

The Right to See: A Due Process Analysis of Access to Information in Army Adverse Administrative Proceedings

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Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.—Chief Justice Earl Warren¹

I. Introduction

Imagine you are an Administrative Law (ADLAW) attorney asked to referee a dispute between two of your peers. One is a trial counsel; the other is the defense counsel for a lieutenant under investigation for an inappropriate relationship. After much debate, the lieutenant's unit decided to simply give the lieutenant a referred Officer Evaluation Report (OER). The lieutenant's counsel contacts you because he only received a heavily redacted fragment of the commander's inquiry that forms the basis for the referred OER and none of the supporting evidence. The counsel argues that the unit deprived his client of a meaningful opportunity to respond. The trial counsel insists that the unit provided everything that is required by the regulation, and there is no requirement to give the lieutenant the supporting evidence. Both sides asked for your opinion. After reading Army Regulation (AR) 15-6, *Procedures for Investigating Officers and Boards of Officers*,² and AR 623-3, *Evaluation Reporting System*,³ you determine that both sides have merit since both regulations have language that is ambiguous and seemingly contradictory. You also know that because he is a junior officer, a referred OER might trigger a separation under AR 600-8-24, *Officer Transfers and Discharges*,⁴ or at the

very least might lead to non-selection in an upcoming promotion board. Realizing the gravity of the issues with potential non-disclosure, you need a way to respond that is legally fair to all parties but within the scope of law and regulation.

Judge advocates and other military practitioners often face issues similar to this one, especially with the large number of critical and complex investigations taking place in the modern Army after nearly fourteen years at war.⁵ These investigations range from mere fact finding inquires all the way to formal elimination proceedings, many containing their own unique procedures.⁶ Nevertheless, these investigatory processes have one common denominator: they are governed by due process.⁷ What this means in definite terms is less clear. As Chief Justice Earl Warren stated in the Supreme Court's decision in *Hannah v. Larche*, "Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."⁸ In other words, while due process exists in all of the various administrative procedures within the Army, the specifics vary depending on the exact type of procedure.⁹ In addition, Army regulations sometimes provide an incomplete picture of due process rights, despite seemingly similar procedures.¹⁰

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¹ Earl Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 188 (1962).

² U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 April 2006) [hereinafter AR 15-6]. While this paper was initially drafted using the October 2nd, 2016 version of AR 15-6, it has been updated to reflect the recent changes in the regulation.

³ U.S. DEP'T OF THE ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-28 (31 Mar. 2014) [hereinafter AR 623-3].

⁴ U.S. DEP'T OF THE ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24].

⁵ See, e.g., Raffi Khatchadourian, *The Kill Company: Did a Colonel's Fiery Rhetoric Set the Conditions for a Massacre?*, THE NEW YORKER, July 6, 2009 at 41. The article discusses the role played by Colonel (COL) Michael Steele, then Commander of the 3d Brigade Combat Team, 101st Airborne Division (Air Assault), in the alleged massacre during the 2006 operation in Samara, Iraqi commonly known as "Operation Iron Triangle." *Id.* This high profile incident was initially investigated using an Army Regulation (AR) 15-6 investigation, portions of which the author obtained in a Freedom of Information Act request and subsequently cited in his work.

⁶ See generally Captain Arthur Hasseig, *The Soldier's Right to Administrative Due Process: The Right to be Heard*, 63 MIL. L. REV. 1 (1974) (listing various types of regulatory procedures that required administrative due process circa 1974); see also Major Jack F. Lane, Jr., *Administrative Due Process and Army Regulation 15-6*, ARMY LAW., May 1974, at 1 (discussing the myriad of administrative actions that can trigger judicial review). The breadth of administrative actions of today's Army mirror those discussed by both Captain (CPT) Hasseig and Major (MAJ) Lane and include flags, administrative investigations, memorandum of reprimand, adverse evaluations, and separations or eliminations from service. See *infra* Part III.

⁷ See Hasseig, *supra* note 6, at 1.

⁸ *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

⁹ See generally Hasseig, *supra* note 6, at 24.

¹⁰ Compare AR 15-6, *supra* note 2, para. 1-9c, with AR 623-3, *supra* note 3, para. 3-28.

However, violating due process rights in any adverse administrative investigation can lead to reversible error if, and when, that action comes under the scrutiny of judicial review.¹¹ Understanding both the requirements and limitations of due process can ensure that actions survive judicial scrutiny while simultaneously achieving the Government's objectives and being fair to the individual respondent.¹²

This article provides guidance to practitioners about how due process considerations factor into the interpretation of various Army administrative regulations and procedures.¹³ Part II reviews the Supreme Court's treatment of administrative due process rights, identifying their known legal contours. Additionally, part II examines how federal courts have applied these due process principles when reviewing allegations of error in adverse military administrative procedures. Part III lays out a methodology that practitioners can use to ensure the satisfaction of a subject's minimal due process rights. Part III then explains how to use that methodology to examine the right to information contained in five common Army administrative procedures. If the methodology exposes any regulatory ambiguity, part III discusses the legal authority that can be used to fill those gaps. Part IV addresses the interplay between due process rights and the Privacy Act of 1974, specifically examining how the "routine use exception" would apply to accusatory information contained in the investigation. In the end, this methodology serves as a tool to

ensure fair, equitable, and legally sound administrative processes.

II. The Judiciary's View of Due Process

The right to due process, as embodied in the 5th Amendment of the Constitution, is one of the most litigated issues within American jurisprudence.¹⁴ The relevant language of the amendment itself seems fairly straightforward: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."¹⁵ Nevertheless, the full scope of these rights remains somewhat unclear, leading to the age old legal question, "how much process is due?"¹⁶ While courts and commentators have consistently held that minimal due process in a non-criminal context includes notice and the opportunity to respond, even these basic requirements are open to debate with their application often driven by specific nuanced facts.¹⁷ Unfortunately, because of the wide variety of processes and procedures within the federal government, no hard and fast interpretation is possible.¹⁸ However, existing federal case law gives some guidance about what is required under certain situations and what is not.

A. The Supreme Court's Due Process Pendulum

The Supreme Court first started to significantly wrestle with the question of how much process is due in non-criminal

¹¹ A service member has several administrative and judicial avenues to challenge an adverse administrative finding. *See* discussion *infra* Part III. Once the servicemember exhausts his or her administrative remedies, he or she may sue for relief, most commonly under the Administrative Procedure Act (APA). Administrative Procurement Act, 5 U.S.C. §§ 701-06 (2016). Should a court determine that the Government has violated that act or due process principles in general, they can grant appropriate relief. *See, e.g., Jones v. United States*, 7 Cl. Ct. 673 (1985) (reversing a discharge for a Soldier under chapter 16, AR 635-200 with seventeen years of service because he was denied due process rights). For an in depth discussion on the applicability of the APA's judicial review provisions as they apply to the military, see Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL L. REV. 135, 156-58 (1985).

¹² *See Lane, supra* note 6, at 1; *see also* Major Richard D. Rosen, *Thinking About Due Process*, ARMY LAW., Mar. 1988, at 3 (discussing the potential limits of required due process in administrative investigations while still allowing such actions to survive judicial scrutiny).

