

Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military

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The United States Navy recently sought the death penalty in the court-martial of a black sailor who stabbed his white superior officer to death aboard a frigate at sea. The sailor believed that the officer had blocked his promotion out of racial prejudice.¹ At the trial, the ship's commander acknowledged that there was "plenty" of racism in the Navy. The defense argued that the commander, a black, had failed to investigate properly the defendant's complaint due to the opposition of his white superior officers.²

Discrimination remains a serious problem in the United States military. As the law stands, however, when an enlistee dons a military uniform, she sheds her right to a judicial remedy for employment discrimination.

The Supreme Court has foreclosed two of three possible causes of action to uniformed military personnel who have suffered discrimination in the service. In *Chappell v. Wallace*,³ the Court held that servicepersons could not sue the military under the equal protection clause of the Fifth Amendment because "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers."⁴ Earlier,

1. N.Y. Times, Jan. 23, 1986, at A14, col. 1.

2. N.Y. Times, Jan. 30, 1986, at A13, col. 1.

3. 462 U.S. 296 (1983).

4. *Id.* at 304. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), established that the victim of a constitutional violation by a federal officer has the right to recover damages against the official in federal court despite the absence of any statute conferring such a right. The doctrine of sovereign immunity bars a similar action against the United States itself.

Commentators have criticized *Chappell* on a number of grounds. First, it leaves courts without discretion to consider the adequacy of intramilitary remedies. Second, the Court departed from its previous rule that it would refuse to provide a *Bivens* remedy only where Congress explicitly directs that a plaintiff must rely on another equally effective remedy. Third, the Court took facts (the disciplinary structure of the military) apparently insufficient to defeat a claim as a "special factor counseling hesitation," and other facts insufficient to defeat a claim under the "alternative remedial scheme" bar, and combined them to derive a basis for refusing a remedy. See Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 285-91 (1984).

One court has since read *Chappell* to apply to a narrow set of cases. *Stanley v. United States*, 574 F. Supp. 474 (S.D. Fla. 1983), *aff'd in part, rev'd in part*, 786 F.2d 1490 (11th Cir.), *cert. granted*, 107 S. Ct. 642 (1986). The *Stanley* court would find "special factors" only where direct orders are

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in *Brown v. GSA*,⁵ the Court ruled that sovereign immunity barred discrimination claims against the federal government under 42 U.S.C. § 1981,⁶ and by implication, 42 U.S.C. § 1985(3).⁷ The *Brown* Court held that Title VII provides the exclusive judicial remedy for discrimination in federal employment.⁸ To date, however, no court has granted a serviceperson a remedy under Title VII.

Title VII extends the protections afforded by the Civil Rights Act of 1964, as amended, to all employees "in military departments."⁹ Notwithstanding this language, both the Eighth and Ninth Circuits have held that Title VII does not apply to uniformed military personnel.¹⁰ The Supreme Court has denied review of the issue.¹¹ These courts thus deny any judicial redress for employment discrimination to over two million citizens in the nation's service.¹² A lone district court has opined that Title VII applies to uniformed servicepersons. Even this court would limit its application severely.¹³

This Note argues that courts should apply Title VII to the United States military. It examines discrimination in the military and the inadequacy of current intramilitary remedies. The Note argues that uniformed servicepersons are statutorily entitled to a remedy for employment discrimination under Title VII. It contends that despite the often narrow and questionable statutory arguments of the opinions, the driving force behind the courts' denial of a Title VII remedy is the "separate community" doctrine, under which courts have traditionally declined to review claims concerning the military for fear of interfering with military discipline and efficiency, and for fear of interfering in a province supposedly entrusted to the "plenary power" of Congress and the President. The Note contends that courts' failure to examine the assumptions of this doctrine has led to its misapplication in cases arising under Title VII. Finally, the Note sug-

involved. 574 F. Supp. at 479. The prevailing interpretation, however, is that *Chappell* necessarily imposed a per se prohibition on the filing of *Bivens*-type actions by servicepersons against their superiors for alleged constitutional violations. *E.g.*, *Mollnow v. Carlton*, 716 F.2d 627, 630 (9th Cir.), *cert. denied*, 465 U.S. 1100 (1983). Moreover, although *Chappell* did not expressly apply to federal statutory violations, some courts, after finding the same risks to military discipline involved, have applied its reasoning to them. *See, e.g.*, *Mir v. Fosburg*, No. 84-5667, slip op. (9th Cir. June 25, 1985).

5. 425 U.S. 820 (1976).

6. 42 U.S.C. § 1981 (1982).

7. 42 U.S.C. § 1985(3) (1982).

8. 425 U.S. at 835.

9. 42 U.S.C. § 2000e-16(a) (1982).

10. *See Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

11. *Johnson v. Alexander*, 439 U.S. 986 (denying certiorari).

12. In 1984, there were 2,138,000 uniformed military personnel on active duty. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 340 (106th ed. 1986).

13. *Hill v. Berkman*, 635 F. Supp. 1228 (E.D.N.Y. 1986). The court in fact denied redress in this case. *See infra* notes 66-75 and accompanying text.

gests that strict adherence to the procedural provisions of the statute would minimize judicial interference with the military, yet protect servicepersons from undue abrogation of their fundamental rights.

I. DISCRIMINATION IN THE MILITARY

A. *A History of Discrimination*

Since the Civil War, various forms of discrimination have dampened morale, heightened militancy, even sparked mutiny in the United States military.¹⁴ By the beginning of World War II, there were only five black officers in the Regular army, three of whom were chaplains.¹⁵ During the Vietnam War, discrimination hampered the combat effort itself. Fear and resentment of racist commanders not only engendered disobedience and desertions, but also incited lynchings, fraggings, and riots both at combat posts in Asia and on training bases at home.¹⁶ Well into the 1960s, if not beyond, the military assigned minorities tasks that perpetuated the image of their meniality and the idea of their marginality to the service. Blacks felt that they were either fodder for the infantry or stewards for the officers.¹⁷

The recent influx of minorities and women as well as its all volunteer policy have forced the military to make some progress toward eliminating discrimination.¹⁸ Blacks now constitute about 19% of uniformed personnel, although they make up only 12% of the general population. On the other hand, women constitute 51% of the general population, but only about 10% of servicepersons. Moreover, the percentages of blacks and women in various ranks differ significantly. Thirty percent of the Army's top noncommissioned officers are black, but only 6% of the Navy's are. Sharp contrasts exist between the numbers of blacks and whites, and between the numbers of women and men, who hold commissioned offices, the highest positions in the service. Black officers are concentrated in the lowest three grades of commissioned offices. Black commissioned officers

14. M. BERRY, *MILITARY NECESSITY AND CIVIL RIGHTS POLICY* 62-74, 90-91 (1977); R. HOPE, *RACIAL STRIFE IN THE U.S. MILITARY: TOWARD THE ELIMINATION OF DISCRIMINATION* 11-15 (1979); W. YOUNG, *MINORITIES AND THE MILITARY* 191-242 (1982).

15. G. PATTON, *WAR AND RACE: THE BLACK OFFICER IN THE AMERICAN MILITARY, 1915-1941*, at 176 (1981).

16. See D. CORTWRIGHT, *SOLDIERS IN REVOLT* (1975); R. HOPE, *supra* note 14, at 37-40. The term "fragging" refers to the use of fragmentation grenades by enlisted personnel against superior officers or other enlisted personnel. *Id.* at 43-47; see *infra* notes 98-99 and accompanying text.

17. NAACP, *THE SEARCH FOR MILITARY JUSTICE: REPORT OF AN NAACP INQUIRY INTO THE PROBLEMS OF THE NEGRO SERVICEMAN IN WEST GERMANY* (1971) [hereinafter NAACP REPORT]; PRESIDENT'S COMM. ON EQUAL OPPORTUNITY IN THE ARMED FORCES, *INITIAL REPORT: EQUALITY OF TREATMENT AND OPPORTUNITY FOR NEGRO MILITARY PERSONNEL STATIONED WITHIN THE UNITED STATES* 3-25 (1963) [hereinafter GESELL COMMITTEE, INITIAL REPORT].

18. W. YOUNG, *supra* note 14, at 233-35.

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reach the proportion of blacks in the general population only in the Army. They never reach the proportion of blacks in the service. And at the rank of colonel or its equivalent, only 2.6% of officers are black.¹⁹ Many black officers claim that white superiors have often overlooked them for assignments that could lead to promotion. These officers contend that discrimination has not disappeared from the service; it has merely “gone underground.”²⁰ On the other hand, for women, the major career impediment is an open, statutorily enacted policy. Women are excluded from combat and therefore from senior command positions as well.²¹ Like minority men, women also suffer from unaccepting or paternalistic attitudes of individual superior (and inferior) officers.²²

B. *Intentional Discrimination*²³

Due to their “extraordinary discretionary authority,”²⁴ individual military officers have wide latitude to discriminate against personnel below them. First, officers may discriminate in granting promotions. Some blacks complain that while white superiors tell them that they are doing an outstanding job, they give them much lower written evaluations or damn them with faint praise.²⁵ In addition, individual commanders may discriminate in handing out nonjudicial punishment and less than honorable administrative discharges. The latter may mar a serviceperson’s life-long employment opportunities. Neither of these actions requires a hearing.²⁶ Finally, commanders may discriminate in transfer and other assignments which can determine opportunities for career advancement.

C. *Neutral Rules Having a Disparate Impact*

In addition to intentional discrimination by commanders, the military pursues a number of policies and practices that, although neutral on their

19. Halloran, *Blacks and Women Find Roads for Advancement Through Life in Military*, N.Y. Times, Aug. 26, 1986, at B24, col. 1.

