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Neil J. Dilloff

Judge Advocate General's Corps of the United States Navy

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Involuntary Activation of Reservists

BY NEIL J. DILLOFF*

There is a club held over the heads of thousands of inactive duty armed forces reserve personnel. It is poised, ready to fall on those "drilling" reservists who fail to meet their reserve obligations satisfactorily. The club was created by the United States Congress and is found in 10 U.S.C. § 673a.¹ This statute imposes the threat of involuntary activation—a call to active duty for a period not to exceed 24 months.² The obligations which must be met by the reservist to avoid the impact of activation consist of attendance at weekly drill meetings and

*A.B., 1970, Univ. of North Carolina at Chapel Hill; J.D., 1973, Georgetown Univ. Law Center. Member of the Maryland and Pennsylvania Bars. The author is presently serving with the Judge Advocate General's Corps of the United States Navy. Views expressed in this article must be considered as those of the individual author and do not purport to promulgate or voice the views of the Judge Advocate General of the Navy, the Department of the Navy, or any other agency or department of the United States.

¹ 10 U.S.C. §673a (1971). It appears as follows:

§ 673a. Ready Reserve: members not assigned to or participating satisfactorily in, units

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

- (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
- (2) has not fulfilled his statutory reserve obligation; and
- (3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to—

- (1) family responsibilities; and
- (2) employment necessary to maintain the national health, safety, or interest.

For the legislative history and purpose of the statute, see 1967 U.S. CODE CONG. & AD. NEWS 1308.

² 10 U.S.C. §673a(b) (1971).

participation in an annual period of active duty training, known affectionately to the reservist as "summer camp." Since the statute's enactment in June 1967, its implementation and enforcement have produced extensive litigation in the federal courts. This article will first discuss the cases arising under 10 U.S.C. § 673a, and will then address the policy questions of whether the remedy of active duty is purely "administrative," as it purports to be, and whether the remedy is a proper one.

I. THE STATUTORY FRAMEWORK AND THE ACTIVATION PROCESS

There are two statutes which deal directly with the activation of reservists. The first, 10 U.S.C. § 673, involves the mobilization of entire reserve units during a national emergency, and will not be discussed here. The second, 10 U.S.C. § 673a, provides for the purportedly "administrative" sanction imposed when a reservist fails to perform his reserve obligation satisfactorily. The remedy provided is a call to active duty, limited to that period of time required to bring the reservist's total active duty service to a period of 24 months.³ The statute provides that "appropriate consideration shall be given to (1) family responsibilities; and (2) employment necessary to maintain the national health, safety, or interest."⁴ It is this activation statute that has produced the litigation to be discussed.

Each of the armed services has implemented 10 U.S.C. § 673a in basically the same manner.⁵ Generally, the sequential elements of the activation process are as follows: an accrual by the reservist of five or more unsatisfactory drill performances in a 1-year period (but only one absence activates the process in the Marine Corps Reserve);⁶ a notice to the reservist that his

³ *Id.*

⁴ *Id.* § 673a(c).

⁵ See Department of Defense Directive (hereinafter cited as DOD Directive) 1215.13, issued Nov. 1, 1972, 38 Fed. Reg. 3043 (1973). The individual services have promulgated their own procedures under DOD Directive 1215.13 as follows: (a) Marine Corps Reserve Standing Operating Procedures (hereinafter RESSOP), MCO P 1001 R. 43 of June 19, 1964, as modified by Commandant of the Marine Corps Message 0 11724Z of March 31, 1971; (b) Chief of Naval Personnel Instruction 5400.42C (enclosure 28) of Oct. 20, 1970; (c) Army Regulation (hereinafter AR) 135-91; and (d) Air Force Manual 35-3, Ch. 41 and Air National Guard Regulation 39-10.

⁶ This element can also be satisfied by a reservist's absence from a substantial portion of his required annual training period, which is usually of a two-week duration.

performance is unsatisfactory; a recommendation by the unit commander that the reservist be called to active duty; a determination by higher authority that the reservist be activated in accordance with the commander's recommendation and pursuant to the statute; and, finally, the issuance of orders to the reservist directing him to report to active duty.

II. A SURVEY OF THE CASE LAW

10 U.S.C. § 673a has spawned in excess of 60 federal court cases involving claims made by reservists attempting to avoid active duty. This number of cases is remarkable in light of the fact that the statute is less than a decade old. This mass of case law can be divided into three discernible categories. The first two are based on the nature of the claim asserted by the reservist, including cases dealing with due process claims and cases involving alleged enlistment contract violations. The third category is characterized by a variety of procedural devices relied on by some courts to avoid addressing the reservist's claim on the merits.

A. *Alleged Violations of Due Process*

Due process violations have been the primary focus of attack by reservists challenging their involuntary activation. The allegations include: (1) the lack of proper notice to the reservists, at various stages in the activation process; (2) the failure to provide a formal hearing prior to activation; (3) the failure of the service to comply with its own regulations; (4) the absence or denial of a right to appeal the activation; and (5) the failure of the service to consider the family responsibilities of the reservist as required by the statute. Each of these due process claims will be discussed separately.

1. *Improper and Insufficient Notice*

The leading notice case, which has been extensively cited by courts in subsequent decisions, is the Second Circuit decision of *Fox v. Brown*.⁷ Fox was a member of the Air National

⁷ 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969).

Guard who was contesting his activation orders. One contention was that he was not given sufficient time to wind up his affairs between his actual notice, claimed to have been received on June 7, 1968, and his reporting date of July 1, 1968. This claim was based on 10 U.S.C. § 672(e), which states:

A reasonable time shall be allowed between the date when a Reserve ordered to active duty . . . is alerted for that duty and the date when he is required to enter upon that duty. Unless the Secretary concerned determines that the military requirements do not allow it, this period shall be at least 30 days.

The court, in rejecting Fox's argument, ruled that notice was effectively received on October 18, 1967, when Fox learned of his activation. The court went on to note that, even accepting Fox's argument, the most he could have obtained was a reporting date of July 7, 1968.⁸ Thus, the case stands for the proposition that "last-minute" notice is valid and not violative of due process of law.

In a subsequent case involving allegations of insufficient notice, the reservist sought an injunction against his activation as well as a declaratory judgment that his orders were void. He asserted that he was physically present for all of his required drills, but was counted absent due to his unmilitary appearance (long hair). The Army conceded that he was marked absent from the fifth drill "because of the appearance he presented during a formal unit inspection," but stated that such procedure was authorized by the Army regulations.¹⁰ The district court, in rejecting the reservist's contention that he had not received sufficient warning of the consequences of being marked absent, held, *inter alia*, that the reservist had no valid due process claim under the fifth amendment.¹¹ It so held be-

⁸ *Id.* at 841.

⁹ 320 F. Supp. 1241 (D. Mass. 1971).

¹⁰ *Id.* at 1243. AR 135-91 (5) (d) (2) states:

A member present at a scheduled unit training assembly will not receive credit for attendance thereat unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander.