¹³ There are several Army administrative regulations and procedures discussed in this article. *See, e.g.,* AR 15-6, *supra* note 2, para. 1-9c; U.S. DEP'T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 2-2b (6 June 2005) (RAR 6 Sept. 2011) [hereinafter AR 635-200]; AR 600-8-24, *supra* note 4, para. 4-11; U.S. DEP'T OF THE ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4b (19 Dec. 1986) [hereinafter AR 600-37]; U.S. DEP'T OF THE ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-17 (6 Nov. 2014) [hereinafter AR 600-20]; AR 623-3, *supra* note 3, para. 3-28, DEP'T OF THE ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) para. 2-6 (11 May 2016) [hereinafter AR 600-8-2]. While not addressed in this paper, comparable administrative due process rights are also enumerated. *See* U.S. DEP'T OF THE ARMY, REG. 27-10, MILITARY JUSTICE para. 3-16b and 3-18 (11 May 2016); U.S. DEP'T OF THE ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY PROCEDURES para. 13-34 to -35 (10 May 2013) (RAR 22 Aug. 2013) [hereinafter AR 735-5]; U.S. DEP'T OF

THE ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 3-8f(6), 4-17 (4 Sept. 2008); U.S. DEP'T OF THE ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 3-3 (29 Nov. 2010) (RAR 3 Sept. 2012). For an in-depth discussion of some unique factors in the inspector general's process and the interplay with access to information, see Lieutenant Colonel Craig A. Meredith, *The Inspector General System*, ARMY LAW., July 2003, at 20.

¹⁴ *See, e.g.,* Lieutenant Colonel Dulaney L. O'Roark, *Military Administrative Due Process of Law as Taught by the Maxfield Litigation*, 72 MIL L. REV. 137, 144-45 (1976). In this article from the post-Vietnam drawdown era, Lieutenant Colonel O'Roark analyzed a potential due process violation in a change in the Army's officer promotion system and how these alleged violations came into play in a pending lawsuit. *See id.* This era saw the first significant application of due process principles in military administrative investigations as well as the judiciary's willingness to examine these proceedings. *See* discussion *infra* Section II.B.

¹⁵ U.S. CONST. amend. V. Due process case law also analyzes section 1 of the XIV Amendment when individual state action is involved, not federal. *See* Hasseig, *supra* note 6, at 2. However, the underlying concepts of due process between the V and XIV Amendment mirror each other in this area. *Id.*

¹⁶ *See generally* O'Roark, *supra* note 14, at 146; Rosen, *supra* note 12, at 5-6; Hasseig, *supra* note 6, at 2-3.

¹⁷ *Id.* In a purely military context, an involuntary discharge prior to expiration of term of service provides the best example of the balancing of these interests. As the type of discharge sought, length of service, and characterization of service all change, so too does the amount and nature of due process available to a respondent. *See infra* Part III.B.

¹⁸ *Id.*

proceedings during the post-World War II era.¹⁹ In 1951, the Court decided *Joint Anti-Fascist Refugee Committee v. McGrath*, which examined the use of the Attorney General's Loyalty Review Board list against alleged communist sympathizers.²⁰ While the Court did not decide the case on due process grounds,²¹ Justice Frankfurter's concurrence introduced a due process rationale into the decision:

But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.²²

Justice Frankfurter further elaborated that due process is not simply a matter of legal convenience, but a right that exists no matter what external pressures may exist on the Government, to include national security concerns.²³ As he continues, "The Attorney General is certainly not immune from the historical requirements of fairness merely because he acts, however conscientiously, in the name of security."²⁴

The Supreme Court further refined their application of due process boundaries in the 1959 case of *Greene v. McElroy*. In *Greene*, an executive employee of a defense contractor was denied a security clearance due to his purported past communist associations.²⁵ The Department of Defense based its determination largely on confidential information that was not shared with the plaintiff during his administrative review.²⁶ After he was unable to gain meaningful employment, the Plaintiff sued the Secretary of

Defense because of adverse stigmatization, and the case eventually came before the Supreme Court.²⁷ While the Court relied on a lack of legal authority in the governing statute to decide the case in favor of the Plaintiff,²⁸ the opinion, authored by Chief Justice Warren, takes on a distinctly due process tone when addressing whether the Government's refusal to disclose the confidential information unfairly harmed the Plaintiff.

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.²⁹

From the *Greene* holding, one tangible aspect of administrative due process appears—when Government action significantly puts an individual's liberty interest at stake, the right of confrontation and cross examination attach as part of the respondent's opportunity to respond.³⁰ Therefore, the Plaintiff in *Greene* was denied due process when the Government deprived him of the information used to revoke his clearance and remove him from his job.³¹

In the 1960 case of *Hannah v. Larche*, the Supreme Court clarified the scope of the right to confrontation and cross-examination established in *Greene*. In *Hannah*, several local election officials in Louisiana sued the Federal Commission on Civil Rights to obtain the identity of

¹⁹ See Hasseig, *supra* note 6, at 4-5 (outlining the contemporary history of due process litigation).

²⁰ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). In this case, several charitable organizations challenged the appearance of their names on the Attorney General's Loyalty Review Board list for supposed Communist sympathies. *Id.* The list would then be circulated to all parts of the federal government. *Id.* Individuals who contributed to these organizations would be shunned from federal employment, essentially outlawing contribution to them by anyone associated with the federal government. *Id.*

²¹ *Id.* at 137-42.

²² *Id.* at 162-63.

²³ *Id.*

²⁴ *Id.* at 173. However the Court arguably took the opposite position six years before in *Korematsu v. United States*, 323 U.S. 214 (1944), a decision where Justice Frankfurter wrote a concurrence recognizing the validity of

the military order interning the plaintiff without minimal due process. *Id.* at 224-25.

²⁵ *Greene v. McElroy*, 360 U.S. 474, 475-92 (1959); see also Hasseig, *supra* note 6, at 5-7 (concisely laying out the facts of *Greene*).

²⁶ *Greene*, 360 U.S. at 491-92.

²⁷ *Id.*

²⁸ *Id.* at 508.

²⁹ *Id.* at 496.

³⁰ *Id.*

³¹ *Id.* But see *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 898-99 (1961) (holding that the rights discussed in *Greene* did not apply because the plaintiff, a short order cook who was also denied a security clearance and access to a military installation, was not denied her livelihood but simply one of many similar short order cook jobs, and the effects of her termination were not stigmatizing).

witnesses who purportedly were to testify against them.³² Relying heavily on the *Greene* decision from the previous term, the petitioning officials argued that the Commission's refusal to identify these witnesses denied the officials their due process right to confront their accuser.³³ The Supreme Court disagreed; distinguishing *Greene* from *Hannah*, the Court held that because the nature of the Commission was investigatory, not adjudicatory, the rights discussed in *Greene* did not apply.³⁴ According to the Court, if a proceeding was merely investigatory, then it did not require more formal rights for those testifying, such as the identity of potential accusers.³⁵ On the other hand, once the proceedings took on an adjudicatory function, the bundle of respondent's rights substantially increases to the more trial-like paradigm.³⁶ Therefore, drawing from a combination of the *Greene* and *Hannah* holdings, should a Government proceeding change from an investigatory function to an accusatory one with a significant liberty interest at stake, trial-like rights of appraisal, confrontation, and cross examination attach in some form.³⁷

Several subsequent cases provide further guidance on the scope of these rights in various types of administrative proceedings. In *Goldberg v. Kelly*, the Supreme Court held that when a significant property interest was at stake—in this case indigent welfare benefits—the right to counsel and a hearing would also attach.³⁸ In the companion cases of *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann*, the Court held that when a university's policy provided an implication of tenure, substantially more trial-like due process

would attach upon termination as compared to a state school where no such policy existed.³⁹ Finally, in *Goss v. Lopez*, the Court extended heightened due process rights to high school students facing suspension where that suspension would have long-term stigmatization on the student and the potential for error by the school administrators was fairly high.⁴⁰