20. *Id.*

21. See 10 U.S.C. §§ 6015, 8549 (Supp. III 1976); see generally R. HOLM, *WOMEN AND THE MILITARY* (1982).

22. Halloran, *supra* note 19, at B24, col. 1.

23. Intentional discrimination would give rise to a cause of action for disparate treatment if Title VII were applied to the military. See 42 U.S.C. § 2000e-2 (1982); McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

24. D. CORTWRIGHT, *supra* note 16, at 209.

25. Halloran, *supra* note 19, at B24, col. 1.

26. See generally D. CORTWRIGHT, *supra* note 16, at 201-19; GESELL COMMITTEE, INITIAL REPORT, *supra* note 17, at 1-25; NAACP REPORT, *supra* note 17, at 1-11, 14-16; U.S. DEP’T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 27-29, 33-35, 67-74, 108-11 (1972) [hereinafter DoD TASK FORCE]; W. YOUNG, *supra* note 14, at 219-35. In addition, servicepersons have charged that the military has engaged in racially selective prosecution in courts-martial. See, e.g., *United States v. Tatum*, 17 M.J. 757 (1984).

face, have a disproportionate, negative impact upon members of minority groups and women. Such practices would give rise to a cause of action if Title VII were applied to the military.²⁷

For instance, critics charge that the Armed Forces Qualification Test (AFQT) measures educational and cultural background, not innate intelligence.²⁸ Even the military admits that it is not an accurate predictor of performance.²⁹ Because members of minority groups score "markedly" lower than whites on this test, however, the military has often "channeled" them into low skill, "soft core" fields or into the Army's infantry unit, where there are few opportunities for further training and fewer for promotion.³⁰ Applied to the military, Title VII would proscribe the use of discriminatory tests not related to performance in the service.

Unredressed, such discrimination is self-perpetuating. When women and minority officers miss out on plum assignments to war colleges and staff commands, they fail to obtain credentials and connections that will enable them to obtain the next promotion.³¹

D. *Inadequacies of Intramilitary Remedies*

The military is a notoriously tradition-bound and hierarchical institution which has often been slow to respect changing public values, including those about discrimination, unless directed to do so by Congress, the President, or the courts. Current intramilitary remedies for discrimination are shockingly inadequate. Their principal deficiencies are: (1) control by the chain of command; (2) lack of formal procedures, accountability, or hearings; and (3) inappropriateness of military fora as courts of last resort.

1. *Command Influence*

Military personnel may pursue remedies for discrimination either under the regulations of the Department of Defense (DoD) Equal Opportunity Program³² or under the general grievance procedure of Article 138

27. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment practice not related to job performance that operates to discriminate on basis of impermissible classifications unlawful under Title VII).

28. D. CORTWRIGHT, *supra* note 16, at 204, 216-17; NAACP REPORT, *supra* note 17, at 1-3 (AFQT "a bonus for having grown up white"); DoD TASK FORCE, *supra* note 26, at 49.

29. DoD TASK FORCE, *supra* note 26, at 49.

30. D. CORTWRIGHT, *supra* note 16, at 203-04; NAACP REPORT, *supra* note 17, at 1-5; W. YOUNG, *supra* note 14, at 226.

31. NAACP REPORT, *supra* note 17, at 4-5.

32. Department of Defense Equal Opportunity Program, 32 C.F.R. § 191 (1986). For an example of individual service regulations pursuant thereto, see Equal Opportunity Program in the Army, Army Reg. No. 600-21 (1977) [hereinafter AR 600-21].

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of the Uniform Code of Military Justice (UCMJ).³³ Under either scheme, one must proceed through the chain of command; there are no independent channels.³⁴ Naturally, personnel are reluctant to file a complaint against a superior officer with that officer for fear of retaliation.³⁵ Concomitantly, officers have less than compelling incentives to investigate and redress complaints against themselves or their colleagues when a challenge is raised by someone of inferior rank.³⁶

2. *Lack of Formal Procedures, Accountability, or Hearings*

Not only does the chain of command control the grievance “process,” but the “process” provides no detailed rules or strict accountability. Neither the Equal Opportunity Program nor Article 138 prescribes any procedures that the chain of command must follow in its investigation of complaints. No particular officer is responsible for investigation.³⁷ As a result, the chain of command usually opts for “informal” investigations, which are principally characterized by delay. The complainant almost never gets a hearing. The “process” resembles a runaround.³⁸

33. Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-940 (1982).

34. DoD regulations provide that “[t]he chain of command is the primary channel to correct discriminatory practices and for communication of race relations and equal opportunity matters.” 32 C.F.R. § 191.4(g) (1986). DoD regulations provide no alternative channels of complaint. Similarly, Army regulations provide that “[i]ndividuals are encouraged to use command channels for redress of grievances When appropriate an independent investigator should be appointed. Personnel assigned to [Equal Opportunity] offices should be consulted . . . in the resolution of complaints of discrimination but should not be used to investigate such matters.” AR 600-21, *supra* note 32, §§ 2-4 (1977). Not only is the appointment of an independent investigator discretionary, but the regulations make no provision for how to do so or whom to appoint.

In parallel fashion, article 138 of the UCMJ provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of

10 U.S.C. § 938 (1982).

35. Servicepersons have claimed that they have been court-martialed on other grounds in retaliation for filing complaints. *See, e.g.,* United States v. Whalen, 15 M.J. 872, 875 (1983).

36. *See* R. RIVKIN, G.I. RIGHTS AND ARMY JUSTICE 181-83 (1970).

37. GESELL COMMITTEE, INITIAL REPORT, *supra* note 17, at 27; *see* M. MACGREGOR, INTEGRATION OF THE ARMED FORCES, 1940-1965, at 566 (Defense Studies Series, 1981) (instead of issuing detailed guidelines and demanding strict accounting, DoD indiscriminately approved equal opportunity plans even when plans eschewed real accountability in favor of vaguely stated principles); *see also supra* note 34.

38. *See* R. RIVKIN, *supra* note 36, at 181-83 (“stalling tactics” of chain of command); R. RIVKIN & B. STICHMAN, THE RIGHTS OF MILITARY PERSONNEL 122-30 (1977) (advising servicepersons that letter to member of Congress is sometimes more promising avenue of complaint than use of chain of command); Fox, *Boards for Correction of Military Records*, 88 CASE & COMMENT, SEPT.-OCT. 1983, at 42, 44 (BOARDS FOR CORRECTION OF MILITARY RECORDS (BCMRs) RARELY GRANT HEARING); NOTE, *Judicial Review and Military Discipline—Cortright v. Resor: The Case of the Boys in the Band*, 72 COLUM. L. REV. 1048, 1067 (1972) (military discretion to institute informal investigation).

3. *Inappropriateness of Military Fora as Courts of Last Resort*

The cardinal goal of military law and military tribunals is discipline, not justice.³⁹ For this reason, the Supreme Court has observed that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."⁴⁰ Although the military should have the first opportunity to redress grievances against it, the courts should not entrust entirely to the military a function, namely the preservation of individual rights, which the military is inherently unsuited to perform.⁴¹ The

The *Hill* case provides a good example of the military runaround. See Plaintiff's Memorandum of Law Opposing Defendant's Motion To Dismiss or for Summary Judgment, and Motion for Judgment on the Pleadings at 9, 52-57, *Hill v. Berkman*, 635 F. Supp. 1228 (1986). Promptly after her discharge, Hill, initially acting pro se, then through attorneys, initiated administrative complaints. She pursued these claims both where she had enlisted and in another city where she had worked. Hill's attorneys communicated with the Army informally by telephone and letter, and then formally by a verified written complaint. Throughout two years of administrative "review," the Army repeatedly delayed and never held a hearing or addressed the merits of Hill's claim. The Army did not grant Hill her honorable discharge papers, without which she had difficulty regaining civilian employment, for 15 months.

With regard to Hill's discrimination complaint, her attorneys complained to her superior officer, who was also an Equal Employment Opportunity (EEO) Officer, and pursued the complaint up the chain of command at each office to which she was directed. After nearly two years, Hill received a "final" agency decision against her and a "right to sue" letter. When she did sue, however, the Army defended on the grounds that she had failed to exhaust her administrative remedies because she had not sought redress at the Army Board for Correction of Military Records (ABCMR). Neither the ABCMR nor any service BCMR, however, has jurisdiction over the substance of discrimination complaints. By issuing an honorable discharge, a service precludes review by its BCMR. See *Glines v. Wade*, 586 F.2d 675, 678 (9th Cir. 1978), *rev'd on other grounds*, 444 U.S. 348 (1980); *Saal v. Middendorf*, 427 F. Supp. 192, 197 (N.D. Cal. 1977), *aff'd*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981).

39. See *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969) ("A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.") (footnote omitted); *Burns v. Wilson*, 346 U.S. 137 (1953) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."); R. MOYER, *JUSTICE AND THE MILITARY* §§ 1-152 (1972) (military justice designed to serve discipline rather than justice; impact upon community more important than individual result); R. SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 67-69, 91 (1970) (Blackstone characterized English military justice, upon which American military justice is closely modeled, as "entirely arbitrary in its decisions and . . . something indulged rather than allowed"; criterion of military administrative boards is convenience).

40. *O'Callahan*, 395 U.S. at 265.

41. See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.21 (1978) (review would strengthen administrative process); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."); Comment, *God, the Army, and Judicial Review: The In-service Conscientious Objector*, 56 CALIF. L. REV. 379, 447 (1968) (military opposition to judicial review conveys impression that its process cannot stand light of scrutiny).

