CIVIL RIGHTS IN THE ARMED FORCES

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

An analysis of Title II (Public Accommodations) of the Civil Rights Act of 1964, its impact on military personnel and their dependents, with recommendations for better legislation and improved procedures of processing requests for legal action through military channels; an examination of discriminatory practices in the military community and suggested methods of treating them.

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CHAPTER I

INTRODUCTION

This Nation was conceived by men who learned through bitter experience the value of freedom and justice. They envisioned a democratic society in which men and women of whatever race, religion, or nativity may live and work together in harmony and without hinderance, so long as they do not trespass on the rights of others. In their great wisdom they framed a Constitution which delineates the rights of citizens and which provides for government by the peoples. Time has confirmed their wisdom, and today, in the midst of foreign and domestic conflicts, we are more conscious than ever of the value of freedom and tranquility. We are also conscious of our failure to perfect our democratic pattern. There are those among our citizenry who have allowed prejudice, particularly racial prejudice, to prevent the realization of our maximum national effort. Racial intolerance is undemocratic and un-American and can be defended on no intelligent grounds. Its existence in any degree in this country at a time

when we are sacrificing our blood and treasure abroad to contain Communist aggression is an embarrassing contradiction.[1]

Men of color have fought from the first days of the Republic for the freedom denied them in peace and war. They have had to fight for the right to fight. They have fought valiantly in every American war but once victory was secured, they were excluded from the prizes they helped to win. Richard Allen, the churchman and pioneer leader, once cried out against the betrayal of the dream, citing an old poem:

> God and a soldier all men do adore
> In time of war and not before;
> When the war is over, and all things righted,
> God is forgotten, and the soldier slighted.[2]

The history of Negro soldiers is indelibly etched in the annals of the American Republic and they have written in blood a testament of gallantry. Collective and individual citations for heroism in action are many. Only a few will be mentioned.

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[1] See Carlson, Forward to S. Schoenfeld, The Negro in the Armed Forces at vi (1945) [hereafter cited as Schoenfeld].

[2] Ebony, Aug. 1968, at 169 (Special Issue: The Black Soldier) [hereafter cited as Ebony].

In Massachusetts Bay Colony in 1643, men called upon to bear arms and fight the Indians included Abraham Pearse. Barzillai Lew, who later distinguished himself at Bunker Hill and Ticonderoga, and others, enlisted as soldier equals with white volunteers.[3]

Crispus Attucks was the first to fall during the American Revolution. Peter Salem, Pompey Lamb and Salem Poor are also heroes of the Revolution. Negro minutemen responded to the alarm of Paul Revere. They froze with George Washington at Valley Forge and covered his withdrawal at Trenton and Princeton.[4]

During the War of 1812, Negroes served with valor aboard American ships along the northern border. They were part of the invading force which went into Canada. Negroes also fought under General Andrew Jackson in the decisive Battle of New Orleans.[5]

There were numerous individual heroes in the Civil War. William Tillman single-handedly recaptured a

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[3] J. Davis, The Negro in the Armed Forces of America, in The American Negro Reference Book 591-92 (1967) /hereafter cited as Reference Book/.

[4] See Schoenfeld, supra note 1, at 4, 5.

[5] Reference Book, supra note 3, at 598-99.

Union vessel from a crew of six rebels.[6] Sergeant

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[6]"In the month of June, 1861, the schooner 'S. J. Waring,' from New York, bound to South America, was captured on the passage by the rebel privateer 'Jeff. Davis,' a prize-crew put on board, consisting of a captain, mate, and four seamen; and the vessel set sail for the port of Charleston, S.C. Three of the original crew were retained on board, a German as steersman, a Yankee who was put in irons, and a black man named William Tillman, the steward and cook of the schooner. The latter was put to work at his usual business, and told that he was henceforth the property of the Confederate States, and would be sold on his arrival at Charleston, as a slave. Night comes on; darkness covers the sea; the vessel is gliding swiftly towards the South; the rebels, one after another, retire to their berths; the hour of midnight approaches; all is silent in the cabin; the captain is asleep; the mate, who has charge of the watch, takes his brandy toddy, and reclines upon the quarter-deck. The negro thinks of home and all its endearments: he sees in the dim future chains and slavery.

He resolves, and determines to put the resolution into practice upon the instant. Armed with a heavy club, he proceeds to the captain's room. He strikes the fatal blow: he feels the pulse, and all is still. He next goes to the adjoining room: another blow is struck, and the black man is master of the cabin. Cautiously he ascends to the deck, strikes the mate: the officer is wounded but not killed. He draws his revolver, and calls for help. The crew are aroused: they are hastening to aid their commander. The negro repeats his blows with the heavy club: the rebel falls dead at Tillman's feet. The African seizes the revolver, drives the crew below deck, orders the release of the Yankees, puts the enemy in irons, and proclaims himself master of the vessel.