From this line of cases, certain contours emerge for constitutionally based administrative due process rights. First, Government action against a person's established liberty or property interests triggers due process in some form, no matter what the context.⁴¹ Second, due process expands when a proceeding changes from an investigatory function to an adjudicatory one; the rights of appraisal, confrontation, and cross-examination vest in some manner.⁴² Finally, as the potential harm increases, so does the degree of the due process, expanding from simple notice and opportunity to respond up to a full, trial-like process.⁴³

B. The Judicial View of Due Process in the Military

While the Supreme Court's case law establishes a roadmap on how to apply due process to Government action as a whole, the specialized nature of the military colors this application of due process within the military administrative context.⁴⁴ The Supreme Court has long established that the military is a specialized society with specific matters that are within the discretion of the military to decide.⁴⁵ For example, in *Orloff v. Willoughby*, the Court dismissed a physician's

³² See generally *Hannah v. Larche*, 363 U.S. 420, 421-30 (1960) (laying out the facts of the case). The respondents in this case were being investigated for allegedly violating the voting rights of African Americans within their districts. *Id.*

³³ *Id.* at 426-27, 442-43.

³⁴ *Id.* at 442.

The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies.

Id.

³⁵ *Id.* at 443-44.

³⁶ *Id.* at 450 (quoting *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294 (1933)); see also *Hannah*, 363 U.S. at 488-89 (Frankfurter, J., concurring) (providing perspective on the difference between an investigatory body and one with an accusatory function).

³⁷ *Id.*; see also *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

³⁸ *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970) ("Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. . . . Particularly where credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.").

³⁹ Compare *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Certain attributes of 'property' interests protected by procedural due process emerge

from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."), with *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) ("A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure.").

⁴⁰ *Goss v. Lopez*, 419 U.S. 565, 580 (1975) ("Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed.").

⁴¹ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 162-63 (1951).

⁴² *Greene*, 360 U.S. at 496; see also *Hannah v. Larche*, 363 U.S. 420, 488-89 (1960) (Frankfurter, J., concurring).

⁴³ *Goldberg*, 397 U.S. at 268-69; see also *Goss*, 419 U.S. at 578-79.

⁴⁴ See generally *Rosen*, *supra* note 12, at 3-4 (discussing possible limitations of due process concerns in military contexts). But see *Lane*, *supra* note 6, at 1 (discussing recent losses by the Government in civil trials for cases involving apparent due process violations by the military at service schools). Given the timing of his article, MAJ Lane was presumably talking about the *Wasson* and *Hagopian* cases. See *infra* Section II.B.1.

⁴⁵ *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). See Colonel Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975) (providing an in depth, historical analysis of the evolution (and devolution) of this so called non-reviewability doctrine).

habeas corpus action against the Army challenging the decision not to grant him a commission as a medical officer.⁴⁶ As the Court stated:

But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.⁴⁷

The Supreme Court's reluctance not to second-guess military action has generally filtered into lower court decisions involving military administrative actions.⁴⁸ Generally, judicial review of military actions only involves reviewing the "legality of prescribed administrative procedure."⁴⁹ So long as those procedures pass basic constitutional scrutiny, courts will not interject their opinions.⁵⁰ For example, in *Sims v. Fox*, the Fifth Circuit initially found an Air Force officer's discharge unconstitutional because he was not afforded a hearing; however, upon rehearing en banc, the Court held that the procedure did provide minimal due process given the interest at stake.⁵¹ Therefore, so long as the proceedings contain minimal due process, the courts will refrain from substituting their own judgment.⁵² Despite this deference, courts tend to grant relief when a plaintiff shows that a proceeding actually violates due process—usually through the inadequacy of the

proceedings or where the military violates its own regulations.⁵³ As the level of potential harm increases for a respondent, so does the level of scrutiny that the court will give to each specific process.⁵⁴

1. Inadequacy of Proceedings

Courts will first scrutinize military administrative proceedings when the proceedings themselves do not contain adequate due process. The Second Circuit addressed this issue in two similar cases in the 1970s, *Wasson v. Trowbridge*⁵⁵ and *Hagopian v. Knowlton*,⁵⁶ both dealt with the procedures for discharging service academy cadets for cause.⁵⁷ In *Wasson*, the court held that a third-year United States Merchant Marine Academy Cadet who was pending dismissal for excessive demerits was first entitled to a hearing; however, the court declined to define the specific requirements of the hearing and instead deferred to the military authorities to establish the necessary procedures.⁵⁸

Five years later, the Second Circuit expanded its holding in *Hagopian*, a case involving the dismissal of a third-year cadet from the United States Military Academy at West Point once again for excessive demerits during a semester.⁵⁹ During his separation proceedings, the plaintiff sought legal advice and requested a hearing with the assistance of counsel.⁶⁰ The Academy leadership denied both requests, and when the plaintiff asked for assistances from the Academy's

⁴⁶ *Id.* at 84-86.

⁴⁷ *Id.* at 93-94; see also *Parker v. Levy*, 417 U.S. 733, 756-57 (1974) (noting that courts are reluctant to second guess the judgment of the executive branch and military officials in purely military affairs, based largely on the fact that the military is a unique organization with its own customs and traditions).

⁴⁸ *Allgood v. Kenan*, 470 F.2d 1071, 1073 (9th Cir. 1972) ("Judicial review of Army administrative determinations is quite limited. Courts will review military determinations by habeas corpus to insure that rights guaranteed by the constitution or by military regulations are protected. Where, for example, the military has prescribed a procedure for entertaining requests for release by reason of a soldier's conscientious objection, see, e. g., AR 635-20 habeas corpus will lie to review the military's disposition of such requests.").

⁴⁹ *Reed v. Franke*, 297 F.2d 17, 20 (4th Cir. 1961).

⁵⁰ *Id.* at 27.

⁵¹ Compare *Sims v. Fox*, 492 F.2d 1088 (5th Cir. 1974) (holding that the plaintiff, a junior officer being separated with an honorable discharge but a negative separation designation number, had demonstrated an adequate liberty interest to require a hearing prior to discharge), with *Sims v. Fox*, 505 F.2d 857 (5th Cir. 1974) (en banc) (holding that the same plaintiff had not shown an adequate liberty and property interest that would require a hearing before a board). See also *Rew v. Ward*, 402 F. Supp. 331 (D.N.M. 1975) (holding that an Airman had a liberty interest in remaining in the United States Air Force, but procedures providing her written notice of offense along with dates and names of witnesses, and allowing her chance to respond with assistance of counsel were adequate to satisfy due process). Besides the military status of the plaintiffs, a key difference between these cases and *Greene* is the degree of resulting stigmatization. Unlike the plaintiff in *Greene*, whose termination for lack of security clearance caused significant professional stigmatization, the plaintiffs in *Sims* and *Rew* faced little harm since no facts about the basis of their discharges appeared on

their Certificate of Release or Discharge from Active Duty. Compare *Sims*, 505 F.2d at 860, with *Greene v. McElroy*, 360 U.S. 490-93 (1959).

⁵² *Sims*, 505 F.2d at 864.

⁵³ See generally Haessig, *supra* note 6, at 18-19. A third ground for judicial review, specifically whether the military's action complies with a governing statute, does not directly involve due process considerations per se. See generally Peck, *supra* note 45, at 40-42 (noting three traditional grounds of judicial review as of the 1960s).