The establishment of independent investigatory bodies would remedy some of the defects of the current grievance process, especially its control by the chain of command. Cf. 10 U.S.C. § 867 (1987) (providing Courts of Military Appeal composed of civilian judges to hear appeals of courts-martial). Independence, however, is not the only issue at stake. Establishing investigatory bodies within the Department of Defense would not address the more profound issues of institutional competence and values. The Constitution establishes Article III courts, not agency investigators, as the guardians of

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lack of an independent forum of last resort not only deprives the complainant of the best guarantee of due process of law, but it deprives the military of outside legitimation of its decisions.⁴²

II. STATUTORY CONSTRUCTION

Despite the history of discrimination in the military, the courts have denied servicepersons a cause of action under Title VII. The Eighth and Ninth Circuits agree that Title VII does not apply to uniformed military personnel, but their rationales contradict each other. Although one district court has held that the statute does apply to the military, it looked to considerations outside the statute to restrict that application severely and to deny a remedy in the case in question.

A. *The Ninth Circuit: The Scope of the "Military Departments"*

In *Gonzalez v. Department of the Army*, plaintiff alleged that he had been denied a promotion because of intentional race discrimination on the part of the Army.⁴³ Title VII applies to the "military departments as defined in section 102 of Title 5."⁴⁴ Nevertheless, in *Gonzalez*, the Ninth Circuit held that Congress referred only to civilian employees when it applied Title VII to the "military departments."⁴⁵ Ample evidence contradicts that conclusion.

First, section 102 of Title 5 states: "The military departments are: The Department of the Army[;] The Department of the Navy[;] The Department of the Air Force."⁴⁶ Title 5 nowhere indicates any exclusion of uniformed personnel from these departments. In fact, Congress expressly defines each of these departments to include uniformed personnel. For example, the Department of the Navy is composed of, among other things, "the entire operating forces . . . of the Navy and of the Marine Corps," and all "field activities, headquarters, forces, bases, installations, activities and functions under the control or supervision of the Secretary of the

civil rights. It also establishes that the civilian government is supreme over the military.

42. *Hill v. Berkman*, 635 F. Supp. at 1240-41.

43. 718 F.2d 926 (9th Cir. 1983). Following his termination, plaintiff was granted reinstatement and a promotion through administrative proceedings. Plaintiff alleged that despite these remedies, he was still "at least four years behind his class-year contemporaries in the promotion process," and that he had sustained other injuries. *Id.* at 927.

44. 42 U.S.C. §2000e-16(a) (1982).

45. 718 F.2d at 927-28 (quoting 42 U.S.C. § 2000e-16(a) (1982)). According to the court's construction of the *Code*, "Congress intended a distinction between 'military departments' and 'armed forces,' the former consisting of civilian employees, the latter of uniformed military personnel." *Id.* at 928. But the court ignored a number of Code provisions that indicate clearly that the armed forces are part of the military departments, not separate from them. See *infra* text and accompanying notes 52-55.

46. 5 U.S.C. § 102 (1982).

Navy.”⁴⁷ In addition, Congress referred the reader to a general definition of military “department” which expressly includes “all field headquarters, *forces, reserve components*, installations, activities, and functions,”⁴⁸ not just civilian bureaucrats. Finally, Congress emphasized the breadth of the term “department” by providing a separate definition of “executive part of the department.” Even these limited parts of the departments encompass thousands of uniformed personnel.⁴⁹

The legislative history of Title VII, like the language of the statute, strongly supports a broad definition of department. The language of Title VII precisely tracks the language of the Fair Labor Standards Act.⁵⁰ That statute, like Title VII, defines military departments by reference to 5 U.S.C. § 102, but then expressly limits its coverage to the civilian employees thereof.⁵¹ If the term “department” encompassed only civilian employees, such limitation would be redundant. Had Congress wanted to narrow the coverage of Title VII, it would have done so in parallel fashion.

The *Gonzalez* court suggested that the term “military departments” refers to civilian employees, whereas the term “armed forces” refers to uniformed personnel.⁵² Congress has defined “armed forces,” however, as “the Army, Navy, Air Force, Marine Corps, and Coast Guard.”⁵³ As noted above, Congress expressly includes the members of these bodies within the “military departments.”⁵⁴ Therefore, whereas the “armed

47. 10 U.S.C. § 5061 (1981). For explanation of the term “departments,” the notes to section 102 refer to Title 10 of the *Code*, which relates to the armed forces. *See also* 10 U.S.C. § 5062(a) (1987) (“*The Navy, within the Department of the Navy*, includes, in general, naval combat and service forces”) (emphasis added); 10 U.S.C. § 5062(b) (1987). For similar definitions of the other departments, see 10 U.S.C. § 3062(b) (1987) (Army); 10 U.S.C. § 8062(b) (1987) (Air Force); 10 U.S.C. § 5063(a) (1987) (Marine Corps within Department of Navy).

48. 10 U.S.C. § 101(5) (1982) (emphasis added); *see also* 10 U.S.C. § 101 note (1982) (“[T]he term ‘Department’ is defined to give it the broad sense of ‘Establishment,’ to conform to the source statute and the usage preferred by the Department of Defense”).

49. 10 U.S.C. § 101(6) (1982) (“‘Executive part of the department’ means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or the Department of the Air Force, as the case may be, at the seat of the government.”); 10 U.S.C. § 101 note (1982) (“the term ‘executive part of the department’ refers to the limited sense of the executive part at the seat of government. This is required by the adoption of the word ‘department’ . . . to cover the broader concept of ‘establishment.’”).

Each of the departments assigns both civilian and uniformed personnel to its executive part. *See, e.g.*, 10 U.S.C. § 5031 (1987) (Navy); 10 U.S.C. § 3031 (1987) (Army); 10 U.S.C. § 8031 (1987) (Air Force); 10 U.S.C. § 5041 (1987) (Headquarters, Marine Corps in executive part of Department of Navy).

50. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 94 (1984).

51. “[The term employee] means any individual employed by the Government of the United States . . . as a civilian in the military departments as defined in section 102 of Title 5.” 29 U.S.C. § 203(e)(2)(A)(i) (1982).

52. *Gonzalez v. Department of the Army*, 718 F.2d 926, 928 (9th Cir. 1983).

53. 10 U.S.C. § 101(4) (1987). These bodies are composed exclusively of uniformed personnel. *See, e.g.*, 10 U.S.C. § 5062(a) (1987) (Navy); 10 U.S.C. § 3062(b) (1987) (Army); 10 U.S.C. § 8062(b) (1987) (Air Force); 10 U.S.C. § 5063(b) (1987) (Marine Corps).

54. *See supra* note 47 and accompanying text.

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forces” encompass only uniformed personnel, the “military departments” encompass both civilian and uniformed personnel.⁵⁵

B. *The Eighth Circuit: The Scope of “Employees”*

In *Johnson v. Alexander*,⁵⁶ plaintiff alleged that he had been denied entrance to the Army on the basis of two regulations which operated to discriminate against blacks. The Eighth Circuit concluded that uniformed military personnel are not “employees” entitled to the protection of Title VII. The court reasoned that military service “differs materially from [civilian] employment in a number of respects.”⁵⁷ The court listed several distinctions between military and civilian employment in a footnote,⁵⁸ but failed to show any relevance of those distinctions to the objectives of Title VII. Indeed, the main distinction noted by the court, that enlisted personnel may not freely quit their “job[s],”⁵⁹ renders the need for Title VII protection more compelling in the military than in civilian employment. Other than the contractual term of employment, the only real distinction between civilian employment and voluntary military employment is the need for extraordinary discipline in the latter. Because the military need not discriminate against its personnel in order to maintain discipline, the distinction should not operate to exclude military personnel from the protection of Title VII.

The Eighth Circuit’s holding, moreover, clashes with Congressional intent that the coverage of the statute be expansive. The 1972 amendments extended Title VII to cover “all federal personnel.”⁶⁰ Courts reason that

55. Moreover, because civilians are commingled with uniformed personnel on staffs in the executive parts of the military departments, civilians alone could not constitute the military departments. *See, e.g.*, statutes cited *supra* note 49. Thus, when Congress occasionally refers to “a civilian employee of a military department . . . or a member of the armed forces, *see, e.g.*, 10 U.S.C. § 2737(a) (1982), it intends to indicate precisely to whom a statute refers, not to sever the armed forces from the military departments. If the military departments were composed solely of civilians, Congress could refer merely to “employees” of military departments. The term “civilian” would be surplusage. Moreover, Congress frequently speaks of members of the armed forces “under the jurisdiction of” a military department or its secretary. *See, e.g.*, 10 U.S.C. § 136(d) (1982) (requiring cooperation between secretary and members of armed forces under department’s jurisdiction); *see also* 10 U.S.C. § 541(b) (1982); 10 U.S.C. § 2104(b) (1982). The general definition of military department, 10 U.S.C. § 101(5) (1982), as well as the specific definitions of each of the departments, include all forces “under the control or supervision of” their respective secretaries. *See supra* notes 47–48 and accompanying text.

56. 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978). One of the regulations called for disclosure of prior arrests even though the arrests were not followed by convictions. The other allowed an applicant to be rejected if the applicant demonstrated an inability to get along with other people. *Id.* at 1220.

57. *Id.* at 1223.

58. *Id.* at 1223 n.4 (“An enlisted man in the Army, for example, is not free to quit his ‘job,’ nor is the Army free to fire him from his employment. Additionally, the soldier is subject not only to military discipline but also to military law.”).

