

Command Authority: What Are the Limits on Regulating the Private Conduct of America's Warriors?

Major Troy C. Wallace*

In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life."²

I. Introduction

You are the new staff judge advocate (SJA) assigned to a division. Before leaving for his next assignment, the outgoing SJA tells you the commanding general (CG) wants to institute two new command policies. The first policy would require personally-owned firearms to be stored in each Soldier's respective unit arms room, and the policy would apply to those living on the installation and those residing off-post.³ The second policy would require all Soldiers who operate motorcycles to wear specific articles of personal protective equipment, including a helmet, while operating a motorcycle. Again, this policy would apply to all Soldiers within the division and would apply when operating a motorcycle both on and off the installation, in a state that imposes no requirement to wear a helmet.⁴ One policy appears to conflict with constitutional rights while the other merely interferes with a personal activity.

You attend your first "actions" meeting with the CG in which the policies are discussed, and it is clear he feels strongly about implementing these policies. You return to your office, somewhat unsure about the lawfulness of the policies. What are the possible legal problems? If they are challenged, what are the Government's relative chances for success?

¹ Judge Advocate, U.S. Army. Presently assigned as Operational Law Attorney, U.S. Army North, Fort Sam Houston, Tex. This article was submitted in partial completion of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.

² Chappell v. Wallace, 462 U.S. 296, 300 (1983) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

³ This is a hypothetical policy based on the recent decision in *D.C. v. Heller*, 128 S. Ct. 2783 (2008) (upholding the individual right to bear arms in the home for traditional purposes such as self-defense, completely unrelated to membership in a militia).

⁴ Hawaii state law does not require the use of any protective headgear, such as a helmet. Such a policy exists at the 25th Infantry Division, Schofield Barracks, Hawaii. Command Policy Memorandum from Commanding General, 25th Infantry Division (Light) & U.S. Army, Hawaii, to Military Personnel and Department of Defense Civilian Employees, subject: Green Tab Memorandum Safety-3, Motorcycle/Moped Operating Requirements (15 Aug. 2005) [hereinafter *Motorcycle Policy*]. The motorcycle policy is derived from AR 385-10. U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 11-9d (23 Aug. 2007) [hereinafter *AR 385-10*]. It is likely that the Hawaii policy was promulgated in order to make certain provisions of AR 385-10 punitive. There are no specific punitive provisions in AR 385-10.

The continued escalation in the Army's operational tempo has fueled an emerging trend in the regulation of servicemembers' private conduct.⁵ Increasingly, SJAs are advising commanders who believe they need to regulate broader areas of private conduct. Many of these activities are not necessarily newly regulated areas, but the scope and breadth of some of these policies are now reaching well beyond what commanders have traditionally regulated.

Rather than solely regulating activities that occur on the installation, some policies restrict or even prohibit entirely lawful private conduct off the installation.⁶ Some policies even apply when servicemembers are off-duty and outside the limits of an installation.⁷ These expansive policies naturally raise questions about their lawfulness and appropriateness.

Some policies are legally supportable, but others may improperly interfere with the private affairs of servicemembers. The law arms commanders with enormous and often unchecked power to promulgate policies that impose limitations on personal conduct,⁸ but there are limits to this power. Meanwhile, servicemembers may be more willing to challenge real or perceived intrusions into their personal affairs when they have families and live off an installation. Therefore, legal advisors should be cautious when reviewing and advising on command policies that are broadly conceived and clearly interfere with personal rights. As with many areas of the law, there is some gray area at the intersection of public regulation and personal rights. Stepping into the gray area may subject the command to challenges. Maintaining a reasonable and defensible position by crafting policies that support a legitimate military need while imposing the minimum amount of restriction necessary is the best course of action.

This primer provides a framework for determining whether a proposed command policy is legally supportable.⁹

⁵ This includes an increase in the number of issues addressed in the typical General Order Number 1, which regulates and prohibits various activities when deployed to a combat zone, including sexual relationships, the viewing and possession of pornography, the use of alcohol, and the taking of photographs. See, e.g., Multi-National Corps-Iraq, Gen. Order No. 1 (14 Feb. 2008).

⁶ See *Motorcycle Policy*, *supra* note 4. The motorcycle policy requires the wear of certain protective equipment regardless of the location in which the motorcycle is operated.

⁷ *Id.*

⁸ See examples of challenged orders and policies which have been upheld in Part III *infra*.

⁹ This primer was written with a view towards applicability in the continental United States (CONUS) only. There are, of course, different issues and factors involved in overseas or deployed environments that could substantially alter the analysis provided in this primer. This is particularly

Despite the current state of the law, which allows for vast command discretion, this primer recommends command self-restraint. Substantively, in Part II, this primer discusses the background and development of command authority. This overview considers constitutional, statutory, and regulatory authority, as well as the judicial evolution of personal jurisdiction over servicemember misconduct. Part III explains how command policies are challenged in the military justice system as collateral attacks on courts-martial convictions and in the federal district courts under the Administrative Procedure Act.¹⁰ This primer concludes with practical recommendations and provides a basic approach to conducting legal reviews of command policy which may intrude upon the personal affairs of servicemembers.

II. Background on Command Authority

At its highest level, command authority is drawn from the general power of the Executive Branch of Government granted to the President in the U.S. Constitution.¹¹ Article II confers on the President direct and supreme command authority by virtue of his power as Commander-in-Chief of the armed forces.¹² Some of the President's command authority is delegated to the heads of individual executive departments, including the Department of Defense (DoD).¹³

Through its constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Congress enacted title 10 of the U.S. Code.¹⁴ In doing so, Congress granted certain rights and responsibilities to the SECDEF¹⁵ and the Secretaries of the Army,¹⁶ Navy,¹⁷ and Air Force.¹⁸ Under federal law, the individual service secretaries have specific statutory responsibilities, such as recruiting, organizing, supplying, equipping, training, and

true with respect to the regulation of motor vehicles and firearms, both mentioned hypothetically and actually herein. In addition, this primer is focused more on orders or policies that have the potential to reach into the off-post residence or private life of a servicemember within the United States. *See, e.g.,* United States v. McDaniels, 50 M.J. 407 (C.A.A.F. 1999) (employing a brief analysis of the lawfulness of an order, but quickly concluding by distinguishing between the authority to regulate activities on a military installation and those occurring off the installation).