¹¹ 320 F. Supp. at 1246.

cause the plaintiff had been provided written notice, by certified mail, after each absence and had been told the possible consequences if five absences were accrued. The notice sent to the plaintiff also informed him of a challenge procedure, and the court noted that "[o]n none of the five occasions did petitioner make any attempt to challenge the accuracy of the military entries" ¹²

Lack of notice was at least one factor that led to the granting of a petition for habeas corpus and an order that the reservist be restored to reserve status in *Horn v. Musick*. ¹³ The Army was cited by an Ohio federal district court for a dual infraction of its own procedures in that it neither notified the reservist of his call to active duty, nor informed him of his right to appeal. The petitioner claimed that the first notice he received occurred when he was arrested by the local sheriff for being absent without leave (AWOL). Although he was told by his commanding officer that activation was going to be recommended, the court held that this, standing alone, was not sufficient notice. ¹⁴ The court concluded that the Army has to give notice, apparently in writing, that orders transferring the reservist to active duty are being issued.

Probably the most explicit case on due process notice requirements is *United States ex rel. Moravetz v. Resor*. ¹⁵ This was an action seeking a writ of habeas corpus in which the petitioner was not notified that his absences from drill were excessive until he received a registered letter, some four days after his last purported absence, stating that he had accumulated more than the permitted number of unexcused absences. The court found that the Army had not complied with Army Regulation 135-91, ¹⁶ and stated flatly: "Due process requires

¹² *Id.*

¹³ 347 F. Supp. 1307 (S.D. Ohio 1971).

¹⁴ *Id.* at 1308.

¹⁵ 349 F. Supp. 1182 (D. Minn. 1972).

¹⁶ *Id.* at 1184. AR 135-91 (12) (e) requires a three-step notice procedure: (1) the reservist must be contacted in person if possible, and furnished a letter of instruction outlining the member's obligation to participate satisfactorily; (2) if it is impractical to establish personal contact, the reservist must be furnished a letter of instruction by certified mail, delivered to addressee only, return receipt requested; and (3) a copy of the letter of instruction and the Post Office receipt, if applicable, are to be filed in the member's Military Personnel Records Jacket.

that the Army follow its own regulations.”¹⁷ The court explained:

Because the penalty for unsatisfactory participation at five or more assembly drills is so severe, the Army has promulgated elaborate procedures to insure that reservists are *promptly* notified when their participation in any training assembly is unsatisfactory. . . .

. . . If the Army had followed its own regulation, petitioner would have been apprised of his unsatisfactory conduct in sufficient time to rectify it if so desired before the next assembly¹⁸

The correct procedure is for reservists to be notified after *each* absence, not in an aggregate manner after five absences have been accrued.¹⁹ The writ of habeas corpus requested by Moravetz was therefore granted.

That due process does not require the reservist to actually receive notice was established in *Wilson v. United States*.²⁰ In *Wilson*, constructive notice was held to be sufficient compliance with Marine Corps activation procedures to satisfy due process. Certified letters containing notice of unsatisfactory performance were mailed to the reservist's address of record. The letters were not removed from the addressee's mail box, however, and were eventually returned to the notifying reserve unit. In alleging lack of notice the reservist explained that he had not been living at his home, but was instead living with his "in-laws." The court upheld the activation, stating that it was too incredible to believe "that the Wilsons would not have seen the notices of certified mail in view of their testimony that they checked for mail at [their home] address at least every other day while not living there."²¹

¹⁷ 349 F. Supp. at 1185. See discussion in text, *infra*, at part II(A) (3).

¹⁸ 349 F. Supp. at 1184.

¹⁹ See *Cruz-Matos v. Laird*, 324 F. Supp. 1325 (D.P.R. 1971). There the Army notified the reservist after each absence, and further notified him of his order to active duty and right to appeal. The reservist's allegation of a violation of due process was dismissed by the court.

²⁰ Civil No. 71-2877 (E.D. Pa., Jan. 20, 1972).

²¹ *Id.* at 3.

2. *Lack of a Proper Hearing*

A frequent claim raised by the involuntarily activated reservist is that the absence of a hearing prior to activation violated a requirement of due process.²² The cases, however, have generally held that the military need not hold a formal hearing prior to the activation.²³ Nevertheless, one service branch has provided a procedure by which the reservist may obtain a hearing if he presents his request in a timely fashion.²⁴

The case mounting the first major constitutional attack on the lack of a formal hearing prior to activation was *O'Mara v. Zebrowski*.²⁵ O'Mara had missed numerous drills, allegedly due to medical reasons, and these excessive absences precipitated his order to active duty. In a suit to enjoin his activation, he contended that the Army procedure violated due process in that no formal hearing was required prior to the unit commander's determination of unsatisfactory performance and recommendation that the reservist be ordered to active duty.²⁶ Although Army procedures did allow appeal from the active duty orders, O'Mara argued that the crucial time when a hearing must be allowed is before the recommendation is first for-

²² See, e.g., *Keistor v. Resor*, 462 F. 2d 471 (3rd Cir.), *cert. denied*, 409 U.S. 894 (1972); *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972); *O'Mara v. Zebrowski*, 447 F.2d 1085 (3rd Cir. 1971); *Autonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Ansted v. Resor*, 437 F.2d 1020 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971); *Gianastasio v. Whyte*, 426 F.2d 908 (2d Cir.), *cert. denied*, 400 U.S. 941 (1970); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *United States v. Lonstein*, 370 F.2d 318 (2d Cir. 1966) (activation not based on 10 U.S.C. § 673a); *Dellaverson v. Laird*, 351 F. Supp. 134 (S.D. Cal. 1972); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Caruso v. Toothaker*, 331 F. Supp. 294 (M.D. Pa. 1971); *Mielke v. Laird*, 324 F. Supp. 165 (E.D. Wis. 1971); *Hickey v. Secretary of the Army*, 320 F. Supp. 1241 (D. Mass. 1971); *Liefermann v. Secretary of the Army*, Civil No. 70-858 (D.S.C., Jan. 5, 1971); *Sullivan v. Cushman*, 290 F. Supp. 659 (D. Mass. 1968).

²³ See, e.g., *Keistor v. Resor*, 462 F.2d 471 (3rd Cir.), *cert. denied*, 409 U.S. 894 (1972); *O'Mara v. Zebrowski*, 447 F.2d 1085 (3rd Cir. 1971); *Autonuk v. United States*, 445 F.2d 592 (6th Cir. 1971); *Ansted v. Resor*, 437 F.2d 1020 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971); *Gianastasio v. Whyte*, 426 F.2d 908 (2d Cir.), *cert. denied*, 400 U.S. 941 (1970); *Dellaverson v. Laird*, 351 F. Supp. 134 (S.D. Cal. 1972); *Caruso v. Toothaker*, 331 F. Supp. 294 (M.D. Pa. 1971); *Hickey v. Secretary of the Army*, 320 F. Supp. 1241 (D. Mass. 1971); *Liefermann v. Secretary of the Army*, Civil No. 70-858 (D.S.C., Jan. 5, 1971).

²⁴ See AR 135-91(20) (e), as amended Nov. 24, 1970.

²⁵ 447 F.2d 1085 (3rd Cir. 1971).

