court obliquely referred to § 504 in *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 580 (1979). The Supreme Court declined, however, to judicially construe § 504 in *Beazer*.

259. 442 U.S. at 400.

260. *Id.* at 414.

of the Court's opinion on other disparate factual circumstances is of primary importance. One prime example is the uncertainty spawned by the Court in its explicit avoidance of the issue whether an implied private right of action exists under section 504.²⁶¹ This has proved *not* to be a critical act of judicial omission, simply because Congress amended the Rehabilitation Act in 1978 by adding: "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."²⁶² In making section 504 procedurally and remedially coterminous with Title VI, Congress, in effect, created a private right of action under section 504.²⁶³

Despite the *Southeastern Community College* decision, a troublesome question concerning the merits of a section 504 claim remains: to what extent can a federal funds recipient consider the physical or mental disability of an individual in deciding whether that person is "otherwise qualified" to participate in the particular program or activity?²⁶⁴ As to this question, *Southeastern Community College* provides, at best, a vaguely formulated answer.

Focusing on this question, the Court noted:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modification in their programs to allow disabled persons to participate. Instead, it requires only that any "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.²⁶⁵

Elaborating further, the Supreme Court rejected the court of appeals

261. *Id.* at 404 n.5.

262. 29 U.S.C. § 794(a)(2) (Supp. III 1979).

263. See *Cannon v. University of Chicago*, 441 U.S. 677 (1979); text accompanying notes 177-91 *supra*. But see Note, *Legislation By Implication: The Exercise of Legislative Authority Under The 1978 Amendments to Section 504 of The Rehabilitation Act of 1973*, 68 KY. L.J. 141, 165 (1979-1980).

264. Since Congress has expressly aligned § 504 with Title VI, the same limitations to Title VI's coverage should also apply to § 504. Most notably, the limited application of Title VI to employment practices of federal funds recipients should be read into § 504. It can be argued that discrimination in employment on the basis of physical or mental handicap is not encompassed by § 504, except where a primary objective of the federal financing is to provide employment. For a detailed discussion of why Title VI, and thus § 504, should apply to discriminatory "employment" practices of the National Guard with respect to its uniformed military personnel, see notes 161-66 and accompanying text *supra*.

265. 442 U.S. at 405.

holding that "the 'otherwise qualified' persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap."²⁶⁶ The Court thus concluded that "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."²⁶⁷ In short, the Supreme Court held that the physical disabilities of handicapped individuals can be considered by a federal funds recipient insofar as it is relevant to the determination of whether such individual is "otherwise qualified" for the particular program or activity involved.²⁶⁸

The Supreme Court's analysis raises some vexing questions: (1) how does the *Southeastern Community College* rationale apply to military personnel of the National Guard; and (2) to what extent, if any, does *Southeastern Community College* require the National Guard to affirmatively accommodate the physical or mental handicap of an individual who wants to participate in its military program?

Clearly, *Southeastern Community College* stands for the proposition that employers, including military employers like the National Guard, can, congruent with the statutory mandate of section 504, impose "reasonable physical qualifications" for entry into their employment related training programs.²⁶⁹ In the military, the central training program is basic training and, "even stipulating that a few handicapped persons, depending upon the particular handicap, could complete basic training, it is clear that the overwhelming majority could not."²⁷⁰

Given the likelihood that basic training as presently constituted will be an insurmountable barrier for the vast majority of handicapped individuals, the relevant question becomes what obligation is there under section 504, in view of the *Southeastern Community College* analysis, for the National Guard to modify its existing training program in order to accommodate the needs of handicapped aspirants to military National Guard positions?

In *Southeastern Community College*, the hearing-impaired plaintiff contended that section 504 imposed an affirmative obligation on the college to make such modifications in its nursing program that "would dispense with the need for effective oral communication."²⁷¹ In other

266. *Id.* at 406.

267. *Id.* The Court concluded that its interpretation of § 504 was, in fact, bolstered by regulations promulgated by HEW.

268. On its face, Ark. Army Nat'l Guard Reg. No. 600-21, ¶ 1-4(b) (Oct. 1, 1979), seems to substantially conform to the *Southeastern Community College* rationale.

269. 442 U.S. at 414. The focus of any judicial determination would be on the term "reasonable," and, of course, the resolution of that nebulous concept hinges on the peculiar facts and circumstances of a given case.