¹⁰ 5 U.S.C. §§ 500–596 (2006).

¹¹ U.S. CONST. art. II, § 1.

¹² *Id.* art. II, § 2.

¹³ 10 U.S.C. § 113 (2006). The general powers of the Secretary of Defense (SECDEF) under this statute are delegated by Congress, not directly by the President. In his discretion, the President may, of course, delegate the authority to make certain decisions to the SECDEF.

¹⁴ *Id.* §§ 101–18506.

¹⁵ *Id.* § 113.

¹⁶ *Id.* § 3013.

¹⁷ *Id.* § 5013.

¹⁸ *Id.* § 8013.

administering their respective departments.¹⁹ To carry out these responsibilities and implement federal law and DoD policy, the secretaries promulgate administrative regulations which further delegate responsibilities and authority to subordinate commanders.²⁰

Army Regulation (AR) 600-20, *Army Command Policy*,²¹ is the primary source of regulatory guidance for Army commanders. It states that "the key elements for command are authority and responsibility."²² *Army Command Policy* provides for nearly all of the most basic command responsibilities, all of which require the commander to exercise his inherent command authority.²³ These responsibilities include exercising basic military authority,²⁴ maintaining good order and discipline in the unit,²⁵ providing for the well-being²⁶ and medical fitness of Soldiers,²⁷ ensuring equal opportunity both on- and off-duty,²⁸ and preventing Soldiers from being victimized by sexual harassment²⁹ and sexual assault.³⁰ Similarly, other military regulations provide commanders with the authority to accomplish various administrative functions, including the administration of military justice,³¹ the issuance and filing of reprimands,³² and separation from service.³³

In addition to administrative authority and responsibilities, chapter 47 of title 10 also includes the Uniform Code of Military Justice (UCMJ).³⁴ Commanders exercise quasi-judicial disciplinary authority in maintaining

¹⁹ *Id.* §§ 3013, 5013, 8013.

²⁰ *Id.* § 3013(g).

²¹ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) [hereinafter AR 600-20].

²² *Id.* para. 1-5b.

²³ One of the earliest cases to judicially recognize inherent command authority was *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961). Recent recognition of the doctrine by the highest military court can be found in *United States v. Miller*, 66 M.J. 306, 308 (C.A.A.F. 2008).

²⁴ AR 600-20, *supra* note 21, para. 4-6.

²⁵ *Id.* para. 4-1.

²⁶ *Id.* para. 3-1.

²⁷ *Id.* para. 5-4. For example, Chapter 5 provides a source of authority for ordering Soldiers to receive certain immunizations.

²⁸ *Id.* ch. 6.

²⁹ *Id.* ch. 7.

³⁰ *Id.* ch. 8.

³¹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005) [hereinafter AR 27-10].

³² U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986) [hereinafter AR 600-37].

³³ U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

³⁴ Codified by the President in the *Manual for Courts-Martial*.

good order and discipline within their units, which can be accomplished through the power to impose non-judicial punishment³⁵ and to prefer and refer charges to a court-martial.³⁶ Commanders exercise similar quasi-judicial authority when they authorize searches of servicemembers or property under their command or control.³⁷ The power to issue search authorizations is virtually identical to the power of federal judges to issue search warrants to civilian law enforcement.³⁸

One of the most important authorities a commander has within the military justice system stems from the punitive articles of the UCMJ.³⁹ Because of its central role in maintaining military discipline, a commander's power to issue lawfully binding and enforceable orders is significant. Violations of lawful orders can be punished in a variety of ways, including discharge and incarceration.⁴⁰ The power to issue orders is derived from and enforced through Article 90,⁴¹ Article 91,⁴² and Article 92⁴³ of the UCMJ. Article 90 provides the basic legal framework of an order and explains the requirements and prohibitions of orders.⁴⁴ Whether issued orally or in the form of written command policies or general orders, orders that are not patently illegal⁴⁵ on their face are presumed to be lawful.⁴⁶ According to the statute,⁴⁷

³⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2008) [hereinafter MCM].

³⁶ *Id.* R.C.M. 601.

³⁷ *Id.* MIL. R. EVID. 315.

³⁸ *See* FED. R. CRIM. P. 41. This rule provides basic authority for federal district and magistrate judges to issue search warrants. Although the probable cause standards applicable to Military Rule of Evidence 315 and Federal Rule of Criminal Procedure 41 are identical, the procedures are different. Unlike the federal civilian system where warrants must be in writing, the military system allows for oral search authorizations which are documented after the authorization has been granted.

³⁹ The power to impose discipline is one of the most important authorities within the context of the military justice system, although not necessarily the most important objective. Commanders and judge advocates often comment that ninety percent of a commander's time is spent on ten percent of the Soldiers.

⁴⁰ *See* UCMJ art. 90 (2008) (providing for a dishonorable discharge, total forfeiture of all pay and allowances and five years confinement for the willful disobedience to an order of a superior commissioned officer).

⁴¹ *Id.* Article 90 proscribes assaults or insubordination towards a superior commissioned officer. It also provides the basic rules which apply to other articles dealing with violations of orders, such as Articles 91 and 92.

⁴² *Id.* art. 91. Article 91 is the companion statute to Article 92, making punishable disrespect or disobedience to warrant officers and noncommissioned officers.