²⁶ *Id.* at 1088.

warded. The Third Circuit Court of Appeals, Judge Van Dusen writing, held that although "[t]he procedure of Army Reg. 135-91 unquestionably could be improved," it was not constitutionally defective, and the activation was affirmed.²⁷ The suggestion for improvement, however, appeared to influence the Army's subsequent decision to amend its regulations to provide for a hearing.²⁸

The Sixth Circuit, in a case decided before *O'Mara*, had upheld the reservist's claim that he had been denied due process. It held in *Schatten v. United States*²⁹ that the reservist was entitled to avail himself of the Marine Corps review procedures before final activation. Although the plaintiff had a dual claim in that he wanted both a hearing and a chance to exhaust his administrative remedies within the Marine Corps before activation, the court refused to pass on each separately. Instead, the plaintiff was granted relief based on both due process violations. The court thus left unclear whether there was a separate right to a hearing. It appeared, however, that the more influential factor was the arbitrary refusal by the reservist's commanding officer to grant the plaintiff a chance to appeal his activation by way of the Article 138 grievance review procedure.³⁰ It is important to note that the relief granted was not a cancellation of the activation orders, but was instead a stay of the orders pending exhaustion of the review procedures. The decision only impliedly seemed to require a hearing prior to activation, and today its apparent import is that one has the right to exhaust his administrative remedies before being required to report for duty.

The doubt created by the Sixth Circuit in *Schatten* was resolved by that court in *Autonuk v. United States*.³¹ In refusing to extend the due process hearing requirement to the administrative activation of an Army reservist, the court stressed

²⁷ *Id.* at 1090.

²⁸ See AR 135-91, *supra* note 24.

²⁹ 419 F.2d 187 (6th Cir. 1969).

³⁰ *Id.* at 190. Article 138, Uniform Code of Military Justice, refers to the procedure to obtain redress of grievances in the military, and is explained in 10 U.S.C. § 938 (1971). For a discussion of Article 138, see Tompkins, *Article 138: A Resurrection*, 27 JAG J. 463 (1974).

³¹ 445 F.2d 592 (6th Cir. 1971).

the unique nature of the military. It rested its decision on the traditional doctrine that discretionary rulings by the military are beyond the scope of review by civilian courts.³² In reaching this conclusion, however, the court did not consider the fact that this theory's influence has been decreasing in recent years.³³ Consequently, the plaintiff's claim that the tremendous impact of activation on his life warranted a hearing fell on deaf ears.

The clearest statement on the issue of whether there is a constitutional right to a hearing prior to activation is contained in *Keister v. Resor*.³⁴ The Third Circuit was again faced with a due process claim, and it seemed to echo the reasoning of *Autonuk* in denying relief:

[The reservist] argues that he is constitutionally entitled to a hearing. . . . He invokes the fifth amendment right to due process. In *Reaves v. Ainsworth* it was stated that, "[To] those in the military . . . the military law is due process." At least with respect to the military's internal procedures regarding civil matters that pronouncement is as vibrant today as it was in 1911. . . . More specifically, it has been held that no constitutional infirmity arises from the absence of a hearing before the involuntary activation of a reservist.³⁵

Despite the unequivocal position adopted by the majority of courts that a pre-activation hearing is not constitutionally mandated, several courts have required hearings under the particular facts before them.³⁶ A typical case is *Mielke v. Laird*.³⁷

³² *Id.* at 594.

³³ See Dilloff, *The World of Wigs: Military Reservists and Their Wearing of Short Hair Wigs*, 12 DUQUESNE L. REV. 161 (1973), in which the author describes the degree to which courts have delved into the sphere of military appearance requirements, and the resulting effect on the constitutional rights of the reservist. See also *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Two v. United States*, 471 F.2d 287 (9th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973); *Silverthorne v. Laird*, 460 F.2d 1175 (5th Cir. 1972) (court review of military regulations pertaining to conscientious objectors); *Ballard v. Laird*, 360 F. Supp. 643 (S.D. Cal. 1973) (sex discrimination in the military). But see *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Parker v. Levy*, 417 U.S. 733 (1974).

³⁴ 462 F.2d 471 (3rd Cir. 1972).

³⁵ *Id.* at 474 (citations omitted).

³⁶ See, e.g., *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972); *Mellinger v. Laird*, 339 F. Supp. 434 (E.D. Pa. 1972); *Mielke v. Laird*, 324 F. Supp. 165 (E.D. Wis. 1971). In

There, a federal district court in Wisconsin held that even though the reservist had no right to personally appear before the activation board, he was entitled to an evidentiary hearing on his contention that the medical excuse for his last absence, which had been corroborated by a physician, was arbitrarily rejected.³⁸

The court in *Mielke* relied on an earlier remand of its decision in *Konn v. Laird*.³⁹ In an unpublished order,⁴⁰ the Seventh Circuit had remanded that case for an evidentiary hearing on Konn's claim that the reserve unit abused its discretion in absence determinations. The district court then conducted a full evidentiary hearing into Konn's claim and dismissed the case on the merits. The appeal from this decision resulted in a reversal on other grounds.⁴¹

3. *Failure of the Service to Follow Its Own Regulations*

In *White v. Callaway*,⁴² the reservist, White, questioned whether his unit commander had complied with Army procedures in determining that one of White's absences was "unexcused." The significance of such a determination is readily apparent. If an absence is determined to be the fault of the reservist, it is recorded as "unexcused" and is included in the total necessary for involuntary activation. On the other hand, if the absence is considered "excused," *i.e.*, not the fault of the reserve member, the absence is not to be counted for that purpose. In *White*, the pertinent regulations required that the reserve unit commander determine whether or not an absence should be excused.⁴³ The reservist claimed that the determination in his case was inappropriate because an adequate investi-

Mellinger the court upheld the activation but recognized that a hearing was necessary even if in the form of an Article 138 hearing instead of the type required by AR 135-91 (20)(e), as amended Nov. 24, 1970.

³⁷ 324 F. Supp. 165 (E.D. Wis. 1971).

³⁸ *Id.* at 166.

³⁹ 323 F. Supp. 1 (E.D. Wis. 1971), *aff'd*, 460 F.2d 1318 (7th Cir. 1972).

⁴⁰ *Konn v. Laird*, Civil No. 18927 (7th Cir., Dec. 14, 1970).

⁴¹ See discussion of *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972), in text, *infra*, at Part II(A)(3).

⁴² 501 F.2d 672 (5th Cir. 1974).

⁴³ *Id.* at 673.

gation had not been made.⁴⁴ The Fifth Circuit, affirming the activation, stated that "a good faith review of White's record and a consideration of the surrounding facts and circumstances" were required; and that White's commanding officer had met this requirement even though he had not interviewed White personally.⁴⁵ The court added:

It would be an improper, *ad hoc* construction of procedural niceties for a court to say the Army should have done things differently here. Holding the Army to its own regulations is one thing; imputing unnecessary procedural prerequisites into a regulation is something entirely different.⁴⁶

Failure to follow its regulations was likewise alleged in *Alston v. Schlesinger*,⁴⁷ where a federal district court found the plaintiff to be a less than admirable litigant. Alston alleged that because he had not received notice of his activation, the military had failed to follow its regulations requiring that the reservist be notified. Such a failure would be a violation of due process. However, once the facts were aired in court, it was discovered that the reservist had not only failed to give his unit the most recent address where he could be reached, but had also never picked up his mail. It appeared that Alston had deliberately neglected to check with the post office since he knew that the notice letters were there. In effect, the court found that the reservist was responsible for the lack of notice by his own failure to act. The court held that the plaintiff should be ordered to active duty because the service had acted in a reasonable manner and had not violated due process.⁴⁸

A third case in which it was asserted that the service had violated its own regulations was *Konn v. Laird*.⁴⁹ There, the Army attempted to activate the reservist a second time after an initial attempt failed. The basis for this second attempt was unexcused absences from drill which had accrued after issuance of the initial activation orders. The rule enunciated by the

⁴⁴ *Id.* at 674.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 368 F. Supp. 537 (D. Mass. 1974).