'The Waring's' head is turned towards New York, with the stars and stripes flying, a fair wind, and she rapidly retraces her steps. A storm comes up: more men are needed to work the ship. Tillman orders the rebels to be unchained, and brought on deck. The command is obeyed; and they are put to work, but informed, that, if they show any disobedience, they will be shot down. Five

William H. Carney is the first Negro Congressional Medal of Honor winner.[7] Negro units distinguished themselves at Fort Wagner,[8] Petersburg[9] and Fort Pillow.[10]

If it had not been for the Tenth Cavelry, a Negro unit, the Rough Riders under Colonel Theodore Roosevelt would have been exterminated at San Juan Hill during the Spanish-American War.[11]

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days more, and 'The S. J. Waring' arrives in the port of New York under the command of William Tillman, the negro patriot." W. Brown, the Negro in the American Rebellion, 74-76 (1867).

[7] Id. at 210 for a more detailed account of his exploits.

[8] B. Brawley, Negro Builders and Heroes, 115-19 (1937) [hereafter cited as Heroes].

[9] G. Williams, Negro Troops in the Rebellion 1861-1865, at 236-39.

[10] Id. at 257-72.

[11] In this action the famous Rough Riders under COL. Roosevelt advanced with too much eagerness and found themselves in a critical position. It was necessary for a regiment of Negro troops to extricate them from that predicament. GEN. John "Black Jack" Pershing, who was then a lieutenant in the Tenth Cavalry, said the black troops charged up the hill and opened a disastrous enfilading fire upon the Spanish right, thus relieving the pinned-down Rough Riders. Schoenfeld, supra note 1, at 15-16; Ebony, supra note 2, at 170.

Privates Henry Johnson and Needham Roberts were the first men in the American Expeditionary Forces to receive the French Croix de Guerre during World War I.[12]

The first American hero of World War II is Dorie Miller, a Navy mess attendant, who helped remove his dying captain from the bridge of their burning ship at Pearl Harbor and then manned a machine gun against attacking Japanese planes.[13] When his ship had been abandoned during the Battle of the Coral Sea, Charles J. French tied a rope around his body, attached it to a raft carrying fifteen men and swam for two hours without rest until the raft was beyond enemy fire.[14] Numerous others performed deeds of equal valor.

The Korean War gave the world many Negro heroes. Among them are Private First Class Arthur Dudley, who rose to command a white squad and killed "more of the

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[12] Heroes, supra note 8, at 194.

[13] Miller was awarded the Navy Cross by Admiral C. W. Nimitz in ceremonies on board a warship in Pearl Harbor. See Reference Book, supra note 3, at 632.

[14] French was commended by Admiral William F. Halsey "for conduct in keeping with the highest traditions of naval service." Id. at 633.

enemy with an M-1 rifle than Sergeant Alvin York or Audie Murphy,"[15] and Sergenat Cornelius H. Charlton, who led three attacks up enemy-held Hill 543 after his platoon leader had been killed. Five hundred thirty-five Chinese Communist dead were counted on the slopes where Charlton and his comrades had made their gallant stand.[16]

The Congressional Medal of Honor has been awarded to seven Negroes thus far for bravery in Vietnam. They are Private First Class Milton Olive III, Specialist Lawrence Joel, Sergeant Donald R. Long, Private First Class James Anderson, Jr., Specialist Dwight H. Johnson, Captain Riley L. Pitts (the first Negro officer to receive the Medal), Sergeant Matthew Leonard and Specialist Clarence E. Sasser.[17]

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[15] York was awarded the Medal of Honor for killing 25 Germans in WW I and Murphy won the Medal for killing a large number of Germans in WW II. Id. at 651 n.. 139.

[16] For a detailed description of his heroic act see W. White, How Far the Promise Land? 99 (1955).

[17] The Congressional Medal of Honor has been awarded to fifty-two Negroes since the Civil War, according to a list published by the Department of Defense in Jan 69. The list also states that Irvin H. Lee, SGT., USAF, author of Negro Medal of Honor Winners, shows five additional winners. The coveted Medal was not awarded to a single Negro during the two World Wars, not because

Against this background of contribution through extraordinary valor and inspirational supreme self-sacrifice, it was inevitable for the Armed Forces to undertake measures to integrate and provide equal opportunities for all members.

Today, the Armed Forces remain the most consistently integrated institution in America. The basic problem is not one of policy, but the perfectability of existing policy. Discrimination as it exists in the Armed Forces today falls roughly into two categories: (1) discriminatory policy in the off-base community in such fields as public accommodations, schools, housing and services which closely touch the lives of military personnel; and (2) subtle discriminatory practices, sanctioned by no official authority, which have nonetheless been allowed to grow on the base and within the military community itself.[18]

On July 26, 1966, Senator Philip Hart of Michigan

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of a dearth of individual bravery but because of in my opinion what appeared to be official indifference. See also Reference Book, supra note 3, at 621-47.