⁴³ *Id.* art. 92. Article 92 deals specifically with failing to obey a punitive general order or punitive regulation. Local installation command policies promulgated by general officers will fall under Article 92, whereas routine personal orders from officers to subordinates will fall under Article 90.

⁴⁴ *Id.* art. 90c(2).

⁴⁵ *Id.* art. 90c(2)(a)(i).

⁴⁶ *Id.* art. 90c(2)(a) (explaining all of the requirements of a lawful order issued either under Article 90 or Article 92).

orders must also not conflict with the statutory or constitutional rights of servicemembers.⁴⁸ Finally, the scope of an order must serve an official purpose; that is

[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.⁴⁹

Although Article 90 appears to be simple on its face, closer consideration reveals a certain vagueness in the use of some terms. For example, the phrase "all activities reasonably necessary to . . . safeguard or promote the morale, discipline, and usefulness of members" could constitute just about anything a commander believes he needs to regulate. The restriction on interfering with private rights is similarly vague. Ultimately, does the statute's vagueness mean commanders can issue command policies that conflict with servicemembers' private rights? What about statutory or constitutional rights?⁵⁰ Like the answer to many legal questions, it depends. Reviewing military case law offers some insight into how the service courts treat the issue. Before examining the case law, however, we should consider what options servicemembers have when deciding whether to obey or disobey an overly intrusive order.

III. Challenging an Order or Command Policy

A. The Servicemember's Options

A servicemember faced with an order, directive, or policy he disagrees with or considers disobeying has four options: (1) obey the order; (2) obey the order, but challenge it in federal court; (3) disobey the order and challenge any punitive disciplinary action; and (4) disobey the order and challenge it in federal court. An SJA confronted with a new command policy must be prepared to deal with three of these four possibilities. The first option presents no problem at all because the servicemember merely complies with the order despite whatever

⁴⁷ *Id.* art. 90c(2)(a)(v).

⁴⁸ *Id.* *See* discussion of the Supreme Court's treatment of constitutional issues in Part III *infra*.

⁴⁹ *Id.* art. 90c(2)(a)(iv).

⁵⁰ Although paragraph 14c(2)(a)(v), UCMJ, states that an order cannot violate a servicemember's statutory or constitutional rights, Supreme Court case law discussed *infra* (cited at footnotes 107 and 108) casts at least some doubts on the validity of this provision.

disagreement or distaste he has for the policy. The second option is to obey the order while also seeking invalidation of the order through a request for injunctive relief in federal court. In the third case, the servicemember disobeys the order and then challenges the order during the court-martial process. The servicemember's last option is to disobey the order and request injunctive relief in federal court.⁵¹ Since these options give rise to challenges in both the military and federal judicial systems, judge advocates should be prepared to analyze new command policies in this context.

When a servicemember disobeys an order, the command must consider its options and determine whether the order will be upheld if challenged. Typical options include taking no action, taking administrative action, imposing nonjudicial punishment, or preferring court-martial charges. Should charges be referred to court-martial, either directly or after refusal of nonjudicial punishment, the servicemember could then challenge the order at the court-martial itself,⁵² on grounds that the order was unlawful or illegal.⁵³ The order could potentially be challenged again during the military appellate process and again after the formal appellate process is complete, through a collateral attack in federal district court. If the Soldier chooses not to disobey, the final possibility, assuming the servicemember has standing, is to affirmatively challenge the order in federal court, most likely through a request for injunctive relief. Since courts-martial are the more commonly applied option, they will be examined first.

B. The Judicial Evolution of Jurisdiction

Only forty years ago, the Supreme Court ruled in *O'Callahan v. Parker* that court-martial jurisdiction exists over a servicemember only for misconduct that is service-connected.⁵⁴ In reversing the lower courts, the majority in *O'Callahan* expressed grave doubts about a court-martial's ability to protect individual constitutional rights, stating that while civilian courts naturally protect these rights, courts-martial are "marked by the age-old manifest destiny of

⁵¹ In this example, the servicemember may also face the possibility of challenging the order in the court-martial process as well.

⁵² The accused could submit a motion to dismiss. See MCM, *supra* note 35, R.C.M. 907. The accused could also attack the lawfulness of the order during trial on the merits.

⁵³ See UCMJ art. 90c(2)(a).

⁵⁴ 395 U.S. 258 (1969) (reversing convictions for attempted rape, housebreaking, and assault with intent to rape because offenses were committed off-post and while on an evening pass, thereby negating court-martial jurisdiction and affording petitioner a trial by a civilian court). Under *O'Callahan*, only crimes that were connected to the accused's military duties, or crimes committed on a military installation if the accused was "off-duty," were sufficient to establish personal jurisdiction under the UCMJ. *Id.* at 273.

retributive justice."⁵⁵ Despite some deference to the military at the time,⁵⁶ the service-connection test had been the prevailing test of court-martial jurisdiction until just over twenty years ago.

In 1987, the Supreme Court decided *Solorio v. United States*⁵⁷ and abandoned the service-connection test for the more universal, status-based rule that applies today.⁵⁸ Besides finally settling the issue of jurisdiction, the Court in *Solorio* also reaffirmed its view that the military establishment, including the military justice system, was entitled to great deference from judicial review.⁵⁹ While federal courts continued to expand their deference to the military into the 1980s,⁶⁰ the military appellate courts struggled with how to analyze and decide cases involving the lawfulness of orders.

C. Orders and Policies in the Military Courts

In 1958, *United States v. Wysong* was one of the first cases to discuss the lawfulness of orders in the context of the relatively new UCMJ.⁶¹ In *Wysong*, the accused had been ordered by his company commander "not to talk to or speak with any of the men in the company concerned with th[e] investigation except in line of duty."⁶² After violating his

⁵⁵ *Id.* at 266. This opinion from 1969 was indicative of a Supreme Court that perceived serious limitations in how the Bill of Rights were to be applied to servicemembers under the scheme provided for in the UCMJ.