⁴⁸ *Id.* at 541.

⁴⁹ 460 F.2d 1318 (7th Cir. 1972).

Seventh Circuit in upholding the petitioner's claim was that a reservist is excused from future drill attendance after activation orders are issued. Subsequent attendance, the court said, may be required only "when necessary to meet some emergency or other special need of the reserve unit."⁵⁰ Thus, absences accruing after orders are issued may not be used to reactivate the reservist if the initial orders are revoked, and, conversely, the only absences which can be counted toward activation are those which occur before the activation orders are in existence.

4. *Right to Appeal*

Although the various armed services have treated the right to appeal an order to involuntary active duty differently, there appears to be unanimous consent that a means of appeal should be available to reservists. In the Army, a special board has been established to handle such appeals—the Involuntary Active Duty Appeal Board⁵¹—while in the Air Force, Navy and Marine Corps, the appropriate avenue of redress is to the superior of the reservist's unit commander via a complaint under 10 U.S.C. § 938.⁵²

A corollary to any right of appeal is notice of that right to the aggrieved individual. In the realm of involuntary activation, it does the reservist no good to have the right of appeal if he has no knowledge of the right or of the procedures available to effectuate it. Courts have been quick to recognize this problem and have seen fit to place the burden of notification on the particular military service.⁵³ Thus, if a reservist is unaware of his right to appeal or is told that there is no such right, his activation will usually be stayed by the court pending the exer-

⁵⁰ *Id.* at 1320.

⁵¹ AR 135-91.

⁵² *But see* Rasmussen v. Seamans, 432 F.2d 346 (10th Cir. 1970) (review under Air Force Manual 35-3 is proper means of redress, not 10 U.S.C. § 938). For cases interpreting the rights of redress under 10 U.S.C. § 938, see Schatten v. United States, 419 F.2d 187, 192 (6th Cir. 1969) (Marine Corps); Fox v. Brown, 402 F.2d 837 (2d Cir. 1968), cert. denied, 394 U.S. 938 (1969) (Air Force); Dellaverson v. Laird, 351 F. Supp. 134 (S.D. Cal. 1972).

⁵³ See, e.g., Baugh v. Bennett, 350 F. Supp. 1248 (D. Idaho 1972); Horn v. Musick, 347 F. Supp. 1307 (S.D. Ohio 1971).

cise of his right to utilize the military appeal procedures.⁵⁴ In some cases, however, activation orders have been entirely voided.⁵⁵

The recognized right of an involuntarily activated reservist to appeal created one procedural issue which was resolved by the court in *Mielke v. Laird*.⁵⁶ The question was whether a reservist is entitled to personally appear before a review board. The court rejected the reservist's claimed right to appear before the Army's Involuntary Active Duty Appeal Board, holding "that the denial of the right to a reservist's personal appearance before the army review body is not actionable in this court."⁵⁷ It went on to quote from *Ansted v. Resor*:⁵⁸

While Army Regulation 135-91 does not provide for a personal hearing on appeal, it allows the appellant to include in his appeal in written form all "appropriate evidence which the applicant may wish to present." We find that this procedure provided reservist Ansted with sufficient protection of his constitutional rights and hold that a full personal hearing was not required as a matter of contractual law or . . . constitutional law.⁵⁹

Even though there is no right to personally appear at an appeal proceeding, the courts do allow, and indeed have insisted, that written evidence be submitted by the reservist in his own behalf.⁶⁰ In addition, the individual military branches have for the most part provided for such a procedure in their

⁵⁴ See *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969), where a member of a rock band was activated because he was credited with absences due to his long hair. The Army had not informed the plaintiff of his right to appeal, as required by regulations, and had, in fact, told him he had no such right. The court granted a stay of the activation orders and directed the Army to allow full appeal by the reservist. See also *Dellaverson v. Laird*, 351 F. Supp. 134 (S.D. Cal. 1972) (The plaintiff must be given a chance to appeal his activation before active duty actually commences.).

⁵⁵ See *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Dellaverson v. Laird*, 351 F. Supp. 134 (S.D. Cal. 1972).

⁵⁶ 324 F. Supp. 165 (E.D. Wis. 1971).

⁵⁷ *Id.* at 166.

⁵⁸ 437 F.2d 1020 (7th Cir. 1971).

⁵⁹ *Id.* at 1024.

⁶⁰ See *United States ex rel. Sledjeski v. Commanding Officer*, 478 F.2d 1147 (2d Cir. 1973); *Wilson v. United States*, Civil No. 71-2877 (E.D. Pa., Jan. 20, 1972); *Winters v. United States*, 281 F. Supp. 289 (E.D. N.Y.), *aff'd*, 390 F.2d 879 (2d Cir.), *cert. denied*, 393 U.S. 896 (1968).

own regulations.⁶¹

In *Wilson v. United States*⁶² the plaintiff was recommended for active duty due to an excessive number of unexcused absences from drill. Proper procedures were followed, with the reservist being notified of his right to appeal; but the recommendation by the unit commander was withdrawn after Wilson submitted a statement indicating that he had missed drills because of his son's illness. Approximately one year later, Wilson was again recommended for involuntary activation because he had, in the interim, again accumulated excessive absences. In his suit, Wilson claimed that he was denied his constitutional rights in that he neither received notice of his activation nor had an opportunity to submit a statement in his behalf on appeal. In addressing his right to submit a statement, the court held that since the plaintiff had been recommended for activation once before (and therefore presumably had knowledge of the procedures), and since he had made no attempt to contact his unit or submit a statement in the second process, he was estopped from raising the argument before the court.⁶³ Although not expressly stated in the opinion, Judge Huyett appeared to be applying the equitable "clean hands" doctrine, with the result that the plaintiff's objections to activation would not be heard due to his prior misconduct in disregarding his contractual obligation to attend drill.⁶⁴

The courts have placed certain affirmative duties on the military services to facilitate the appeals of involuntarily activated reservists. The court in *Baugh v. Bennett*⁶⁵ held that "[w]hen a reservist files an appeal notice which on its face is insufficient to raise any issue, some further duty is placed on his superiors to provide means to point out the inadequacies of the notice"⁶⁶ In addition, the military has a duty to counsel the reservist on the necessity of presenting adequate grounds to support the appeal.⁶⁷

⁶¹ See note 5 *supra*.

⁶² Civil No. 71-2877 (E.D. Pa., Jan. 20, 1972).

⁶³ *Id.* at 3.

⁶⁴ *Id.* at 2.

⁶⁵ 329 F. Supp. 20 (D. Idaho 1971).

⁶⁶ *Id.* at 24.