270. Comment, *supra* note 109, at 198-99.

271. 442 U.S. at 407.

words, the plaintiff maintained that section 504 required Southeastern Community College to embark on a course of action that would accommodate her physical handicap, thus facilitating her entry into and successful completion of the nursing degree program. The Court rejected the contentions for two principal reasons: (1) the accommodation of the plaintiff's physical handicap would require the college to make "substantial adjustments" and "extensive modifications" of its existing nursing program;²⁷² and (2) "neither the language, purpose, nor history of § 504 reveals an affirmative action obligation on all recipients of federal funds."²⁷³ Thus, according to the Supreme Court, "even if HEW has attempted to create such an obligation itself, it lacks the authority to do so."²⁷⁴

At this point, however, the Court creates uncertainty and confusion by stating:

We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. *It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.* Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. *Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW.*²⁷⁵

The ambiguities of the Court's opinion are apparent in the context of the military. One writer graphically has illustrated this uncertainty by analyzing closely both sides of the issue and making some very forceful, effective arguments and counterarguments.²⁷⁶

A central issue is whether the military's adamant insistence on the successful completion of a rather physically demanding training program, usually denoted as basic training, constitutes an "unreasonable and discriminatory" refusal to accommodate, thus amounting "to discrimina-

272. *Id.* at 410. Justice Powell noted that if these substantial changes were required by the applicable HEW regulations, then "they would constitute an unauthorized extension of the obligations" mandated by § 504. *Id.*

273. *Id.* at 411.

274. *Id.* at 411-12.

275. *Id.* at 412-13 (emphasis added).

276. See Comment, *supra* note 109, at 197-201.

tion against the handicapped."²⁷⁷ Future litigation of this issue in the courts is likely, regardless of the administrative determinations of HEW.²⁷⁸

Of the other statutory antidiscrimination protections available to uniformed military personnel, the Uniform Code of Military Justice²⁷⁹ (UCMJ) is probably the most intriguing; articles 133²⁸⁰ and 134²⁸¹ of the UCMJ are the focal points of this discussion. A cogent argument can be made that these statutory proscriptions embrace conduct which can be likened to sexual harassment in the context of Title VII,²⁸² and, if so, arguably prohibit a species of sex discrimination.²⁸³ Moreover, one can plausibly contend that arbitrary discrimination by anyone subject to the UCMJ can be characterized as either "conduct unbecoming an officer and a gentleman," "disorders and neglects to the prejudice of good order and

277. This is the precise line of demarcation that Justice Powell charged HEW with the responsibility of drawing in *Southeastern Community College*, 442 U.S. at 413.

278. For a discussion of the problems created by applying Title VI standards to § 504 claims, see *Zorick v. Tyres*, 372 So. 2d 133, 138-39 (Fla. Dist. Ct. App. 1979). Moreover, as is the case with Title VI, eleventh amendment constraints exist whenever retrospective monetary damages are sought from a state treasury. See *Stubbs v. Kline*, 463 F. Supp. 110 (W.D. Pa. 1978). The district court concluded, "The Rehabilitation Act of 1973, unlike Title VII, does not contain the requisite explicit congressional authorization to enable individuals to bring suits against the states. The Eleventh Amendment is a bar, therefore, to plaintiffs' cause of action under 29 U.S.C. § 794." *Id.* at 116. If the *Stubbs* rationale is correct, the prospects of obtaining monetary relief from state coffers appear slim, and the only real hope of obtaining such monetary relief probably lies with public officials who are held liable in their individual capacities. See, e.g., *Scheuer v. Rhodes*, 416 U.S. at 237-38.

279. 10 U.S.C. §§ 801-940 (1976 & Supp. III 1979).

280. 10 U.S.C. § 933 (1976).

281. 10 U.S.C. § 934 (1976). Article 134 can be described as a general article because of its encompassing language. See *Secretary of the Navy v. Avrech*, 418 U.S. 676, 678 (1974) (holding that articles 133 & 134 not unconstitutionally vague); *Parker v. Levy*, 417 U.S. 733, 756 (1974).

282. Several courts have wrestled with the question whether sexual harassment at the workplace constitutes sex discrimination for Title VII purposes. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Garber v. Saxon Business Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975).