⁵⁶ See, e.g., *Welchel v. McDonald*, 340 U.S. 122 (1950) (deciding that a military accused was not denied due process when he was offered the opportunity to present an insanity defense, while deferring to the military justice system by refusing to question the method by which evidence was reviewed at trial).

⁵⁷ 483 U.S. 435 (1987).

⁵⁸ *Id.* at 451. As had existed prior to *O'Callahan*, the military status of the accused at the time of the commission of an offense was reinstated as the proper standard for determining court-martial jurisdiction. See *Kinsella v. Singleton*, 361 U.S. 234 (1960), cited in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

⁵⁹ *Solorio*, 483 U.S. at 447-48. By the time the Supreme Court decided *Solorio* in 1987, the Military Deference Doctrine had become firmly entrenched in its jurisprudence and would have a far-reaching impact on military as well as political decision-making well into the future. See John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

⁶⁰ See *Goldman v. Weinberger*, 475 U.S. 503 (1986) (involving Air Force member who unsuccessfully sought injunctive relief from a regulation that prevented him from wearing religious headdress (yarmulke)); *Rostker v. Goldberg*, 453 U.S. 57 (1980) (involving male plaintiffs who unsuccessfully sought injunctive relief to prevent enforcement of the Military Selective Service Act); *Brown v. Glines*, 444 U.S. 348 (1980) (involving Air Force captain who unsuccessfully challenged an installation regulation requiring him to obtain prior approval before circulating petitions on base).

⁶¹ 26 C.M.R. 29 (C.M.A. 1958). The UCMJ was first enacted in 1950 and was only eight years old by the time *Wysong* was decided.

⁶² *Id.* at 30. The investigation concerned the alleged sexual promiscuity of his wife and minor stepdaughter, not the accused himself. *Id.*

commander's order by confronting potential witnesses, the accused was tried and convicted at a general court-martial and sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for five years.⁶³

The Court of Military Appeals set aside the specifications related to the violation of the order because the court found that the order "severely restricted" the accused's speech and was overly broad and vague.⁶⁴ The court's main concern was that orders should be tailored to be "specific, definite, and certain."⁶⁵ Other than stating that orders cannot be overly vague, the case offered little additional guidance for practitioners. Nearly twenty years would pass before a case with more comprehensive guidance was published.

In 1986, in *United States v. Green*, the Army Court of Military Review set aside the accused's conviction for violating a Fort Stewart regulation governing alcohol use and intoxication.⁶⁶ The specific provision of the regulation Private Green had been convicted of violating prohibited military personnel from "having any alcohol in their system or on their breath during duty hours."⁶⁷ Despite clear evidence that the accused had been drunk and had assaulted another Soldier as a result of intoxication, the court held that the policy was "standardless, arbitrary, and unreasonable, and that it serve[d] no corresponding military need not better satisfied by statutes and regulations of greater dignity."⁶⁸

In *Green*, the court emphasized two points that later became crystallized in successive case law. The first is that superiors or commanders may regulate "activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the [service]."⁶⁹ The second point qualifies the first, stating that the "regulatory authority of a commander is not unlimited Orders and directives which only tangentially

further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close judicial scrutiny and may be invalid and unenforceable."⁷⁰ Unfortunately, the decision in *Green* failed to explain what level of scrutiny applies when balancing a personal right and a legitimate military need. This standard would become clearer only after several more years of litigating orders and policies at courts-martial.

Two kinds of "lawfulness of an order" cases became prevalent during the 1980s and early 1990s: cases challenging safe sex orders and the regulation of alcohol. With respect to the former, accused servicemembers with human immunodeficiency virus (HIV) challenged command orders requiring servicemembers to engage in safe-sex practices including (1) informing potential partners of their disease; and (2) wearing condoms during sexual activity.⁷¹ While the courts recognized the personal right of servicemembers to engage in sexual relations, they nevertheless found that commanders have a "compelling interest" in maintaining the health and well-being of both servicemembers and civilians.⁷² In addition, the courts required that orders be "specific, definite, and certain" and not impose an undue burden on private rights.⁷³

In addition to "safe-sex" orders, the military courts reviewed many cases involving the regulation of alcohol.⁷⁴ The courts have approached challenges to alcohol consumption orders similarly to the issue of safe-sex orders. Courts have agreed that commanders may issue orders that

⁶³ *Id.*

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* But see *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (holding that the use of "no contact" orders in situations involving suspected fraternization do not violate an accused's Sixth Amendment confrontation rights and are thus lawful because they rationally relate to a legitimate military need, namely the preservation of good order and discipline).

⁶⁶ 22 M.J. 711 (A.C.M.R. 1986).

⁶⁷ *Id.* at 714.

⁶⁸ *Id.* at 719. The specific authority the court was referring to was a recent re-publication of AR 600-85, which had occurred six months before promulgation of the Fort Stewart regulation. The two regulations had material provisions in direct conflict with the other. The Army regulation imposed no criminal liability upon the accused, whereas the Fort Stewart regulation criminalized the mere presence of alcohol on the breath. For the current version of AR 600-85, see U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (2 Feb. 2009).

⁶⁹ *Green*, 22 M.J. at 716.

⁷⁰ *Id.* See also *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order requiring Sailor who had significant financial problems to report personal financial transactions held invalid because it was overly broad and did not satisfy a legitimate military need).

⁷¹ See *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990) (holding that orders issued for the purpose of protecting civilians from the harmful acts of servicemembers are clearly valid); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Ebanks*, 29 M.J. 926 (A.F.C.M.R. 1989) (affirming conviction for disobeying "safe-sex" order and finding that the order had a valid military purpose); see also *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996). The accused in *Pritchard* was convicted of violating a "safe-sex" order with his own spouse. Because the accused agreed that the order was lawful during the providency inquiry, the court did not otherwise analyze the lawfulness of order. The court did, however, admit that there might have been a potential issue requiring constitutional analysis absent the stipulation.

