SENTENCE FIRST—VERDICT AFTERWARDS: DISHONORABLE DISCHARGES WITHOUT TRIAL BY COURT-MARTIAL?

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"Herald, read the accusation!" said the King. On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment-scroll and read as follows:

"The Queen of Hearts, she made some tarts,
    All on a summer day:
The Knave of Hearts, he stole those tarts,
    And took them quite away!"

"Consider your verdict," the King said to the jury. "Not yet, not yet!" the Rabbit hastily interrupted. "There's a great deal to come before that!"

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"Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice.

Lewis Carroll, Alice in Wonderland
Chapters XI and XII

At the close of the Panmunjom truce negotiations, 21 American prisoners of war refused repatriation, rejecting every appeal that they reconsider. On January 22, 1954, their last day of grace expired and they moved northward with the enemy. Their families and friends were shocked and saddened. The American people were dismayed that there should be even 21 American soldiers who would choose communism. But

* See Contributors' Section, Masthead, p. 656, for biographical data.
their decision seemed final and irrevocable, and under the terms of the Armistice Agreement of July 27, 1953, we had no choice but to let them go.  

All 21 were Army enlisted men. The Army proceeded to drop them from its rolls as deserters and to issue them administrative discharges, so called "undesirable discharges." When word of this proposed action reached the Secretary of Defense, the Honorable Charles E. Wilson, he said that the men should be dishonorably discharged. The Judge Advocate General of the Army advised the Secretary of the Army that this could not be done except pursuant to the sentence of a general court-martial. When he learned of this, the Secretary of Defense requested the opinion of the General Counsel of the Department of Defense, the Honorable H. Struve Hensel, who said that it could be done. Secretary Wilson thereupon ordered the Secretary of the Army to issue dishonorable discharges to the men. He complied.

Secretary Wilson saw fit to expand somewhat on his decision. He took full responsibility for it, saying that the whole business was "sordid," that the men had "disgraced their service and country," and that Army authorities felt that the penalty was just and "the least that should happen to them." He pointed out that the refusal of the prisoners to come home had raised a new issue, one which the United States had not faced in the past, in that the men had placed themselves beyond the reach of court-martial process, but that the Army had tried to deal with it in the traditional way "through the procedures of the Judge Advocate General's Office." "They were a little confused about it," he added. "They were tied up in the ordinary red-tape procedures." Whereas he saw no reason why, in a case of this sort, the Department of Defense should not go back to "fundamental law." What this fundamental law was, he did not explain.

The Secretary was untroubled by possible legal objections. "I sup-

2 The events leading up to this decision, and the personal backgrounds of the men, are told in the recent book by Virginia Pasley (who is not related to the writer), Twenty-One Stayed (1954). Recently, four of the men returned to the United States. One is said to have died.
3 Unpublished Opinion Memorandum for the Secretary of Defense, January 25, 1954. Through the courtesy of the Office of the General Counsel of the Department of Defense, a copy of the opinion has been made available to the writer. See Appendix to this article.
pose the lawyers will argue about it, but that’s all right,” he said. “You must consider that hundreds of thousands bled and many died. I believe in charity and justice but you have to consider the American people and the morale of the men in our services.” When and if the men ever came back, they could challenge the validity of their discharges if they so desired.

Others were not so sure. One anonymous Army officer was quoted as saying: “If the Secretary can dishonorably discharge these traitors because he doesn’t like what they’ve done, he can also dishonorably discharge Gen. Matthew Ridgway because he doesn’t like the General’s argument in favor of a bigger Army budget. He doesn’t need a reason. He can just not like you.”

But later President Eisenhower was quoted as saying that “he knew of no action that could be taken but to discharge them dishonorably, as Mr. Wilson has ordered the Army to do.” This seemed to settle the matter. Thereafter very little was heard about it until the recent return of four of the men revived interest in their story. It may be significant, however, that no more dishonorable discharges have been issued without trial.

Now, two years later, it is time that the matter be reconsidered. I submit that Secretary Wilson’s action was illegal, and further that it was a betrayal of the “fundamental law” on which he claimed to rely.

6 Presumably by appealing to the Army Discharge Review Board (58 Stat. 286 (1944), 38 U.S.C. § 693h (1952); 32 C.F.R. § 581.2 (1955)), and thence to the Army Board for the Correction of Military Records (60 Stat. 812, 837 (1946), 5 U.S.C. § 191(a) (1952); 32 C.F.R. § 581.3 (1955)). See Secretary Wilson’s testimony to this effect in Hearings before the Senate Committee on Armed Services, 83d Cong., 2d Sess., on S. 3096 (Doctor Draft Act Amendments) at 148-49 (1954). During this testimony, Mr. Wilson reaffirmed his opinion that his decision to order dishonorable discharges was the right one, and the one the American people wanted. Hearings, supra, at 11, 149. Court-martial, or dropping the men as deserters, was ruled out on the theory that either action would violate the terms of the truce agreement. N.Y. Times, June 19, 1955, p. 4, col. 2. The Army did make plans to court-martial the first three men who returned for their acts committed in prison camp before their fateful decision. But in United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), Note 41 Cornell L.Q. 498 (1956) the Supreme Court held that discharged servicemen could not validly be tried by court-martial. This was followed by Judge Goodman’s release of the three on habeas corpus (N.Y. Times, Nov. 9, 1955, p. 19, col. 2), a ruling which the Army has decided not to contest (N.Y. Times, Nov. 17, 1955, p. 14, col. 1). An attorney for the men is reported as threatening to sue for back pay and honorable discharges (Ibid.). If he does, the thesis of this article will be tested in court.
I. THE DISHONORABLE DISCHARGES WERE ILLEGAL

"Although the defendant may be the worst of men; . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."


In holding that a dishonorable discharge may be awarded only pursuant to the sentence of a general court-martial, the Judge Advocate General of the Army acted in accord with a long line of military tradition. In overruling him, the General Counsel of the Department of Defense advanced the following arguments:9

(i) The Secretary of Defense may exercise or direct the exercise of any authority vested in the Secretary of the Army;
(ii) An 1806 statute,10 still in effect, authorizes the Secretary of the Army to discharge an enlisted man at any time, without restriction or limitation on the type of discharge;
(iii) The prior opinions of the Judge Advocate General that a dishonorable discharge may be issued only pursuant to sentence of a court-martial were based on Army Regulations, which are not binding on the Secretary who promulgates them;
(iv) The Uniform Code of Military Justice does not expressly or impliedly repeal or impair the power of the Secretary of the Army conferred by the 1806 statute;
(v) The issue by the Secretary of the Army of any type of discharge is a discretionary act not subject to review in the courts.

Proposition (i) may be conceded. Propositions (ii) and (iii) are, I believe, incorrect. Proposition (iv) is misleading. Proposition (v), insofar as it relates to a dishonorable discharge, has never been tested in any court. I submit that it is not the law.

(a) The Different Kinds of Discharges Distinguished

At the outset, it seems desirable to outline the various types of military discharges currently in use for enlisted men. They are five in number:

(i) Honorable Discharge;
(ii) General Discharge under Honorable Conditions;
(iii) Undesirable Discharge;

(iv) Bad Conduct Discharge;
(v) Dishonorable Discharge.\(^{11}\)

The first three are awarded administratively, the last two by sentence of court-martial.\(^{12}\)

(i) *Honorable Discharge*

This is the form customarily issued a soldier after completion of a period of satisfactory service. It is a "formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor."\(^{13}\) It entitles the holder to all rights under the various veterans' benefit statutes. It has been characterized as "an extremely valuable property right as well as a personal right."\(^{14}\)

(ii) *General Discharge Under Honorable Conditions*

This type, of relatively recent origin, is authorized for soldiers who, although their service has been honorable, do not meet the requirements for an honorable discharge, for example, a soldier who has more than one conviction by special court-martial on his record.\(^{15}\) It is also authorized for use in security cases.\(^{16}\) The Army claims that this type of discharge entitles the holder to the same benefits and perquisites as an honorable discharge.\(^{17}\) While this is perhaps true of most of the federal statutes,\(^{18}\) there have been cases arising under state laws which made the holding of an *honorable discharge* a necessary prerequisite.\(^{19}\)

\(^{11}\) Army Regulations No. 615-360, para. 4, June 24, 1953. A complete list of the different types of discharge, covering both officers and enlisted men, and the consequences of each, may be found in a table included in Hearings before the Senate Committee on Armed Services, 83d Cong., 2d Sess., on S. 3096 (Doctor Draft Act Amendments) at 28 (1954). What follows in the text is only a brief summary of the information contained in this table.

\(^{12}\) Army Regulations No. 615-360, para. 4, June 24, 1953.

\(^{13}\) United States v. Kelly, 82 U.S. (15 Wall.) 34, 36 (1872) (quoting the then Judge Advocate General of the United States, the Hon. Joseph Holt, Esq.).


\(^{15}\) Army Regulations No. 615-360, para. 9, June 24, 1953.


\(^{19}\) See, e.g. Patterson v. Lamb, 329 U.S. 539 (1947), discussed infra at pp. 561-62 (the Iowa authorities refused to accept a "discharge from the draft" as equivalent to an honorable discharge for state tax exemption purposes); Horylev v. New York State Bonus Commis-
Undesirable Discharge

Formerly known as the "discharge without honor," this type of discharge is authorized for administrative issuance in a wide variety of cases, such as fraudulent enlistment, desertion or aggravated absence without leave coupled with physical unfitness, conviction by a civil court, total unfitness (including confirmed homosexuality), and certain types of security cases.

An undesirable discharge may, depending upon the circumstances, bar the holder from benefits under statutes administered by the Veterans' Administration. Thus, it does so if based on desertion, treason, or certain other specified reasons. Benefits under National Service Life Insurance are not, however, forfeited except in certain extreme cases such as mutiny or treason, in which event the form of discharge is irrelevant. An undesirable discharge cuts off re-employment rights under the Universal Military Training and Service Act. It deprives the holder of the right to preference for United States Civil Service employment and of the right of restoration to a United States Civil Service position. The holder loses other miscellaneous benefits. Finally, he will probably lose the right to benefits under most of the state statutes.