59. *Id.*

60. Pub. L. No. 92-261, § 717(a), 86 Stat. 103, 111 (1972) (codified at 42 U.S.C.

because Congress did not expressly state its intention to include the uniformed military, it must have intended to exclude them. In the light of Congressional intent to provide comprehensive coverage with the 1972 amendments, the opposite presumption should obtain: Unless Congress expressly excluded a group, silence in the legislative history indicates an intent to include. Because Congress directed that the term "employee" in Title VII be construed "in the manner common for federal statutes," the legislative history of the term "employee" in federal labor statutes, among others, provides evidence of Congress' intent that Title VII reach broadly in its coverage. In Title VII, as in several other statutes, Congress left the term "employee" undefined in order to include the broadest possible spectrum of workers despite distinctions between them.⁶¹ Furthermore, in construing Title VII, courts have held that the term employee must be given its "common, everyday meaning,"⁶² which would surely include servicepersons. Moreover, uniformed military personnel would qualify as employees even under the *narrowest* federal statutory definition,⁶³ under the narrow common law "right to control" test, which stresses physical control over the worker, and under the "economic realities" analysis, which examines the employee's dependency upon the employer.⁶⁴

§2000e-2016(a) (1982)).

61. Title VII states merely that "the term 'employee' means an individual employed by an employer," with certain exceptions not relevant here. 42 U.S.C. § 2000e(f); *see Dowd, supra* note 50, at 78.

The Supreme Court has indicated that the use of the undefined or unlimited term "employee" should be analyzed in light of its statutory purpose. If the statute in question is designed to serve a broad remedial goal, then the term should be broadly construed. In *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), for example, the Court stated that the term "employee" did not have a static meaning. "Rather, 'it takes color from its surroundings . . . [in] the statute where it appears' . . . and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.'" *Id.* at 124 (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940)); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940). The definition of employee status included factors that would indicate whether "particular workers . . . are subject, as a matter of economic fact, to the evils the statute was designed to eradicate." 322 U.S. at 127. Both the military and the Supreme Court have conceded that uniformed military personnel are subject to discrimination, the evil that Title VII was enacted to eradicate. The Court has, moreover, admitted in dictum that the "relationship of the Government to members of the military . . . is . . . that of employer to employee." *Parker v. Levy*, 417 U.S. 733, 751 (1974).

62. *Cobb v. Sun Papers*, 673 F.2d 337, 339 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982); *see also Hishon v. King & Spalding*, 467 U.S. 69 (1984) (no per se exemption of partnership decisions from scrutiny despite fact that partners are not "employees" for most legal purposes). In addition, Congress has included members of the armed forces in its policies governing federal employees. *See, e.g., Federal Tort Claims Act*, 28 U.S.C. § 2671 (1982); *Child Support Enforcement Act*, 42 U.S.C. § 659(a) (1982); *Foreign Assistance Act*, 22 U.S.C. § 2403(j) (1982); *Inspector General Act of 1978*, 5 U.S.C. app. 3 § 8(3) (1982).

63. *See Dowd, supra* note 50, at 89-95 (discussing narrow "right to control" test at common law). The National Labor Relations Act (NLRA) contains the narrowest federal statutory definition of "employee." *See id.* at 92-94. The Supreme Court has interpreted the NLRA definition as coextensive with the common law "right to control" test. *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); *Dowd, supra* note 50, at 92; *see infra* note 64.

64. Both *Hearst*, 322 U.S. 111, and *United States v. Silk*, 331 U.S. 704 (1947), employ a common law "economic realities" test to determine employee status. "[When] the economic facts of the relation

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The Eighth and Ninth Circuits interpret the language of Title VII in contradictory fashion. Whereas the Ninth Circuit held in *Gonzalez* that the phrase “military departments” in Title VII does not encompass uniformed employees, the Eighth Circuit expressly conceded in *Johnson* that it does.⁶⁵ Conversely, the Ninth Circuit, despite the relative weakness of its “military department” holding, has never even bothered to raise the still weaker “employee” argument upon which the Eighth Circuit rests its rule.⁶⁶ Because the courts cannot agree on cogent reasons why Title VII should not apply to the military, their consensus is largely illusory.

C. *The District Court Opinion*

In *Hill v. Berkman*, plaintiff alleged that the Army’s closing of the Nuclear, Biological and Chemical Specialist (NBC Specialist) position to women was not substantially related to the combat exclusion policy as the Army contended, but instead represented intentional sex discrimination. In *Hill v. Berkman*, the court disagreed with the line of authority holding that Title VII does not apply to the uniformed military. Although it characterized the legislative history as the court stated that “[t]he plainest rendering of the statute suggests that Title VII does not distinguish between uniformed employees and civilian employees. . . .”⁶⁷ In the absence of a

make it more nearly one of employment . . . with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.” *Hearst*, 322 U.S. at 128 (discussing “employers” and “independent contractors”). The economic realities test focuses on the dependency of the worker on the employer. Its application has resulted in a flexible standard that favors inclusion of a broad group of workers under the term “employee.” See Dowd, *supra* note 50, at 93.

Professor Dowd advocates a version of the economic realities test which would assess the employer’s ability to affect an individual’s employment opportunities. Dowd, *supra* note 50, at 77. Given the binding nature of an enlistment in the service, as well as the stigma (especially with respect to future employment opportunities) of a dishonorable discharge, the military and its uniformed personnel would stand in an employer-employee relationship under this test as well.

Uniformed servicepersons would qualify as employees even under the older, narrower common law “right to control” test, which assesses only the employer’s right to control the worker. See, e.g., *Cobb*, 673 F.2d at 339; *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980); *McClure v. Salvation Army*, 460 F.2d 553, 557 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). Surely the military has an even greater degree of control over its personnel, who are subject to exacting discipline and cannot quit, than many civilian employers who fall within the test have.

65. “The great ‘military departments’ of this country referred to in 5 U.S.C. § 102 include . . . uniformed personnel of various ranks and grades . . .” 572 F.2d at 1224.

66. The Eighth Circuit, moreover, has acted at odds with its own doctrine. On one occasion, for instance, the panel held that although Title VII did not protect a member of the Arkansas National Guard, 42 U.S.C. § 1981 did. (Section 1981 presumably applied because the various National Guards are state, not federal, organizations.) But the court made express and exclusive use of Title VII doctrine to evaluate the § 1981 claim. See *Taylor v. Jones*, 653 F.2d 1193, 1201 (8th Cir. 1981) (“The evidence . . . can be analyzed within the framework established in *McDonnell Douglas Corp. v. Green* That decision was rendered in a Title VII action.”).

67. 635 F. Supp. 1228 (1986). Plaintiff did not challenge the validity of the combat exclusion policy itself. She merely contended that in this case, the Army was using the combat exclusion policy as a pretext for discriminating against women.

contrary decision by Congress, there is no reason for a military exception to the equal protection policies embodied in Title VII."⁶⁸

Despite its rejection of a military exception to Title VII, the ruling in *Hill* narrowly circumscribed the application of Title VII to military personnel actions. First, it suggested that courts should apply a balancing test similar to that announced by the Fifth Circuit in *Mindes v. Seaman*,⁶⁹ a constitutional action, to determine whether to review a Title VII claim against the military.⁷⁰ The *Mindes* test affords the military a high degree of judicial deference.⁷¹ Applying this test, the court declared that in order to avoid second-guessing "day-to-day decisions crucial to disciplinary relationships," courts should not afford a Title VII remedy for "isolated individual allegations of discrimination [which] are best left to intramilitary review."⁷² Second, the court held that even for policy decisions that affect a large number of personnel, the test for judicial intervention is "whether the military decision was clearly arbitrary and erroneous, with a harmful effect present at the time the dispute reaches the court."⁷³ The court contended that a highly deferential test based on a "clearly erroneous" standard would "allow[s] the armed forces necessary flexibility to make changes and alter policy."⁷⁴ It did not explain why military policies having discriminatory impact should be afforded more deference than those of other organizations.⁷⁵ Nor did the court attempt to justify the requirement that a harmful effect be present at the time of suit.

The strikingly narrow reasoning of the appellate cases and the courts' failure to address the conflicts between them suggest that the courts have cloaked policy objections to Title VII claims in the guise of statutory con-

Hill enlisted in the Army Reserve on the understanding that she would become an NBC Specialist. After she had completed basic training, taken an unpaid leave from her job, and given up her apartment, the Reserve informed her that it had reclassified the NBC position as a "combat support role," and had thus closed it to women. After adverse public reaction, the Army reopened the NBC position to women thirteen months later. The Army's current policy is that the NBC position is not a combat position. Women are currently working as NBC Specialists. *Hill*, 635 F. Supp. at 1231-32; Plaintiff's Memorandum of Law Opposing Defendants' Motion to Dismiss or for Summary Judgment, and Motion for Judgment on the Pleadings at 1-9, *Hill v. Berkman*, 635 F. Supp. 1228 (1986); see *supra* note 38.

68. *Hill v. Berkman*, 635 F. Supp. 1228, 1236, 1237 (1986).

69. 453 F.2d 197 (5th Cir. 1971).

70. *Hill*, 635 F. Supp. at 1240. Although *Mindes* involved a claim brought under the Constitution, Judge Weinstein found "its analysis relevant in a Title VII context where questions of deference may affect the exercise of jurisdiction." *Id.*

71. See Comment, *Federal Judicial Review of Military Administrative Decisions*, 51 GEO. WASH. L. REV. 612, 617-20 (1983).

72. *Hill*, 635 F. Supp. at 1241.

73. *Id.*

74. *Id.*

75. Indeed, Judge Weinstein suggested that the policy decisions of all organizations deserve a high degree of judicial deference: "[P]olicy decisions, subject to change, characterize all active organizations and must develop freely." *Id.* at 1241. But Title VII prohibits employment policies not justified by business necessity that operate to discriminate. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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struction.⁷⁶ As *Hill v. Berkman* illustrates, however, statutory construction raises the strong possibility that Congress intended Title VII to cover all military personnel. Because the legislative history of Title VII mandates that it be construed broadly to effectuate its compelling purpose of enforcing the equal protection clause,⁷⁷ courts should resolve statutory ambiguities in favor of inclusion.