⁷² See *Dumford*, 30 M.J. 137; *Womack*, 29 M.J. 88.

⁷³ *Womack*, 29 M.J. at 90.

⁷⁴ See, e.g., *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988). *Kochan* involved a nineteen-year-old Sailor stationed in Hawaii who had been ordered not to consume alcohol until he reached twenty-one years of age. *Id.* at 574. The Sailor violated the order by drinking alcohol at a party in a private residence. *Id.* Although the minimum drinking age in Hawaii was twenty-one, it was not unlawful for persons under twenty-one to consume alcohol in private. The court in *Kochan* held that the "no drinking" order was illegal because it improperly restricted the accused's private rights without satisfying any legitimate military need. *Id.* at 575.

infringe on the personal rights⁷⁵ of servicemembers if (1) there is a legitimate military need;⁷⁶ (2) the order does not conflict with service regulations;⁷⁷ (3) and the order is narrowly tailored to satisfy the military need.⁷⁸ The order may not be overly vague, and it must rationally relate to the military need to be served.⁷⁹ In addition, a commander need not first find that unlawful, prejudicial, or service-discrediting misconduct will occur if the order is not issued before issuing the order.⁸⁰ Rather, an order may be preventive in nature, fulfilling the purpose of “safeguard[ing] or promot[ing] the morale, discipline, and usefulness of members of the command.”⁸¹

Both the safe-sex cases and the alcohol consumption cases demonstrate that for an order or policy to be valid and enforceable, it must serve a valid military purpose. Stated differently, an order must be rationally related to a legitimate military need. Orders may infringe on the personal or private rights of a servicemember, but, in addition to having a valid military purpose, they must be specific, clear, and reasonable in light of that purpose. Orders or policies that comply with these provisions will likely pass judicial scrutiny in the military justice system.

So, in the introductory example, what is the likelihood that the two new command policies will be upheld? The motorcycle policy will likely survive scrutiny in a court-martial proceeding. Even though the policy arguably

infringes on the private right to choose whether to wear safety equipment, maintaining the safety of servicemembers represents a valid military purpose, and the policy is specific and narrowly tailored to meet identifiable and genuine safety concerns. In contrast, the policy requiring servicemembers to secure their firearms on-post would almost certainly fail. Although firearms raise safety concerns, this policy is very broad in scope and unnecessarily infringes not only on private rights, but judicially recognized constitutional rights as well.⁸² Therefore, a military court would likely find this policy invalid and dismiss charges related to the policy.⁸³ The clear discriminator between these two relatively easy examples is the degree of protection afforded the rights; one is constitutionally protected while the other is not.

Now assume a servicemember has refused to comply with the policies. As stated earlier, the command has the option of taking administrative action against the servicemember or prosecuting the servicemember at a court-martial. The next section briefly discusses the challenges servicemembers may initiate in federal court against court-martial convictions or administrative decisions.

D. Federal Judicial Remedies

Servicemembers can challenge the military’s judicial or administrative response to the violation of a policy in federal district court. In the case of courts-martial, federal courts will collaterally review a conviction after a servicemember’s military criminal appeals have been exhausted.⁸⁴ In the case of adverse administrative measures,⁸⁵ the servicemember can

⁷⁵ That is, the basic freedoms associated with daily living. Contrast this with rights implicating a servicemember’s fundamental constitutional rights, such as the right to marry or to procreate.

⁷⁶ See *United States v. Wilson*, 30 C.M.R. 165 (C.M.A. 1961) (holding blanket prohibition on consuming alcohol at any time, under any circumstances, unlawful for failing to satisfy a military need). *But see United States v. Blye*, 39 M.J. 92 (C.M.A. 1993) (holding order not to consume alcohol can be legally issued so long as it relates to a military need, such as the protection of the unit, victims, potential witnesses, or to ensure a defendant’s appearance at trial).

⁷⁷ See *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989). The accused was a known alcoholic who had been receiving treatment and who was pending discharge from the Coast Guard when he was granted a liberty pass for one evening, with the caveat order by his commander that he could not consume alcohol. After violating the order not to imbibe, he was tried and convicted. The court agreed that an order not to consume alcohol could be lawful, but the order in *Roach* was not because it conflicted with a Coast Guard personnel regulation.

⁷⁸ Orders may be preventative in nature. See UCMJ art. 90c(2)(a)(iv) (2008); *United States v. Padgett*, 48 M.J. 273, 278 (C.A.A.F. 1998); *United States v. Blye*, 39 M.J. 92, 94–95 (C.M.A. 1993).

⁷⁹ See *Padgett*, 48 M.J. 273. The accused had been romantically involved with a fourteen-year-old female and was ordered to cease all contact with the underage girl. The order was very broad, stated no time limitations or other stipulations, and was intended to permanently end the relationship. The court upheld the order as lawful because it served the military purpose of “protecting a 14-year-old girl and the reputation of the military.” *Id.* at 278. *Padgett* is heavily cited in recent military case law dealing with the lawfulness of an order.

⁸⁰ *Id.* at 278.

⁸¹ *Id.* See also UCMJ art. 90c(2)(a).

⁸² See *D.C. v. Heller*, 128 S. Ct. 2783 (2008). As stated earlier, this analysis applies in the context of living off military installations within CONUS. Firearms can be intensely regulated in overseas jurisdictions where status of forces agreements (SOFA) or other international agreements apply.

⁸³ The broad scope and application of an installation-wide policy should be contrasted with a narrowly tailored personal order given to an individual Soldier for his protection or those around him. In the case of domestic violence, or similar situations, personal orders issued for reasons of safety will almost always be lawful as satisfying a legitimate military purpose. Thus, an order requiring a Soldier to temporarily surrender weapons for the purpose of protecting a spouse or children would probably be lawful. Obviously, there are issues with the scope and duration of such an order, requiring considerably more thought than that given to routine orders.