⁵⁴ See, e.g., *Bland v. Connally*, 293 F.2d 852, 858 (D.C. Cir. 1961) (voiding a U.S. Naval Reservist's discharge under other than honorable conditions when no hearing was given). "What is challenged is the right of the service to introduce the element of punishment of 'labeling' into the involuntary separation, by characterizing the discharge derogatorily. The position of the dischargee is thus much stronger than that in *Greene* . . ." *Id.* Of note, the plaintiff in *Bland* faced a discharge "under conditions other than honorable." *Id.* at 854.

⁵⁵ *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

⁵⁶ *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972).

⁵⁷ See also Major John H. Beasley, *The USMA Honor System—A Due Process Hybrid*, 118 MIL. L. REV. 187, 199-204 (providing detailed facts about both *Wasson* and *Hagopian* and placing them contextually into a larger expansion of due process litigation during the early 1970s).

⁵⁸ *Wasson*, 382 F.2d at 812. Of note, the *Wasson* court did not extend the Plaintiff the right to counsel nor did it afford him the right to examine confidential fitness reports without an evidentiary hearing that showed the nature of the information in question. *Id.* at 812-13.

⁵⁹ *Hagopian*, 470 F.2d at 204-05.

⁶⁰ *Id.* at 206-07.

legal department, they informed him that they were “discouraged from counseling cadets who were called to appear before conduct boards.”⁶¹

After the Academy’s Academic Board recommended dismissal, the plaintiff sued alleging that his pending separation violated his due process rights, and he requested injunctive relief.⁶² When the case reached the Second Circuit, the court held that the Academy’s proceeding violated the plaintiff’s due process rights because of the interests associated with a both a college education and a career as an officer.⁶³ The court further held that due process in this case would have been satisfied if the plaintiff had been afforded the right to appear before the board and to at least consult with legal counsel.⁶⁴ The court understood it was expanding its holding in *Wasson*, but attributed this specificity to the difference in size and scale of West Point compared to the Merchant Marine Academy, as well as, the nature of this particular board proceeding.⁶⁵ Finally, the court attempted to define a standard upon which it could judge these types of due process cases where the outcome would “give the reader a ‘feel’ for what is fundamentally fair in a particular instance.”⁶⁶ *Wasson* and *Hagopian* both reinforce the conclusion that if the military’s procedures do not afford minimal levels of due process, the courts will intervene.

2. Regulatory Violations

In addition to looking at procedural inadequacies, courts will also grant relief in cases where the military violates its own regulation.⁶⁷ The general theory is that once a governmental agency, such as the Army, prescribes a rule either through statute or regulation, due process mandates that the agency follow that rule.⁶⁸ For example, in *Bluth v. Laird*, the Fourth Circuit granted relief when an Army physician claimed that the Army failed to follow its own regulation for processing and subsequently denying his deferment from duty overseas.⁶⁹ Ruling against the Government, the *Bluth* court

stated, “[I]n exercising its discretion, the military will be held to the positive commands it has imposed on itself as to what procedures and steps are to be followed”⁷⁰ While these cases may reinforce an argument that an agency must be wary of unnecessarily providing procedural rights, they also demonstrate that once the Government creates these rights, they must be followed.⁷¹

3. The “Mindes” Test

While the cases cited above are not exhaustive, they reinforce both the judiciary’s deference towards the military as well as its duty to ensure adequate due process based on various precedents and other authorities. In *Mindes v. Seaman*, the Fifth Circuit took the analysis a step further by creating a workable test for trial courts tasked with determining whether an administrative action warrants intervention.⁷² *Mindes* involved an Air Force officer who was separated from service as a result of an evaluation report that he claimed contained factually inaccurate information.⁷³ After exhausting his administrative remedies, the Plaintiff sued for relief.⁷⁴ In its opinion, the Fifth Circuit surveyed similar case law to set forth known parameters for judicial review of military administrative actions.⁷⁵ The court first determined that it had jurisdiction so long as a plaintiff (a) successfully claimed a violation of a constitutional right or that the military failed to follow an applicable statute or its own regulation; and (b) the plaintiff exhausted his administrative remedies.⁷⁶ Once these conditions had been met, a court could then examine whether it should intervene:

A district court faced with a sufficient allegation must examine the substance of that allegation in light of the policy reasons behind nonreview of military matters. In making that examination, such of the following factors as are present must be

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 209.

⁶⁴ *Id.* at 210-11. The court declined to grant the Plaintiff the right to counsel at the proceeding and access to confidential fitness reports prepared by plaintiff’s tactical officer. *Id.* at 212-13.

⁶⁵ *Id.* at 211 (“With a cadet population of several thousand, it is unlikely that the members of the Board, drawn from several departments, would have a sufficient acquaintanceship with the cadet to be able to appraise him or determine his ‘potential for retention’ merely on the basis of his letter to it.”).

⁶⁶ *Id.* at 209.

⁶⁷ See *Rosen*, *supra* note 12, at 7-10. See also *Peck*, *supra* note 45, at 40-42 (discussing the Supreme Court’s evolution into this area).

⁶⁸ *Id.*

⁶⁹ *Bluth v. Laird*, 435 F.2d 1065, 1067 (4th Cir. 1970). Major Bluth, an Army physician, also claimed he had not been properly trained in his basic

branch prior to receiving orders for Vietnam, also violating Army regulations. *Id.*

⁷⁰ *Id.* at 1071. See also *Feliciano v. Laird*, 426 F.2d 424 (1970) (“When a clear cut duty imposed by a regulation is not performed, mandamus will issue to compel the federal officer to fulfill his obligation.”). But see *Peck*, *supra* note 45, at 2-3 (noting the irregular application of this principle by various circuits).

⁷¹ See generally *Rosen*, *supra* note 12, at 7-10. Major *Rosen* argued that the Military, especially subordinate commanders, must be wary of granting new procedural due process rights through policies and regulations in order to prevent unnecessarily and costly litigation. *Id.*

⁷² *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

⁷³ *Id.* at 198.

⁷⁴ *Id.*

⁷⁵ *Id.* at 199-201.

⁷⁶ *Id.*

weighed (although not necessarily in the order listed).

1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty. An obviously tenuous claim of any sort must be weighted in favor of declining review.

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved. Courts should defer to the superior knowledge and experience of professionals in matters such as promotions or orders directly related to specific military functions.⁷⁷

The Fifth Circuit subsequently added an additional step of addressing whether the regulation was drafted for the benefit of the individual Soldier or for the service.⁷⁸ The *Mindes* test presents both trial courts and litigators a concise yet practical analysis for these issues drawing from Supreme Court case law down to individual regulations.

III. Regulatory Analysis Framework for Military Practitioners

⁷⁷ *Id.* at 201. See also Peck, *supra* note 45, at 73-77 (balancing the various elements of the *Mindes* test).

⁷⁸ *Silverthorne v. Laird*, 460 F.2d 1175 (5th Cir. 1972) (comparing the regulatory process to determine whether a Soldier is a conscientious objector with the regulatory process for an administrative separation).

⁷⁹ *Cf.* Rosen, *supra* note 12, at 6-10. Major Rosen argued that the positive nature of Army regulations was what primarily drove due process analysis and that the procedural protections granted by many regulations were largely a creation of the specific governing statute or regulation in question. *Id.*

⁸⁰ See generally *Greene v. McElroy*, 360 U.S. 474, 491-92 (1959) (identifying liberty and property interests in a case of continued employment), and *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (discussing welfare benefits as significant property interest).