283. Apparently, the communication of "indecent, insulting, or obscene language" was the basis for two courts-martials recently in the 3d Armored Division at Nuremberg, West Germany. Interestingly, one case involved a male perpetrator and a female victim; the other case had a female perpetrator and a male victim. Both cases were prosecuted to conviction. See *Arkansas Gazette*, March 7, April 9, 1980, at 18A, 20A, for newspaper accounts of these courts-martial trials.

discipline," or "conduct of a nature to bring discredit upon the armed forces," thus violating either article 133 or article 134, or both. Hence, the UCMJ probably embodies punitive antidiscrimination protections.²⁸⁴

Beyond the perimeter of the military installation,²⁸⁵ Title II of the Civil Rights Act of 1964,²⁸⁶ proscribing discrimination or segregation on the basis of race, color, religion, or national origin in places of public accommodation, and Title VIII of the Civil Rights Act of 1968,²⁸⁷ forbidding discrimination on the ground of race, color, religion, sex, or national origin in the sale or rental of housing, are the other principal statutory antidiscrimination protections available to uniformed military personnel.²⁸⁸

IV. THE CONSTITUTION AND GENDER-BASED CLASSIFICATIONS IN THE MILITARY

As a rule, the courts have been reluctant "to review or intervene in matters concerning the military."²⁸⁹ In fact, one commentator has opined that "the toughest problem facing an equal protection challenge . . . is the 'great deference' courts show the military and their reluctance to interfere in military matters."²⁹⁰ The most commonly stated explication for this

284. The maximum permissible punishment for "[i]ndecent, insulting, or obscene language; Communicated to a female of the age of 16 years or over" is a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for 1 year. *See* U.S. DEPT OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 127c (rev. ed. 1969). Of course, only a General Courts-Martial can impose this maximum punishment. *See also* 10 U.S.C. § 938 (1976).

285. *See* R. STILLMAN, *supra* note 1, at 62 (pointing out that integration of the armed forces had little impact on civilian communities outside the military gates). The irony of this "is that the least democratic organization, the armed forces, has introduced equality most rapidly in America." *Id.* at 124.

286. 42 U.S.C. §§ 2000a to 2000a-6 (1976).

287. 42 U.S.C. §§ 3601-3619 (1976 & Supp. III 1979). An ancillary statutory proscription against private acts of discrimination in housing is 42 U.S.C. § 1982 (1976). *See* *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

288. *See also* Army Reg. No. 600-18 (Jan. 1, 1979); Army Reg. No. 600-21, ¶ 2-10 (June 20, 1977). These regulations provide the military administrative measures which can be invoked to insure compliance with the statutory enactments referred to above.

289. *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976). For other cases adhering to the tradition of judicial restraint with respect to military affairs, see *Gilligan v. Morgan*, 413 U.S. 1 (1973); *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978).

290. Goodman, *Woman, War, and Equality: An Examination of Sex Discrimination in the Military*, 5 WOMEN'S RIGHTS L. REP. 243, 266 (1979). *See also* Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 397 (1976).

"deferential" treatment of the military is that it is a society of its own, completely different from the civilian sector, and "governed by unique demands for discipline."²⁹¹ Thus, the Supreme Court has held that "the unique character of the military environment and the mission of the armed forces necessitate a different application of individual constitutional rights."²⁹²

The vast majority of issues concerning the protections against discrimination which are afforded to uniformed military personnel by the United States Constitution has surfaced in the context of gender-based distinctions.²⁹³ Surprisingly, for the most part, "the courts have not allowed the military context in which sex discrimination equal protection claims have arisen to taint the results."²⁹⁴ Given this, the focus should be on two principal areas of controversy in sex-related military cases: (1) pregnancy; and (2) pay, benefits, promotions, and assignments.²⁹⁵

291. Goodman, *supra* note 290, at 266.

292. *Brown v. Glines*, 444 U.S. 348, 354 (1980). *See also* *Middendorf v. Henry*, 425 U.S. 25 (1976); *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 427 U.S. 733 (1974).

Although the "uniqueness" of the military may, under some circumstances, justify the application of a less stringent standard to determine whether individual constitutional rights have been contravened, the courts seem to universally accept the proposition that "the military is subject to the Bill of Rights and its constitutional implications." *Crawford v. Cushman*, 531 F.2d 1114, 1120 (2d Cir. 1976). *See also* *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Reed v. Franke*, 297 F.2d 17 (4th Cir. 1961). *But see* *Wiener, Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1-2), 72 HARV. L. REV. 1, 266 (1958), where the thesis is posed that the framers of the Constitution did not intend for the Bill of Rights to apply to members of the armed forces. *Cf. Henderson, Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (surmising that the Bill of Rights was intended to apply to the armed services). For a helpful list of the various articles and court decisions dealing with the question of the applicability of the Bill of Rights to the military justice system, see H. MOYER, *JUSTICE AND THE MILITARY* 241-42 (1972).