Bad Conduct Discharge

This type of discharge may be awarded by sentence of a general or special court-martial. Depending upon the offense for which it was issued, 220 App. Div. 345, 221 N.Y. Supp. 548 (3d Dept. 1927) (honorable discharge "for the good of the service as an alien enemy" did not entitle holder to a soldier's bonus); Zearing v. Johnson, 10 Cal. App. 2d 654, 52 P.2d 1019 (1935) ("discharge from draft" did not entitle holder to state tax exemption).

20 Army Regulations No. 615-366, paras. 6, 10, 14, 17, Oct. 26, 1949.
21 Army Regulations No. 615-368, para. 5, Oct. 27, 1948.


28 Hearings, supra note 11.
29 Ibid.
30 Army Regulations No. 315-360, para. 4, June 24, 1953; Army Regulations No. 315-364, May 3, 1951.
given, or the court by which it was adjudged, it may or may not bar the holder from the various veterans' benefits.\(^{31}\)

**(v) Dishonorable Discharge**

It is generally accepted that this type of discharge may be awarded only pursuant to the sentence of a general court-martial. It has very drastic consequences. Thus, if based upon a conviction of desertion in time of war, it results in permanent loss of United States citizenship and permanent disability to hold any office of trust or profit under the United States.\(^{32}\) A dishonorable discharge bars the holder from all benefits under any statute administered by the Veterans' Administration, except the statutes relating to National Service Life Insurance.\(^{33}\) It cuts off private re-employment rights\(^{34}\) and all rights to Civil Service preference or to restoration to Civil Service positions.\(^{35}\) And it nearly always deprives the holder of benefits under the laws of the various states.\(^{36}\)

The statutory authority for these various types of discharge leaves a great deal to be desired. The basic statute applicable to the Army is the Act of 1806,\(^{37}\) relied upon by the General Counsel, but it says nothing about the different forms of discharge.

There is no statute of general application governing the honorable discharge as such. But by Section 249(c) of the Armed Forces Reserve Act,\(^{38}\) an enlisted reservist may not be discharged under conditions other

\(^{31}\) A bad conduct discharge awarded by a general court-martial cuts off all veterans' benefits except under the statutes relating to National Service Life Insurance. 58 Stat. 286 (1944), 38 U.S.C. § 693g (1952). If awarded by a special court-martial, it may cut off such benefits, depending upon the circumstances. Hearings, supra note 11.


\(^{35}\) See notes 26 and 27, supra.

\(^{36}\) Hearings, note 11 supra.


than honorable except by sentence of court-martial or upon the approved finding of a board of officers. And under Section 9(a) of the Universal Military Training Act\textsuperscript{39} an inductee who satisfactorily completes his period of service is entitled to a certificate to that effect. The former statute clearly, and the latter by implication, seem to require that a soldier who meets the necessary conditions is entitled to an honorable discharge, or at least a general discharge under honorable conditions.

The different veterans' benefits statutes cited above contain numerous references to various types of discharges. But this is for the purpose of spelling out the consequences thereof, rather than of setting forth the authority therefor. At the most, they constitute Congressional recognition and implied approval of the fact that different types of discharge are used.

The Uniform Code of Military Justice\textsuperscript{40} contains numerous references to the dishonorable discharge, the bad-conduct discharge, and to "forms of discharge authorized for administrative issuance."\textsuperscript{41} But again these are more in the nature of references than clear-cut authorizations for use.

Since then there is lacking a clear statutory blueprint, it becomes necessary to consider the views of the text-writers, the inferences which may legitimately be drawn from the statutes which do exist, and the relevant court decisions.

(b) A Dishonorable Discharge Is Punitive in Nature

Implicit in the General Counsel's opinion, although not expressly stated, is the assumption that a dishonorable discharge is not a punishment but a mere administrative act. This assumption is incorrect. Military law\textsuperscript{42} has always regarded the dishonorable discharge as punitive in

\textsuperscript{40} 64 Stat. 107 (1950), 50 U.S.C. §§ 551-728 (1952). (Hereinafter cited as UCMJ.)
\textsuperscript{41} See, e.g., UCMJ, arts. 19, 20, 66(b), 71(c), 74(b), 75(b), 64 Stat. 114, 128, 131, 132 (1950), 50 U.S.C. §§ 579, 580, 653(b), 658(c), 661(b), 662(b) (1952). And see § 12 of the Act of May 5, 1950 (of which Act UCMJ is part), 64 Stat. 147 (1950), 50 U.S.C. § 740 (1952).
\textsuperscript{42} Military law is not based solely on statute. "It has also a \textit{lex non scripta} or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, which, though enacted, are recognized in the 84th article of war, under the designation of 'the custom of war,' as a means for the guiding of courts-martial in the administration of justice in doubtful cases. The same are also recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent." Winthrop, Military Law and Precedents 41 (2d ed. 1895; reprint of 1920). In Martin v. Mott, 25 U.S. (12 Wheat.) 36 (1827), Justice Story referred to the "general usage of the military service, or what may not unfitly be called the customary military law." And see Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857).
nature, highly punitive, and exclusively so. As such, it can be awarded only pursuant to the sentence of a court-martial, and a general court-martial at that. By no stretch of the imagination can it be regarded as a mere administrative action.

The writers are unanimous on the point. The outstanding authority is Colonel William Winthrop, whose classic treatise, Military Law and Precedents, has been equalled by no other text on military law and by few legal texts on any other subject. In the first edition, published in 1886, in commenting on what was then Article of War 4 (now Section 652a of Title 10 of the United States Code, and since 1806 the basic statute governing Army discharges), Winthrop said:

*The two kinds Distinguished.* Two kinds of this discharge are authorized and recognized by the Article,—discharge by the order of certain executive or military officials designated, and discharge by sentence of general court-martial. The two are clearly distinguished by the fact that, while the latter is a punishment imposed upon a trial and conviction of a military offence, the former is a mere terminating or rescinding of a contract. While the latter is known as "dishonorable," the former is, in the legal sense, "honorable." A discharge by order, under the Article, can be no more "dishonorable" than a discharge by sentence can be "honorable."

In the second edition, published in 1896, Winthrop said the same thing in almost the same language.

Davis is equally emphatic. In explaining the same Article, he says:

This Article, in its second clause, specifies two kinds of discharge as authorized to be given to soldiers before their terms of enlistment have expired and which are quite distinct in their nature. The one is given by executive order, and the other by sentence; the one is a rescinding of the contract of the soldier, authorized to be resorted to whenever deemed desirable, at the discretion of the Secretary of War, etc., and is in law an honorable discharge or a discharge without honor, as the case may be; the other is a punishment, and therefore a dishonorable discharge. One of the officials named can, of his own authority, no more order a soldier to be, in terms, dishonorably discharged than can a court-martial adjudge a soldier to be honorably discharged.

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44 Rev. Stat. § 1342, art. 4 (1875).
45 1 Winthrop, Military Law 777 (1886).
46 Winthrop, Military Law and Precedents 549 (2d ed. 1896, reprint of 1920). And see id. at 433.
47 Davis, A Treatise on the Military Law of the United States 353 (3d ed. 1913). Again, Davis says: "A dishonorable discharge is a discharge expressly imposed by sentence of a general court-martial. It is only in pursuance of such a sentence that a dishonorable discharge can be authorized, since, being a punishment, it cannot be prescribed by an order." Id. at 356.
This position has been consistently taken by the Judge Advocate General of the Army, the officer charged by Congress with the responsibility of interpreting and applying Army military law, in a series of rulings which go back at least to 1889.

The 1917 Manual for Courts-Martial, promulgated by order of the Secretary of War, stated the rule succinctly:

A dishonorable discharge can be imposed only pursuant to a sentence of a general court-martial.

This edition of the Manual listed dishonorable discharge as the most severe of the "usual punishments imposed upon soldiers," more so even than confinement at hard labor. The 1921 edition of the Manual for Courts-Martial, which was promulgated by Executive Order of the President, and therefore had a higher sanction than an order of the Secretary of War, said the same thing, in identical language.

The omission of this language from subsequent editions of the Manual cannot be ascribed to any intervening change in law or policy (such a drastic overturn of a rule would surely have been explained), but must be attributed to the fact that the 1928 Manual was a severe compression of the 1921 edition (201 pages of text versus 538), and to the fact that later versions were patterned after the 1928 edition.

49 "Being a punishment it [i.e. a dishonorable discharge] can only be authorized by sentence of a court-martial after trial and conviction, and no executive or military official (except in executing such a sentence) can legally give or order such discharge. P. 36, 334, Nov., 1889; 56, 220, Oct., 1892; 60, 95, June, 1893." Dig. Op. JAG (1912) 440. Accord, Dig. Op. JAG (1912) 459 (para. XVI G), 462 (para. XX F).
50 "Dishonorable discharge is a severe punishment of a distinct species from all others. It imports an odium, ignominy, and disgrace."
C.M. 120711, quoted in Op. JAG, Jan. 21, 1919 (Op. JAG (1919) 110; Schiller, Military Law 167 (1952)) (a dishonorable discharge may not be implied, even from a sentence of life imprisonment). Cf. Dig. Op. JAG (1912-40) 250, para. 422(4) (a dishonorable discharge can be imposed only pursuant to a sentence of a general court-martial and it must be expressly included in the sentence).

Tillotson reflects these views: "Dishonorable discharge can be authorized only by sentence of a general court-martial after trial and convention." Tillotson, The Articles of War Annotated 351 (5th rev. ed. 1949).
52 Id. at 159, para. 343.
I submit that the General Counsel was mistaken in saying that the opinions of the Judge Advocate General merely reflected Army regulations. They reflected the military law, as it has always been understood, by Winthrop, Davis, and every other authority on the subject. The Army regulations merely stated the law as so understood. And, as pointed out above, the rule as stated in the 1921 Manual was a Presidential order, and not a mere regulation of the Secretary of War.

The Navy's position has always been the same as the Army's, even though prior to enactment of the Uniform Code of Military Justice in 1950 the Navy operated under different statutes from the Army. Thus, both the 1942 and 1948 editions of the Bureau of Naval Personnel Manual stated:

Dishonorable discharges may be given only by approved sentences of general courts martial and are appropriate for serious offenses warranting dishonorable separation as included punishment.