III. THE SEPARATE COMMUNITY DOCTRINE AND ITS MISAPPLICATION IN DISCRIMINATION CASES

In the majority of cases involving the military, courts defer to the military under the vague yet expansive "separate community" doctrine.⁷⁸ Courts' refusal to apply Title VII in military cases is most likely driven not by their narrow statutory arguments but by this general deference to the military. The Supreme Court stated the reasoning underlying the separate community doctrine in 1954 in *Orloff v. Willoughby*:

"[J]udges are not given the task of running the Army. The responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."⁷⁹

Even commentators who sympathize with this doctrine agree that courts have failed both to delineate its boundaries and to analyze its assumptions.⁸⁰ Moreover, courts have failed to show why the doctrine should ap-

76. Rather than examine the conflicting rationales of the Eighth and Ninth Circuits, most district courts merely cite to those authorities without independent analysis. See, e.g., *Cobb v. United States Merchant Marine Academy*, 592 F. Supp. 640 (E.D.N.Y. 1984); *Hunter v. Stetson*, 444 F. Supp. 238 (E.D.N.Y. 1977) (same); see also *Helm v. California*, 722 F.2d 507 (9th Cir. 1983) (applying Eighth and Ninth Circuit Title VII decisions to determine scope of Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 633(a), whose language tracks that of Title VII); *Simpson v. United States*, 467 F. Supp. 1122 (S.D.N.Y. 1979) (ADEA does not apply to National Guard technician); *Lear v. Schlesinger*, 17 F.R.D. 8497 (W.D. Mo. 1978) (same).

77. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Hill*, 635 F. Supp. at 1237.

78. The separate community doctrine is also known as the military necessity or nonreviewability doctrine. See generally Comment, *supra* note 41, at 379-85, 413-47.

79. 345 U.S. 83, 93-94 (1953).

80. See, e.g., Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 177 (1984). Hirschhorn, a strong supporter of the separate community doctrine, concedes that the Supreme Court has failed to supply a satisfactory rationale for it. "[T]hat military personnel do not enjoy the same rights as civilian personnel is advanced as a reason why they should not." *Id.* at 202. The majority of the Court, he continues, is unwilling to compare

ply in discrimination cases. In recent decisions affirming the separate community doctrine, the Supreme Court has relied on military cases from the nineteenth century.⁸¹ At the same time, the Court has ignored current literature from other disciplines that illuminates the nature of the modern military.⁸² The Supreme Court's outmoded military jurisprudence has led lower courts to apply the separate community doctrine overbroadly to discrimination cases, particularly those under the statutory rubric of Title VII. The misapplication derives from misconceptions about three critical issues: the nature of the military, the nature of military discipline, and the separation of powers.

A. *The Nature of the Military*

The courts assume that the military is a "society apart"⁸³ from civilian society. That assumption clashes with the social and economic realities of the military and of discrimination.

1. *Social Integration*

Sheer numbers undermine the premise of the separate community doctrine.⁸⁴ In 1984, 2,138,000 uniformed military personnel were on active

the existing state of affairs with alternatives closer to civilian norms. "The majority does not articulate a reason for this distinctive unwillingness to question legislative and administrative judgment where individual rights are concerned. Instead, it consistently asserts, without further elaboration, that the purpose of the armed forces is to fight wars, which requires a climate of discipline and unquestioned obedience without parallel in other activities of the government." *Id.* at 203.

81. In *Parker v. Levy*, 417 U.S. 733 (1974), for example, Justice Rehnquist relied on random quotations about the military from cases from the 1890's. Many of these early cases had been little cited in the 20th century. On the other hand, Justice Rehnquist offered no analysis of First Amendment policies or of the causes of dissent in the military. See Sherman, *Legal Inadequacies and Doctrinal Restraints in Controlling the Military*, 49 IND. L.J. 539, 570-71 (1974).

82. Certainly social science is not an infallible guide to the decision of military cases. Often it raises as many questions as it answers. But assumptions like those in *Parker v. Levy*, supported only by unverified quotations from another century, are inadequate means of responding to the changed conditions of the modern military. See Sherman, *supra* note 81, at 544, 573.

83. *Parker*, 417 U.S. at 744 (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953)); see Zillman & Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 396 (1976).

84. Chief Justice Warren, for example, has written:

[E]vents quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress. Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million; every resident male is a potential member of the peacetime armed forces; such service may occupy a minimum of four percent of the adult life of the average American male reaching draft age; reserve obligations extend over ten percent of such a person's life; and veterans are numbered in excess of twenty-two and a half million. When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

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duty.⁸⁵ One fifth of all adults have had military experience.⁸⁶ Most enlisted personnel and junior officers remain in frequent contact with the civilian community and return to it after fairly short tours of service; they do not become isolated from American society.⁸⁷

This contact is significant. As a military task force itself pointed out, discrimination in the military has its roots in civilian society. “[T]he military system is not entirely independent of, or isolated from, the larger society. . . . The one is part of the other To the extent that the larger system discriminates against its own personnel . . . , the smaller system plays its role in effecting that discrimination.”⁸⁸

More importantly, discrimination in the military feeds discrimination in civilian society. For example, a Pentagon committee reported in 1969 that the Marine Corps was returning Marines, both black and white, to civilian society with more deeply seated prejudices than they possessed upon entrance to service.⁸⁹ A former Marine Corps Commandant has pointed out that “[t]oday most middle-aged men, most business, government, civic and professional leaders, have served some time in uniform. Whether they liked it or not, their training and experience have affected them, for the creeds and attitudes of the armed forces are powerful medicine, and can become habit-forming”⁹⁰ Because the military is an integral part of society, Title VII must apply to servicepersons in order to achieve its goal of ending societal employment discrimination.

2. *Economic Integration*

The end of the Second World War saw the birth of the “military industrial complex” or the “defense industry.” Far from “a society apart,” today’s military forms an integral part of the economy which employs more people, has a larger budget, and accounts for a larger percentage of the gross national product than any other entity in the nation.⁹¹ In other words, the military is a major employer and should be subject to the same antidiscrimination requirements as all other government and private employers. The military itself acknowledges the convergence of military ser-

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187-88 (1962).

85. U.S. DEP’T OF COMMERCE, *supra* note 12, at 340.

86. R. SHERRILL, *supra* note 39, at 213.

87. Hirschhorn, *supra* note 80, at 205. Not only are servicepersons not physically isolated from civilian society, but social scientists generally agree that since World War II, military and civilian social structures have gradually converged due to technology and the bureaucratization of military functions, among other factors. Sherman, *supra* note 81, at 542.

88. DoD TASK FORCE, *supra* note 26, at 16-17; *see also* D. CORTWRIGHT, *supra* note 16, at 208 (roots of discrimination in military lie partly in civilian society).

89. D. CORTWRIGHT, *supra* note 16, at 210.

90. R. SHERRILL, *supra* note 39, at 213.

91. R. HOPE, *supra* note 14, at 1; *see also* U.S. DEP’T OF COMMERCE, *supra* note 12, at 330-31.

vice with civilian employment. In order to fill its ranks, today's volunteer military aggressively advertises itself as an employer and a stepping stone to careers in the private sector.⁹² Indeed, the great majority of servicepersons perform technical, clerical, and other tasks similar to those of civilian employees.⁹³

Moreover, those advertisements have drawn racial and ethnic minorities, and increasingly, women—precisely those groups that Title VII was enacted to protect—to enlist in the military in high numbers.⁹⁴ Thus, to exclude the uniformed military from Title VII would be to exclude a substantial percentage of the Act's intended constituency from its protection.

B. *Military Discipline*

The military's singular mission to prepare for combat and its concomitant need to exact unfailing discipline may indeed justify limitation of some civil rights of soldiers.⁹⁵ The courts, however, have failed to weigh the actual threat to discipline of affording a remedy for discrimination. Even more critically, the courts have failed to weigh the costs to the military and to society of *not* affording a remedy. Courts that apply the separate community doctrine in antidiscrimination cases rely on two false premises: that antidiscrimination suits will disrupt military discipline, and that disallowance of such suits will preserve military order.

1. *The Costs of Not Affording a Remedy*

Again and again, courts have refused to allow servicepersons to sue the military for discrimination and other grievances because of the purported threat to discipline and the alleged fear of a flood of suits.⁹⁶ Discrimina-

92. The typical refrain of military recruiting commercials is: "Find your future in the Army." The way that the military promotes itself impeaches its argument that it is not an employer and that servicepersons are not employees. Its advertisements do not suggest that recruits will join an isolated society, but stress the career opportunities that service affords in both military and civilian life. One of the main advertisements tells potential recruits that the Army will send them to college after their tour of service. Another reminds recruits that "[t]he computer training is yours forever." Still another claims that "the army is the world's largest school for high technology." See *supra* Section II.B.

93. See *Brown v. Glines*, 444 U.S. 348, 370 (Brennan, J., dissenting) (1980); *Rostker v. Goldberg*, 453 U.S. 57, 84 (White, J., dissenting) (1980) (in event of mobilization, military would have to conscript at least 80,000 people for noncombat positions); *Zillman & Inwinkelried*, *supra* note 83, at 403-04; *Hirschhorn*, *supra* note 80, at 205-06.

94. See U.S. DEP'T OF COMMERCE, *supra* note 12, at 341 (Table No. 566).

95. See generally *Hirschhorn*, *supra* note 80. *Hirschhorn* carries the discipline argument farther than any other court or commentator. He argues not only that strict discipline is essential to effective warfare, but that "the Constitution permits the United States an unlimited choice of ends in war, which necessarily implies an unlimited choice of . . . means." He then argues that "these ends can be effectively pursued with safety to the political institutions of the Constitution only by subordinating the personalities of members of the armed forces to the will of the political authorities." *Id.* at 208.