293. *But see* *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.) (racial discrimination), *cert. denied*, 439 U.S. 986 (1978); *Simpson v. United States*, 467 F. Supp. 1122 (S.D.N.Y. 1979) (age discrimination). Constitutional violations have also been alleged with respect to arbitrary acts of discrimination on the basis of handicap. *See, e.g., King Smith v. Aaron*, 455 F.2d 378 (3d Cir. 1972); *Stubbs v. Kline*, 463 F. Supp. 110 (W.D. Pa. 1978); *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977); *Frederick L. v. Thomas*, 408 F. Supp. 832 (E.D. Pa. 1976). Moreover, in view of *Davis v. Passman*, 442 U.S. 228 (1979), a private remedy seems to exist in the case of such constitutional violations.

294. Goodman, *supra* note 290, at 266.

295. *See* *Zillman & Imwinkelried, supra* note 290, at 427-34, where a

A. *Pregnancy*

The first gender-based distinction to be judicially scrutinized in view of the United States Constitution involved "the status of the pregnant servicewoman."²⁹⁶ *Struck v. Secretary of Defense*²⁹⁷ was the first case to deal with the issue of the constitutionality of military regulations requiring the immediate discharge of pregnant servicewomen.²⁹⁸ In *Struck*, an Air Force officer nurse challenged an Air Force regulation which called for the mandatory honorable discharge of pregnant females. The United States Court of Appeals for the Ninth Circuit rejected the complainant's contention that the discharge regulation denied her equal protection. In the court's view, "a relevant physical difference between males and females justifies their separate classification for some purposes and avoids the problem of a denial of Equal Protection of the Law."²⁹⁹

In a subsequent case, *Crawford v. Cushman*,³⁰⁰ a contrary result was reached. In *Crawford*, the United States Court of Appeals for the Second

296. *Id.* at 427.

297. 460 F.2d 1372 (9th Cir. 1971), *vacated*, 409 U.S. 1071 (1972). The constitutional issues in *Struck* became moot when the Air Force permitted the complainant to remain on active duty. See *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D. C. 1972) (upholding the constitutionality of an Air Force mandatory pregnancy discharge regulation). See also *Cook v. Arentzen*, No. 73-332-N (E.D. Va., Jan. 8, 1976); *Robinson v. Rand*, 340 F. Supp. 37 (D. Colo. 1972).

298. When the *Struck* case was commenced, all of the armed services "traditionally required the prompt honorable discharge of pregnant females." Zillman & Imwinkelried, *supra* note 290, at 427-28.

299. 460 F.2d at 1375. In addition to holding that the mandatory discharge regulation was not violative of the due process clause of the fifth amendment, the court of appeals spurned the contention that the challenged regulation denied claimant her right to freedom of religion, holding instead that the regulation was justified by "a compelling public interest in not having pregnant female soldiers in the Military establishment . . ." *Id.* at 1377.

Interestingly, *Struck* had some apparent impact on the military despite its holding. For example, the Secretary of the Army promulgated Army Reg. No. 635-200, ch. 8 (1973), which permitted a waiver of the mandatory pregnancy discharge requirement in most factual circumstances, thus injecting some flexibility into the administrative process. See Zillman & Imwinkelried, *supra* note 290, at 428-29.

300. 531 F.2d 1114 (2d Cir. 1976). Besides the substantive due process and equal protection issues, *Crawford* addressed the complex question of "whether the courts have any business at all concerning themselves with the basic issue of armed services' rules relating to pregnancy." *Id.* at 1119. Although sensitive to the "hands off" doctrine of *Orloff v. Willoughby*, 345 U.S. 83 (1954), and its progeny, the United States Court of Appeals for the Second Circuit ultimately concluded that judicial review of the substantive constitutional issues should not be precluded on the basis of "judicial defenses to the military." 531 F.2d at 1121.

In connection with the question of judicial reviewability of military decisions and rules, see *West v. Brown*, 558 F.2d 757 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). See also *University of Missouri School of Law v. State Bar of Missouri*, 478 U.S. 1056 (1976).