The Judge Advocate General of the Navy has ruled in several cases that a dishonorable discharge can be issued only pursuant to the sentence of a general court martial, and that a purported dishonorable discharge ordered in the absence of such a sentence is null and void.

In short, prior to 1954, there had never been the slightest doubt on the part of those acquainted with military law that a dishonorable discharge was a punishment, and a severe punishment, which could be awarded only pursuant to the sentence of a court-martial. Surely, the burden is on those who would now challenge this view, after 150 years of unanimous acceptance.

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58 Articles for the Government of the Navy, Rev. Stat. § 1624 (1875), as amended.
60 Navy Court Martial Order No. 36, p. 4 (1941); Navy Court Martial Order No. 11, p. 9 (1932); Navy Court Martial Order No. 190, p. 28 (1918).
61 That the rule is an ancient one appears from the following statement of Louis de Gaya, writing in the 17th century of the continental system of military law:

The Captain has power in his Company to make two Serjeants, three Corporals, and five Landpassades; but he cannot by his own Authority casheer (sic) them, whatever their fault may be: that depends on a Council of War. (De Gaya, The Art of War 17-32 (English trans. from Fr. 1678) quoted in Mummey, A Brief History of Summary Punishment in the Armies of the World, 15 Fed. B.J. 286, 298 (1955)).

The Council of War referred to by de Gaya consisted of the Regimental Commander and his Company Commanders. It had various functions, including that of acting as a sort of primitive court-martial. Although its proceedings were summary in nature, they were none the less judicial (Mummey, op. cit. supra at 298).

62 Secretary Wilson's subordinates have continued to affirm the traditional view. Thus, in the hearings on the Doctor Draft Act Amendments, both Assistant Secretary of the Army Hugh M. Milton and Assistant Secretary of the Air Force H. Lee White asserted...
The General Counsel's principal reliance is upon the statute relating to Army discharges, originally enacted by the Continental Congress in 1776. This statute was revised in 1806 and eventually became the old Fourth Article of War. Later it was renumbered as Article of War 108. With the enactment of the Uniform Code of Military Justice, it was removed from the Articles which make up the Code proper, and became simply Section 652a of Title 10 of the United States Code. Throughout its history, the statute has undergone only minor changes in wording. It now reads as follows:

Rules governing discharges. No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

Now it is perfectly true that this statute does not in terms impose any limitations or restrictions on the authority of the Secretary of the Army to issue discharges. It merely recognizes that there are two permissible ways of effecting a discharge and proscribes any other. It says nothing about the details of either. To construe the statute as Mr. Hensel has done, as conferring unlimited power because it contains no express restrictions, is to read it in vacuo, without regard to its history, background, or later interpretation. Moreover, this is the very statute which Winthrop and Davis were construing and explaining in the passages quoted above, in which they stated unequivocally that a dishonorable discharge could not be awarded by administrative act. These writers were not relying on Army Regulations, but on basic military law as it had always been understood and applied, in both the Army and the Navy, since the foundation of the Republic. It seems a little less than fair to give the opposite construction to a statute, 150 years old, without even mentioning these eminent authorities to the contrary.

The General Counsel's opinion claims that there is nothing in the

that a dishonorable discharge could be awarded only by a court-martial, and that it was punitive and not administrative. Hearings before Senate Committee on Armed Services on S. 3096, 83d Cong., 2d Sess., at 97, 107 (1954).


64 Act of April 10, 1806, § 1, art. 11, 2 Stat. 361 (1845).

65 Rev. Stat. § 1342, art. 4 (1875).

66 41 Stat. 809 (1920).

Uniform Code of Military Justice which is inconsistent with his interpretation of the 1806 statute. He cites Article 74(b) of the Code as expressly recognizing "the power of a Secretary of a military Department administratively to substitute a discharge determined by him for any discharge or dismissal ordered by sentence of a court-martial." What this is intended to prove is not quite clear. It is a paraphrase of Article 74(b), which reads:

The Secretary of the Department may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.69

The opinion does not mention Article 75(b), which reads:

Where a previously executed sentence of dishonorable or bad-conduct discharge is not sustained on a new trial, the Secretary of the Department shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of his enlistment.70

Nor does it refer to Section 12 of the Act of May 5, 1950 (of which Act the Uniform Code is a part), which authorizes the Judge Advocate General, in certain types of cases and under certain conditions, to vacate a sentence and "substitute for a dismissal, dishonorable discharge, or bad-conduct discharge, previously executed, a form of discharge authorized for administrative issuance."71

To me, the only fair inference to be drawn from these three sections, considered together, is that a dishonorable or bad-conduct discharge is not authorized for administrative issuance. Beyond this, they are of no help in construing the 1806 statute. Certainly, they offer no support for the General Counsel's thesis.

The true construction of the 1806 statute, which has always heretofore been followed, is that it refers to two different types of discharge, the one administrative, which may be honorable or "without honor," and the other punitive, which may only be dishonorable. The former rests within the discretion of the executive. The latter is a judicial act, which can be taken only pursuant to the sentence of a court-martial after a fair trial.

This is a perfectly reasonable reading, fully consistent with the language of the statute. It is the construction which has always been followed. To jettison it now, and interpret the statute as vesting arbitrary authority in the Secretary of the Army to issue any sort of discharge he

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69 UCMJ, art. 74(b), 64 Stat. 132 (1950), 50 U.S.C. § 661(b) (1952).
70 UCMJ, art. 75(b), 64 Stat. 132 (1950), 50 U.S.C. § 662(b) (1952).
likes, for any reason he likes, is to ignore settled law and to espouse a philosophy of administrative absolutism.

(d) The Court Cases Considered

In support of the proposition that the administrative issuance of a dishonorable discharge is a discretionary act, not subject to review in the courts, the General Counsel's opinion cites three cases, Reid v. United States,72 Nordmann v. Woodring,73 and Miller v. Commanding Officer, Camp Bowie.74 The fact of the matter is that none of these cases involved a dishonorable discharge. The last named did not involve any type of discharge at all. The other two dealt with recognized forms of administrative discharges. So does every other case which I have been able to find, except one, where the exception is apparent rather than real. But since unwarranted conclusions seem to have been drawn from the language used in some of the opinions, it becomes necessary to examine the cases in detail.

Reid v. United States75 was an action for back pay brought under the Tucker Act76 by a former enlisted man who claimed that his discharge without honor was illegal. In ruling against Reid's right to recover, Judge Hough of the District Court held:

(i) An enlistment is, at most, similar to a general contract of hire, terminable at will by the Government;

(ii) Article of War 4 clearly confers upon the President the right to grant a discharge before expiration of an enlistment;

(iii) There was no illegality in issuing Reid a "discharge without honor," although this phrase is not in the statutes and is found only in the Army regulations; the latter do not bind the Secretary who issues them, much less the Commander-in-Chief;

(iv) The exact method of a soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must be left in the discretion of the executive having power to grant some kind of discharge;

(v) It is beyond the power of the judicial branch to coerce or review the discretion of the executive;

(vi) A discharge with a very bad character is not a punishment within the meaning of any federal statute.

74 57 F. Supp. 884 (N.D. Tex. 1944).
75 161 Fed. 469 (S.D.N.Y. 1908).
Since only a discharge without honor was involved, the Reid case is obviously not authority for the administrative issuance of a dishonorable discharge. It can be construed as such only by reading out of context the court's statement that the exact method of discharge, not being regulated by statute, rests in the discretion of the executive. To this there are at least three answers.

(i) The court had before it only a case of discharge without honor. Even if it had said anything about dishonorable discharges, which it did not, such statement would have been only dictum.

(ii) In considering the phrase "discharge without honor," the court relied on the absence of any statute defining or relating to such a discharge. As pointed out above, there are today numerous statutory references to the various types of discharge.

(iii) In construing the statute, the court relied on the unwritten military law:

The statutory grant contained in the fourth article of war must be interpreted in the light of military practices, customs, and procedure well known and judicially recognized long before the date of the Revised Statutes, and indeed, long before the adoption of our earliest articles of war, in 1806, and by those customs so recognized and approved by Congress, the soldier's engagement was but at the will of the government which he served and that government by authority of Congress speaks through (for the purposes of this case) the President of the United States.\(^7\)

If military practices, customs, and procedures are relied upon in interpreting the statute to uphold the power of the executive to issue an administrative discharge without honor, is it not inconsistent to ignore such practices, customs and procedures when considering whether the same statute authorizes the administrative issue of a dishonorable discharge?

When the Reid case reached the United States Supreme Court on writ of error, the Court refused jurisdiction on the ground that the amount involved was less than $3,000, expressing no opinion as to the merits of Reid's claim.\(^8\)

The next case cited in the General Counsel's opinion is Nordmann v. Woodring.\(^9\) Here the question was whether an alien soldier, who had had a long and honorable service record, could be summarily discharged by order of the Secretary of War for failure to comply with certain statutory requirements\(^8\) pertaining to declaration of intent to become a citizen. What form the discharge was to take does not appear. Clearly,

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\(^7\) 161 Fed. 469, 471 (S.D.N.Y. 1906). Cf. note 42 supra.
\(^8\) 211 U.S. 529 (1909).
\(^8\) 50 Stat. 696 (1937) modifying 50 Stat. 442, 446 (1937); 52 Stat. 642, 646 (1938).
however, there was no thought of a dishonorable discharge. Nordmann’s concern was to prevent any discharge at all from being issued, and to this end he brought suit in a federal district court to review the Secretary’s order and to enjoin the carrying out thereof. Although the court thought that under all the circumstances a “reasonable construction” of the applicable statutes could have been made which would have permitted Nordmann’s retention in the Army, it held that it lacked jurisdiction to review the Secretary’s action.

All that the Nordmann case actually decided was that the Secretary of War had the right, in his discretion, or the duty, if he so read the statute, to discharge a soldier before the expiration of his enlistment, and that the courts could not review such an act. But the court went further and used language which seemed to drop an “iron curtain” between any act of the executive in effecting a discharge, or in construing a “military statute,” and review by the courts. I propose to return to this problem later.