96. See, e.g., *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 (2d Cir. 1968) ("[T]he courts must have regard to the flood of unmeritorious petitions that might be loosed by

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tion itself, however, poses a grave threat to military discipline, morale, and order. Close examination has revealed even instances of apparently spontaneous racial violence to be prompted by underlying resentment by blacks of unequal treatment by the command.⁹⁷ Events in Vietnam suggested that black resistance to discriminatory command substantially impaired combat efficiency.⁹⁸ The Congressional Black Caucus found that racial polarization on account of discriminatory practices could potentially stalemate the overall effectiveness of the military as a fighting force.⁹⁹ Courts do not protect military order by ignoring military discrimination.

2. *The Costs of Affording a Remedy*

The military has never substantiated, nor has it been asked to substantiate, its claims that judicial review will disrupt discipline and invite an avalanche of suits. In fact, Article III courts have adjudicated a number of constitutional antidiscrimination claims against the military without impairment of discipline or a flood of suits.¹⁰⁰ Statutory claims under Title VII, the parameters of which are precisely defined by the Congress, pose still less of a threat of intrusion. Moreover, floods predicted by the military have failed to materialize in the past. When federal courts granted habeas corpus review to those imprisoned by courts-martial,¹⁰¹ for instance, the military predicted a flood of suits. Chief Justice Warren later

such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces."), *cert. denied*, 394 U.S. 929 (1969); *see also* Note, *supra* note 38, at 1056 (courts fear intervention will result in flood of claims not deserving of judicial review); *infra* notes 101-02 and accompanying text; *supra* note 76.

97. De Nike, *The New "Problem Soldier"—Dissenter in the Ranks*, 49 *IND. L.J.* 685, 687-89 (1974).

98. D. CORTWRIGHT, *supra* note 16, at 41 ("Claiming that they would be endangered by racist commanders, Willie Moten and six others of C Company . . . refused to move into the field. There is no telling how many other similar incidents took place . . ."); *see also id.* at 56, 140, 154-55, 210, 218-19 (Army racism resulted in refusal to follow orders; black revolt; challenge to stability of armed forces, future of all volunteer force, survival of American military; threat to national security).

99. *Id.* at 218-19. Furthermore, lack of any meaningful remedy for discrimination may increase frustration, disrespect for superiors, and resort to violent self-help remedies on the part of uniformed personnel. For instance, a black sailor recently stabbed his white superior officer to death aboard a frigate at sea. The sailor believed that the officer had blocked his promotion out of racial prejudice. *N.Y. Times*, Jan. 23, 1986, at A14, col. 1. At the court-martial, the ship's commander acknowledged that there is "plenty" of racism in the Navy. The defense argued that the commander, a black, had failed to investigate the defendant's discrimination complaint properly on account of opposition of his white superior officers. *N.Y. Times*, Jan. 30, 1986, at A13, col. 1. The court-martial convicted the sailor of murder and sentenced him to life in prison.

100. *See, e.g.*, Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) (Marine Corps mandatory pregnancy discharge rule unconstitutional violation of equal protection); *see also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (not discriminatory to allow women officers longer term of service without promotion because they have lesser opportunities due to combat exclusion); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (statute discriminating with respect to spousal benefits of uniformed personnel on basis of sex held unconstitutionally discriminatory).

101. *Burns v. Wilson*, 346 U.S. 137 (1953).

noted, however, that the courts actually received strikingly few petitions.¹⁰² In addition, typical Title VII actions against the military would involve routine personnel decisions similar to those made in any other agency.¹⁰³

Furthermore, courts have not discussed the close relationship between discipline and morale.¹⁰⁴ Studies indicate that the perceived fairness of a system of military justice has a positive effect on discipline.¹⁰⁵ Safeguarding rights through Title VII actions would probably strengthen discipline, not slacken it.

3. *Distinction Between Discrimination and Other Causes of Action*

In cases concerning the military, courts typically quote from a melange of precedents involving review of courts-martial and administrative actions,¹⁰⁶ constitutional and statutory rights,¹⁰⁷ routine and political questions. Sometimes the courts ignore the fact that although all of these actions may raise the same concerns, namely military discipline and

102. Warren, *supra* note 84, at 188-89 ("[S]ince 1951 the number of habeas corpus petitions alleging a lack of fairness in courts-martial has been quite insubstantial.")

Similarly, the military argued against the adoption of the Uniform Code of Military Justice in 1951 on the grounds that its broadening of the rights of servicepersons was a threat to discipline. Yet the UCMJ has not resulted in any substantial breakdown of discipline and in very few appeals in the civil courts have ensued. *Id.*; Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 49-50 (1970).

103. See Comment, *supra* note 71, at 622.

104. Even Baron von Steuben, the strict Prussian military theorist and disciplinarian, recognized the importance of morale. According to von Steuben, a captain's first object should be "to gain the love of his men, by treating them with every possible kindness and humanity, inquiring into their complaints, and when well founded, seeing them redressed." *quoted in* R. RIVKIN, *supra* note 36, at 335.

Modern social and military scientists confirm von Steuben. Experiences of the French Army and German Navy in World War I, for instance, demonstrate that resistance to military authority first arises from non-ideological threats to soldiers' well-being, such as danger, poor material conditions, and, significantly, degrading use of military authority. See L. RADINE, *THE TAMING OF THE TROOPS: SOCIAL CONTROL IN THE UNITED STATES ARMY* 9-10, 34-38, 78-79, 115-16 (1977); Hirschhorn, *supra* note 80, at 224-25.

In addition, observers have questioned the relationship between discipline itself and combat readiness and effectiveness. Studies of enlisted personnel have shown that only 1% fought because of "leadership and discipline." Self-preservation, self-respect, and expectations of family and colleagues were far more important. Even among officers, only 19% percent thought that soldiers fought due to discipline. See R. RIVKIN, *supra* note 36, at 336-38.

Obviously, none of these issues can be resolved in the space of a footnote. Raising them, however, demonstrates the pervasiveness and complexity of the unexamined assumptions upon which many military cases rest.

105. See Note, *supra* note 103, at 328 n.130; *cf.* Brown v. Glines, 444 U.S. 348, 371 (1980) (Brennan, J., dissenting) ("The forced absence of peaceful expression only creates the illusion of good order; underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when First Amendment rights are devalued.")

106. See Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 10 (1975); Comment, *supra* note 71, at 414, 422, 423 n.197.

107. See generally Baskir, *Reflections on the Senate Investigation of Army Surveillance*, 49 IND. L.J. 618, 637-48 (1974) (adjudication of constitutionality of army surveillance).

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separation of powers, they implicate them in different ways. Many of the cases in which the courts have limited servicepersons' constitutional rights, for instance, have arisen under the First Amendment. In these cases, the serviceperson has sought the right to take positive actions—to circulate petitions,¹⁰⁸ to tell black soldiers not to fight,¹⁰⁹ to wear nonuniform articles of clothing¹¹⁰—which pose a threat to the discipline, order, and morale of the armed forces. Similarly, in Sixth Amendment actions, servicepersons have sought the right to force the military to change its procedures with respect to the speedy exercise of discipline.¹¹¹ In an action for discrimination, however, the only threat to discipline that the military has ever cited is the threat posed by the lawsuit itself—a threat, as noted, that the military has never substantiated. Unlike a tort action which might directly challenge the validity of orders given, a typical personnel action to upgrade a discharge from dishonorable to honorable, or even to challenge denial of a promotion would ordinarily pose little threat to discipline.

C. *Separation of Powers*

Courts often refuse to review actions against the military on the grounds that the Constitution requires judicial deference to Congress and the President with respect to military matters.¹¹² Case law in this area is decidedly confused. As the Eighth and Ninth circuit cases, *Hill*, and *Mindes* demonstrate, even when courts grant review of military actions governed by a statute, they defer substantially to the judgment of the military.

1. *Deference to Political Branches*

Article I, section 8 of the Constitution grants Congress broad jurisdiction over the formation of rules governing the military.¹¹³ Article II, section 2 makes the President the Commander in Chief of the armed forces.

108. *Brown*, 444 U.S. 348 (1980) (regulations requiring servicepersons to obtain command approval before circulating petitions do not violate First Amendment).

109. *Parker v. Levy*, 417 U.S. 733 (1974) (Articles 133 and 134 of UCMJ, authorizing court-martial for “conduct unbecoming an officer and a gentleman” and for conduct to prejudice of good order and discipline, neither unconstitutionally vague nor facially invalid due to overbreadth).

110. *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (Air Force may prohibit wearing of yarmulke because regulations were within scope of military power to regulate itself).

111. *Middendorf v. Henry*, 425 U.S. 25 (1976) (no Fifth Amendment due process or Sixth Amendment right to counsel in summary court-martial).

112. See Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 397–403 (1984).

113. That section gives Congress the power to “declare War, . . . raise and support Armies, . . . provide and maintain a Navy[,] . . . make Rules for the Government and Regulation of the land and naval Forces[,] . . . provide for calling forth the Militia, . . . [and] provide for organizing, arming, and disciplining, the Militia.” U.S. CONSR. art. I, §8, cl. 14.