⁶⁷ *Id.*

In *United States ex rel. Sledjeski v. Commanding Officer*,⁶⁸ the Second Circuit placed a related duty on the military. The Marine Corps regulations required that "Commanding officers investigate all personal hardship problems or physical defects claimed by mandatory participants prior to submission of a recommendation for involuntary active duty."⁶⁹ In this case, unlike *Baugh v. Bennett*, Sledjeski had not filed an appeal; however, the court granted a stay because ". . . in the absence of any questioning on the subject [of hardship] the report of the Marine Corps officers to the Commandant was misleading."⁷⁰ Thus, the court specifically held that where a regulation requires "investigation," there is an affirmative duty placed on the military branch to inquire into possible objections not raised by the reservist. The court declined to determine whether a reservist must always be made aware of his right to make a claim, however.⁷¹ The concurring opinion in *Sledjeski*, written by Judge Feinberg, argued that the majority opinion did not go far enough in this respect. Judge Feinberg stated: "The majority does not reach the question of whether a reservist must be advised of his right to make a hardship claim before his failure to do so may be regarded as a waiver. I would hold that such notification is required."⁷² Judge Feinberg concurred because the majority's stay allowed Sledjeski the opportunity to exercise his right to claim hardship.

Although the majority in *Sledjeski* refused to determine whether the military was required to inform the reservist of his legal defenses, the Second Circuit, in *Rohe v. Froehlke*,⁷³ was not so hesitant in requiring that the reservist be informed that he may include in his appeal a rebuttal to any facts in issue. In *Rohe*, the circuit court held that the reservist must be allowed to rebut the contents of his military record, and must be informed that he has a right to do so.⁷⁴ The court construed Army Regulation 135-91(20), which authorizes appeal from

⁶⁸ 478 F.2d 1147 (2d Cir. 1973).

⁶⁹ *Id.* at 1149, quoting Marine Corps Order P 1001 R. 43, ¶ 2-102(2) (d).

⁷⁰ *Id.* at 1150.

⁷¹ *Id.*

⁷² *Id.* at 1151.

⁷³ 500 F.2d 113 (2d Cir. 1974).

⁷⁴ *Id.* at 116.

involuntary activation, to include the right of reservists to challenge the basis upon which they were activated as well as the legality of the activation process itself.⁷⁵

A similar issue, presented in *Feeny v. Smith*,⁷⁶ was whether the reservist is entitled to inspect his medical record in preparation for a pre-activation appeal. The reservist claimed that he was denied a meaningful appeal because the unavailability of his record prevented him from learning the basis upon which the Army had activated him. The district court concluded that the denial of access to records, in conjunction with an inadequate investigation into the alleged fifth unexcused absence, constituted a deprivation of due process.⁷⁷ In ordering that the activation be vacated, the court stressed the essential nature of due process in the regulations governing activation of reservists:

Whatever one may think of the attitude of the petitioner insofar as his response to his obligation to serve and attend was concerned, the requirements of the regulation have their purpose. Essentially, *it is to lay the foundation for the very serious step of ordering a reservist to active duty*.⁷⁸

5. *Family Responsibilities and Hardship Claims*

The *Sledjeski*⁷⁹ case, which was discussed earlier with respect to affirmative duties imposed on the military, is the principal case interpreting 10 U.S.C. § 673a(c) (1), the section requiring that consideration be given to family responsibilities prior to activation. Sledjeski was a Marine Reservist who was ordered to active duty after he had not only missed his annual period of active duty training in the summer of 1971 but also skipped drills in September and October of that year. In his petition for habeas corpus and relief from activation, Sledjeski claimed that he was denied due process of law because of the failure of the Marine Corps to consider his hardship in accordance with its regulations. He alleged that no consideration was

⁷⁵ *Id.* at n.3.

⁷⁶ 371 F. Supp. 319 (D. Utah 1973).

⁷⁷ *Id.* at 330.

⁷⁸ *Id.* at 329 (emphasis added).

⁷⁹ 478 F.2d 1147 (2d Cir. 1973).

given to the facts that he was married, that his wife had been recently hospitalized for leg surgery and was unable to work, and that they had a 16-month-old baby.⁸⁰ The position argued by Sledjeski was that he had not been told and did not know of his right to claim family hardship until after he had received his orders to active duty. The court, although not sympathetic to the plaintiff personally,⁸¹ granted relief because it found that "appropriate consideration" had not been given to his claims, as was required by the statute.⁸²

The Marine Corps was found to have prevented the reservist's timely submission of a hardship claim in *McSweeney v. United States*.⁸³ In addition to the statute, the Marine Corps Separations and Retirement Manual, § 6014(2) "requires the service to inform and assist a member in the preparation of dependency or hardship discharge."⁸⁴ In *McSweeney*, the reservist received information on his right to claim hardship, but he was not informed of where the claim should be submitted. Consequently, *McSweeney* was prevented from submitting a claim based on his present status, and the Marine Review Board activated him on the bases of data that was at least 1 year old.⁸⁵ Because of this and other factors,⁸⁶ the district court

⁸⁰ *Id.* at 1149.

⁸¹ *Id.* at 1150.

⁸² *Id.*

⁸³ 338 F. Supp. 350 (N.D. Ohio 1971).

⁸⁴ *Id.* at 354.

⁸⁵ At the time of activation, *McSweeney* was married, the father of one 19-month-old child and the expectant father of another, his mother was widowed and his father-in-law had suffered a heart attack, a broken hip, and had gangrene of both feet. *Id.* at 351.

⁸⁶ The court was also disturbed by the performance of the Marine Corps in this case. After having performed satisfactorily for 3 years, *McSweeney* missed a weekend drill. His medical excuse, which was corroborated by a physician, was rejected by the Corps as being untimely submitted; but *McSweeney* was allowed to make up the absences by equivalent instruction, and he did so. Later, however, these absences were used by the Marines to activate the reservist, and the equivalent service was not even reported in response to congressional inquiry:

Two letters, one signed by a Colonel, Deputy Director, and the other signed by a General, Acting Commandant of the Marine Corps, both containing serious mistakes having critical bearing on this matter is severely prejudicial and exemplifies the same lack of exactitude and inadvertence that has characterized this entire proceeding.

338 F. Supp. at 355.

cancelled the orders and issued a permanent injunction against the Marine Corps from activating the petitioner.

It should be noted that the relief granted to McSweeney was tantamount to a judgment on the merits. In contrast to this conclusive type of relief, more typical decisions have merely remanded the case for a reconsideration by the service branch. In *McSweeney*, the function of the Marine Review Board was usurped in that the court weighed the plaintiff's claim and determined that his hardship was so great that he should not be called to active duty. Such judicial activism in assuming the fact-finding functions of a military board is fairly unique in this area of military case law.

Another case in which the reservist was granted relief is *Dellaverson v. Laird*.⁸⁷ Here, the reservist was not given an opportunity to submit a written statement explaining his reasons for seeking to be classified as unfit for activation due to personal family considerations. The court, in setting aside the activation, found that this opportunity to submit a statement must be given prior to activation and that the Marine Corps had failed to comply with its own regulations in this respect.

In those cases where courts have upheld activation in the face of personal hardship claims, two justifications have been advanced: (1) the untimely request for consideration of the claim by the reservist,⁸⁸ and (2) the reluctance of the courts to interfere in the internal fact-finding of the military.⁸⁹ In general, however, courts have been protective when confronted

⁸⁷ 351 F. Supp. 134 (S.D. Cal. 1972).

⁸⁸ See, e.g., *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Sullivan v. Cushman*, 290 F. Supp. 659 (D. Mass. 1968).