The above analysis show that courts view Army regulations not simply as rules written in a vacuum, but also containing principles drawn from significant judicial precedents governing due process. In other words, Army regulations are not simply positivist legal authority but do contain essential constitutional elements.⁷⁹ Military practitioners should keep these factors in mind when analyzing compliance or non-compliance with a regulatory provision.

This case law also provides a roadmap for practitioners to use when analyzing a due process issue arising from regulatory ambiguity, such as whether to grant access to information discussed in the opening scenario. To analyze these types of issues, practitioners must first identify the type of interest at stake for the respondent: liberty, property, or both.⁸⁰ Next practitioners must determine whether the administrative proceeding in question is investigative or adjudicatory, conducting an analysis similar to *Hannah v. Larche*.⁸¹ As *Hannah* showed, when the process turns from investigatory to adjudicatory, the respondent is entitled to more robust protections.⁸² Third, practitioners must determine what rights the regulation requires—proper appraisal of the government's action, confrontation of that action, and cross examination of the information presented—given the interest at stake.⁸³ Within this step, practitioners must address whether these rights are positive or constitutional and whether they are adequate given the interest involved.⁸⁴ Next, practitioners should examine any concerns that the procedure places unnecessary burdens on the Government.⁸⁵ Lastly, practitioners should examine the entire process for a final check on whether the outcome is fundamentally fair and objectively “feels” right.⁸⁶

Using this methodology, most Army regulations satisfy due process scrutiny when examining the right to information, but a few have some significant gaps. In cases of doubt, practitioners should use the governing case law to make a due process determination about whether or not to grant access to the information.

A. The Baseline: Army Regulation 15-6

⁸¹ See *Hannah v. Larche*, 363 U.S. 420, 440-41 (1960) (discussing investigatory roles of the commission in question), 442-51 (discussing the role of purely investigative bodies).

⁸² *Id.* at 488-89 (Frankfurter, J., concurring).

⁸³ *Greene*, 360 U.S. at 496.

⁸⁴ *Id.* See also Rosen, *supra* note 12, at 6-10.

⁸⁵ See *Silverthorne v. Laird*, 460 F.2d 1186 (5th Cir. 1972); see also *Mindes v. Seamen*, 453 F.2d 202 (5th Cir. 1971).

⁸⁶ See *Hagopian v. Knowlton*, 470 F.2d 209 (2d Cir. 1972) (“Because of the factors controlling what process is due usually vary from case to case, prior decisions on the subject cannot ordinarily furnish more than general guidelines which might give the reader a ‘feel’ for what is fundamentally fair in a particular instance.”).

The Army's primary administrative investigative regulation, AR 15-6, *Procedures for Administrative Investigations and Boards of Officers*, serves as a baseline standard for all other regulatory procedures as well as a procedure to use when no other regulation applies.⁸⁷ It provides commanders with a mechanism for obtaining facts and recommendations on any issue within their purview to investigate.⁸⁸ While primarily an investigative tool, AR 15-6 itself can transition to an adjudicatory function and mandates certain additional rights when this occurs.⁸⁹ Paragraph 1-12c enumerates these rights:

[W]hen adverse administrative action is contemplated against an individual . . . including an individual designated as a respondent, based upon information obtained as a result of a preliminary inquiry, administrative investigation, or board of officers conducted pursuant to this regulation, the appropriate military authority must observe the following minimum safeguards before taking final action against the individual:

- (1) Notify the person in writing of the proposed adverse action and provide a copy, if not previously provided, of *that part of the findings and recommendations of the investigation or board and the supporting evidence on which the proposed adverse action is based*...
- (2) Give the person a reasonable opportunity, no less than 10 days, to reply, in writing, and to submit relevant rebuttal material.
- (3) Review and evaluate the person's response.⁹⁰

Paragraph 1-12d further elaborates that if another regulation provides a different procedure for adverse administrative action, that regulation will govern so long it "provide[s] procedural safeguards, such as notice to the individual and opportunity to respond."⁹¹

This provision of AR 15-6 satisfies all the necessary due process requirements discussed in case law, especially the right to have access to adverse information. Its instructions should be taken at face value without alteration, absent some other clear regulatory authority.⁹² While not specifically identifying whether a liberty or property interest is at stake, it can be used in either situation.⁹³ As noted, while the regulation is primarily investigative, it recognizes that an investigation often turns into an adjudicatory function and provides additional rights when this occurs.⁹⁴ These include the rights (1) to be apprised of the nature of the adverse action; (2) to confront the evidence used in the adverse action; and (3) to cross-examine through the use of a written rebuttal.⁹⁵ Finally, this process is fundamentally fair because it allows for broad access to adverse information, the scope is clear, and the rights of parties are protected—the rights of appraisal, confrontation, and cross examination—and codified in the regulation itself.⁹⁶ When in doubt, practitioners representing both the Government and an individual respondent should always default to the rule contained in AR 15-6.

B. Derogatory Information: Army Regulation 600-37 and Army Regulation 600-20

Closely aligned with AR 15-6 are the procedural rights contained in AR 600-37, *Unfavorable Information*,⁹⁷ and AR 600-20, *Army Command Policy*, governing reliefs from command.⁹⁸ Both regulations involve situations similar to *Greene v. McElroy* where the respondent faces a significant liberty interest and potentially career ending stigmatization.⁹⁹ For AR 600-37, this action is the filing of an administrative reprimand in an official military personnel file;¹⁰⁰ in AR 600-20, the action is removal from command, a position that the Army recognizes as one with special "authority and responsibility" over other Soldiers.¹⁰¹

Since both regulations carry long-term implications for a respondent's career, both of these processes are adjudicatory¹⁰² and they both afford due process rights nearly

⁸⁷ AR 15-6, *supra* note 2, para. 1-1.

⁸⁸ *Id.* para. 1-6.

⁸⁹ *Id.* para. 1-12a.

⁹⁰ *Id.* para. 1-12c (emphasis added).

⁹¹ *Id.* para. 1-12d.

⁹² Prior to the April 1st, 2016 revision of the regulation, some legal offices have undertaken the practice of redacting personally identifiable information (PII) from AR 15-6 investigations, to include identities of witnesses, and often cite the Privacy Act as authority. Such practice deprives a respondent of the right to cross examine witnesses to the proceedings and creates a situation analogous to *Greene*. The April 1st, 2016 revision to AR 15-6 may cause additional confusion on this point with the addition to references to the Privacy Act in paragraph 1-12c(2). The interplay between the Privacy Act and due process is discussed in Section IV *infra*.

⁹³ *Accord* AR 735-5, *supra* note 13, para. 13-25 (mandating use of an AR 15-6 investigation under five different property loss and accountability

scenarios); AR 635-200, *supra* note 13, para. 2-10g (directing that administrative reparation boards initiated under AR 635-200 use the formal board procedures of AR 15-6).

⁹⁴ AR 15-6, *supra* note 2, para. 1-12c.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ AR 600-37, *supra* note 13, para. 3-4b.

⁹⁸ AR 600-20, *supra* note 13, para. 2-17.

⁹⁹ *See generally* *Greene v. McElroy*, 360 U.S. 474, 491-92 (1959).

¹⁰⁰ AR 600-37, *supra* note 13, para. 3-4b.

¹⁰¹ *See generally* AR 600-20, *supra* note 13, para. 1-5 (discussing the unique position of command in the Army).