[18] J. Willenz, Human Rights of the Man in Uniform, A Report of the Planning Conference Sponsored by the American Veterans Committee, at 16 (1968).

read to the United States Senate a letter which the American Veterans Committee addressed to the Honorable Thomas D. Morris, Assistant Secretary of Defense for Manpower. The following is a portion of that letter as read by Senator Hart:

> While any worthwhile efforts to eliminate off-base discrimination must center on the functions of the base commander, a redefinition of responsibilities at all levels of command in this field is an essential preliminary. It should be the policy of the Department of Defense and part of the mission of the chain of command from the Secretaries of the Services to the local base commander not only to remove discrimination within the Armed Forces, but also to make every effort to eliminate discriminatory practices as they affect members of the Armed Forces and their dependents within the neighboring civilian communities.
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> As a part of this process of redefinition, a different concept of the base commander's functions in the racial field must be evolved. Interviews with base commanders have led the Committee to conclude that commanders desire more explicit instructions and clarification of their responsibilities in this regard. These commanders, concerned with morale factors, increasingly feel the need to act. Before they act, they need to have their responsibilities defined. They need more explicit orders and more detailed directives. These should be provided.[19]

The purpose of this thesis is to offer to the Armed Forces a redefinition of command responsibilities

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[19] 112 Cong. Rec. 17096 (1966).

in attacking the problem of racial discrimination. This thesis will analyze Title II (Public Accommodation) of the Civil Rights Act of 1964, its impact on military personnel and their dependents, and make recommendations for better legislation and improved procedures of processing requests for legal action through military channels. Further; this paper will examine discriminatory practices within the military community, and will suggest methods of treating them.

CHAPTER II

HISTORICAL DEVELOPMENT OF FEDERAL INTEREST IN CIVIL RIGHTS

A. Congressional Legislation

After the Civil War (1861-1865), leaders in the former Confederate states had no intention of extending any semblance of equality to their former slaves. Most southern states passed odious "black codes," which denied the freedmen many of the rights of citizenship, including suffrage. These codes also forbade the possession of firearms and liquor by Negroes; governed their employment by strict labor contracts; and established rigid curfew and vagrancy laws. The Negro was once again relegated to a status of social, economic, and political inferiority in America.[20]

The federal government evidenced its interest by enacting a series of civil rights statutes. The first passed during the Era of Reconstruction was the Civil

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[20]The Cowles Comprehensive Encyclopedia, 681 (1966).

Rights or Enforcement Act of April 9, 1866.[21] The Act provided that all citizens, excluding Indians not taxed, shall have the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.

A month later the Slave Kidnapping Act[22] was passed to punish persons, who carry away any other person, whether Negro, mulatto, or otherwise, with intent that such person be sold or carried into involuntary servitude or held as a slave. A similar statute, the Peonage Abolition Act of March 2, 1867,[23] abolished the holding of laborers in a state of compulsory servitude to a master for the working out of indebtedness. This practice was prevalent in the southwestern states formerly part of Mexico.

Congress passed an Act[24] on May 31, 1870, which provided that the prerequisite to become qualified to vote and the exercise of the right to vote in all state

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[21]Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

[22]Act of May 21, 1866, ch. 86, § 1, 14 Stat. 50.

[23]Act of Mar. 2, 1867, ch. 187, § 1, 14 Stat. 546.

[24]Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140.

elections shall be without distinction of race, color, or previous condition of servitude.

The Anti-Lynching Act of April 20, 1871,[25] was enacted to enforce the provisions of the fourteenth amendment to the Constitution. It made persons, who under color of state law, deprive another of any right secured by the Constitution of the United States liable to the injured party. It also provided for punishment of persons for conspiring to deprive any person or class of persons of the equal protection of the law.

The Civil Rights Act of March 1, 1875,[26] culminated the initial series of civil rights legislation. It gave all persons the right to full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, theaters, and other places of public amusement. In 1883, the Supreme Court of the United States struck down the public accommodations sections of the 1875 Act in the Civil Rights Cases.[27]

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[25]Act of Apr. 20, 1871, ch. 22, §§ 1-2, 17 Stat. 13.

[26]Act of Mar. 1, 1875, ch. 114, § 1, 18 Stat. 335.

[27]109 U.S. 3 (1883). Unlike Title II of the Civil Rights Act of 1964 (see p. 14 infra), the 1875 Act

No major legislation on the subject had been enacted by Congress for eighty-two years when the Civil Rights Act of 1957[28] became law. The Act created the Commission on Civil Rights in the executive branch of the Government as a means of further securing and protecting the rights of all citizens in such areas as voting, education, housing, employment, administration of justice, use of public facilities and transportation.