Some commentators have characterized these powers as "exclusive."¹¹⁴ These commentators do not explain, however, why Congress' power over the military should be reviewed with any more deference than any other power granted under Article I, section 8.¹¹⁵ For example, although courts recognize congressional powers under the commerce clause, they still regularly review the constitutionality of statutes passed thereunder. Moreover, they regularly interpret the meaning of those statutes.¹¹⁶ Congress' power to make rules governing the armed forces no more precludes judicial review of statutes governing the military than the commerce clause precludes judicial review of statutes governing interstate trucking. And the President's power under the Commander in Chief clause is not relevant to whether Title VII applies to uniformed personnel.¹¹⁷ Courts may not abdicate their duties of constitutional and statutory interpretation merely because the military is involved.¹¹⁸

2. *Deference to the Military*

The *Mindes* test and its application in the *Hill* case illustrate the problematic nature of judicial deference to the military. The *Mindes* test consists of four criteria for determining whether federal courts should review a military action: (1) the nature and strength of plaintiff's claim; (2) the potential injury to plaintiff if review is denied; (3) the type and degree of anticipated interference with military functions; and (4) the extent to

114. See, e.g., Steinman, *supra* note 4, at 288 (assumes, without support, that "the Constitution grants Congress plenary authority over the military").

115. See Note, *supra* note 112, at 411.

116. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (upholding power of Congress to charter Bank of United States). Under accepted doctrines of judicial review, a court may refuse to hear a case only if the court lacks jurisdiction or if the case is nonjusticiable. Courts invoking the justiciability requirement with respect to the military often imply that the political question doctrine bars complete review. The Supreme Court articulated the political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962). The most important inquiry that that case suggests is whether there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. In *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell J., concurring), Justice Powell synthesized two additional strands of inquiry from the remaining five in *Baker*: questions whose resolution would require the Court to move beyond areas of judicial expertise and questions where prudential considerations counsel against judicial intervention. See *infra* text and accompanying notes 129-34.

Given the narrow view of textual commitments taken by the Supreme Court even where the constitutional language is more suggestive of delegation than Article I, section 8, see *Powell v. McCormack*, 395 U.S. 486 (1969); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), the Court would be unlikely to find a delegation where the language is structurally identical to that of the commerce clause. See Note, *supra* note 112, at 397-403.

117. That clause would only be relevant if it were claimed that the statute, if it applied, would infringe upon the President's powers as Commander in Chief. Given Congress' express power to make rules governing the armed forces, a plaintiff probably could not prevail with this argument. It was not made in any of the cases.

118. Cf. *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir.), cert. denied 449 U.S. 1042 (1980) (court will not defer to agency's pronouncement on constitutional question).

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which military expertise or discretion exists.¹¹⁹ However, although the court intended the test to answer the question of whether to review or abstain, the first two criteria go to the merits of a case. The test directs courts to evaluate the merits of a case in deciding whether to review it.¹²⁰ Therefore, the test encourages courts to determine the merits before they are likely to have sufficient information with which to do so properly.

Because of its incoherent nature, courts have often applied the *Mindes* analysis not as an abstention doctrine, but as a standard of deference on the merits.¹²¹ The *Hill v. Berkman* court, for instance, applied the test in this manner. After finding that Title VII applied to uniformed personnel, the court introduced the *Mindes* analysis to justify a severe limitation on that application. First, in dictum, it stated that Title VII should not apply to “isolated individual allegations of discrimination.”¹²² This dictum, because it suggested that courts actually abstain from review of individual instances of discrimination, was close to the spirit of *Mindes*. It was, however, far from the spirit of Title VII, which does not permit either individual instances of discrimination or discrimination pursuant to institutional policy.¹²³ Second, the court altered the standard of liability under Title VII for military policy decisions. For those decisions, the court ruled that the test is “whether the military decision was clearly arbitrary and erroneous, with a harmful effect present at the time the dispute reaches the court.”¹²⁴ The critical factual question “is whether the [military] clearly acted in bad faith.”¹²⁵ But Title VII allows no good faith defense

119. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); see *supra* text and accompanying notes 69–75.

120. *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). *Dillard* laid out an alternate test, which inquires broadly whether review would result in the court’s encroachment upon the legislative and executive branches’ constitutional responsibilities. *Id.* at 320–22. See Comment, *supra* note 71, at 619. Commentators have criticized the *Dillard* test on the ground that it fails to clarify sufficiently when review of military decisions is appropriate and that it is overinclusive. *Id.* at 620.

The *Mindes* test resembles tests used by courts for determining whether to grant preliminary injunctions. See, e.g., FED. R. CIV. PROC. 65. Such criteria may be appropriate where preliminary relief is concerned because the parties are entitled to subsequent review on the merits and because courts must protect defendants from irreparable harm arising out of unwarranted issuance of injunctions. Courts should not employ speculative criteria, however, where a plaintiff may be denied review altogether.

121. Courts have applied the political question doctrine, another abstention doctrine, in a similarly confused fashion. See Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976); Tigar, *Judicial Power, the “Political Question Doctrine,” and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

122. *Hill*, 635 F. Supp. at 1241.

123. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (individual instances/disparate treatment); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (institutional policy/disparate impact).

124. *Hill*, 635 F. Supp. at 1241.

125. *Id.*

to claims of disparate impact.¹²⁶ The abstention test of *Mindes* nowhere authorizes alteration of statutory burdens.

Even observers who find Judge Weinstein's decision wise under the circumstances must concede that, given its premise, it was wrong. Having found that Title VII applied to uniformed personnel, Judge Weinstein then effectively amended the statute with respect to its application to them. The function of courts, however, is to interpret and apply statutes, not amend them. Amendment of statutes is a lawmaking function committed by the Constitution to Congress. A court may not decline to apply a statute otherwise applicable because it seems unwise to do so in a certain situation, nor may it decree limitations on a statute not found in its text or in the Constitution.¹²⁷

3. *Institutional Competence*

Ostensibly because they lack expertise with respect to military discipline, courts often defer to military judgment. The judiciary, however, has not demonstrated any less competence in considering individual rights in the military than in prison, government employment, or national security contexts—other settings involving considerations of discipline or other complex and sensitive matters.¹²⁸ The military has failed to justify sufficiently why the issue of discipline should be privileged above all others. The Supreme Court has, under the umbrella of the political question doctrine, denied plaintiffs a remedy that would have required continuous judicial surveillance of the training, weaponry, and orders of the military.¹²⁹ A Title VII remedy, however, would not infringe upon these areas of military expertise. Moreover, in most Title VII cases, statutory interpre-

126. See *Griggs*, 401 U.S. at 432. Although plaintiff Hill alleged disparate treatment, which requires a showing of intent, the court's holding appeared to require a showing of bad faith even for claims of disparate impact.

127. U.S. CONST. art. I, § 1; cf. *United States v. Guy Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (executive agreement may not bypass statute).

128. See military discrimination cases cited *supra* note 100; *Brown v. Glines*, 444 U.S. 348, 365 (1980) (Brennan, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 852-56 (1976) (Brennan, J., dissenting); see also *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (reviewing and upholding exclusion of women from certain guard positions in male penitentiaries on BFOQ rationale under Title VII); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (public debate on foreign policy); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (schools); *United States v. Robel*, 389 U.S. 258 (1967) (defense employment).

Note that the incompetence argument is a "slippery slope." If the Supreme Court allowed gave credence to it, every case dealing with a complex institution might require a special tribunal.

129. *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court observed that "this is not a case in which damages are sought Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. *Id.* at 5. Title VII actions typically involve damages and Title VII grants courts considerable equitable discretion. A Title VII remedy for discrimination would not involve a court in decisions about strategy and weaponry beyond its expertise.

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tation and individual rights—the core of judicial expertise—will be the central issues, not discipline.

To leave such determinations to the military, on the other hand, would pose two problems. First, the military possesses neither the competence nor the jurisdiction to assess statutory or constitutional claims of discrimination.¹³⁰ The Constitution assigns this function to the judiciary, not the executive branch. Second, military superiors trying to assess such claims would face a conflict of interest between their perceived need for discipline and the complainants' rights.¹³¹ In fact, “the need for formal protections of independence is probably at its greatest in the military context, where discipline and institutional loyalty are most intense.”¹³²

IV. APPLYING TITLE VII TO THE MILITARY

Application of Title VII has not wrought havoc upon police or fire departments, hospitals, or other institutions that demand discipline from their employees. Application of Title VII to actions by uniformed personnel would not cause chaos within the military either. In drafting the provisions of Title VII, Congress provided procedural hurdles for plaintiffs and remedial discretion for courts to avoid disrupting institutions or flooding the courts. These provisions are just as capable of operating with respect to the military as with respect to other institutions.

A. Procedure: Exhaustion of Remedies

Title VII requires federal employees aggrieved by agency discrimination to comply with rigorous administrative procedures.¹³³ In brief, before a complainant may file a suit in court, or even appeal to the Equal Employment Opportunity Commission (EEOC), complainant must: attempt conciliation through an Equal Employment Opportunity (EEO) Counselor; file a formal written complaint with the agency; review the disposition proposed after an investigation by the agency EEO Director; request a formal hearing by a complaints examiner or a review by the agency head; and receive a final agency decision. At each stage, plaintiff must

130. See *Brown v. Glines*, 444 U.S. at 370 (Brennan, J., dissenting) (“[J]udges, not military officers, possess the competence and authority to interpret and apply the First Amendment.”); *Schlesinger v. Councilman*, 420 U.S. 738, 763–65 (1975) (Brennan, J., dissenting) (courts and military tribunals possess expertise over constitutional and other questions not requiring particular military knowledge); *Zillman & Imwinkelried*, *supra* note 83, at 435.

131. *Brown v. Glines*, 444 U.S. at 368–69 (Brennan, J., dissenting) (“Because they invariably have the visage of overriding importance, there is always a temptation to invoke security ‘necessities’ to justify an encroachment upon civil liberties.”); *Zillman & Imwinkelried*, *supra* note 83, at 435 (“[C]ourts should be skeptical of claims of military necessity.”).

132. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 223.