¹⁰² *See generally* *Hannah v. Larche*, 363 U.S. 442 (1960).

identical to AR 15-6: (1) proper notice to include information that the initiating official relied on, and (2) the opportunity to reply with a written rebuttal that the initiating official must consider prior to final determination.¹⁰³ Given that both of these regulations constitute otherwise minor administrative actions and do not directly result in the termination of a Soldier's status in the Armed Forces, they afford adequate due process. Furthermore, both regulations enumerate the right to see both the basis of the derogatory action and any evidence used to support it. This again affords adequate appraisal, confrontation, and cross-examination.

C. Separations: Army Regulation 635-200 and Army Regulation 600-8-24

The two active duty separation regulations, AR 635-200, *Active Duty Enlisted Administrative Separations*, and AR 600-8-24, *Officer Transfers and Discharges*, further develop the rights enumerated in AR 15-6. Both regulations address policies and procedures for the involuntary termination of a Soldier's military career for cause and granting a discharge under less than honorable conditions.¹⁰⁴ Therefore, both procedures are also adjudicatory since a discharge under less than honorable conditions can have significant stigmatization on the ability to gain meaningful employment outside the military.¹⁰⁵

The separation proceedings themselves, and the rights associated with them, reflect the distinction the Supreme Court drew in both *Greene v. McElroy* and *Cafeteria and Restaurant Workers Union v. McElroy*: The potential for increased loss in professional standing affords more robust due process rights.¹⁰⁶ As a result, the exact procedural protections afforded to respondents increase with either their time in service or the nature of discharge sought.¹⁰⁷ Despite this, the minimal procedural protections afforded to Soldiers include the right to adequate notice, the right to inspect the

documents forming the basis for separation, and, at a minimum, the opportunity to provide a written response.¹⁰⁸

As with AR 15-6 and AR 600-37, both regulations enumerate the right to examine evidence used in both proceedings and to allow for assistance of counsel in interpreting and using that evidence.¹⁰⁹ Both regulations afford ample due process by preserving the right to be apprised of the separation action, the right to confront both witnesses and evidence used in the proceedings, and the right to cross-examine that evidence. In fact, as the potential for long-term stigmatization inside or outside the military increases, so do the rights associated with each procedure, ranging from a written response to a trial-like board proceeding.¹¹⁰ Therefore, the procedures outlined in both regulations adequately capture the spectrum of administrative due process rights that the Supreme Court envisioned in its case law. The regulations place heavy burdens on the government, but because each can result in long term consequences for the respondents, their procedures are necessary and fundamentally fair.

D. Evaluation Reports: Army Regulation 623-3

Despite primarily being a rating and evaluation tool, AR 623-3, *Evaluation Reporting System*, also contains significant due process considerations since adverse evaluations carry long-term career implications.¹¹¹ The regulation primarily evaluates the performance of officers and non-commissioned officers (NCOs) "who are best qualified for promotion and assignment to positions of greater responsibility."¹¹² All officers and NCOs undergo some form of periodic evaluation throughout the course of their duties.¹¹³ These evaluations, either in the form of OERs, Academic Evaluation Reports (AERs), or Non-Commissioned Officer Evaluation Reports (NCOERs), are routine, administrative matters that do not trigger due process. However, AR 623-3 contains provisions for adverse evaluations under certain criteria.¹¹⁴ Once this

¹⁰³ See AR 600-37, *supra* note 13, para. 3-4b (enumerating the specific rights); AR 600-20, *supra* note 13, para. 2-17 (incorporating AR 15-6 by reference). Army Regulation 600-37 also contains a right to appeal the reprimand to the Department of the Army Suitability Evaluation Board (DASEB). AR 600-37, *supra* note 13, para. 7-2.

¹⁰⁴ See generally AR 635-200, *supra* note 13, paras. 2-1, 2-2 (outlining the general notice requirements for certain separations initiated under the regulations); AR 600-8-24, *supra* note 13, paras. 4-1, 4-2 (providing criteria for initiation of officer elimination proceedings).

¹⁰⁵ See, e.g., *Bland v. Connally*, 293 F.2d 858 (D.C. Cir. 1961) (discussing stigmatization of an Other than Honorable discharge).

¹⁰⁶ Compare *Greene v. McElroy*, 360 U.S. 496 (1959), with *Cafeteria & Rest. Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 898-99 (1961). The interests are also similar to the distinction the Supreme Court drew in *Bd. of Regents v. Roth* and *Perry v. Sindermann* between tenured and non-tenured employees. See also *Bd. of Regents v. Roth*, 408 U.S. 577 (1972); *Perry v. Sindermann*, 408 U.S. 602 (1972).

¹⁰⁷ See AR 635-200, *supra* note 13, paras. 2-2c(4) (mandating that a Soldier with over six years of total active and reserve service receive a hearing before an administrative separation board), 3-7e (mandating that no Soldier

will be separated under the regulation with discharge characterization of other than honorable unless he or she has been afforded the right to present their case before a separation board); AR 600-8-24, *supra* note 13, para. 4-20 (defining the term probationary officer versus a nonprobationary officer and providing probationary officer's their rights related to being discharged).

¹⁰⁸ AR 635-200, *supra* note 13, para. 2-2b; AR 600-8-24, *supra* note 13, para. 4-11.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See, e.g., *Mindes v. Seamen*, 453 F.2d 197, 198-99 (5th Cir. 1971) (detailing how an Air Force officer's career ended as a direct result of a bad evaluation).

¹¹² AR 623-3, *supra* note 3, para. 1-8a(2).

¹¹³ *Id.* para. 1-8b.

¹¹⁴ *Id.* paras. 3-25, 3-26.

occurs, the evaluation becomes analogous to an administrative reprimand under AR 600-37 due to the implications on an officer or NCO's career.¹¹⁵ Furthermore, under certain situations, an adverse OER can directly trigger an officer's elimination under AR 600-8-24.¹¹⁶ Therefore, the referral of an evaluation report is an adjudicatory administrative proceeding because it puts an Officer or NCO's liberty interests at stake once again through potential career-ending stigmatization.

Even though its effects are comparable to AR 15-6, AR 600-37, and AR 600-20, the referral procedures in AR 623-3 do not measure up to the protections contained in the other regulations, arguably making them deficient in enumerated due process. The procedures themselves outlined in paragraph 3-28 of AR 623-3 include only initial notification and opportunity to comment and they only apply to OERs and AERs, not NCOERs.¹¹⁷ Furthermore, compared to all the regulations examined, AR 623-3 does not contain language similar to the baseline due process protections seen in paragraph 1-9c of AR 15-6.¹¹⁸

One contributing factor to the lack of due process language is the manner in which AR 623-3 mandates the use of derogatory information in an evaluation. Under AR 623-3, only complete and verified derogatory information can be used in an evaluation.¹¹⁹ These rules imply that the necessary due process safeguards are filled by other regulations, such as AR 15-6.¹²⁰ However, the failure to include the usual due process language in AR 623-3 creates a situation where an evaluation might rely on verified derogatory information contained in an informal commander's inquiry and minimal due process has yet to be afforded. Prior to the April 1st, 2016 revision, AR 15-6 itself would also imply that this omission is proper because it specifically references "an adverse evaluation report" when discussing other regulatory procedures that supersede AR 15-6's organic provisions.¹²¹

Because access to supporting evidence is not specifically addressed in paragraph 1-9d of the October 2nd, 2006 version of AR 15-6 as a universal baseline right, a close reading might suggest that a respondent is not entitled to this right unless enumerated in the governing regulation.¹²²

The circular logic of this regulatory gap previously led to situations similar to the introduction, which are nearly analogous to *Greene v. McElroy* because a respondent simply cannot challenge the information used against him.¹²³ Practitioners should be wary of subscribing to this interpretation of AR 623-3 because it arguably violates fundamental fairness.¹²⁴ The spectrum of jurisprudence—originating in the Supreme Court, extending through the Federal Courts, and enumerated in all other similar regulations—all support the proposition that if the Government uses information in an adjudicatory manner, then the Government must provide that information to the respondent in order to satisfy due process. Furthermore, the burden on the Government to provide this information is de minimis compared to the potential harm to a respondent. The April 1st, 2016 revision of AR 15-6 actually address this issue in one of its major changes to the now paragraph 1-12.¹²⁵ These changes should clarify this issue going forward. However, if practitioners are concerned about the legal authority that allows them to release any relevant adverse information, specifically when trying to comply with AR 15-6's new reference to the Privacy Act (discussed below), they need only look to the cited case law. Practitioners representing individual respondents should also look to this authority to justify their requests to obtain information if access is denied.