⁸⁹ See, e.g., *Jolicoeur v. Laird*, 462 F.2d 1234 (8th Cir. 1972); *Keister v. Resor*, 462 F.2d 471 (3rd Cir. 1972); *Ansted v. Resor*, 437 F.2d 1020 (7th Cir. 1971); *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Dix v. Rollins*, 413 F.2d 711 (8th Cir. 1969); *Byrne v. Resor*, 412 F.2d 774 (3rd Cir. 1969); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969); *Fox v. Brown*, 402 F.2d 837 (2d Cir. 1968), cert. denied, 394 U.S. 938 (1969); *Corona v. Laird*, 357 F. Supp. 1357 (E.D. Wis. 1973); *Baugh v. Bennett*, 350 F. Supp. 1248 (D. Idaho 1972); *Schulz v. Resor*, 332 F. Supp. 708 (E.D. Wis. 1970); *Caruso v. Toothaker*, 331 F. Supp. 294 (M.D. Pa. 1971); *Mickey v. Barclay*, 328 F. Supp. 1108 (E.D. Pa. 1971); *Krill v. Bauer*, 314 F. Supp. 965 (E.D. Wis. 1970); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y.), aff'd, 390 F.2d 879 (2d Cir.), cert. denied, 393 U.S. 896 (1968). See generally *Orloff v. Willoughby*, 345 U.S. 83 (1953).

with reservists' hardship and family considerations claims. The human side of activation appears to have been given more consideration by the courts than mere naked assertions of due process violations, which only involve the internal activation process. In sum, it appears easier for the courts to find a violation of due process, and to intervene accordingly, if some personal hardship is alleged rather than if only cold legal claims of lack of notice or hearing are presented.

B. *Allegations of Breach of Contract*

Involuntarily activated reservists have often argued that there has been a breach of the enlistment contract by the military.⁹⁰ The primary event which has generated the breach of contract allegations is the changing of drill attendance requirement by the particular military service. At one time, all of the services required 90 percent attendance at drill in order for a reservist to be deemed a satisfactory participant. The Marines, however, changed to a 100 percent drill attendance requirement in 1967,⁹¹ while the other services maintained 90 percent requirements. Some reservists challenging their activation orders have subsequently attacked this modification as an unlawful change in their enlistment contract.

In *Winters v. United States*,⁹² the district court rejected the contract argument, holding that "the imposing of the more stringent training duty by the regulations operated entirely within the limits of the pre-existing law."⁹³ The court also directed this comment to the frustrated reservist:

⁹⁰ See, e.g., *Schwartz v. Franklin*, 412 F.2d 736 (9th Cir. 1969); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Weber v. United States*, 288 F. Supp. 491 (E.D. Pa. 1968); *In re McBee*, 287 F. Supp. 926 (S.D. Cal. 1968); *Pfile v. Corcoran*, 287 F. Supp. 554 (D. Colo. 1968); *Even v. Clifford*, 287 F. Supp. 334 (S.D. Cal. 1968); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y.), *aff'd*, 390 F.2d 879 (2d Cir.), *cert. denied*, 393 U.S. 896 (1968); *Gion v. McNamara*, Civil No. 67-1563-EC (C.D. Cal., Jan. 9, 1968). See also Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. Rich. L. Rev. 121 (1974); Comment, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. Chi. L. Rev. 783 (1972).

⁹¹ See Marine Corps Bulletin, MCO P 1001R 43, RESSOP, para. 2052.1 (Mar. 15, 1967).

⁹² 281 F. Supp. 289 (E.D.N.Y.), *aff'd*, 390 F.2d 879 (2d Cir.), *cert. denied*, 393 U.S. 896 (1968).

⁹³ *Id.* at 296.

The strenuous contention . . . that the Government was bound by the enlistment contract and [by] the Statement of Understanding to continue as to the plaintiff the right to unexcused absence from ten percent of drills in each anniversary year must be rejected as wholly unsound. The Bulletin of March 15, 1967, is of unquestionable validity, was intended to apply to plaintiff, and it does apply to him. Since plaintiff in fact knew of its existence, whether or not it was promulgated with due formality it is binding upon him.⁹⁴

The court in *Weber v. United States*⁹⁵ reached a similar conclusion, but found the authority for the change in drill attendance requirements within the contract itself. It cited *Winters* with approval⁹⁶ and held: "The increase in scheduled drills operated entirely within the limits of the enlistment contract. It contemplated the right to regulate the percentage of scheduled drills providing it did not violate minimum requirements fixed by Congress."⁹⁷

Yet a third justification for allowing a change in the law to modify previously existing contracts was formulated in *Pfile v. Corcoran*.⁹⁸ There, the petitioner alleged that included in his contract was the then current sanction that a delinquent reservist could only be called to active duty for a period not to exceed 45 days.⁹⁹ The court concluded that Pfile's contract was subject to the newly enacted statute, 10 U.S.C. § 673a, because "[t]he present statute can be regarded as falling within the 'wide discretion' [of Congress] War Powers, and the statute appears validly applicable to petitioner, even if it contravenes his enlistment contract."¹⁰⁰

Although the breach of enlistment contract argument has generally been unsuccessful, in one case the reservist was able to escape active duty. This occurred in *Gion v. McNamara*,¹⁰¹ where the orders were set aside after the court concluded that

⁹⁴ *Id.*

⁹⁵ 288 F. Supp. 491 (E.D. Pa. 1968).

⁹⁶ *Id.* at 494.

⁹⁷ *Id.*

⁹⁸ 287 F. Supp. 554 (D. Colo. 1968).

⁹⁹ *Id.* at 556.

¹⁰⁰ *Id.* at 561.

¹⁰¹ Civil No. 67-1563-EC (C.D. Cal., Jan. 9, 1968).

the Marine Corps' change in drill requirements invalidated the enlistment contract.

The breach of contract argument has been advanced in another situation, arising when the period of activation extends the duty time of the reservist beyond what would have been his release date absent the activation. The issue becomes whether the activation takes precedence over the contractual release date. Two theories have been relied on by the reservist in these situations. The first addresses the constitutionality of holding the activated reservist so that he can complete his active duty, while the second questions whether such action by the military constitutes a breach of contract. The distinction between the two theories often fades in the cases as the attacks become intertwined.

The section of the statute drawing the fire of the reservist in these cases is 10 U.S.C. § 673a(b), which permits the extension of an enlistment to allow completion of the involuntary active duty period. In *Fox v. Brown*,¹⁰² this section was pitted against 32 U.S.C. § 303(d), which provides that "in time of peace no enlisted man may be required to serve for a period longer than that for which he enlisted" The reservist argued that this statute barred the extension of his release date. The majority, however, did not agree, as Judge Smith noted that the right to recall to active duty any reservist who unsatisfactorily participated in training was established "notwithstanding any other provision of law."¹⁰³ The statute was upheld as constitutional.

In *Karpinski v. Resor*,¹⁰⁴ the court again upheld the reservist's extension of duty. It answered the plaintiff's constitutional argument with the decision in *Fox v. Brown*,¹⁰⁵ and turned aside his breach of contract plea with the statement that "the terms of enlistment of a member of the reserve forces, even if they have the attributes of a contract, are subject to change in the interest of the national security."¹⁰⁶

¹⁰² 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969).

¹⁰³ *Id.* at 841.

¹⁰⁴ 419 F.2d 531 (3rd Cir. 1969).

¹⁰⁵ *Id.* at 533.

