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Constitutional Law--Armed Forces--Living in Two Worlds

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CASE COMMENTS
Constitutional Law — Armed Forces—Living in Two Worlds

P, an army reservist, worked for a theatrical agency as agent for "rock and roll" bands. Because of this position P wore his hair "longer than conventional length." Until July 1, 1968, the Army permitted reservists to have long hair if it contributed to their civilian livelihood. On this date the Army issued a directive which ended that right. Faced with the threat of immediate induction, P instituted this action to permanently enjoin his superior officers from enforcing certain statutes and the July 1, 1968 directive. He alleged that enforcement of these statutes and the directive, resulting in his activation, would violate his constitutional right to practice his chosen profession free from unreasonable governmental interference and would constitute a denial of liberty without due process of law. Held, injunction denied. The military did not go "far beyond any rational exercise of discretion." Standards of appearance for reservists are within the discretion of the military, and enforcement of these standards through procedures provided by law did not violate the rights of P. Absent extraordinary circumstances, the courts will not review military administrative proceedings. Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969).

In disposing of the Constitutional questions raised by this case, the court first established that certain constitutional rights are curtailed or suspended while an individual is in the military. In part, this is because the armed services "serve an essential function in safeguarding the country." To fully discharge this duty the court found that the armed services require a degree of discipline that necessarily impairs certain rights. They also found that individual rights were not unconstitutionally impaired thereby because it is the Constitution that authorizes the creation of an Army.

The courts allow the military a wide breadth of discretion in the regulation of its personnel and are extremely reluctant to review the exercise of that discretion. As a test for judicial intervention this court would require "action by the military which goes far beyond any rational exercise of discretion." Raderman was not

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1 Raderman v. Kaine, 411 F.2d 1102, 1106 (2d Cir. 1969).
2 Id. at 1104.
3 Id. at 1104.
4 Id. at 1104.
5 Id. at 1106.
contesting improper application of admittedly valid regulations; he was contesting the validity of the regulation. To grant the relief sought, this court would have had to determine what is the proper length of a reservist's hair. Such a determination was found to be clearly within the discretion of the military, and therefore not reviewable.

[A] federal court may properly examine the decision to call a reservist for active duty in order to determine if the reservist's procedural rights under the applicable statutes and military procedure and regulations were violated in a manner which caused substantial prejudice to the reservist.6

This statement is by the Court of Appeals for the Second Circuit less than one year before Raderman, in a remarkably similar factual situation involving a long-haired "rock and roll" musician. The cases are distinguished on two points: (1) In the earlier case, Smith v. Resor, the reservist had already been ordered to active duty, and (2) in Smith the Army regulation permitting reservists to wear long hair if it contributed to their civilian livelihood was still in effect.7 The second difference, of course, is controlling. To grant relief in Smith the court merely had to require the Army to follow its own regulation. Since the Army's discretionary standards for reservists were not questioned, the court felt that to grant relief

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6 Smith v. Resor, 406 F.2d 141, 146 (2d Cir. 1969).
7 The Army's Weekly Bulletin, dated Oct. 20, 1967, provided:
4. WEARING OF BEARDS, LONG HAIR OR MOUSTACHES BY RESERVISTS.
(a) References:
(1) Para. 31, AR 600-20
(2) Para. 34c, AR 140-1
(b) Cited references provide the following:
(1) Unit commanders have the authority to order individuals to remove, cut short, or trim, the items in question so that individuals will present a neat and soldierly appearance.
(2) Unit commanders have the authority to deny an individual credit for attendance at a drill if the individual does not present a neat and soldierly appearance.
(c) Individuals have the right to retain long hair, a beard or moustache if these items do, in fact, contribute to the individual's civilian livelihood. However, this must be proved by the individual concerned, and made a part of his record. If it is established that the individual's livelihood warrants long hair, a beard, or moustache, the unit commander has the right to insist that they be maintained in a neat manner.
(d) Discretion and moderation in issuing orders to remove beards should be exercised by the unit commanders, and each case will be considered and evaluated individually as it is presented.
would not involve undue interference with the military. Also, in *Smith* the Army's in-service reviewing procedure was effectively closed off because the officer who made the decision to activate Smith removed from his personnel file the "proof" that his hair contributed to his civilian livelihood.

From these two decisions one might conclude that when it is within the discretion of the military to establish standards for reservists, those standards are not judicially reviewable unless they go "far beyond any rational exercise of discretion." But in application, if regulations embodying these standards are violated to the substantial prejudice of a reservist, then the courts may grant relief. A reservist desiring to test an administrative determination by the military resulting in his activation usually does so under a habeas corpus writ pursuant to 28 U.S.C. §2241 (1964). This statute makes the habeas writ available when the plaintiff is "in custody" without attempting to set the boundaries of "custody". Decisions make clear that status as a member of the armed forces imposes a sufficient restraint on one's liberty to make the habeas writ available to him. However in *United States ex rel Schonbrun v. Commanding Officer,* another Second Circuit case, the court stated:

Generally habeas corpus is available only to a petitioner who is entitled to release from unlawful restraint, and is not a means of testing the conditions of admittedly lawful custody. . . . On the other hand, habeas corpus will lie to test the legality of a change from probation or parole to imprisonment. . . . Arguably a transfer from reserve status to active duty is attracted by the analogy of this latter line of cases rather than the former, although a change in duty assignments of a soldier or sailor in active service would not be. Yet to hold that habeas lies in such a case would require a rather close distinction of the decisions that it is not available to a selective service registrant before induction.