The third case cited in the opinion is Miller v. Commanding Officer, Camp Bowie, Tex. The petitioner, alleging that he had been improperly inducted into the Army, was seeking his release by writ of habeas corpus. This is a type of proceeding with which the military authorities and the federal courts have long been familiar. The petitioner added a new twist by including in his prayer for relief a request that the court “give him an honorable discharge from the United States Army.” The court held that it had “no power to discharge from the Army, either dishonorably or honorably.” On the merits, the court found that there was no basis for granting the writ. This case has no bearing on the problem before us.

We come now to a group of cases which are not cited in the General Counsel’s memorandum but which seem none the less relevant. Two of these involved a special type of World War I discharge entitled “discharge from the draft.” This was authorized by an order of the Secretary of War dated January 12, 1918, issued under the Selective Draft Act of 1917. It was intended primarily for use in cases of draftees who had

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81 It should be observed that the case was decided on a motion to dismiss, which meant that all Nordmann’s allegations were taken as true, and that whatever equities may have existed in the Government’s favor did not have to be considered. Cases in the civil courts involving military law are often disposed of on motions of this sort, with the result that the whole story is not always brought out and the position of the military may appear more unreasonable than perhaps it is.
82 57 F. Sup. 884 (N.D. Tex. 1944).
83 Id. at 886.
84 40 Stat. 76 (1917).
been inducted into the Army but who failed to pass their physical examination at the place of mobilization.

In *Davis v. Woodring*, the petitioner brought suit for mandamus directing the Secretary of War to issue him an honorable discharge and for a declaratory judgment declaring that he was entitled to such a discharge. The district court denied relief, and the Court of Appeals for the District of Columbia affirmed. Since there was no article of war prescribing the form or terms of the discharge certificate, and since discretion in such matters had been delegated by Congress to the Secretary of War, under this authorization the Secretary could from time to time adopt such forms as the exigencies of the service required.

In *Patterson v. Lamb*, the situation was more complicated. Lamb was ordered by his draft board to report for military duty on November 11, 1918. The order stated that from and after that date he would be a "soldier in the military service of the United States." Lamb reported as ordered and was put in charge of a contingent of draftees proceeding by train from Davenport, Iowa, to Camp Dodge. On November 15, he received a notice from his draft board stating that he was discharged from the Army, and on January 26, 1919, he received a certificate of "Discharge from Draft" dated November 14, 1918, with $4 pay. An accompanying notice stated that this was the equivalent of an honorable discharge from the Army.

Many years later, however, the Iowa authorities refused to recognize Lamb's discharge as an honorable discharge entitling him to tax exemption. After failing to get relief in the Iowa courts, and after trying in vain to get the Adjutant General of the Army to issue him an honorable discharge, Lamb sued in the United States District Court for the District of Columbia for a declaratory judgment declaring that he had been honorably discharged from military service and directing the Secretary of War and the Adjutant General to issue him an honorable discharge. The district court dismissed the complaint, but the Court of Appeals (incidentally, the same court which had decided *Davis v. Woodring*) reversed, only to be reversed in its turn by the Supreme Court. The Supreme Court held that the War Department was within its rights in issuing Lamb a "discharge from the draft" rather than the type of discharge it customarily granted to soldiers who performed military service "after being fully and finally absorbed into the service." Even though

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85 111 F.2d 523 (D.C. Cir. 1940).
86 329 U.S. 539 (1947).
the regulation under which Lamb was discharged was designed primarily for draftees who were rejected for physical reasons at the mobilization camp, it was also suitable for draftees turned back because of the Armistice. Had the Armistice not intervened, Lamb might have been rejected at Camp Dodge and received Form No. 638, which is what in fact he did receive.

No statute or previous Army Regulation had provided for the extraordinary situation which developed on Armistice Day and which made it necessary for the President to halt the processing of these thousands of men and direct that they return to their homes. When this new situation arose, it was certainly within the province of the War Department to provide for its solution by, among other things, issuing to those returned home an appropriate form of certificate, whether of the honorable discharge variety, a "discharge from draft," or some special form designed specifically for the occasion. Respondent was inducted into the Army and was discharged before he reached a mobilization camp for final processing. His discharge adequately indicates these facts. The law demands no more. 89

This opinion is not altogether satisfactory. The Supreme Court did not even discuss the reasoning of the court below. The passage quoted sounds more like an argument based on expediency than on law. Two things are clear, however:

(i) The case did not involve a dishonorable discharge, or even a discharge without honor;

(ii) The Court expressly declined to rule on the question whether "and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates issued to soldiers," that being "a question we need not here determine." 90

The most that the case holds is that the Secretary of the Army may, regardless of his prior regulations, issue new forms of administrative discharges as new situations may require. It is in no way authority for the proposition that the Secretary of the Army may issue a dishonorable discharge as an administrative matter, merely because the situation is new and unprecedented.

Subsequent to the date of the General Counsel's opinion the New York Court of Appeals decided Matter of Nistal v. Hausauer. 91 Nistal had brought a statutory proceeding in the nature of mandamus to compel the Commanding General of the New York National Guard to issue him an honorable discharge, and in the nature of certiorari to review the act

89 Id. at 545.
90 Id. at 542.
of that official in issuing him a discharge without honor. The trial court dismissed the complaint for lack of jurisdiction, citing the Reid case. The appellate division reversed in a 3-2 decision, the majority holding that, while the act of discharging a militiaman was in itself the exercise of an executive function, the act of characterizing it as "without honor" was a judicial action, subject to court review under the State statutes.

The Court of Appeals reversed, in a 5 to 1 decision, and affirmed the order of Special Term dismissing the proceeding for lack of jurisdiction. A "discharge without honor" given by respondent, as Chief of Staff, with the accompanying recital that the action was "By Command of the Governor," is a discretionary act within the power of the executive which the civil courts may not review. The Court added this interesting observation:

It is conceded in these briefs that a dishonorable discharge cannot be imposed on a soldier except after a court-martial but here, again, the distinction seems plain that a dishonorable discharge has always been considered punishment for wrongdoing, whereas a discharge without honor means only that the soldier is being discharged without the kind of commendation involved in an honorable discharge.

Gentila v. Pace is the only case I have been able to find which seems to support the proposition that a dishonorable discharge may be awarded administratively. But the case is misleading. Gentila alleged that he had been given a dishonorable discharge without trial on the ground of desertion and physical unfitness. In fact, he was given an undesirable discharge, under conditions other than honorable, because of desertion and physical unfitness, under applicable Army Regulations. But because the case was decided on motion to dismiss, the truth or falsity of plaintiff's allegation in this respect was never tested in court.

Gentila argued that the Army regulation which had been invoked did not apply to his case and that he was entitled to an honorable discharge. He had petitioned the Army Discharge Review Board for an honorable discharge and the board had twice denied his application. For a variety of reasons he attacked this ruling in a suit against the Secretary of the Army

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92 This is another case where it is hard to tell what actually happened, since the respondent demurred to petitioner's complaint. But if the facts were as petitioner alleged, it would appear that he was indeed treated most unjustly.
93 203 Misc. 89, 115 N.Y.S.2d 75 (Sup. Ct. N.Y. County 1952).
96 Id. at 154, 124 N.E.2d at 98 (1954).
97 193 F.2d 924 (D.C. Cir. 1951), cert. denied, 342 U.S. 943 (1952).
for a mandatory injunction. The court of appeals affirmed a decision of
the district court granting the Government's motion to dismiss,\(^9\) and the
Supreme Court denied certiorari.\(^1\)\(^0\)

The precise ruling of the court of appeals was that, under Section 10
of the Administrative Procedure Act,\(^1\)\(^0\) and under the statute creating
the Army Discharge Review Board,\(^1\)\(^0\) a decision by the latter board
changing, correcting or modifying a discharge or dismissal, or refusing
to do so, was final, subject only to review by the Secretary of the Army,
and was not subject to review by the courts, particularly when all that
was alleged against the Board's action was that it was based on an er-
roneous finding of fact. The court said it could find little or no direct
authority, but cited Patterson v. Lamb and the Davis, Reid, and Nord-
mann cases.\(^1\)\(^0\)\(^3\)

It is unfortunate that this case was decided on a motion to dismiss and
on the assumption that petitioner's allegation that he had been dishonor-
ably discharged was correct, whereas in fact this allegation was untrue.
But even if the case is given its broadest interpretation, it stands only for
the proposition that a ruling by the Army Discharge Review Board, after
a hearing in accordance with the statute, affirmed by the Secretary, which
keeps in effect a dishonorable discharge previously issued, is not subject
to review by the courts. Of course this in itself is a far-reaching conclu-
sion. Taken in conjunction with the court's language in the Nordmann
case, discussed above,\(^1\)\(^0\)\(^4\) it raises the serious question whether the courts
are prepared to abdicate in this area and eschew their responsibility for
declaring and applying the law on the important problem of military
discharges. Personally, I cannot believe that this is the case. In Patter-
son v. Lamb,\(^1\)\(^0\)\(^6\) the Supreme Court expressly reserved this question.

There are indications in the most recent cases, involving "security
.discharges," that at least some courts are reconsidering the traditional
view that the form and manner of discharge are within the exclusive dis-
cretion of the military. Thus, in Levin v. Gillespie, a United States Dis-
trict Court, after first ordering that a doctor, who had been inducted as
a private, be discharged if he was not to be given the rank provided by

\(^9\) 193 F.2d 924 (D.C. Cir. 1951).
\(^10\) 342 U.S. 943 (1952).
\(^10\) 193 F.2d 924, 927, n.10. The court did not discuss the more basic question whether
a dishonorable discharge was authorized under the regulation involved. Of course this issue
did not really exist, because in fact there never had been a dishonorable discharge.
\(^10\) Supra pp. 560.
\(^10\) 329 U.S. 539, 542 (1947).
statute,\textsuperscript{106} followed this with an injunction against an undesirable discharge and ordering either an honorable discharge or a general discharge under honorable conditions.\textsuperscript{107} And in \textit{Bernstein v. Herren},\textsuperscript{108} another district court refused to dismiss a complaint by certain inductees who had asked for a declaratory judgment concerning their discharge rights and for an injunction against "security discharges." The court stated that to deny an honorable discharge on the ground of pre-induction conduct would be a deprivation of property without due process of law. A preliminary injunction was denied, however, on the ground that the plaintiffs had not shown that they were threatened with less than general discharges under honorable conditions, and upon the defendant's affidavit that a general discharge would entitle the recipient to the same benefits and perquisites as an honorable discharge.