Circuit framed the substantive issue in terms of whether the Marine Corps mandatory discharge regulation was constitutionally infirm. As to the substantive due process question, the court of appeals likened the Marine Corps regulation to the mandatory leave provisions which were challenged in *Cleveland Board of Education v. LaFleur*;³⁰¹ thus, it held that the mandatory discharge regulation³⁰² impermissibly "established an irrebuttable presumption that any pregnant female in the Marine Corps is permanently unfit for duty."³⁰³ Elaborating further, the court of appeals stated:

[T]he mandatory discharge regulation is overbroad and overly restrictive because it penalizes the decision to bear a child by those Marines whose mobility and readiness would not be reduced, either during most months preceeding birth or during their careers after birth. The Marine Corps' general rule may also be counterproductive because the penalty of discharge can lead women to ignore or conceal pregnancy as long as possible to avoid diagnosis and discharge.³⁰⁴

Hence, the court of appeals concluded that the Marine Corps was constitutionally compelled to make individual case-by-case determinations "since the ability of the individual employee to cope with the needs of the job is dependent upon her individual abilities."³⁰⁵

As to the equal protection claim, the Second Circuit decided that the mandatory discharge regulation was both irrationally underinclusive, "since it does not apply to personnel with any other temporary disabilities,"³⁰⁶ and overinclusive "because it operates to discharge pregnant Marines automatically, whenever they are discovered to be pregnant, without any individual determination of their fitness to serve."³⁰⁷

In short, the court of appeals held that the challenged discharge regulation was violative of the federal constitutional principles of due process and equal protection.³⁰⁸ This is probably a more reasonable approach

301. 414 U.S. 632 (1974).

302. MCO P2900.16, ¶ 6012 (Nov. 21, 1969). This regulation, along with similar regulations of the various armed forces, seems to have arisen from Exec. Order No. 10,240, 3 C.F.R. 749 (1949).

303. *Crawford v. Cushman*, 531 F.2d at 1125.

304. *Id.*

305. *Id.*

306. *Id.* at 1123.

307. *Id.* Administrative convenience was another justification proffered for the discharge regulation. In rejoinder, the court stated, "[T]he state interest of administrative convenience in avoiding the elimination of individual hearing was insufficient to justify an otherwise irrational statutory differentiation of the sexes." *Id.*

308. The dissenting judge took strong exception to the majority opinion. *Id.* at 1128 (Moore, J., dissenting).

today in view of the emphasis in recruiting and retaining qualified women in the armed forces.³⁰⁹

B. *Pay, Benefits, Promotion, and Assignments*

Two United States Supreme Court decisions, *Frontiero v. Richardson*³¹⁰ and *Schlesinger v. Ballard*,³¹¹ have examined the constitutionality of sex-based differential standards governing pay, benefits, and promotions. In *Frontiero*, a married female Air Force officer sought increased benefits for her husband as a dependent.³¹² She was denied these increased benefits because federal statutes³¹³ provided that "a serviceman may claim his wife as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support,"³¹⁴ while a servicewoman could "claim her husband as a 'dependent' " only if he was "in fact dependent upon her for over one-half of his support."³¹⁵ The *Frontieros* attacked these statutory provisions on the premise that they unconstitutionally discriminated against servicewomen.³¹⁶ The United States Supreme Court agreed with their contention and held "that by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband."³¹⁷

In *Ballard*, a male naval officer challenged Navy discharge regulations³¹⁸ which provided different promotional periods prior to involuntary

309. See Goodman, *supra* note 290, at 249, where the commentator states, "The armed services are using women in increasingly large numbers because they need them and because the need has coincided with changes in popular thinking about women's roles."

310. 411 U.S. 677 (1973).

311. 419 U.S. 498 (1975).

312. 411 U.S. at 680. Specifically, Lieutenant *Frontiero* tried to obtain "increased quarters allowances, and housing and medical benefits for her husband . . . on the ground that he was her 'dependent.' " *Id.*

313. See 37 U.S.C. §§ 401-429 (1976 & Supp. III 1979); 10 U.S.C. §§ 1071-1089 (1976).

314. 411 U.S. at 678.

315. *Id.* at 678-79.

316. *Id.* at 679. The Supreme Court framed the issue as "whether this difference in treatment constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment." *Id.*

317. *Id.* at 690-91. The ambiguity created by the divergent opinions and rationales in *Frontiero* has been eased by subsequent decisions which have clearly articulated the standard of analysis in gender-based equal protection cases. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Craig v. Boren*, 429 U.S. 190 (1976).