¹⁰⁶ *Id.* For a discussion of enlistment contracts, see Dilloff, *A Contractual Analysis*

There appears to be one particular circumstance concerning enlistment extension in which the military will fail in its attempt to activate. Such a situation occurred in *Musikov v. Secretary of Defense*.¹⁰⁷ There, the plaintiff's orders were "cut" on October 24, 1972, his enlistment was scheduled to expire on October 27, 1972, and he received the orders on October 28, 1972. The district court held that the orders became effective only when received by the reservist, and that in this case the orders were unenforceable because the plaintiff was no longer in the military when they were received.

C. *Procedural Bars to Judicial Review*

Traditionally, federal courts have refrained from exercising jurisdiction to review military decision-making, except to determine whether the service has complied with its own regulations.¹⁰⁸ This laissez-faire policy has encompassed the involuntary activation area as well.¹⁰⁹ The basic rationales for this "nonreviewability" doctrine are twofold: (1) to invade military decisions would do dishonor to the separation of powers principle, and (2) the military's needs are unique, and the courts should avoid interfering in an area with which they are unfamiliar.¹¹⁰ The two theories have general applicability because

of the *Military Enlistment*, 8 U. RICH. L. REV. 121 (1974); Comment, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783 (1972).

¹⁰⁷ 357 F. Supp. 526 (D. Minn. 1973).

¹⁰⁸ See *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Reaves v. Ainsworth*, 219 U.S. 269 (1911); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).

¹⁰⁹ See *Jolicoeur v. Laird*, 462 F.2d 1234 (8th Cir. 1972); *Keister v. Resor*, 462 F.2d 471 (3rd Cir. 1972); *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972); *Ansted v. Resor*, 437 F.2d 1020 (7th Cir. 1971); *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Dix v. Rollins*, 413 F.2d 711 (8th Cir. 1969); *Byrne v. Resor*, 412 F.2d 744 (3rd Cir. 1969); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Fox v. Brown*, 402 F.2d 837 (2d Cir. 1968), cert. denied, 394 U.S. 938 (1969); *Corona v. Laird*, 357 F. Supp. 1357 (E.D. Wis. 1973); *Baugh v. Bennett*, 350 F. Supp. 1248 (D. Idaho 1972); *Schulz v. Resor*, 332 F. Supp. 708 (E.D. Wis. 1970); *Caruso v. Toothaker*, 331 F. Supp. 294 (M.D. Pa. 1971); *Mickey v. Barclay*, 328 F. Supp. 1108 (E.D. Pa. 1971); *Krill v. Bauer*, 314 F. Supp. 965 (E.D. Wis. 1970); *Metz v. United States*, 304 F. Supp. 207 (W.D. Pa. 1969); *Winters v. United States*, 281 F. Supp. 289 (E.D.N.Y.), aff'd, 390 F.2d 879 (2d Cir.), cert. denied, 393 U.S. 896 (1968).

¹¹⁰ See generally *Sherman, Judicial Review of Military Determinations and the*

the military reserves fall within the proper scope of the legislative and executive branches of the government and the reserve forces are obviously unique to the military.

Almost every involuntary activation case involves a battle between the reservist, who attempts to avoid the nonreviewability doctrine by alleging a violation of military regulations, and the military, which attempts to interpose the traditional rule. A corollary argument used by the military is that it is in a separate sphere, and is vested by Congress with wide discretion upon which the court should be reluctant to impinge. Although the arguments of the military have not been universally dispositive, they have been accorded unanimous lip service by the courts, and they have often played a supporting role in those decisions where the courts have barred the reservist's claims because of procedural deficiencies.

1. *Exhaustion of Administrative Remedies*

Many involuntary activation cases have been decided on the basis that the reservist had failed to exhaust his administrative remedies before turning to the courts.¹¹¹ All services except the Army, which has its own Involuntary Active Duty Review Board, provide administrative remedies pursuant to 10 U.S.C. § 938 (Article 138, Uniform Code of Military Justice); and the courts hold that these avenues of relief must be exhausted before the court will take cognizance of the controversy.¹¹² It should be noted, however, that Article 138 has been held inapplicable to National Guard personnel, and thus this procedure need not be exhausted prior to guardsmen seeking

Exhaustion of Remedies Requirement, 48 MIL. L. REV. 91, 145-48 (1970) [hereinafter cited as Sherman].

¹¹¹ See *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Fox v. Brown*, 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969); *Curtis v. Rost*, Civil No. T-5095 (D. Kan., Mar. 17, 1973); *Keleher v. Chaffee*, Civil No. 788-72 (D.N.J., Oct. 11, 1972); *Mickey v. Barclay*, 328 F. Supp. 1108 (E.D. Pa. 1971); *Leifermann v. Secretary of the Army*, Civil No. 70-858 (D.S.C., Jan. 5, 1971). See generally *Salcedo v. Lauer*, 430 F.2d 1282 (9th Cir. 1970); *United States ex rel. Berry v. Commanding General*, 411 F.2d 822 (5th Cir. 1969); *Morbeto v. United States*, 293 F. Supp. 313 (C.D. Cal. 1968); *Levy v. Dillon*, 286 F. Supp. 593 (D. Kan. 1968); Sherman, *supra* note 110.

¹¹² See *Smith v. Resor*, 406 F.2d 141, 147 (2d Cir. 1969).

judicial review.¹¹³

The pursuit of administrative relief must be sincere and complete. In *Leifermann v. Secretary of the Army*¹¹⁴ the court held, *inter alia*, that the doctrine of exhaustion of remedies required that all issues must be raised and passed upon by the military before any of them can be heard in a civilian court. The exhaustion must be comprehensive and not merely symbolic in nature.

A classic case applying this doctrine is *Mickey v. Barclay*.¹¹⁵ There, a Marine reservist who was familiar with the necessary administrative procedures nevertheless failed to pursue his case until he was involuntarily activated. He marched into court claiming that his commanding officer had abused his discretion in determining absences and recommending activation. Judge Luongo, in his opinion for the district court, emphasized that the plaintiff had ample opportunity to contest the grievances through administrative channels, and held that, because he had chosen to ignore the military review available, he could not now stand before the district court and cry "Foul."¹¹⁶

A variation on the administrative remedies doctrine appeared in *Lizzio v. Richardson*.¹¹⁷ The plaintiff, an Army reservist, claimed he was medically unfit for active duty because of a skin condition. However, he had never appeared before the induction board to allow Army physicians to examine his alleged condition. This caused the court to conclude that by not providing the Army an opportunity to examine him, the reservist had failed to exhaust his military remedies.¹¹⁸ The court did not reach the merits of the case.

2. When to Object

There have been two cases in which the reservist chal-

¹¹³ *Rasmussen v. Seaman*, 432 F.2d 346, 349 (10th Cir. 1970).

¹¹⁴ Civil No. 70-858 (D.S.C., Jan. 5, 1971).

¹¹⁵ 328 F. Supp. 1108 (E.D. Pa. 1971). See also *Herrick v. Cushman*, 379 F. Supp. 1143 (E.D.N.C. 1974).

¹¹⁶ 328 F. Supp. at 1115.

¹¹⁷ 378 F. Supp. 986 (E.D. Pa. 1974).

¹¹⁸ *Id.* at 989.

lenged the period of time for which active duty was ordered. These claims centered upon whether the 2 weeks annual active duty training should be included in the maximum 24 month active duty period allowable. In *Fox v. Brown*,¹¹⁹ the court stated that any claim in this vein had to be raised while on active duty, and in *Giardina v. Ambrose*,¹²⁰ where a National Guardsman was activated into the United States Army, the same conclusion was reached.