On the other hand, relief has been denied in similar cases, on both procedural and jurisdictional grounds, especially when the discharge had already issued.\textsuperscript{109} In the most recent case of this sort, \textit{Harmon v. Brucker},\textsuperscript{110} the District Court for the District of Columbia declared itself powerless to disturb an undesirable discharge issued to plaintiff as a security risk. Nevertheless, the court protested the result, deplored the lack of "adequate congressional circumscription of military action regarding discharges—action which is isolated from judicial review," and all but invited a reversal by the Supreme Court.

What will be the ultimate outcome of this line of cases cannot now be predicted. There is reason to believe, however, that the Supreme Court will reaffirm the traditional prerogative of the judiciary to review and set aside arbitrary or unauthorized administrative action, in whatever form it may appear.\textsuperscript{111}

It is often uncritically stated that matters relating to military justice are wholly within the province of the military and therefore not subject to review in the civil courts. This is not true. Under our constitutional system of government there are limits to executive and legislative authority, and when the extent of such authority is in issue, only the courts can decide the question. The military is not exempt from this general principle of constitutional law. Thus, Professor Glenn states:

\textsuperscript{106} 121 F. Supp. 239 (N.D. Cal. 1954) (opinion by Roche, C.J.).
\textsuperscript{107} 121 F. Supp. 726 (N.D. Cal. 1954) (opinion by Harris, J.).
\textsuperscript{111} Cf. Peters v. Hobby, 349 U.S. 331 (1955); Wieman v. Updegraff, 344 U.S. 183 (1952); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Kutcher v. Higley,
Likewise the decision or act of a commander would depend for its immunity from common law adjudication upon whether or not it was justified by the powers conferred upon that commander by the custom and statutes governing the organization of the army.

Now the determination of that question cannot be left to the military court or to the commander, because to do that would be to deny the very proposition that there are limits to the court-martial's jurisdiction or the commander's powers, which of course there are. Consequently it is for the common law court to decide, in the particular case, whether the military court had jurisdiction or the commander had power to act.\(^1\)

General Snedeker points out that the reluctance of the civilian courts to interfere in matters of military justice is in large part based on British precedent. But, he adds:

The analogy to the British system completely disregards the fact that the United States has a written constitution, in which the power to make rules for the government (including provision for the internal judicial process) of the armed forces is placed in legislative, not executive, hands.\(^2\)

But even if the Supreme Court should reaffirm the traditional view that the courts may not review undesirable discharges, this would be no authority for Mr. Hensel's proposition that the administrative award of a dishonorable discharge is not subject to judicial review.

It may be contended that there is no real difference between a dishonorable and an undesirable discharge, and that it is sheer hypocrisy to argue that the one can be issued only after a trial by court-martial while admitting that the other can be awarded administratively without even a hearing. There is indeed merit in this argument. The popular mind sees little difference between the two types of discharge. Even the courts have confused them.\(^3\) Both involve a stigma; both unquestionably prejudice a man's subsequent career.

The trouble with the argument is that it proves too much. To the

\(^{1}\) F.2d — (D.C. Cir. No. 12831, Apr. 20, 1956); Parker v. Lester, 227 F.2d 708 (9th Cir. 1955); Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955); Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955); Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952).


\(^{3}\) Snedeker, Military Justice Under the Uniform Code 46 and n.76 (1953).

\(^{4}\) Thus in Gentila v. Pace, 111 F.2d 523 (D.C. Cir. 1940), discussed supra, pp. 563-64, the Court did not discuss the distinction. In Nistal v. Hausauer, 282 App. Div. 7, 12, 121 N.Y.S.2d 712, 716 (1st Dept. 1953), discussed supra pp. 562-63, the court said:

... the quasi-judicial nature of the determination is not altered according to whether...

If results in a discharge described as 'dishonorable' or 'without honor' under the nomenclature of the Military Regulations. The effect on the man's civilian life is the same. Such a proclamation... impugns the character or reputation of a citizen, which may not ordinarily be done without basis in fact or in reason."

Admittedly, the Court of Appeals took a different view. 308 N.Y. 146, 154, 123 N.E.2d 94, 98 (1954).
extent that it has any validity, it is an argument against the administra-
tive issuance, without trial or hearing, of *any* sort of discharge under
conditions other than honorable. 5 This indeed was Colonel Winthrop’s
position. He viewed the discharge without honor, then an innovation, as
wholly unwarranted, if not illegal. Thus he said:

**Discharge “Without Honor.”** This is a species of discharge recently
introduced into our practice, as supposed to be warranted by the Fourth
Article, and proper to be given where the circumstances which have induced
the discharge are discreditable to the soldier. But the distinction between
a discharge “without honor” and a “dishonorable” discharge is fanciful
and unreal, and, in the opinion of the author, it is open to discussion
whether this newly invented form is legally authorized under this Article.
In all cases, as above indicated, the cause or occasion of a summary dis-
charge may properly be set forth in the body of the certificate, and the
material thus be furnished for any future adjudication in the event of a
legal question being raised upon the effect of the discharge. The so-called
discharge “without honor” is thus believed to be as unnecessary as it is of
doubtful authority. 6

But to argue from this that, because the courts have since upheld the ad-
ministrative issuance of a discharge without honor, the administrative
issuance of a *dishonorable* discharge is equally legal, is surely to turn
Winthrop on his head! Moreover, as pointed out above, some of the
courts seem to be coming back to Winthrop’s view.

The fact is, whatever their similarities, there are differences between
the dishonorable discharge and the discharge without honor, both prac-
tical and legal. Military men would never confuse them. The one is a
symbol of ignominy and disgrace; the other is, at most, a mark of extreme
dissatisfaction. The very color of the paper on which they are printed is
different. A dishonorable discharge is yellow; 117 in soldier’s slang it is
called a “yellow ticket.” Yellow in our culture is a symbol of cowardice
and shame. The undesirable discharge, which was formerly blue, a

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116 A persuasive argument to this effect is found in Watts, The Draftee and Internal
Security (1955), a study of the Army Personnel Security Program and its effect upon
persons inducted under the provisions of the Universal Military Training and Service Act,
submitted to the Secretary of the Army on behalf of the Workers Defense League. N.Y.
Times, Aug. 5, 1955, p. 36, col. 1. This study has resulted in the Army changing its policies,
so that it will no longer issue undesirable discharges on the basis solely of pre-induction
activities or associations. N.Y. Times, Nov. 19, 1955, p. 1, col. 2. Nor will the Army any
longer adjudge a soldier a security risk simply because of association with an allegedly sub-
versive person or group. N.Y. Times, Apr. 28, 1956, p. 1, col. 2. The new rules are set
forth in Army Regulations No. 604-10, July 29, 1955, as amended Oct. 17, 1955 (Govern-

116 Winthrop, Military Law and Precedents 550 (2d ed. 1890; reprint of 1920).

117 Dep’t of the Army, Special Regulations No. 615-360-1, para. 11b, June 24, 1953.
neutral color, is now printed on white paper, like the honorable discharge.\textsuperscript{118} To the soldier or the veteran things like this are important. And the difference is more than one of form. As pointed out above, different legal consequences flow from the two.

(e) \textit{The Officer Dismissal Cases}

It is interesting that the General Counsel’s opinion does not cite any of the statutes or cases relating to the administrative dismissal of commissioned officers, although one would have thought that they constituted the best available precedents. However, closer analysis shows that they are not in fact authority for the administrative award of a dishonorable discharge to an enlisted man.

At the outset we are confronted with a problem of terminology. An officer may be “discharged” or he may be “dismissed the service.” Moreover, the same term, “dismissal,” is used without distinction for two quite different types of action.

An officer may be \textit{discharged} by order of the President or of the Secretary of the Army for various reasons set forth in the statutes and regulations.\textsuperscript{119} Such a discharge may be honorable or “under other than honorable conditions”; it may not be dishonorable. It is equivalent to an honorable discharge, or a discharge without honor, of an enlisted man.

An officer may be \textit{dismissed} the service pursuant to, or in commutation of, the sentence of a general court-martial. Such a dismissal is in all respects equivalent to the dishonorable discharge of an enlisted man.\textsuperscript{120}

There remains a reserve power in the President to \textit{dismiss} an officer summarily. This power is not expressly granted by the Constitution, but nearly every President has claimed it as inherent in his constitutional powers as Chief Executive and as Commander in Chief. Its existence is recognized by various statutes, which however at the same time severely limit its exercise. Such an administrative dismissal of a commissioned officer by order of the President is something very different from his dismissal pursuant to sentence of a court-martial. It is simply another equivalent of the administrative discharge, by the Secretary of the Army or other authorized official, of an enlisted man. Like the latter, it is not dishonorable; it may be honorable, or (the usual case) it may be without honor. Thus, Winthrop says:

\begin{itemize}
\item \textsuperscript{118} Ibid.
\item \textsuperscript{119} Dept of the Army, Special Regulations No. 605-290-1, June 17, 1952. And see Hearings, supra note 11, at 28.
\item \textsuperscript{120} Op. JAG (Army) 1950/4075, Aug. 9, 1950; United States v. Ballinger, C. M. 368421, 13 C.M.R. 465 (1953).
\end{itemize}
The two modes of discharge or dismissal of officers specified in the Article [old Article of War 99, now 50 U.S.C. 739] are quite distinct in their nature. A dismissal imposed by sentence of court-martial, (or in commutation thereof,) is a punishment—a penalty incurred by law upon a conviction of a criminal offence.\(^1\)

Winthrop admits that:

Any dismissal, indeed, where resorted to because of offences or misconduct of the officer, has the moral effect of punishment, in that it not only deprives the party of that which is valuable to him but affixes a reproach upon his reputation. The latter, however, is by no means an essential incident of an executive dismissal. . . .\(^2\)

He concedes that the term dismissal is ordinarily reserved for those instances which involve disgrace.