Next was the Civil Rights Act of 1960,[29] which placed restrictions on the states in the administration of literacy tests to registrants for federal elections and provided for the appointment of voting referees to report to the district courts on irregularities in registration and voting procedures.

The Civil Rights Acts of 1964[30] and 1968[31] are

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broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those involving interstate commerce.

[28] 42 U.S.C. § 1975 (1957).

[29] 42 U.S.C. §§ 1971-74 (1960).

[30] See p. 24 and note 44 infra.

[31] 42 U.S.C.A. §§ 3601-31 (1968).

the most prolific in the field of civil rights enacted by Congress in recent years. The most important provision of the latter is Title VIII, which provides for fair housing within constitutional limitations throughout the United States.

B. Executive Interest

The civil rights laws were not designed to deal with the specific problems of equality in the Armed Forces. After World War II, there was general recognition of the need for revision of racial practices in the military. President Harry S. Truman responded by issuing Executive Order 9981[32] on July 26, 1948, abolishing segregation as a policy in the Armed Forces of the United States:

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[32] C.F.R. 722 (1943-48 Comp.). The date the Order was signed is significant—two weeks before the Democratic National Nominating Convention had opened in Philadelphia. In the spring of 1948, A. Philip Randolph, chairman of a newly created League for Non-Violent Civil Disobedience Against Military Segregation, had threatened organized noncompliance with the military draft unless President Truman issued an executive order against segregation. Whether President Truman did indeed yield to combined pressures of Negro leaders and politics, or whether he acted out of strong conviction, he nevertheless played a decisive role in breaking traditional patterns of discrimination. See L. Ianniello, Milestones Along the March, 35-36 (1965).

> WHEREAS it is essential that there be maintained in the armed services of the United States the highest standards of democracy, with equality of treatment and opportunity for all those who serve in our country's defense:
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> . . . . . .
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> 1. It is the declared policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin. This policy shall be put into effect as rapidly as possible, having due regard to the time required to effectuate any necessary changes without impairing efficiency or morale.

The historic edict also established the President's Committee on Equality of Treatment and Opportunity in the Armed Services. The Committee[33] consisted of seven members, with the Honorable Charles B. Fahy serving as its chairman. The Fahy Committee, as it came to be called, worked for nearly two years and presented its report—

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[33]Truman appointed the following to the Committee —Chairman: Charles Fahy, former Solicitor General of the United States. Members: Alphonsus J. Donahue, prominent Catholic layman; Lester Granger, Executive Director of the National Urban League; John Sengstackle, publisher of the Chicago Defender; William E. Stevenson, President of Oberlin College; Dwight G. Palmer, Board Chairman of General Cable Corporation; and Charles Luckman of Lever Brothers. (Donahue died in July 1949. Luckman did not actively participate in the work of the Committee.) 1950 President's Committee on Equality of Treatment and Opportunity in the Armed Services Report /xii/ (1950).

Freedom to Serve—to the President on May 22, 1950. It found a great gap between announced policy and actual practice in the Armed Services but there was also evidence of substantial progress.

The next major advancement toward equality in the military occurred in June 1962,[34] when President John F. Kennedy appointed another President's Committee on Equal Opportunity in the Armed Forces and named the Honorable Gerhard A. Gesell, a lawyer, as chairman. (Appendix A) The Committee[35] limited its work to an intensive study of problems of equal opportunity on and off military installations within the United States. After a year, the Committee submitted its initial report

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[34] During the 8-year administration of President Dwight Eisenhower (1952-1960), no significant advancement was made toward equality. Nothing was done toward resolving the conflict of the military accepting segregated schools and school busses for the children of its Negro servicemen, even though the United States Supreme Court had declared that these practices were unconstitutional. Reference Book, supra note 3, at 658.

[35] Other members: Nathaniel S. Colley, Abe Fortas, Louis J. Hector, Benjamin Muse, John H. Sengstacke and Whitney M. Young, Jr. 1963 President's Committee on Equal Opportunity in the Armed Forces, 93 (1963).

to the President. On June 21, 1963, in a letter transmitting the report to his Secretary of Defense, Robert S. McNamara, President Kennedy wrote:

> We have come a long way in the 15 years since President Truman ordered the desegregation of the Armed Forces. The military services lead almost every other segment of our society in establishing equality of opportunity for all Americans. Yet a great deal remains to be done.
> As the report emphasizes, a serious morale problem is created for Negro military personnel when various forms of segregation and discrimination exist in communities neighboring military bases. Discriminatory practices are morally wrong wherever they occur—they are especially inequitable and iniquitous when they inconvenience and embarrass those serving in the Armed Services and their families. Responsible citizens of all races in these communities should work together to open up public accommodations and housing for Negro military personnel and their dependents. This effort is required by the interests of our national defense, national policy and basic considerations of human decency. (Appendix B)