3. *Standing to Object*

Once the reservist satisfies jurisdictional requirements, the courts have been fairly lenient in allowing reservists to bring their cause to court. Standing, in these cases, is no more and no less than being able to enter the courthouse door and raise an objection on the merits. In a strict sense, standing has not served as the basis for a procedural dismissal of a case, but it can be said that it has lain at the heart of the nonreviewability doctrine.

There are two general rules of standing. First, the threat of involuntary activation will provide a reservist with standing and thereby enable him to attack the factual basis behind the threatened activation.¹²¹ Second, an ex-reservist who is already on active duty, *a fortiori*, has standing to attack his activation.¹²²

III. CONCLUSION

Involuntary activation works great changes upon a reservist's theretofore civilian lifestyle. He is thrust into the military environment with all of its rigors and variant legal system,¹²³

¹¹⁹ 402 F.2d 837, 840 (2d Cir. 1968), *cert. denied*, 394 U.S. 938 (1969).

¹²⁰ 301 F. Supp. 326 (D. Mass. 1969).

¹²¹ See, e.g., *Friedman v. Froehlke*, 470 F.2d 1351 (1st Cir. 1972); *Raderman v. Kaine*, 411 F.2d 1102 (2d Cir.), *cert. dismissed*, 396 U.S. 976 (1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Klinkhammer v. Richardson*, 359 F. Supp. 67 (D. Minn.), *aff'd*, 488 F.2d 920 (8th Cir. 1973); *Garmon v. Warner*, 358 F. Supp. 206 (W.D.N.C. 1973); *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973).

¹²² See *Anderson v. Laird*, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971); *Gianatasio v. Whyte*, 426 F.2d 908 (2d Cir.), *cert. denied*, 400 U.S. 941 (1970).

¹²³ See Uniform Code of Military Justice, 10 U.S.C. §§ 801 et. seq. See generally H. MOYER, *JUSTICE AND THE MILITARY* 61-76 (1972) [hereinafter cited as MOYER].

and he is usually dislocated from his home and family. Certainly, attendance at drills and participation in active duty training are not such demanding requirements that a reservist should allow himself to become eligible for involuntary activation. If this is so, why, then, are so many reservists allowing themselves to become candidates for activation? Is it a failing in the program itself, a failing in the implementation of the program, or a defect in the training which the reservist originally received when he entered the military? Whatever the reason, it is apparent that these types of cases are best solved outside the judicial arena. They are internal matters for the individual military service, and not appropriate for civilian judges who can better spend their valuable court time elsewhere. The only instance in which a court should intervene is when gross violations of due process are involved; when the activation was produced by discretionary decisions of a unit commander with which the reservist differs, the judiciary should not interfere.

The rationale behind 10 U.S.C. § 673a is that a reservist needs a minimum amount of annual military training in order to maintain his readiness for national emergencies. If a reservist refuses to attend drills and receive training in that manner, he must be called to active duty to fulfill his obligations and to guarantee the military readiness requirements. Judicial recognition of this rationale was apparent in *O'Mara v. Zebrowski*,¹²⁴ in which the court stated: "[T]he primary purpose of involuntary activation appears to be to maintain the military proficiency that is otherwise maintained by attendance at unit training assemblies."¹²⁵

The nature of involuntary activation has been widely discussed by courts and commentators.¹²⁶ Their key inquiry appears to be whether the activation procedure is administrative or punitive. If activation is to be considered punitive, it is possible that more stringent procedures, such as a formal hearing, a right to counsel and confrontation of witnesses, would be

¹²⁴ 447 F.2d 1085.

¹²⁵ *Id.* at 1089.

¹²⁶ See *Keister v. Resor*, 462 F.2d 471, 475 (3rd Cir.), *cert. denied*, 409 U.S. 894 (1972); *MOYER* at 75-76.

required. By characterizing activation as "administrative," courts have avoided the procedural safeguards required in a criminal case; but, despite the language of the court opinions, activation is punitive in effect if not in name. In fact, in the most recent treatise on military justice, the section on involuntary activation is aptly entitled "Punitive Activation."¹²⁷

It is clear from the facts of the cases that the real reason for removing reservists from their civilian lives is to punish them for being delinquent reservists. Certainly, no one can contend that the failure to attend five drills in a year, or the failure to attend one drill if in the Marine Corps, automatically necessitates many months of "training" so as to get the reservist's ability to perform "up to snuff." Moreover, this harsh remedy for what appears to be a mere infraction of the rules has not proven to be an effective deterrent to other reservists seeking to avoid their drills. It is commonly known that reservists frequently possess a lax attitude toward their duties and often invent ingenious methods to escape their monthly penance.

It is the opinion of the author that 10 U.S.C. § 673a provides a punishment which is disproportionate to the "crime." It becomes even more punitive when, after failing to report for duty, reservists are treated as unauthorized absentees and are subject to apprehension and confinement for being AWOL from the service.¹²⁸ Thus, the penalty can be two-fold: extraction from civilian life and castigation in military life.

Extra drills or other less severe remedies should be substituted for the sanctions contained in the federal activation statute. A delinquent reservist can be made to serve extra hours of duty at his unit or can be assigned extra work projects. Using the reservist during the weeknights at hospitals or other public institutions is a more appropriate remedy.

Not only is the statute too harsh on its face, it can be unequal in its application because it places vast discretion at the local reserve unit level. If the commanding officer decides not to submit a recommendation, then no matter how delin-

¹²⁷ Moyer at 75.

¹²⁸ See, e.g., *United States v. Kilbreth*, 22 U.S.M.C.A. 390 (1973).

quent the reservist is in failing to attend drills or summer camp, he will not be activated. Thus, the discretion vested at the recommendation stage of the process leads to a nonuniformity of treatment among the reservists. This has resulted in "unit shopping" in some areas, where a reservist seeks to join the least disciplined unit so as to protect himself if he misses a few too many drills.

If it must be conceded that the statute will remain, and will continue to include the harsh remedy of activation, a step toward uniformity in its application among the services can still be taken. This can be obtained by standardizing the activation procedures throughout the services. The need for this has already been recognized by the office of the Secretary of Defense, which in 1973 promulgated regulations concerning the issuance of activation orders.¹²⁹ This regulation, however, falls far short of the desired goal because it does not enunciate standard procedures to be applied *throughout* the activation process. For example, it does not address the due process notice and hearing argument. The regulation only applies when reserve members have either performed unsatisfactorily or "have not fulfilled their statutory reserve obligation."¹³⁰ The problems experienced by reservists have not arisen after this determination, but prior to it. Additionally, the new regulation does not address the lack of uniformity in appellate procedures.¹³¹ By standardizing the entire activation process, the Department of Defense would relieve reservists, as well as federal judges, of the burden of trudging through a maze of complex and often contradictory regulations. Until new regulations are adopted to smooth the uneven edges of the activation process and to take some of the sting out of 10 U.S.C. § 673a, it is safe to say that the club will remain poised and ready to strike America's delinquent "weekend warriors."

¹²⁹ 32 C.F.R. §§ 100.1-100.3 (1974).

¹³⁰ *Id.* at § 100.3(b).

¹³¹ Establishing an appellate body for all branches of the reserve, similar to the Army's Involuntary Active Duty Appeal Board, would provide a significant step toward the desired procedural uniformity.