But whatever be the name applied to it, or the grounds or circumstances attending it, the exercise of the executive will is, in all the cases, the same act in law, the authority exerted being simply that of a divestiture of office.\(^3\)

In short, the administrative dismissal of an officer is the precise parallel of the administrative discharge without honor of an enlisted man, except that, unlike the latter, its exercise has been drastically curtailed by Congress. Such action by Congress may be attributable, in part, to a realization that a dismissal almost inevitably carries with it a derogatory implication, in fact if not in law. The confusion of terminology has perhaps contributed to the result. But the principal reason has been historical, the desire, especially strong during the period immediately following the Civil War, of a jealous Congress to curb Presidential authority.

Prior to the Civil War, despite objections voiced by some,\(^4\) the power of summary dismissal of military officers by the President was in fact exercised, although infrequently,\(^5\) and such action was upheld by successive Attorneys-General.\(^6\) During the Civil War summary dismissals

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121 Winthrop, Military Law and Precedents 736 (2d ed. 1896, reprint of 1920).
122 Id. at 737.
123 Ibid.
124 The principal critic was De Hart, Observations on Military Law and the Constitution and Practice of Courts Martial 228-43 (1846, published New York, 1862). De Hart cited an opinion of Major General Winfield Scott, given to the Secretary of War in 1845, arguing against the existence of the power. General Scott, relying on The Federalist, No. 69 (Hamilton), had argued that the President was only the "first general and admiral of the Confederacy," and that the Constitution was intended to negative any idea that he would become, like George III, the "fountain of all honor and power over the army and navy." De Hart's views were, however, repudiated by two Attorneys General (4 Ops. Att'y Gen. 603, 613 (1847); 8 id. 223, 230-31 (1856)), and Winthrop concluded that they were clearly wrong. (Winthrop, supra note 121, at 742, n. 78, and 744.)
125 Winthrop, supra note 121, at 738.
126 4 Ops. Att'y Gen. 603 (1847); 8 Ops. Att'y Gen. 223, 230 (1856).
and discharges of officers were frequent. Winthrop states that there were over 1650 such cases.\footnote{127 Winthrop, supra note 121, at 738-39.}\footnote{128 Rev. Stat. § 1230 (1875).} \footnote{129 12 Ops. Att'y Gen. 4 (1866).} \footnote{130 Winthrop, supra note 121, at 65.} \footnote{131 Jag. 250.4, Sept. 11, 1918, Dig. Op. JAG 1912-40, § 227; cf. Colby, "The Power of the President to Remove Officers of the Army," 15 Geo. L.J. 168 (1927).} \footnote{132 In Wallace v. United States, 257 U.S. 541, petition for rehearing denied, 258 U.S. 296 (1922), the Supreme Court held that the President's appointment of a successor to fill the vacancy created by the dismissal of a commissioned officer, and confirmation of such appointment by the Senate, made the dismissal final. The Court declined to consider the constitutionality of Rev. Stat. § 1230. Mr. Justice Reed, in his dissenting opinion in United States ex rel. Toth v. Quarles, 350 U.S. 11, 34 (1955), cited the statute without questioning its constitutionality. (Admittedly he was citing it in support of a different proposition, namely, the continuing availability of a trial by court-martial to a dismissed officer.)} \footnote{133 64 Stat. 110 (1950); 30 U.S.C. § 554 (1952).} \footnote{134 Rev. Stat. § 1229 (1875).} \footnote{135 14 Stat. 430 (1867).} \footnote{136 Winthrop, supra note 121, at 740.}

Apparently disturbed by this trend, Congress passed two statutes to curb the President in the exercise of this power, and these statutes remain law to this day. By the first, passed in 1865 while the Civil War was still in progress, an officer was permitted to apply for a trial by court-martial, upon making oath that he had been wrongfully dismissed. As soon as the necessities of the service might permit, the President was to convene a court-martial to try the officer on the charges on which he had been dismissed. If no such court was convened within six months of the application, or if the court having been convened did not award a sentence of dismissal or death, then the order of the President was to be void. Although at least one Attorney General gave his opinion that this statute was constitutional, Winthrop doubted it, and his doubts have been echoed. However, its constitutionality has never been successfully challenged in court. With minor changes in wording, it is now part of Article 4 of the Uniform Code of Military Justice.

The other statute was passed in 1866. It expressly limited the President's power of executive dismissal of a commissioned officer to time of war. It preceded by one year the Tenure of Office Act of 1867, and Winthrop noted that it was "the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the President of the power of removal from office." He doubted its constitutionality, and thought that, while it was of course binding till repealed or authoritatively determined to be unconstitutional, it is rather to be respected as an expression of the sentiment
of Congress that dismissals, without trial, of army and navy officers, are in general inexpedient in time of peace, than as an exercise of the legislative power "to make rules for the government and regulation of the land forces." But the statute has never been judicially declared unconstitutional and it is still on the books. It was recently re-enacted as part of the statute enacting the Uniform Code of Military Justice.

The net effect is that the President may summarily dismiss a commissioned officer only in time of war, and even then the officer may demand a trial by court-martial. Whether or not these statutes are constitutional, they are in fact observed, and result in a drastic limitation on the power of the President, so much so that even in time of war it is not the practice of the Army to recommend Presidential dismissal of an officer, but to convene a board of officers to consider whether grounds exist for recommending a statutory discharge for cause by order of the Secretary of the Army.

It must be emphasized that the reason that these statutes are of doubtful constitutionality is not because they inhibit any supposed power of the President to dismiss an officer by way of punishment, which is a judicial function, but because they purport to limit his administrative authority to dispense with an officer's services summarily, a purely executive function. No such constitutional problem is presented in the case of an enlisted man. Here the power of the Secretary of the Army to terminate a soldier's enlistment is absolute. He may discharge an enlisted man summarily for any reason, or for no reason, and apparently he may characterize such a discharge as honorable or as without honor. Nothing is taken from his executive authority by the rule of law which says that he may not award a dishonorable discharge without a trial by court-martial.

137 Id. at 745.
138 Like Rev. Stat. § 1230, this statute could also be stultified by the Presidential appointment and Senate confirmation of a successor to fill the vacancy created by a dismissal, it being held that the prohibition was aimed only at the President acting alone, and that confirmation of a successor by the Senate served to ratify the original dismissal. Keyes v. United States, 109 U.S. 336 (1883); Blake v. United States, 103 U.S. 227 (1880).
140 The President may still, however, "drop from the rolls" of the Army any officer who has been absent without leave three months or more, or who has been convicted by a civil court and finally sentenced to a Federal or State penitentiary or correctional institution, and in such case the officer has no right to demand a trial by court-martial. 64 Stat. 146 (1950), 50 U.S.C. § 739 (1952). In this type of case no formal discharge certificate is issued.
142 Precisely this distinction is drawn by Professor Gardner, citing these very statutes,
The result of the General Counsel's opinion is a curious anomaly. Under the law and practice, with certain narrowly defined exceptions, the President may not summarily dismiss a commissioned officer, even honorably, except in time of war, and then only subject to a right in the officer to demand a trial by court-martial. But now we are told that the Secretary of the Army may award a dishonorable discharge to an enlisted man, without a trial by court-martial, at any time and for any reason he sees fit. Surely this is inequitable. The charge is often made that military law discriminates unfairly against enlisted men and in favor of officers. Usually this accusation is only demagoguery, unsupported by fact. But as long as the opinion of the General Counsel stands we have a glaring example of this very discrimination.

II. THE DISHONORABLE DISCHARGES VIOLATED THE LAW OF THE LAND

The concept of the fair trial is the cornerstone of civilization, and when it is sacrificed on grounds of political expediency, civilization itself is threatened.

JOHN VINCENT BARRY, Justice of the Supreme Court of Victoria

The Honorable Mr. Justice Barry, of the Supreme Court of Victoria, made this striking statement in the course of an informal talk which he gave last spring at the Cornell Law School concerning the trial of William Joyce, the notorious "Lord Haw-Haw." It was Justice Barry's thesis that Joyce was illegally convicted and sentenced, because the question of his continued allegiance to the Crown had been improperly withdrawn from the jury, and because the fundamental rule was disregarded that the duty of allegiance is owed in return for the obligation of protection. The renewal by Joyce, an alien, of a British passport did not, \textit{per se} and as a matter of law, impose upon the Crown a continuing obligation of protection.\footnote{See dissenting opinion of Lord Porter in Joyce v. Director of Public Prosecutions, [1946] A.C. 347, 374. Mr. Justice Barry's remarks are the subject of a forthcoming article by him in Res Judicatae.}

There is a remarkable similarity between Joyce's situation and that of the twenty-one prisoners of war. In both cases the accused seemed to have committed that most detested of acts, treason. In both they seemed beyond the reach of ordinary legal process, or of the law as previously understood. In both, the authorities felt that the power of the State must be vindicated.

Thus far I have said nothing on the question whether the twenty-one prisoners were guilty or innocent of the acts charged. It is possible that in his article, "The Great Charter and the Case of Angilly v. United States," 67 Harv. L. Rev. 1, 25-26 (1953).
on a trial some of them could have established defenses such as insanity, or physical or mental duress. Perhaps they could not. It makes no difference. They were given no trial.

It is a fundamental principle of our law that no man is deemed guilty until he has been tried by a court of competent jurisdiction and convicted of the offense charged. Violation of this principle, on any ground, under any circumstances, is an act of basic injustice, infinitely transcending in its ultimate harm to society the possible damage done by allowing twenty-one "turncoats" to go unpunished.