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*It is interesting to speculate about the Army's reasons for issuing the July 1, 1968 directive ending for reservists the privilege of wearing long hair. On July 1, 1968 the Army was under a Court order forbidding the induction of Smith pending final determination of his appeal. When *Smith v. Resor* was handed down in early 1969, in effect it directed the Army to follow its own regulations. By this time the regulation the Army had violated to the prejudice of the reservist was no longer in effect. The Army could not activate Smith for having long hair at the time suit was brought, but it could require Smith to cut his hair, or face induction under the current regulations.

*Raderman v. Kaine, 411 F.2d 1102, 1106 (2d Cir. 1969).*

"403 F.2d 371 (2d Cir. 1968).

*United States ex rel Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968).*
Whether or not habeas corpus is available to contest the call-up of a reservist, a federal district court is free to treat the proceeding as one for mandamus under 28 U.S.C. § 1361. (1964). This statute vests the district courts with “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

Debate at the time of passage made clear that Congress did not intend the courts to use this statute to justify interference with the exercise of discretion. With respect to the military, courts have been very respectful of this intent, declining to intervene unless official action goes “far beyond any rational exercise of discretion.”

For example, in Schonbrun when plaintiff’s unit was activated he sought relief under an Army regulation that exempted one whose activation would result in extreme personal and community hardship. His activation would have had an adverse effect on his wife’s mental disorder, and he was a difficult-to-replace teacher in a special school for disadvantaged youth. The Army decided he was not to be exempt from activation, and the court, though it sympathized with his plight, held that this was a rational exercise of discretion that would not justify judicial intervention.

Regulations set forth by the service may, of course, be modified by the service. (Witness the regulation terminating the right of an Army reservist to retain long hair.) The effect of the “enlistment contract”—the agreement between the reservist and the service in which he enlisted — on such modification power is unclear. The power of Congress to alter this “contract” is also undefined. One commonly used “agreement” signed by the reservist provided that the reservist could not be ordered to active duty without his consent, except in time of war, or when the President declared a national emergency, or “when otherwise prescribed by law.” If the reservist did not participate satisfactorily in his military training, this fact was reportedly to his draft board, which reclassified him and made him eligible for induction. This resulted in unsatisfactorily participating reservists having no more change of going on active duty than their draft-eligible peers, although if called they would serve the normal two years plus the six months active duty all reservists undergo. To close this “loophole”, Congress enacted legislation empowering the

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United States ex rel Schonbrun v. Commanding Officer, 403 F.2d 371, 374 (2d. Cir. 1968).
armed services to order to active duty members of their respective reserves who were not serving satisfactorily. This legislation gave the reservist credit for the six months he had already served, but eliminated draft board reclassification (and possible reclassification hearings), and induction by the draft board.

It is arguable that being ordered to active duty under this statute would be contrary to the agreement signed by the reservist when he entered the service, and the validity of the legislation has been tested by a few reservists ordered to active duty for unsatisfactory participation. An unreported case by the United States District Court for the Central District of California held that application of the statute would violate the "enlistment contract", and would therefore be a deprivation of property without due process of law.

In a nearly identical factual situation, the United States District Court for the Eastern District of New York held that the new statute was provided for in the "enlistment contract" by the phrase, "when otherwise prescribed by law", and therefore the "contract" was not violated. This court felt that if the clause were construed in any other way it would "fetter" the President and Secretary of Defense in the administration of the reserves. In another similar situation, the United States District Court for Colorado dealt with an "enlistment contract" that did not provide for a reservist to be ordered to active duty "when otherwise prescribed by law". There was no way of interpreting this "contract" so that a reservist could be ordered to active duty except in time of war or national emergency declared by the President. This court referred to the above decisions, and held that Congress has the power to alter existing contracts under certain circumstances through the exercise of some paramount power of the sovereign. In this instance the paramount power was the Constitutionally provided War Powers—the powers of Congress to declare war, raise armies, and to govern and regulate land and naval forces.

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"Id." at 296.
"Id." at 559.
CASE COMMENTS

CONCLUSION

It appears that a reservist does not have rights protected to the same degree by the Constitution as do his fellow citizens who are civilians. Likewise, his access to the courts for review of administrative proceedings appears more constricted than his civilian counterpart. The terms of the very agreement he signed that made him a member of the reserves are subject to modification by Congress in the exercise of some paramount sovereign power. These impairments of liberty are adequately justified by the courts; indeed there are few citizens who would question the need of the military for discipline at the expense of some individual liberties.

Problems sometimes arise when the soldier is also a civilian, or perhaps, when he is neither soldier nor civilian, but in limbo between the two worlds and forced to live in both. For example, he is subject to the same rigid discipline as a full-time soldier, but only for a few days each month. The effects of this discipline, however, often persist beyond the end of his drill (a man with short hair on the weekend rarely has long hair the following week, though he has the same freedom to wear long hair then as any civilian).

Problems involving reservists multiplied with the Viet Nam War; after its end we shall see a corresponding reduction in litigation. These problems have helped define more clearly the rights and obligations of reservists.

William Robert Wooton

Constitutional Law — Judicial Review of Congressional Membership Exclusion

Adam Clayton Powell, Jr. was duly elected from the Eighteenth Congressional District of New York to serve in the House of Representatives for the Ninetieth Congress. During the Eighty-ninth Congress, a special subcommittee of the House had reported that the Committee on Education and Labor, of which Powell was chairman, had deceived the House authorities as to travel expenses and, additionally, that there was strong evidence that Powell had directed illegal salary payments to his wife. Consequently, when the Ninetieth Congress organized in January, 1967, the oath was not administered to Powell. On February 23, 1967, a select committee of the Ninetieth Congress issued a report, finding