A firm voice had spoken. The President requested the Secretary to review the recommendations of the Committee and to report to him within thirty days. On July 24, 1963, Mr. McNamara advised the President that he was issuing a directive which clearly states the Department of Defense policy with respect to discrimination, with special emphasis on off-base discrimination. He also told the President:

> Our military effectiveness is unquestionably reduced as a result of civilian racial discrimination against men in uniform. The Committee report has made this point with great clarity. With equal clarity it demonstrates that the Department of Defense has in the past only imperfectly recognized the harm flowing from off-base discrimination. That imperfect recognition has in turn meant the lack of a program to correct the conditions giving rise to the harm.
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> Certainly the damage to military effectiveness from off-base discrimination is not less than that caused by off-base vice, as to which the off-limits sanction is quite customary. (Appendix C)

C. Department of Defense Policy on Equality

The directive to which Mr. McNamara referred, Department of Defense Directive 5120.36 entitled, "Equal Opportunity in the Armed Forces" was issued on July 26, 1963. The policy of equal opportunity was re-affirmed. It stated that the policy of the Department of Defense is to conduct all of its activities free from racial discrimination and to provide equal opportunity for all personnel in the Armed Forces and all civilian employees irrespective of their color. The Directive clearly stated that practices of discrimination against members of the Army, Navy, and Air Force, all of whom are without a civilian's freedom of choice in where to live, work, or travel and spend off-duty hours, are harmful to

military effectiveness. It places the responsibility upon all members of the Department of Defense to oppose discrimination and foster equal opportunity for servicemen and their families on and off-base.[36]

In order to effect and insure the implementation of the policies articulated in the Directive of July 1963, the Secretary of Defense assigned the responsibility and delegated the authority for promoting equal opportunity for members in the Armed Forces to the Assistant Secretary of Defense (Manpower). The Office of the Deputy Assistant Secretary of Defense (Civil Rights)[37] was established to carry out the functions which had been assigned to the Assistant Secretary of Defense (Manpower).

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[36] Compare the present policy with that of the War Department in 1940. On 9 Oct. 1940, the White House released a statement which had been prepared by the War Department declaring that, "The policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organization. This policy has proven satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental for national defense." M. Davie, Negroes in American Society 318 (1st ed. 1949).

[37] Alfred B. Fitt, Stephen N. Shulman and Jack Moskowitz have respectively been appointed to the Office.

The Military Departments established agencies[38] to provide specific attention to policies and programs in the field of equal opportunity and equal treatment for military personnel and their dependents. The Office of the Deputy Assistant Secretary of Defense (Civil Rights) worked closely with the Military Departments in developing the departmental regulations, instructions, and manuals required for the implementation of the equal opportunity policies and programs. The regulations and instructions provided the guidance needed in the area of civil rights to aid commanders in the discharge of their responsibilities both on and off military reservations.[39]

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[38] The Army established an Equal Rights Branch in the Office of the Deputy Chief of Staff for Personnel. The Navy created an Ad Hoc Committee in the Bureau of Personnel that addressed itself to the overall program of equal opportunity. The Air Force established an Air Force Committee on Equal Opportunity and the Equal Opportunity Group, Directorate of Personnel Planning. The latter group serves as the Air Staff central point of contact on all equal opportunity matters and its Chief was Secretary to the Air Force Committee on Equal Opportunity. Department of Defense Resource and Reference Book at 5, Sep. 21, 1967 (unpublished book in the Office of the Deputy Assistant Secretary of Defense (Civil Rights and Industrial Relations).

[39] Id. at 6.

CHAPTER III

THE CIVIL RIGHTS ACT OF 1964

A. Legislative Hisotry of the Act

On June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in public accommodations. The President's message stated in part:

> No one has been barred on account of his race from fighting or dying for America—there are no white or colored signs on the foxholes or graveyards of battle. Surely, in 1963, 100 years after emancipation, it should not be necessary for any American Citizen to demonstrate in the streets for the opportunity to stop at a hotel, or to eat at a lunch counter in the very department store in which he is shopping, or to enter a motion picture house, on the same terms as any other customer.[40]

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 and one in the House, H.R. 7152.

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[40] U.S. Code Cong. & Ad. News, 88th Cong., 2d Sess. 2363 (1964).

After extended hearings, each of these bills was favorably reported to its respective House—H.R. 7152 on November 20, 1963,[41] and S. 1732 on February 10, 1964.[42] Although each bill originally incorporated extensive findings of fact, these were eliminated from the bills as they were reported. The House passed its bill in January 1964 and sent it to the Senate.