When James I made his entry into England to assume the crown which had been declared his upon the death of Queen Elizabeth, he committed an act which profoundly shocked the conscience of his new subjects. During his progress to Westminster, he ordered to be summarily hanged a thief who had been caught in the act in the town of Newark. Professor Radin, who recounts the incident, states:

The man would certainly have been hanged and quite promptly, if he had been duly indicted, tried, and convicted—which at that time could have taken place within twenty-four hours. That would have been per legem terre, which James with obvious deliberateness meant to defy. It is significant that many of James' new subjects did not fail—to be sure, only in private communication—to comment on the fact—and to declare that it violated Magna Carta.¹⁴⁴

Magna Carta, in its famous 39th Article, guaranteed that:

... no free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we go against him, or send against him, except by the legal judgment of his peers, or by the law of the land.¹⁴⁵

Our own Constitution and Bill of Rights continue these basic guarantees and add another which is relevant here, the prohibition against bills of attainder.¹⁴⁶ In Cummings v. Missouri,¹⁴⁷ the Supreme Court defined a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."

The Court defined "punishment" as not restricted to deprivation of life, liberty, or property, but as also embracing "deprivation or suspension of political or civil rights."¹⁴⁸ This is the precise effect of a dishonorable discharge: it deprives the

¹⁴⁴ Radin, "The Myth of Magna Carta," 60 Harv. L. Rev. 1060, 1087 (1947). It is true that these twenty-one prisoners had put themselves beyond the process of a United States court-martial, and Secretary Wilson cited this as justification for his summary action. But the requirements of the law cannot be thus set aside on the ground of circumstance.

¹⁴⁵ The translation is that of Professor Gardner, supra note 142, at 2.

¹⁴⁶ U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1.


¹⁴⁸ 71 U.S. (4 Wall.) 277, 323 (1866).

¹⁴⁹ Id. at 322.
holder of valuable political and civil rights, beside making him an object of disgrace. It is the effect which was intended in the case of these prisoners:

Such discharge, when issued, will have the full force and effect of a dishonorable discharge within the meaning of all the various veterans' benefit statutes.\footnote{150 Memorandum Opinion of Jan. 24, 1954, supra note 3.}

Measured by the tests laid down by the Supreme Court, it is clear that what we have here is a bill of attainder, a species of tyranny prohibited by the Constitution to the Congress and the States, and therefore \textit{a fortiori} to the Executive Branch.

In justifying the issuance of the dishonorable discharges, the Secretary of Defense argued that since the men were not amenable to trial a new situation had been presented which the ordinary rules did not fit. Therefore, said he, he saw no reason why the Department should not go back to "fundamental law."

We are left to speculate what fundamental law the Secretary had in mind. If he meant the statute of 1806, he used a phrase somewhat more solemn than is ordinarily attached to legislative enactments. And as we have seen, this particular statute does not mean what is claimed for it.

If the Secretary meant the Constitution, he did not say so. In any case, there is nothing in the Constitution to support his claim. True, it makes the President the Commander in Chief of the Army. But it also empowers Congress to make rules for the government and regulation of the land and naval forces, and Congress has done so, most recently by enacting the Uniform Code of Military Justice.\footnote{151 64 Stat. 107 (1950), 50 U.S.C. §§ 551-728 (1952). On the distinction between the powers of the President as Chief Executive and Commander in Chief and the power of Congress to make rules for the government and regulation of the land and naval forces, see Snedeker, \textit{Military Justice Under the Uniform Code} 37-39, 43 (1953).} Nothing in the Uniform Code of Military Justice, or in the various Articles of War which preceded it, authorized the action taken. On the contrary, the implications of such Code and Articles are all the other way, and their historical construction and interpretation are flatly to the contrary.

I suspect that by "fundamental law" the Secretary meant something a good deal less specific than the Constitution or even an Act of Congress. I suspect that he had in mind the notion, much in vogue today, new in appearance but old as Egypt, that within the Executive Branch the will of the commander is "supreme." It might be noted that more than once Mr. Hensel has expressed the opinion that the Secretary of Defense possesses "supreme" authority within the Department of Defense and over all officers and agencies thereof. This was the keynote of the legal
opinion which accompanied Reorganization Plan No. 6.\textsuperscript{152} It is repeated in the memorandum of January 25, 1954, in support of the dishonorable discharges:

... the Secretary of Defense has supreme power and authority to run the affairs of the Department of Defense and all its organizations and agencies. Such Secretary of Defense may exercise and may direct the exercise of any and all authority vested in the Secretaries of the respective military Departments.\textsuperscript{153}

In fairness, it must be conceded that the latter memorandum attempts to find such authority vested by statute in the Secretary of the Army. Nor does it use the phrase "fundamental law." This was Secretary Wilson's expression, chosen, perhaps ill-advisedly, during a news conference.

But that such ideas are in the air can hardly be denied. The theory of a single "chain of command," running from the President down, is a favorite one, not merely in military affairs, but throughout the Executive branch. Insofar as the concept of a unilinear chain of command is regarded merely as a tool of efficient administration, military or otherwise, it is not open to serious objection. But once it is taken as the starting point of all thinking in the administrative area, it is easy to forget that it is circumscribed by many constitutional and legislative limitations, and must be so circumscribed if our republican form of government is to be preserved. The "supreme power and authority" of the executive is limited to executive matters. It must not invade the legislative or judicial sphere. It must not be exercised in contravention of the law, whether that law is statutory or traditional. This limitation of executive power, and not the power itself, is the "fundamental law" of the land, and has been such for upward of seven centuries. As Bracton put it:

The King himself ought not to be subject to any man, but he ought to be subject to God and the law, since law makes the King. Therefore let the King render to the law what the law has rendered to the King, namely, dominion and power, for there is no King where will rules and not the law.\textsuperscript{154}

Coke cited this passage during his famous controversy with James I, in which he established once and for all that even the King was under the law. The issue then was precisely the same: whether the King could take a case from the judges and decide it himself "in his Royal person." Coke's reply has come ringing down through the centuries:

\textsuperscript{152} Opinion of H. Struve Hensel, Counsel for the Committee on Department of Defense Organization, Roger Kent, General Counsel of the Department of Defense, and Frank X. Brown, Assistant General Counsel (Department Programs), March 27, 1953, S. Comm. on Armed Services, Report of the Rockefeller Committee on Department of Defense Organization, Committee Print, 83d Cong., 1st Sess. 18-21 (1953).

\textsuperscript{153} Opinion Memorandum for the Secretary of Defense, Jan. 25, 1954, supra note 3.

\textsuperscript{154} Bracton, On the Laws and Customs of England, Book I, Chapter VIII, n.5b.
To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony &c. or betwixt party and party, concerning his inheritance, chattels, or goods, &c. but this ought to be determined and adjudged in some court of justice, according to the law and custom of England.\footnote{155 Prohibitions del Roy, 12 Coke Rep. 63, 77 Eng. Rep. 1342 (K.B. 1607).}

This is the "law of the land," the fundamental safeguard of human rights and liberties, acknowledged as such in every English speaking nation. It is no less binding in military law than in civilian proceedings. This means that the powers of the President, as Commander in Chief, and of his subordinates in the defense hierarchy, do not include the power to dispense justice summarily and without trial.

General Snedeker, in discussing the power of the President as Commander in Chief to issue regulations governing the armed services, emphasizes the point that such regulations "cannot, without prior legislative authority, cover judicial acts related to courts-martial, or establish judicial procedures which affect the substantive rights of the accused."\footnote{156 Snedeker, Military justice Under the Uniform Code 37 (1953). The author exempts the pardoning power of the President conferred by art. II, § 2, cl. 1 of the Constitution. Id. at 37, and n.14.}

And again:

The subsequent provision [of the Constitution] conferring upon the President the unenumerated powers of commander in chief cannot impair the rule-making power expressly conferred upon Congress in Article I of the Constitution. . . . The power to make rules for the government and regulation of the land and naval forces is, by the Constitution, made a general legislative subject. The executive, in dealing with military justice, is outside the scope of any wartime or emergency powers which may be implied from his constitutional position as executive or as commander in chief. . . . The silence of Congress as to some aspects, the absence of judicial review, and mere usage or the policies of predecessors in office, however, cannot form a legitimate basis for any new powers in this field.\footnote{157 Snedeker, supra note 156, at 38-39. And see id., at 43.}

The Supreme Court has held that "the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."\footnote{158 Burns v. Wilson, 346 U.S. 137, 142-43 (1953).}

It has often been charged that military law is not law at all, but the mere will of the commander. Winthrop said that courts-martial are not courts in the full sense of the term, but "are, in fact, simply instrumental-
ties of the executive power, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.\textsuperscript{169}

But the Supreme Court has thought otherwise. In 1887, in speaking of a trial by court-martial, the Court said, quoting from an opinion of Lincoln's Attorney General:

The whole proceeding from its inception is judicial. The trial, finding and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law.\textsuperscript{160}

It is the latter, rather than the former, view which has been espoused by Congress in successive reforms of the Articles of War, in 1920,\textsuperscript{161} in 1948,\textsuperscript{162} and finally in 1950 by the enactment of the Uniform Code of Military Justice.\textsuperscript{163} This Code, in the words of its sponsors and the Congress which enacted it, was an earnest and sincere effort to reconcile the seemingly irreconcilable: the demands of justice with the needs of military discipline.\textsuperscript{164} A key provision of the Code, echoing a similar provision of the Elston Act,\textsuperscript{165} is a sweeping prohibition of the exercise of command influence upon courts-martial, coupled with a specific provision making any such act itself a court-martial offense.\textsuperscript{166}

Whatever cynics may think, there is little doubt that the Code as a whole, and these provisions in particular, have gone a long way toward eliminating "command control" over the administration of military justice by courts-martial.\textsuperscript{167} This was a tremendous step forward. It is dis-

\textsuperscript{169}Winthrop, Military Law and Precedents 49 (2d ed. 1896, reprint of 1920).
\textsuperscript{160}Runkle v. United States, 122 U.S. 543, 558 (1887) (quoting from 11 Ops. Att'y Gen. 19, 21 (1864)).
\textsuperscript{161}41 Stat. 809 (1920). The original 1806 statute was amended several times prior to its publication in the Revised Statutes (Rev. Stat. § 1542 (1875)), and again in 1916 (39 Stat. 650).
\textsuperscript{162}62 Stat. 628 (1948).
\textsuperscript{165}Article of War 88, 62 Stat. 639 (1948).
\textsuperscript{166}UCMJ arts. 37, 96(2), 64 Stat. 120, 137 (1950), 50 U.S.C. §§ 612, 692(2) (1952).
\textsuperscript{167}See, e.g., Ward, "UCMJ—Does It Work?," 6 Vand. L. Rev. 186, 199-201 (1953).