318. See 10 U.S.C. §§ 6382(a), 6401 (1976).

discharge for male and female line officers. Thirteen years of active duty service without promotion would lead to the involuntary discharge of female line officers, while nine years without promotion would result in the involuntary discharge of male officers.³¹⁹ The United States Supreme Court upheld the disparate treatment on the ground that women had endured restricted career opportunities in the Navy, such as not being permitted to serve on combat ships or in combat zones.³²⁰ Thus, there was sufficient justification for the disparate treatment.

One can glean from *Frontiero* and *Ballard* that the due process clause of the fifth amendment does provide, at least when females are victims of the differential treatment, some form of protection against sex discrimination in the military, with respect to pay, benefits, and promotions. Nonetheless, gender-based combat assignment restrictions, statutory and otherwise, persist and seem to be almost unassailable.³²¹

319. For useful discussions of *Schlesinger v. Ballard*, see Comment, *supra* note 109, at 186; Note, Schlesinger v. Ballard: *Equal Protection Washes Out to Sea*, 13 CAL. W.L. REV. 317 (1977).

320. 429 U.S. at 508. At the time *Ballard* was decided, combat restrictions for women in the Navy were embodied in 10 U.S.C. § 6015 (1976) (amended 1978). In short, the statute precluded women from serving on combat aircraft and naval ships, other than hospital ships and naval transports, whatever their mission. Air Force women were also statutorily excluded from combat. See 10 U.S.C. § 8549 (1976). Although the Army is not subject to any statutory restriction in the assignment of its female personnel, it excludes women from combat as a matter of policy. See Goodman, *supra* note 290, at 251.

In *Kovack v. Middendorf*, 425 F. Supp. 72 (D. Del. 1976), a federal district court upheld the Navy's combat restrictions, but two years later, in *Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978), the Navy's virtual blanket exclusion of women from ships was declared unconstitutional. This court decision prompted Congress to amend 10 U.S.C. § 6015 (1976). Pub. L. No. 95-485, § 808, 92 Stat. 1623 (1978). In effect, the duty restrictions for Navy women have been eased somewhat; however, 10 U.S.C. § 6015 (Supp. III 1979), is now more explicit in imposing arguably the most pernicious form of sex-discrimination against Navy women: exclusion from service aircraft and ships engaged in combat missions.

321. Congressional opinion regarding the impropriety of placing women in combat situations has apparently colored legislation which excludes women from the military draft. This exclusion, in turn, has raised profound sex discrimination questions. See, e.g., *United States v. Cook*, 311 F. Supp. 122 (W.D. Pa. 1970); *United States v. St. Clair*, 291 F. Supp. 122 (S.D.N.Y. 1968). These courts held the gender-based classification embodied in the Military Selective Service Act did not unconstitutionally discriminate against men.

Apparently homosexual behavior can properly be considered if it is not the sole determinant factor underlying the military decision. See, e.g., *Neal v. Secretary of Navy*, 472 F. Supp. 763 (E.D. Pa. 1979).

A recent case rejecting a gender-based attack on differential military grooming standards (between men and women) is *Klotzbach v. Callaway*, 473 F. Supp. 1337 (W.D.N.Y. 1979). But see *Campbell v. Beaughter*, 519 F.2d 1307 (9th Cir.), cert. denied, 423 U.S. 1073 (1976); *Ayer v. McLucas*, 401 F. Supp. 1001 (D. Nev. 1975); *Martin v. Schlesinger*, 371 F. Supp. 637 (D. Ala. 1974).

V. CONCLUSION

The foregoing analyses indicate that the breadth of the various sources of antidiscrimination protection available to uniformed military personnel—executive orders, military regulations and directives, statutory enactments, and provisions of the United States Constitution—is uncertain and, in some instances, disturbingly limited. A prime example of this is the legislative protections field. In this area, Congress has not specifically provided uniformed military personnel with antidiscrimination protections; when it has legislatively proscribed discrimination, courts frequently have held that it was not “the manifest intent of Congress” to extend the protections to uniformed military personnel. Thus, it is ironic that those who serve in defense of our nation and its fundamental principles find themselves in a precarious position in terms of protection against arbitrary acts of discrimination on the basis of race, color, religion, national origin, sex, age, handicap, and the like.