Proponents in the Senate maneuvered the bill directly on to the Senate calendar on February 26, 1964, instead of referring it to a committee. When the bill was called up for debate, a long filibuster began. The Senate finally voted for cloture of debate on June 10, 1964. During the filibuster, leadership from both parties worked out a new and modified amendment in the nature of a substitute for the House bill. This version was known as the Dirksen-Mansfield Amendment; after further modification by amendment on the floor, it was the Dirksen-Mansfield Amendment which passed the Senate on June 19, 1964. The House discharged the Senate version from the Judiciary Committee on June 30, and passed it

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[41] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 1 (1963).

[42] S. Rep. No. 872, 88th Cong., 2d Sess., pt. 1, at 1 (1964).

two days later.[43]

The Act[44] as finally adopted was most comprehensive. It undertook to eliminate, through peaceful and voluntary settlement, discrimination in voting, places of public accommodations, public facilities, education, federally assisted programs, and employment. President Johnson, when signing the Civil Rights Act on July 2, 1964, reminded the nation that "Americans of every race and color have died in battle to protect our freedom." The Civil Rights Act, in the words of the President,

> . . . does not restrict the freedom of any American so long as he respects the rights of others. It does not give special treatment to any citizen. It does say the only limit to a man's hope for happiness and for the future of his children shall be his own ability.[45]

B. Title II: Public Accommodations

This title of the Act (Appendix D) forbids discrimination or segregation on the ground of race, color, religion or national origin is forbidden in each of the

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[43] CCH Civil Rights Act of 1964 at 1-2 (1964).

[44] The Civil Rights Act of 1964, 78 Stat. §§ 101-1106 (1964).

[45] Dep't of Defense Fact Sheet-8, Civil Rights 4 (1964).

following establishments:

1. Inns, hotels, motels and other places providing lodging to transient guests. The mere operation of an establishment of this nature affects commerce within the meaning of this title. However, the famous "Mrs. Murphy's boarding house" is excluded; the Act does not apply to a building with not more than five rooms for transients which is also occupied by the proprietor as his residence.[46]

2. Restaurants, cafeterias, lunchrooms, lunch counters, soda fountains, or other facilities principally engaged in selling food for consumption on the premises; or any gasoline station;[47]

3. Motion picture houses, theaters, concert halls, sports arenas, stadiums, or other places of exhibition or entertainment. Genuine private clubs are specifically exempted.[48]

Coverage of an establishment listed in subparagraph 2 and 3 above depends upon whether it offers to

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[46] 78 Stat. § 201(b)(1) (1964).

[47] 78 Stat. § 201(b)(2) (1964).

[48] 78 Stat. § 201(b)(3) (1964).

serve interstate travelers, or a substantial portion of the food or gasoline or other products which it sells, or source of entertainment which it customarily presents, has crossed any state line. The establishment is also covered if discrimination or segregation is supported by any law of a state or agency or political subdivision thereof.[49]

Any establishment which is located within an establishment subject to the Act, or which has a covered establishment physically within it, is covered. Thus a barber shop in a hotel is fully subject to the law although 95% of the customers are local residents.[50] If the law is applicable to the establishment, the Civil Rights Act protects all prospective patrons—not merely those who are interstate travelers. Title II also forbids attempts to intimidate, threaten, or coerce any person exercising his rights of access to public accommodations, or to punish or attempt to punish anyone for exercising these rights.[51]

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[49] 78 Stat. § 201(c) (1964).

[50] Pinkney v. Meloy, 241 F. Supp. 943, 947 (N.D. Fla. 1965).

[51] 78 Stat. § 203 (1964).

The ban on discrimination in public accommodations is enforceable by an injunction proceeding initiated either by the aggrieved individual or by the Attorney General of the United States.[52]

C. Constitutionality of Title II

Almost immediately after the passage of the Civil Rights Act of 1964, the court was required to deal with it. On August 10, 1964, Mr. Justice Black refused to enjoin enforcement of the Act, pending final determination of its constitutionality by the Supreme Court of the United States. The appellants had requested a single justice to stay orders of a three-judge United States District Court for the Northern District of Georgia which had enjoined proprietors of a motel and a separately owned restaurant from refusing to accept Negroes as guests and customers solely because of their race or color.[53] Four months later the Supreme Court in Atlanta Motel v. United States[54] held the public

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[52]78 Stat. §§ 204, 206 (1964).

[53]Atlanta Motel v. U.S., 85 S. Ct. 1 (Black, Circuit Justice, 1964).

[54]379 U.S. 241 (1964); accord, Katzenbach v. McClung, 379 U.S. 294 (1964).

accommodations provisions of the Civil Rights Act of 1964 valid under the commerce clause.[55] The Court reasoned that the power of Congress to promote interstate commerce includes the power to regulate local incidents thereof, including local activities, in both the states of origin and destination, which might have a substantial and harmful effect upon that commerce. It is interesting to note that the Court did not use the fourteenth amendment as additional authority for Congress to enact Title II, although, there is considerable evidence that the legislators intended it to have a dual basis.[56]

D. Judicial Interpretations Under the Commerce Clause

Establishments which discriminate, such as restaurants, cafeterias, and other places where food is served, have caused most of the litigation under Title

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[55]There is, of course, power in the Supreme Court to hold the Civil Rights Act unconstitutional. That power has been uniformly recognized and acted upon at least since Marbury v. Madison, 5 U.S. 137 (1803).