⁸⁴ See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 749–50 (1975) (reversing district court injunction imposed against Army captain’s court-martial); *United States v. Augenblick*, 393 U.S. 348, 349–50 (1969) (reversing Court of Claims assertion of jurisdiction and order of backpay for alleged constitutional violations resulting in court-martial conviction); *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983) (affirming Court of Claims dismissal of servicemember petition for reversal of his court-martial conviction, reinstatement and backpay).

⁸⁵ Administrative action could be in the form of a written reprimand, reduction in grade, or separation from the service. Similar challenges could also arise from specific provisions in service regulations that either restrict or prohibit otherwise lawful activities. See, e.g., AR 385-10, *supra* note 4, para. 11-9d (purporting to “require” Soldiers to wear certain protective clothing and equipment while operating a motorcycle, even though the regulation contains no punitive language creating a legal obligation to comply).

request injunctive relief⁸⁶ or collaterally attack the underlying decision itself in federal court.⁸⁷ The differences in the standards of review for each, however, are significant. Nevertheless, in all cases, federal courts give great deference to military officials and are loath to interfere in purely military matters.⁸⁸

1. Collateral Attacks on Courts-Martial Convictions

Servicemembers may challenge court-martial convictions based on violations of orders or policies in federal court. However, collateral attacks in federal court are not opportunities to re-litigate the underlying court-martial.⁸⁹ Collateral attacks on court-martial convictions are limited to challenges based on constitutional grounds.⁹⁰ In addition, collateral attacks must allege a violation of a significant constitutional due process right in the trial process itself.⁹¹ This narrow window of collateral attack is open only to those issues addressing fundamental fairness in military proceedings and the constitutional guarantees of due process.⁹² Mere allegations of constitutional violations alone are insufficient.⁹³ If the military courts have previously litigated the constitutional issues raised “fully and fairly,” federal courts will refrain from asserting jurisdiction and substituting its judgment for that of the military courts.⁹⁴ On the other hand, if a federal court determines that a

constitutionally unfair trial has taken place, the court may exercise its discretion and grant review of the case.⁹⁵

If a servicemember is successful in challenging his court-martial, the federal district court can overturn the military criminal conviction.⁹⁶ The court could order the servicemember reinstated as if he had never left the military, order years of backpay, and require any remedial promotion boards and other favorable consideration for the time the servicemember spent absent from the military. In light of federal courts’ power of review, judge advocates should advise commanders that their decisions are subject to review and potential reversal.

Based on the discussion above, what is the proper analysis and advice on our two command policies? The policy requiring safety equipment raises no constitutional issues, so it has almost no chance of collateral review. By contrast, the policy governing firearms raises concerns about an individual’s right to bear arms under the Second Amendment.⁹⁷ Therefore, if a servicemember were convicted of violating this policy at a court-martial, and the military courts failed to adequately address the constitutional questions involved, federal review and reversal could occur.⁹⁸ The prudent recommendation would be to advise against the firearms policy but support the motorcycle policy.

⁸⁶ See 28 U.S.C. § 1651 (2006) (outlining general power of federal courts to issue all writs incident to the performance of their judicial function). This statute grants federal courts the power to grant injunctive relief.

⁸⁷ See, e.g., *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In *Mindes*, an Air Force officer sought review of an adverse officer evaluation report (OER) after exhausting all possible avenues of redress. The court fashioned a detailed analysis, discussed *infra* in Part D.2, for when military decisions should be reviewed and remanded the case for such a review. *Id.* at 201–02.

⁸⁸ See *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733, 758–59 (1974); *Burns v. Wilson*, 346 U.S. 137, *reh’g denied*, 346 U.S. 844 (1953).

⁸⁹ *Schlesinger*, 420 U.S. at 746.

⁹⁰ *Bowling v. United States*, 713 F.2d 1558, 1560–61 (Fed. Cir. 1983).

⁹¹ *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (“[A] constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, that the proceeding is more a spectacle or trial by ordeal than a disciplined contest.”). The Court cited the 1923 case of *Moore v. Dempsey*, 261 U.S. 86 (1923), as an example. Charged with first-degree murder, the African-American defendants in *Moore v. Dempsey* had no possibility of a fair trial. The entire trial lasted only forty-five minutes; racial discrimination pervaded the all-white jury; the court-appointed defense attorney called no witnesses; and the jury took less than five minutes to render guilty verdicts. *Augenblick* makes it clear that trial errors at courts-martial, even those of an evidentiary nature and those that may affect the outcome of the trial, do not necessarily rise to a constitutional level justifying collateral review.

⁹² *Matias v. United States*, 19 Cl. Ct. 635 (1990), *aff’d*, 923 F.2d 821 (Fed. Cir. 1990).

⁹³ *Augenblick*, 393 U.S. at 351–52, 356.

⁹⁴ *Burns v. United States*, 346 U.S. 137, 142, 144, *reh’g denied*, 346 U.S. 844 (1953).

2. Servicemember Attacks on Administrative Actions

Servicemembers can also seek review in federal court of command policies or adverse administrative actions taken against them. These attacks can be brought in one of two ways. The first type of challenge involves direct attacks on substantive military decisions.⁹⁹ The second challenge is in the form of injunctive relief.¹⁰⁰

Although not required, a review of command actions or policies often involves the initiation of adverse

⁹⁵ *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).

⁹⁶ See 28 U.S.C. § 1331 (2006); *Burns*, 346 U.S. at 144, *reh’g denied*, 346 U.S. 844 (1953); *New v. Cohen*, 129 F.3d 639, 648 (D.C. Cir. 1997). The power of federal courts to review the constitutionality of courts-martial convictions comes generally from federal question jurisdiction under 28 U.S.C. § 1331. As stated in *Burns*, a federal court’s power to overturn a court-martial conviction would be based on constitutional due process grounds and would be reviewed only in the unlikely event that the military court of appeals failed to adequately address alleged violations. *Burns*, 346 U.S. at 144.