¹¹⁵ *Id.* See also *Mindes*, 453 F.2d. at 198-99.

¹¹⁶ See AR 600-8-24, *supra* note 13, para. 4-2c(4) (listing a referred Officer Evaluation Report (OER) as one of the basis for initiation of elimination under the regulation).

¹¹⁷ AR 623-3, *supra* note 3, para. 3-28.

¹¹⁸ Compare AR 623-3, *supra* note 3, para. 3-28b, with AR 15-6, *supra* note 10, para.1-12c.

¹¹⁹ See AR 623-3, *supra* note 3, para. 3-19 (mandating that only verified derogatory information be used in evaluations and directing evaluations not be delayed due to incomplete investigations).

¹²⁰ *Id.*

¹²¹ U.S. DEP'T OF THE ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 1-9d (1 April 2006) [hereinafter Old AR 15-6]. ("[D]iscussing the lack of a requirement to refer an investigation conducted under this regulation to a soldier prior to giving the soldier an adverse evaluation report based upon the investigation because the regulations governing evaluation reports provide the necessary procedural safeguards.") (emphasis added).

¹²² *Id.*

¹²³ E-mail from Captain David Ford, Chief, Client Services, 101st Airborne Div., to author (Dec. 09, 2014, 16:53 EST) (on file with author) (noting that his office has seen several issues about releasing information to investigation respondents). See also *Greene v. McElroy*, 360 U.S. 496 (1959). While chapter 4 of AR 623-3 covers requests for commander's inquiries and appeals in the Officer Evaluation Report (OER), Academic Evaluation Report (AER), and Noncommissioned Officer Evaluation Report (NCOER) process, these all occur after the filing of an evaluation when the stigmatizing harm to a respondent's career has already been done. AR 623-3, *supra* note 3, para. 4-1. Further, AR 623-3 specifically states that a commander's inquiry does not have to follow the procedures of AR 15-6, thus preventing a respondent from arguing that the protections of paragraph 1-12c apply. *Id.* para. 4-4c.

¹²⁴ See *Hagopian v. Knowlton*, 470 F.2d 209 (2d Cir. 1972) (noting how prior cases set forth a "feels fair" standard for objective review).

¹²⁵ See AR 15-6, *supra* note 2, para. 1-12d ("AR 623-3, however, prescribes that the referral procedures specified in AR 15-6 will be followed before initiating or directing a relief for cause, if the relief is contemplated on the basis of an AR 15-6 investigation."). Notwithstanding this change, Army Regulation 623-3 itself would require a much larger change, amending paragraph 3-28 to include language similar to all three rights in AR 15-6, paragraph 1-12c and expanding it to NCOERs.

E. Flag Reports: Army Regulation 600-8-2

Like AR 623-3, AR 600-8-2, *Suspension of Favorable Personnel Actions (Flag)*, relies heavily on the due process contained in other regulations. Therefore, practitioners need to be aware of the same due process pitfalls when reviewing action taken under AR 600-8-2 alone. The regulation's primary purpose is to "institute[] a system to guard against the execution of specified favorable personnel actions for Soldiers not in good standing (for example, unfavorable status)."¹²⁶ In other words, it maintains the status quo for Soldiers who are undergoing some sort of unfavorable process such as being the subject of an administrative investigation.¹²⁷ The regulation specifically states that a flag is not punitive and it is not the final disposition in any adverse action.¹²⁸ Therefore, it is intended to merely be an investigatory tool that creates a situation analogous to the Plaintiffs in *Hannah v. Larche* who merely faced an investigation rather than the Plaintiff in *Greene v. McElroy* who was harmed by one.¹²⁹ As a result, the enumerated due process is minimal—written notice of the flag.¹³⁰

Normally, these rights would be sufficient since AR 600-8-2 contemplates some other follow on action occurring.¹³¹ However, situations might develop where the flag process turns adjudicatory, potentially endangering a liberty interest, and thus requiring more robust due process. For example, if the lieutenant in the introduction was promotable, flagging him would also result in a Department of the Army (DA) imposed flag "F" for removal from a promotion selection list.¹³² His promotion would be suspended until the matter is resolved.¹³³ If the final outcome results unfavorably for the respondent, he may be removed from the promotion list, significantly affecting his career.¹³⁴ While AR 600-8-2 relies on due process requirements contained in other regulations, as the analysis of AR 623-3 shows, these requirements may not adequately afford a

respondent access to the information used against him. If a situation arises that exposes an individual flagged using code "F" or another similar code to some long-term career consequences, that individual should be afforded the baseline rights in AR 15-6, paragraph 1-12c. Therefore, practitioners should read those due process rights into these types situations unless another process affords more robust due process protections.

IV. Privacy Act Considerations

One concern practitioners often cite when trying to determine the proper release of information is whether the restrictions contained in both the Privacy Act of 1974¹³⁵ and AR 340-21, *The Army Privacy Program*¹³⁶ limit access. This concern is now heightened with AR 15-6, paragraph 1-12c making specific reference to complying with both the Privacy Act and the Freedom of Information Act (FOIA) when releasing information to respondents.¹³⁷ While a full analysis of the Privacy Act, its interplay with the FOIA,¹³⁸ and the ramifications of noncompliance are outside the scope of this article, practitioners should know that all of the relevant authority favors disclosure of information to a subject of an investigation, especially if that disclosure affords administrative due process.¹³⁹

According to both the statute and the governing Army policy, the Privacy Act provides protections to individuals who have personal information kept "in a system of records" retrieved by the individual's name or other personally identifying information.¹⁴⁰ When an agency collects personal information on an individual, that individual has the right to inspect that information absent a specific exemption prohibiting the disclosure.¹⁴¹ Therefore, practitioners must understand that the Privacy Act is first and foremost a program that allows individuals access to information

¹²⁶ AR 600-8-2, *supra* note 13, para. 1-8.

¹²⁷ *Id.* paras. 2-1e, 2-2 (listing the Army's nontransferable flag codes, do include *inter alia* "L" for commander's investigation, "A" for adverse action, and "D" for a referred OER or a relief for cause).

¹²⁸ *Id.* paras. 2-1b, 2-1c.

¹²⁹ Compare *Greene v. McElroy*, 360 U.S. 496 (1959), with *Hannah v. Larche*, 363 U.S. 420 (1960).

¹³⁰ AR 600-8-2, *supra* note 13, para. 2-6.

¹³¹ *Id.* para. 2-1c, para. 2-9b (listing the various rules for removing various flags).