[56]See, e.g., Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 1396, 1410, 1413-1418 (1963); S. Rep. No. 872, 88th Cong., 2d Sess., pt. 2, at 25-33, 88-92 (1964).

II, because the utilization of such places causes close commingling of the races and because many are located within facilities which would not otherwise have been affected. The Act provides in part that any facility principally engaged in selling food for consumption is covered if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce.[57]

Generally, the federal courts have been liberal in their interpretation of the commerce test in its application of Title II. The location of the establishment is important in determining whether it affects commerce. If it is located near an interstate highway, the courts have consistently held that such places are covered because travelers may intelligently assume that such eating places are covered and the owners do not inquire as to whether or not customers are interstate travelers before service is rendered.[58]

The courts have made no distinction in applying

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[57] 78 Stat. § 201(c) (1964).

[58] See, e.g., Newman v. Piggie Pork Enterprises, 377 F.2d 433, 435 (4th Cir. 1967); Gregory v. Meyer, 376 F.2d 509 (5th Cir. 1967).

the Act with respect to facilities that serve food on a sit-down or drive-in basis. The decisions have been that Congress clearly intended to extend its power beyond sit-down restaurants and that food stores that sell food "ready" for consumption are covered. In a mobile society, the ready availability of prepared food is a practical necessity and Congress was not concerned about where the food is consumed.[59]

The case of Gregory v. Meyer,[60] indicates the length the courts will go in determining whether a substantial portion of the food that a restaurant sells has moved in commerce. In this case the court decided the Burger Boy Drive-In Restaurant of Savannah, Georgia, having an annual sales of about $71,000, which included approximately $5,000 of coffee and tea that originated out of state, was covered. Its main product was hamburgers. Two-thirds of its sales volume consisted of beef products which come to Savannah from Augusta, Georgia. The meat packer in Augusta purchased twenty to thirty per cent of the cattle used in its operation

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[59] See Newman v. Piggie Port Enterprises, 377 F.2d 433, 436 (4th Cir. 1967), cert. granted, 390 U.S. 400 (1968).

[60] 376 F.2d 509, 511 (5th Cir. 1967).

from South Carolina. The restaurant used additional products in its service, such as grits, hot cakes, waffle batter mix, cereals, mayonnaise, pickles, tomato juice, chili sauce, beans, gravy bases, macaroni, rice, peas, tobasco sauce, soups, extracts, flour, cookies, and catsup, which had moved in commerce. The court considered the origin of all of these items before it granted injunctive relief against the owner of the drive-in restaurant.

The impact of banning discrimination in eating facilities is extensive. A golf course was found to be a place of public accommodation within the meaning of the Act because it had a lunch counter located on it that offered to serve the general public.[61] A snack bar located on the premises of a bowling alley brought the entire facility under the Act. The statute contains no percentage test. It is not necessary that the covered establishment which magnetizes the non-covered establishment occupies a majority or substantial part of the

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[61]Evens v. Laurel Links, 261 F. Supp. 474 (E.D. Va. 1966). An alternate ground brought the golf course within the Act. It is a place of exhibition or entertainment within the meaning of 78 Stat. § 201(b)(3) (1964), where a golf team from the District of Columbia, on a regular annual basis, played on the course which was located in Virginia.

premises, or that its sales are a major or even a substantial part of the revenues.[62]

Since places of public accommodation differ markedly in their operations, the courts have had to make the factual determination whether public places are within the class described in the 1964 Civil Rights Act. The determination must be made on the circumstances of each case. Opponents of the statute have tried to circumvent it by claiming exemption under the private club exclusion.[63] A YMCA health and athletic club that offered lodging, eating facilities and recreational activities, but which admitted only persons with a membership card, was found to be only a sham. Its sole purpose was to escape the effect of the provisions of the Act. The YMCA was financed with public funds, its objective was the building of Christian character in "our community's youth", and its membership was large and non-selective, other than along racial lines.[64]

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[62] See Fazzio v. Adams, 396 F.2d 146, 149-50 (5th Cir. 1968).

[63] 78 Stat. § 201(e) (1964).