⁹⁷ U.S. CONST. amend. II.

⁹⁸ See *D.C. v. Heller*, 128 S. Ct. 2783 (2008). The author recognizes the unlikely scenario that a military trial or appellate court would fail to adequately address the constitutional issues.

⁹⁹ Servicemembers could also choose to obey an order, but also collaterally attack it.

¹⁰⁰ 28 U.S.C. § 1651 (2006); FED. R. CIV. P. 65.

administrative action. Because the amount of due process afforded to a servicemember in an administrative action is far less than that of a court-martial, federal court review of administrative actions is more expansive than the limited “constitutional review” involved in the collateral attack of courts-martial. When reviewing adverse administrative actions, federal courts can consider possible constitutional violations, regulatory violations, or policy violations and whether due process has been denied as a result of these violations.¹⁰¹ However, review of administrative actions is still limited and the doctrine of deference briefly discussed earlier in Part III.B still applies.¹⁰²

Alternatively, servicemembers may file for a preliminary injunction (PI) or a temporary restraining order (TRO) in an effort to compel the military to act or to refrain from acting.¹⁰³ The PI and TRO are designed to keep the status of the parties static until a court can consider the merits of the challenged action.

In most federal circuits, servicemembers who attack substantive administrative decisions¹⁰⁴ or seek injunctive relief must survive the test enumerated in *Mindes v. Seaman*,¹⁰⁵ which governs the review of military administrative actions and policies.¹⁰⁶ Because most Army

installations are located in circuits applying *Mindes*, judge advocates must understand the *Mindes* analysis in order to provide commanders with intelligent and reasoned advice.¹⁰⁷

Under the *Mindes* test, courts will not review internal military decisions unless a plaintiff alleges: (1) a violation of the Constitution, a federal statute, or a military regulation and (2) has exhausted all available administrative remedies.¹⁰⁸ If the servicemember meets both of these requirements, the court must then weigh four factors to determine whether review should be granted. These factors are (1) the nature and strength of the servicemember’s claims; (2) the potential injury to the servicemember if review is denied; (3) the extent to which review would potentially interfere with military functions; and (4) the extent to which military discretion or expertise is involved.¹⁰⁹ The last two elements of the balancing test recognize that military expertise in the decision-making process is difficult to second-guess.

In addition to the limited review of administrative actions and policies, extreme deference is given to the judgment of policymakers.¹¹⁰ Federal courts recognize that the military is a specialized society, separate from civilian society with laws and traditions of its own.¹¹¹ Even if a servicemember successfully overcomes the four-prong test in *Mindes*, the court will proceed with great deference to policymakers and commanders in reviewing the administrative decision.¹¹² Nowhere is the doctrine of

¹⁰¹ See *Hanna v. Sec’y of the Army*, 513 F.3d 4 (1st Cir. 2008) (finding the Army’s wrongful denial of a request for conscientious objector status and discharge resulted in permanent injunction preventing applicant physician from being ordered to active duty); *Witt v. Sec’y of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (remanding case challenging “Don’t Ask, Don’t Tell” to the district court for findings on procedural due process after deciding that the policy was subject to the heightened scrutiny test in light of the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)); see also Administrative Procedures Act (APA), 5 U.S.C. §§ 500–596 (2006) [hereinafter APA].

¹⁰² See *supra* note 59 and accompanying text.

¹⁰³ 28 U.S.C. § 1651 (2006); FED. R. CIV. P. 65.

¹⁰⁴ This is accomplished by alleging a violation of the APA.

¹⁰⁵ *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (enumerating a test for reviewability and expressing reluctance to substitute the judgment of courts for those who possess military expertise). Most circuits have expressly adopted the *Mindes* test. See *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984) (applying *Mindes v. Seaman*); *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985) (adopting the test in *Mindes v. Seaman*); *Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983) (applying the *Mindes* analysis); *Wenger v. Monroe*, 282 F.3d 1068 (9th Cir. 2002) (applying *Mindes v. Seaman*); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981) (adopting the *Mindes* test); *Winck v. England*, 327 F.3d 1296 (11th Cir. 2003) (limiting application of *Mindes* to cases involving facial challenges to regulations or cases that are not incident to military service).

¹⁰⁶ If a servicemember challenges an order in a circuit that has not adopted *Mindes*, most of those circuits will first apply a test for justiciability. If the allegations are found to be reviewable, the courts will then employ traditional deference standards which are difficult to overcome. See *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981) (rejecting the rule in *Mindes v. Seaman* and holding instead that once a constitutional claim has been ruled to be justiciable under *Gilligan v. Morgan*, 413 U.S. 1 (1973) and *Orloff v. Willoughby*, 345 U.S. 83 (1953), it should be heard and decided on the merits); *Knutson v. Wisconsin Air Nat’l Guard*, 995 F.2d 765 (7th Cir. 1993) (rejecting the rule in *Mindes* and employing broad deference to the military); *Watson v. Arkansas Nat’l Guard*, 886 F.2d 1004 (8th Cir. 1989)

(rejecting *Mindes* and applying the holding of another Fifth Circuit case, *Crawford v. Texas Army Nat’l Guard*, 794 F.2d 1034 (5th Cir. 1986), which essentially applies the broader deference rule of *Chappell v. Wallace*, 462 U.S. 296 (1983)); *Kries v. Sec’y of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (rejecting *Mindes* and applying an analysis similar to the Third Circuit’s decision in *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981)).

¹⁰⁷ All of the military installations in the following states are located in *Mindes* jurisdictions: Arizona, Alabama, California, Colorado, Florida, Georgia, Louisiana, Maryland, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, and Virginia. This includes the vast majority of Army installations within CONUS.