133. 42 U.S.C. § 2000e–16(c) (1982).

comply with strict deadlines or waiting periods.¹³⁴ Only after final agency action (or after 180 days if no final action has been taken) may the claimant appeal to the Equal Employment Opportunity Commission (EEOC) or to federal district court.¹³⁵

Unfortunately, unlike the programs of other agencies, the Department of Defense Equal Opportunity Program is limited substantially to education, evaluation of statistical data, and enforcement of nondiscrimination requirements concerning use of facilities.¹³⁶ Military Equal Opportunity (EO) officers may not investigate complaints of discrimination.¹³⁷ They have no independent authority. As an Army regulation expressly states, "In reality, the Commander is the Equal Opportunity Officer and, as such, is assisted by staff members having Equal Opportunity responsibilities."¹³⁸ Individuals must use command channels for the redress of grievances. Those channels are woefully inadequate.¹³⁹

To protect itself and its personnel, the military should appoint a Director of Equal Opportunity and Equal Employment Opportunity Counselors as provided for in Title VII and the regulations promulgated pursuant thereto.¹⁴⁰ The rigorous exhaustion requirements will protect the military from frivolous suits while the independence of the EEO officers would afford complainants more vigorous and unbiased investigation than they receive at present. The exhaustion provision seeks to preserve the balance of power between the judiciary and the military or other government agency "by regulating the timeliness of court review rather than the ultimate availability of review,"¹⁴¹ as the separate community doctrine and the *Mindes* test so inadequately attempt.¹⁴²

B. *Substance: The Prima Facie Case and the Defense of Necessity*

If afforded a cause of action against the military, a serviceperson who had fulfilled the exhaustion requirement would have to establish a prima facie case of disparate treatment or disparate impact, just as any Title VII

134. 29 C.F.R. § 1613 (1986).

135. 29 C.F.R. § 1613.231, .281 (1986).

136. See 29 C.F.R. § 191 (1985); AR 600-21 (1977).

137. AR 600-21 at para. 2-5. In fact, the strongest argument that Title VII does not apply to the military is that the military is not subject to the jurisdiction of the EEOC. See *Gonzalez v. Army*, 718 F.2d 926, 928 (1983). But the legislative history demonstrates that Congress simply retained much of an existing procedure when it vested jurisdiction in the Civil Service Commission. H.R. Rep. No. 238, 92d Cong., 1st Sess., reprinted in U.S. Code Cong. & Admin. News 2137.

138. *Id.* at para. 4-1.

139. See *Supra* text and accompanying notes 32-42.

140. See *supra* text and accompanying notes 133-35.

141. Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement*, 55 VA. L. REV. 483, 500 (1969).

142. See Comment, *supra* note 41, at 380-82; *supra* notes 119-26 and accompanying text.

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plaintiff would.¹⁴³ Then the military, like any other Title VII defendant, would have an opportunity to rebut with a bona fide occupational qualification (BFOQ) or business necessity defense.¹⁴⁴ A BFOQ defense arose in the *Hill* case. In accepting it, the court employed an argument so deferential to the military as to be circular. The court held that “[b]ecause combat risk is an occupational qualification mandated by statute, it is an appropriate BFOQ exception to Title VII.”¹⁴⁵ The court reasoned further that “[b]y extension, the Army policy on women in combat, though not codified by Congress, should be accorded the weight of a statute.” Assuming *arguendo* that the statutory combat exclusion renders sex a BFOQ for military combat positions, “Army policy” should not thereby escape judicial scrutiny. Agency policies, even military ones, are not entitled to the same deference as federal statutes.¹⁴⁶ If the military uses the combat exclusion or any other statute as a pretext for discrimination,¹⁴⁷ or draws its regulations overbroadly,¹⁴⁸ it should be liable under Title VII. If Title

143. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), sets forth a four-point test for evaluating plaintiff's prima facie case for disparate treatment, but cautions that its guidelines are not rigid. *Id.* at 802 & n.13. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), sets out the prima facie case for disparate impact.

144. Two other statutory defenses related to testing and seniority have received considerable judicial attention. See 42 U.S.C. § 2000e-2(h) (1982). In addition, Title VII contains numerous minor defenses among its provisions.

The statutory BFOQ defense is narrower than the judicially created business necessity defense. The legislative history of Title VII, the EEOC, and the courts all assert that the BFOQ is to be applied only in rare situations. See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969). In particular, the BFOQ defense applies only to hiring and referrals, not to discrimination between current employees. Moreover, a BFOQ is not a defense to a charge of racial discrimination in any situation. 42 U.S.C. § 2000e-2(e) (1982). A court will find a BFOQ only if the “essence of the business operation would be undermined otherwise.” *Diaz v. Pan American World Airways*, 442 F.2d 385, 388 (5th Cir. 1971). Public preferences and prejudices do not constitute BFOQ's unless they are based on an entity's inability to perform its primary function. *Diaz*, 442 F.2d at 389. *But see* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding exclusion of women from certain guard positions in male penitentiaries on BFOQ rationale). See generally Comment, *Bona Fide Occupation Qualifications and the Military Employer: Opportunities for Females and the Handicapped*, 11 AKRON L. REV. 182 (1977).

The judicially created business necessity defense is less rigorous than the BFOQ. Courts do not define it consistently. See generally Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII litigation*, 46 U. Pitt. L. Rev. 555, 590-606 (1985).

145. *Hill v. Berkman*, 635 F. Supp. at 1240.

146. The Administrative Procedure Act provides that agency actions shall be overturned where they are “contrary to constitutional right, power, privilege, or immunity.” 5 U.S.C. § 706(2)(B) (1982). The Act includes the military in the definition of agency, 5 U.S.C. § 551(1) (1982), except courts-martial and military commissions, 5 U.S.C. § 555(1)(F) (1982), and “military authority exercised in the field in time of war or in occupied territory,” 5 U.S.C. § 551(G) (1982). See, e.g., *Crawford v. Cushman*, 531 F.2d 1114 (1976) (constitutional validity of Marine Corps regulation enacted pursuant to broad Congressional authorization, see 10 U.S.C. § 5031(d) (1982), subject to judicial review).

147. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (plaintiff entitled to prove defendant's stated reason for discrimination is pretext in disparate treatment cases); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (apparently necessary rule having disparate impact and imposed with discriminatory purpose violates Title VII).

148. *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973) (necessary discrimina-

VII applies to the military as the *Hill* court held, the military may avail itself of any statutory defense or of the less rigorous business necessity defense. In so doing, however, the military must meet the statutory burden of proof with respect to its statutory defenses unless Congress amends Title VII. Likewise, the military should have to prove, not simply articulate, a business necessity defense.

C. Remedies

Under Title VII, a court may award a plaintiff a panoply of legal and equitable remedies, including but not limited to reinstatement, hiring, back pay, and any other equitable remedy to fashion the most complete relief possible.¹⁴⁹ In practice, trial courts have little discretion to deny full back pay up to two years and complete remedial seniority.¹⁵⁰ No punitive damages are allowed, however, and courts have already granted reinstatement and remedial seniority, among other equitable remedies, to servicepersons for a variety of causes of action.¹⁵¹ Although courts have discretion only to fashion the most complete relief possible, most forms of equitable relief, such as reporting obligations and conditional decrees, are by nature more flexible than back pay and seniority. Article III courts, by tradition extremely, if not unduly deferential to military needs, are not likely to fashion highly intrusive Title VII remedies. The separate community doctrine, the *Mindes* test, and most courts' unwillingness to apply Title VII to the military at all suggest that courts will tread softly in the equitable area. For example, the *Hill* court, the only court to apply Title VII to servicepersons, refused to afford the plaintiff any relief whatsoever despite "flaws" in the military's procedure.¹⁵² Rather than create a wave of judicial intrusion into military affairs, provision of a Title VII remedy would encourage the military itself to eradicate discrimination within its ranks so as to avoid any intrusion.

V. CONCLUSION

The legislative history of Title VII clearly mandates that the statute be construed broadly to include all situations not expressly excluded. The

tion must be as narrowly circumscribed as possible).

149. 42 U.S.C. §§ 2000e-5(g), -16(d) (1982).

150. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-25 (1974) (backpay); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (seniority).

151. See *Dillard v. Brown* 652 F.2d 316 (3rd Cir. 1981) (authorizing review of claim to enjoin military from discharging plaintiff); *Dilley v. Alexander*, 603 F.2d 914 (1974) (ordering reinstatement of officer discharged by improperly constituted review board); *Colson v. Bradley*, 477 F.2d 739. (2d Cir. 1973) (ordering military review of plaintiff's claim that he was unfairly passed over for promotion and discharged).

152. *Hill v. Berkman*, 638 F. Supp. 1228, 1242 (E.D.N.Y. 1986).

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military argues, on the contrary, that uniformed personnel should be excluded because they were not expressly included. Given the legislative history, judicial interpretation and compelling purposes behind the statute, the military's arguments are unconvincing. The courts should apply Title VII as written to uniformed military personnel. Adherence to the procedural provisions of Title VII and judicious use of remedial discretion will protect the interests of the military. If the result is undesirable, then Congress, not the courts, may amend the statute.

Justice Douglas once explained that

it is the function of the courts to make sure . . . that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.¹⁵³

In protecting the rights of military personnel under Title VII, the courts would no doubt also protect the security of the nation. As General Douglas MacArthur once pointed out, morale within the military "will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice on the part of their government, or of ignorance, personal ambition, or ineptitude on the part of their military leaders."¹⁵⁴

153. *Winters v. United States*, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968).

154. Annual Report of the Chief of Staff, U.S. Army, for the Fiscal Year Ending June 30, 1933, quoted in BARTLETT'S FAMILIAR QUOTATIONS 771 (15th ed. 1982).