Snedeker, in speaking of Winthrop's executive instrumentality theory, states:

The death knell of this theory, which still appeared in service publications, was
heartening to see it now nullified by the simple expedient of dispensing with the court-martial altogether!

CONCLUSION

Justice ought to bear rule everywhere, and especially in armies: it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.

The Art of War, by Louis de Gaya (1678), quoted on Title Page, Clode, Administration of Justice under Military and Martial Law (2d ed. 1874).

There is one saving grace to Mr. Hensel's opinion. In it he states:

The issuance of any dishonorable discharge to an enlisted man by the Secretary of the Army, may, of course, be administratively reviewed and changed at any time by said Secretary of the Army or any successor Secretary. 168

This is correct. Although the law used to be that a dishonorable discharge, once awarded, was irrevocable except by Act of Congress, 169 the statutes now permit the Secretary of a military department to review and modify any military record, including a dishonorable discharge, whenever deemed necessary by him to correct an error or rectify an injustice. 170 I submit that a great injustice has been done. It should be corrected forthwith.

sounded when Congress, in the Uniform Code, provided for a Court of Military Appeals, assured an annual review of sentence policies of the armed forces, demanded that the procedural regulations prescribed by the President be reported to Congress, and specifically provided for punishment of commanding officers who admonish or otherwise attempt unlawfully to influence the action of courts-martial. The trend of the hearings before Congress leads inevitably to the conclusion that courts-martial are instrumentalities created by legislative authority for the performance of a judicial function, and are not instrumentalities of the executive power for the enforcement of discipline.


170 60 Stat. 837 (1946), as amended, 5 U.S.C. § 191a (1952). Under the Act of June 22, 1944 (58 Stat. 286, as amended, 38 U.S.C. § 693(h) (1952)), the Secretary of the Army is authorized to establish a board of review with power to review, change, correct, or modify any discharge or dismissal, except one issued by reason of the sentence of a general court martial, and to issue a new discharge. The Board's action is final, subject only to review by the Secretary.

Under the former statute there has been established the Army Board for the Correction of Military Records (32 C.F.R. § 581.3 (1955)), under the latter, the Army Discharge Review Board (32 C.F.R. § 581.2 (1955)). The normal procedure is to appeal to the latter board first.

For the powers and functions of these boards, see 40 Ops. Att'y Gen. 504 (1947); 41 id. No. 1 (1949); 41 id. No. 8 (1949); 41 id. No. 19 (1952).
January 25, 1954

OPINION MEMORANDUM FOR THE SECRETARY OF DEFENSE

I have considered whether the American enlisted men who have been held as prisoners of war by the Communist forces in North Korea and who, within the time limit fixed under the Armistice Agreement dated July 27, 1953, have refused to be repatriated may be dishonorably discharged from the United States Army by administrative action of the Secretary of the Army acting pursuant to the orders of the Secretary of Defense.

In my opinion, the Secretary of Defense has the authority to order the Secretary of the Army to dishonorably discharge from the United States Army by administrative action such United States enlisted personnel who have been held as prisoners of war by the Communist forces in North Korea and who, within the time limit fixed under the Armistice Agreement dated July 27, 1953, have refused to be repatriated. Such time limit has expired. The Secretary of the Army has full authority pursuant to such instructions by the Secretary of Defense and otherwise to issue an administrative dishonorable discharge and such discharge, when issued, will have the full force and effect of a dishonorable discharge within the meaning of all the various veterans' benefit statutes.

DISCUSSION

The Armistice Agreement of July 27, 1953 between the United Nations Command and the Communist Command, together with an Annex dated June 8, 1953 entitled "Terms of Reference for Neutral Nations Repatriation Commission," contains the relevant provisions with respect to the release and repatriation of all prisoners of war held in the custody of each side at the effective date of the Armistice Agreement. Under such Armistice Agreement and its "Terms of Reference" Annex, it is provided that all prisoners of war who have not exercised their right to be repatriated and "for whom no other disposition has been agreed to by the Political Conference within one hundred and twenty (120) days after the Neutral Nations Repatriation Commission has assumed their custody" shall be relieved "from the prisoner of war status to civilian status." Such 120-day period expired at 10:00 A.M. Eastern Standard Time on January 22, 1954 and no disposition of any kind was agreed to by the Political Conference with respect to the American enlisted men who had been taken prisoners of war by the Communists and who had not exercised, as of such hour and date, their right to be repatriated. As of the aforesaid hour and date, therefore, such prisoners of war became civilians in spite of the lack of formal declaration of such fact by the Neutral Nations Repatriation Commission.

The military authorities of the United States are, therefore, authorized and required to separate such enlisted men from the Army and to return them to civilian status.

As set forth in the opinion dated March 27, 1953 by the General Counsel and Assistant General Counsel of the Department of Defense and the Counsel for the Committee on Department of Defense Organization, the Secretary of
Defense has supreme power and authority to run the affairs of the Department of Defense and all its organizations and agencies. Such Secretary of Defense may exercise and may direct the exercise of any and all authority vested in the Secretaries of the respective military Departments.

The basic statute specifically authorizing the Secretary of the Department of the Army to issue discharges from the Army is found in 10 U.S.C. 652a which reads as follows:

No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial.

Such statute is currently in full force and effect. In substance, this provision has been in effect since 1806. See Reid v. United States, 161 Fed. 469, 471. Furthermore, this statute merely supplements the power of the heads of Departments to govern their departments conferred by 5 U.S.C. 22, which has been statute law since July 27, 1789.

It will be noted that the statute authorizes the discharge from the Army of enlisted men whose terms of service have not yet expired in two alternative ways—(a) in the manner prescribed by the Secretary of the Department of the Army and (b) by sentence of a general or special court-martial. Such alternative provision covers all types of discharges and neither alternative contains any restriction or limitation on the type of discharge authorized under such alternative provision. Above all, there is no limitation, express or implied, on the authority of the Secretary of the Army to issue and to prescribe the issuance of all types of discharges.

Pursuant to such statutory authorization, the Secretary of the Army may, in his discretion, issue dishonorable discharges as well as honorable discharges and prescribe the manner in which enlisted men may be discharged. As indicated above, the statute imposes no restrictions on the Secretary of the Army with respect to discharges of enlisted men. No subsequent or other statute contains any such restriction.

The opinions of the Judge Advocate General of the Army since 1889 that dishonorable discharges may be issued only after general or special courts-martial were correct under Army Regulations as then and currently promulgated by the Secretary of the Army. They were not—and are not now—correct to the extent that they imply or state any statutory limitation on the power of the Secretary of the Army to issue dishonorable discharges.

The current provisions of the Army Regulations providing that dishonorable discharges to enlisted men may be issued only after findings of court-martial are not binding on the Secretary of the Army who promulgated such Army Regulations. Reid v. United States, supra, 472. Furthermore, it is not necessary for the Secretary of the Army to amend any of the Army Regulations. His act of issuing a dishonorable discharge will not only be superior to the Army Regulations which were made by him and have no force except by virtue of his order but also his act of issuing such dishonorable discharge will be, in and of itself, an effective amendment of any Army Regulations to the contrary.
The issuance of any dishonorable discharge to an enlisted man by the Secretary of the Army may, of course, be administratively reviewed and changed at any time by said Secretary of the Army or by any successor Secretary.

I have considered the suggestion made by the Judge Advocate General of the Army that the Uniform Code of Military Justice enacted on May 5, 1950 (See 50 U.S.C. 551 et seq.) has by implication repealed the power of the Secretary of the Army, conferred upon him in 10 U.S.C. 652a, to issue dishonorable discharges. There is no express provision in such Uniform Code of Military Justice restricting in any way such authority of the Secretary of the Army or amending the statute of 10 U.S.C. 652a. The Uniform Code of Military Justice is a codification of the criminal and penal jurisdiction to be exercised by general and special courts-martial. It is concerned with the trial and punishment of offenses against military law rather than the issuance of discharges to enlisted men. Its provisions are entirely consistent with 10 U.S.C. 652a which provides two alternative methods in which discharges of all types may be issued—(a) in a manner prescribed by the Secretary of the Army and (b) by general or special court-martial. As a matter of fact, the Uniform Code of Military Justice expressly recognizes the power of a Secretary of a military Department administratively to substitute a discharge determined by him for any discharge or dismissal ordered by sentence of a court-martial (see 50 U.S.C. 661(b)).

The doctrine of repeal by implication does not apply. That doctrine is applicable only when a second statute, although not mentioning the prior statute, is by its terms so inconsistent with and contrary to the prior statute that no other conclusion can be drawn except that the prior statute was intended to be repealed. Such is not the case with the Uniform Code of Military Justice and 10 U.S.C. 652a. There is no inconsistency between the Uniform Code and 10 U.S.C. 652a. As a matter of fact, both statutes are entirely consistent; the second statute, i.e., the Code of Military Justice, merely spelling out in greater detail the authority of the general and special courts-martial under 10 U.S.C. 652a and all other relevant statutes.

Furthermore, the issuance by the Secretary of the Army of any type of discharge, being a discretionary act permitted to him by the statutes of the United States, is not subject to review by any of the courts of the United States. Miller v. Commanding Officer, Camp Bowie, 57 Fed. Supp. 884; Nordmann v. Woodring, 28 Fed. Supp. 573; Reid v. United States, 211 U.S. 529.

It is, therefore, clear that 10 U.S.C. 652a affirmatively authorizes the Secretary of the Army to issue administratively all kinds of discharges to enlisted men and to prescribe the manner in which such discharges shall be issued; that the authority conferred by such statute upon the Secretary of the Army has not been repealed, amended or limited by any subsequent statute; and that the issuance by the Secretary of the Army of a dishonorable or any other type of discharge to an enlisted man is not reviewable in the courts of the United States.

/s/ H. STRUVE HENSEL
H. STRUVE HENSEL