¹⁰⁸ *Mindes*, 453 F.2d at 201.

¹⁰⁹ *Id.*

¹¹⁰ *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

¹¹¹ *Id.* at 746. See *Middendorf v. Henry*, 425 U.S. 25 (1976) (holding that servicemembers are not entitled to counsel at summary courts-martial, under either Fifth or Sixth Amendment grounds); *Parker v. Levy*, 417 U.S. 733, 758–59 (1974) (refusing to overturn conviction of officer/physician for making disloyal statements about the propriety of the Vietnam War and refusing to conduct training for Special Forces medics preparing to deploy); *United States v. New*, 350 F. Supp. 2d 80 (D.D.C. 2004) (refusing to overturn servicemember’s conviction for refusing to wear United Nations uniform accessories in connection with peacekeeping deployment to Macedonia); *Staton v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975) (refusing to overturn former Army warrant officer’s court-martial conviction for fraternization).

¹¹² See, e.g., *Weiss v. United States*, 510 U.S. 163 (1994) (addressing unsuccessful challenge to The Judge Advocate General appointment of military judges); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (involving Air Force member who unsuccessfully sought injunctive relief from a regulation that prevented him from wearing religious headdress

military deference more alive than in the review of administrative decisions. This is consistent with the traditional reluctance to review or intervene in matters concerning the military, especially those involving personnel decisions.¹¹³ It is also consistent with the recognition that the military is a specialized society, which requires duty and discipline unlike anything in civilian life.¹¹⁴ With this in mind, how do our two command policies fare under this analysis?

A servicemember who challenges the motorcycle policy administratively would likely not meet the *Mindes* test for reviewability because showing a *prima facie* violation of the Constitution, a federal statute, or a regulation would be difficult.¹¹⁵ Assuming the challenge did manage to pass the initial test for reviewability, the servicemember would still have difficulty satisfying the remaining four-prong balancing test under *Mindes*. Ultimately, most courts would probably find no harm to the servicemember and hesitate to interfere with the commander's decision to improve the safety of his Soldiers and members of the community.

In contrast, a servicemember attacking the firearms policy would likely have no difficulty passing the initial test for reviewability. The four-prong test would also weigh

strongly in favor of the servicemember based on the weight of the factors and the harm the servicemember would suffer if review were denied. In this case, the court would likely grant review and might enjoin the commander from enforcing the policy.

IV. Conclusion

Successfully challenging courts-martial convictions and military decisions in federal court is quite difficult. The military deference doctrine has become firmly entrenched in federal jurisprudence in the last thirty years, giving considerable discretion to policymakers and commanders. In addition, the *Mindes* test for reviewability has also become well-established.

Modern courts-martial are no less protective of an accused servicemember's rights than any other court. As such, federal court review of a conviction is only barely within the realm of possible. The command will almost always prevail in this situation. By contrast, the chances of challenging the lawfulness of an order or regulation at a court-martial are less clear, and the likelihood that an order or regulation will survive the scrutiny of a court will depend on the quality of the analysis given to the order or policy before its implementation.

In analyzing the lawfulness of an order, judge advocates should focus on whether the military need or objective is fairly balanced with the regulated activity and the degree to which the order interferes with the servicemember's private rights. Since most orders will interfere with a personal right, the intent and effect of the policy must be clear and narrowly tailored to meet the military need. If the order potentially infringes upon a constitutional right, it must be subjected to intense legal scrutiny prior to implementation as it would be during trial or on appeal. If the order is deemed lawful in light of this analysis, a servicemember's chances of being granted federal review will be slight at best.

Since the earliest deployments to Afghanistan and Iraq, commanders have increasingly regulated the private conduct of their Soldiers. Judge advocates reviewing new command policies should subject these potential policies to the analyses discussed in this primer before recommending approval. Although the military is afforded more deference now than ever, the courts do review and reverse bad decisions. Moreover, today's new servicemembers may be more inclined to litigate infringements on their liberty, whether real or perceived. Therefore, conducting a thorough legal analysis and imposing the minimum burdens necessary should be commanders' approach when considering whether to impose additional restrictions on America's warriors.

(yarmulke)); *Rostker v. Goldberg*, 453 U.S. 57 (1980) (involving male plaintiffs who unsuccessfully sought injunctive relief to prevent enforcement of the Military Selective Service Act); *Brown v. Glines*, 444 U.S. 348 (1980) (involving Air Force captain who unsuccessfully challenged an installation regulation requiring him to obtain prior approval before circulating petitions on base); *Witmer v. United States*, 348 U.S. 375 (1955) (refusing to grant relief to conscientious objector applicant, based in part on the doctrine of deference); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("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."); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (dismissing challenge to DoD's "Don't Ask, Don't Tell" policy on homosexual conduct). *But see* *Hanna v. Sec'y of the Army*, 513 F.3d 4 (1st Cir. 2008) (overturning Army's denial of conscientious objector status and discharge based finding of "no basis in fact" for the denial); *Witt v. Sec'y of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (remanding "Don't Ask, Don't Tell" case brought by dismissed Air Force officer for findings on substantive due process claims as applied to appellant-officer, in light of the Supreme Court's decision regarding the criminality of homosexual conduct in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹¹³ See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."); see also *Goldberg*, 453 U.S. at 64-65 (cases involving national defense and military affairs deserve the greatest possible deference); *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991) (discharge decisions within the discretion of the military); *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986) (finding that an officer seeking injunctive relief against the National Guard failed to satisfy the four-prong test of *Mindes* and holding that a decision on whether to transfer a servicemember is a matter within the discretion of the military, and, consistent with doctrine of deference, will not be disturbed).

¹¹⁴ *Schlesinger*, 420 U.S. at 757 (explaining that the nature of the military requires certain demands that are "without counterpart in civilian life").

¹¹⁵ This example, and the one following it, assumes that the servicemember has exhausted any review or complaint process the command may have established.