¹³² *Id.* para. 2-2e. Flag code "F" is initiated by Headquarters, Department of the Army, when a Soldier is pending "removal or consideration for removal" from a command, promotion, or school selection list. *Id.*; see also Memorandum for Record from Chief, DA Promotions Branch, U.S. Army Human Res. Command (HRC), subject: Information Paper on HQDA Flag—Removal from a Selection List (F) (18 July 2013) (discussing the applicability of an "F" flag and the procedures that HRC will follow when the derogatory information has not yet been seen by the promotion board).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 5 U.S.C. § 552a (2012).

¹³⁶ U.S. DEP'T OF THE ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM (5 July 1985) [hereinafter AR 340-21].

¹³⁷ See AR 15-6, *supra* note 2, para. 1-12c(1) (stating that any release of information made under the regulation must comply with FOIA and the Privacy Act).

¹³⁸ 5 U.S.C. § 552 (2012); U.S. DEP'T OF THE ARMY, REG. 25-55, THE DEP'T OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1987) [hereinafter AR 22-55].

¹³⁹ See Colonel (R) Richard L. Huff & Lieutenant Colonel Craig E. Meruka, *Freedom of Information Act to Personal Information Contained in Government Records: Public Property or Protected Information*, ARMY LAW., Jan. 2010 at 2; Major Lassus, *TJAGSA Practice Note: Administrative and Civil Law Notes*, ARMY LAW., Nov. 1991, at 44-50 [hereinafter TJAGSA Note].

¹⁴⁰ 5 U.S.C. § 552a(b) (2012); AR 340-21, *supra* note 136, para. 1-1.

¹⁴¹ AR 340-21, *supra* note 136, para. 1-5.

collected on themselves when that record is retrieved by their name or a personal identifier (e.g. the “LTC Smith 15-6 Investigation”). While the Army has established several exemptions, such as the “general legal files exception” that practitioners might think would apply,¹⁴² provisions such as AR 15-6, paragraph 1-12c show that the Army did not intend for an exemption to apply for an investigation adversely used against an individual. However, should practitioners consider withholding information because they believe an exemption applies, they should first balance both the statute’s language and the reason behind the exemption with the potential harm to a respondent should non-disclosure occur.

The second Privacy Act concern many practitioners have is that disclosing information contained within an investigation, specifically statements and other evidence, might violate a third party’s Privacy Act rights. This concern generally should not control the overall decision about whether to release, primarily because the information contained in the evidence is not normally kept within a system of records since it is not retrieved by the third party’s name or personal identifier.¹⁴³ However, even if it was kept within a system of records, the information could still be disclosed under the routine use Privacy Act exemption so long as the type of disclosure is properly noticed as a routine use disclosure and the actual disclosure itself is compatible with the reason behind the information’s initial collection.¹⁴⁴ In a typical AR 15-6 investigation, any information collected during the investigation would generally fall under routine use since (1) that information is compatible with the purpose of the investigation, and (2) the Army has provided a routine use notice.¹⁴⁵ This would include the identity of the party providing the information so that a respondent may use it to confront and cross-examine the investigation.¹⁴⁶ However, if the investigation contains information whose initial collection was not compatible with the investigation, such as a third party’s Enlisted Record’s Brief (ERB), that information should be removed.¹⁴⁷ When determining whether to release information, practitioners should remember that the Privacy Act’s primary purpose synchs with due process. Unless specifically prohibited by another statute or regulation, or

unless the compatibility test fails, practitioners should err on the side of releasing information in order to satisfy due process.

V. Conclusion

Returning to the scenario highlighted in the introduction, as the ADLAW attorney, you should now recognize that a failure to provide the lieutenant with the commander’s inquiry and supporting evidence would deny the lieutenant adequate due process. You can therefore provide a legal opinion stating that due process requires the release of those portions of investigation related to the lieutenant’s actions. As authority, you can cite to AR 15-6, paragraph 1-12c and discuss how in the absence of more specific protections, this paragraph should apply even though the investigation is merely a Commander’s Inquiry. If necessary, you can also cite to cases such as *Greene v. McElroy* to support releasing adverse information to a respondent when there is the possibility of significant career stigmatization. Finally, should the unit raise any Privacy Act concerns about disclosing the evidence in the investigation, you can opine that the disclosure is covered by the routine use exception since release of that evidence is compatible with the original intent of its collection.

Justice Frankfurter’s words that due process “is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process” are as applicable today as they were when first written in 1951.¹⁴⁸ Due process comes in many forms, but it possesses certain fundamental characteristics that are always present no matter what specific procedure is used. These rights include the right of a respondent to be apprised of the action taken against him or her, the ability to confront the information used to form this appraisal, and the right to cross-examine that information in some form. Nearly every Army Regulation involving the potential loss of a significant liberty or property interest clearly reflects these concepts. However others, such as AR 623-3 and

¹⁴² *Id.* para. 5-5g. Paragraph 5-5 contains all of the Army’s listed Privacy Act exemptions. Others examples include, but are not limited to, Department of the Army Inspector General files, *id.* para. 5-5a, Court Martial Files, *id.* para. 5-5h, and U.S. Army Criminal Investigation Command’s (CID) informant registries, *id.* para. 5-5i.

¹⁴³ See generally 5 U.S.C. § 552a(a)(5) (2012) (defining “system of records”); see also *Henke v. United States Dep’t of Commerce*, 83 F.3d 1453, 1460-61 (D.C. Cir. 1996) (holding that the test for determining a system of records is whether the information is actually retrieved by an individual’s name, not simply retrievable).

¹⁴⁴ 5 U.S.C. § 552a(a)(7) (2012). See TJAGSA Note, *supra* note 139, at 44-45 (explaining how the routine use exemption operates); see also U.S. Army Criminal Investigation Command, *Criminal Investigation Note: Release of Reports of Investigation to Respondents of Administrative Actions*, ARMY LAW., Apr. 1987, at 46 (noting that CID reports of investigation are releasable to respondents in an AR 635-200 separation proceeding under the routine use exception).

¹⁴⁵ AR 340-21, *supra* note 136, para. 3-1, 3-2 (providing routine disclosure notice). The most common method of collecting evidence in an Army

investigation is on a DA Form 2823, Sworn Statement. That form provides a Privacy Act notice informing an individual of potential routine uses of the information. U.S. Dep’t of the Army, DA Form 2823, Sworn Statement (Nov. 2006).

¹⁴⁶ See generally *Greene v. McElroy*, 360 U.S. 496 (1959). Redaction of certain PII, such as a witness’s social security number, would be proper so long as that redaction does not deprive a respondent of a meaningful opportunity to confront the accusations and the accusers. *Id.*

¹⁴⁷ See TJAGSA Note, *supra* note 139, at 48-49 (outlining the current interpretation of the compatibility principle). In the example given, since the personal and administrative information contained on the Enlisted Records Brief (ERB) was not collected specifically because the third party was under investigation, its disclosure would not be compatible with the investigation routine use disclosure. Disclosure of the subject’s ERB would be allowed because it is information contained in a system of records on the subject himself. *Id.*

¹⁴⁸ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951).

AR 600-8-2, contain ambiguity that might lead to an unfair denial of due process. Using case law and focusing on the type of interest involved, the type of action used, and the adequacy of the rights enumerated, military practitioners can clearly identify any of these regulatory gaps and read the appropriate due process protections into the regulation when not enumerated. That way, military practitioners can ensure fundamental fairness for both the Government and the respondent in any procedure where a Soldier stands to lose some interest protected by very the Constitution that the Soldier has sworn to support and defend.