[64] Nesmith v. Y.M.C.A., 397 F.2d 96, 100 (4th Cir. 1968). The issue was not raised as to whether the swimming pool, gymnasium and exercise activities come under

The courts have recognized that the Civil Rights Act was enacted with a spirit of justice and equality in order to remove racial discrimination from certain facilities which are open to the general public. The commerce clause has been used in most cases to end discriminatory practices. In their interpretation of the statute, the courts even have applied the statute to establishments which have affected commerce in the distant past. Therefore, an amusement park that provided mechanical rides for children and, during winter months, maintained an ice skating rink, was a place of public accommodation under the Act because at sometime in the past its mechanical rides were purchased from sources out of state. It is sufficient if the amusement park "customarily" presents entertainment that "has moved" in interstate commerce. If this test is met, then the establishment is subject to the Act at all times, even if current entertainment has not moved in interstate commerce.[65]

Sec. 201(b)(3) of the Act which prohibits discrimination in any motion picture house, theatre, concert hall, sports arena, stadium, or "other place of exhibition or entertainment."; accord, Kyles v. Paul, 263 F. Supp. 412 (W.D. Ark. 1967).

[65]Miller v. Amusement Enterprises, 394 F.2d 342, 351-52 (5th Cir. 1968); see Twitty v. Vogue Theatre Corp.,

Thus, the federal courts have been generous in construing and applying the Civil Rights Act of 1964 in an effort to strike down the evil forces of discrimination. The purpose of the Act is the vindication of human dignity and not mere economics. The statute attempts to solve the problem of deprivation of personal dignity that accompanies denial of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person feels when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of his education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he is a citizen of the United States and may well be called upon to serve in the military and lay down his life for this country.

E. Judicial Non-Interpretation Under the State Action Clause

Injunctive relief against discrimination in

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242 F. Supp. 281 (M.D. Fla. 1965) Contra, Daniel v. Paul, 395 F.2d 118 (8th Cir. 1968).

places of public accommodation may be granted when the discriminatory practice affects interstate commerce or is supported by state action. Section 201(d) of the Civil Rights Act of 1964 declares that discrimination or segregation by an establishment is supported by state action if it is (1) carried on under color of any law, statute, ordinance, or regulation; or (2) carried on under color of any custom or usage required or enforced by officials of the state or political subdivision thereof; or (3) required by action of the state or political subdivision thereof.

It is utterly surprising that neither the Supreme Court of the United States nor any of the lower federal courts have used the state action theory to grant relief pursuant to Title II; even though it was apparent that the states supported discrimination and segregation in public accommodations within the meaning of Section 201(d). Instead, all decisions have been based upon the commerce test. The courts have strained to make the establishments enumerated in Section 201(b) meet this test by taking under consideration the location of the establishments in relation to interstate highways, the communication media used in advertising, the origin of the goods and services offered for sale, exhibition or

entertainment, the membership and purpose of alleged private clubs and other criteria deemed appropriate to make the factual determination.

In 1964, thirty-two states had either by statute or executive order prohibited discrimination or segregation in public accommodations.[66] Most of the cases in which Title II has been litigated were southern or border states where officials, acting under color of law, arrested "sit-in" demonstrators at public accommodation facilities and convicted them for violation of the state criminal trespass law[67] or breach of the peace law.[68] Before the Supreme Court concerned itself with the validity of the convictions, it resolved the issue of whether the establishments were subject to the Civil

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[66] See Atlanta Motel v. U.S., 379 U.S. 241, 259-61 n. 8 (1964).

[67] The Georgia criminal trespass law is found in Ga. Code Ann., § 26-1503 (1969); and that of Alabama in Ala. Code Recomp., Title 14 § 426 (1967 Cum. Supp.); and that of Florida in Fla. Stat. § 821.18 (1965); and that of Maryland in Md. Ann. Code, 1957 (Cum. Supp. 1968), Art. 27, § 577; and that of Arkansas in § 41-1433, Ark. Stat. Ann. (1967 Cum. Supp.) and that of North Carolina in § 14-134, N.C. Gen. Stat. (Cum. Supp. 1967).

[68] The South Carolina breach of the peace law is found in § 15-909, Code of Law of S.C., 1962 (1968 Supp.) and that of Louisiana in 1950 La. Rev. Stat. § 14:103.1 (1969 Cum. Supp.).

Rights Act. The case of Hamm v. Rock Hill[69] serves to illustrate the point. The case involved Negro "sit-in" demonstrators who were convicted under South Carolina and Arkansas criminal trespass statutes, respectively, for participating in demonstrations in luncheon facilities of retail stores in their respective states. In resolving the factual question of whether the luncheon facilities were public accommodations in the sense of Title II, the Court determined that they met the commerce test because the lunch counters were located in large retail variety stores (one belonged to a national chain) which offered to sell thousands of items to the public that have moved in interstate commerce; they invited all members of the public on their premises to do business and offered to serve all persons, except at their lunch counters which were restricted to whites only. Mr. Justice Clark, speaking for the majority, stated that in light of such a record and the legislative history indicating that Congress intended to cover retail stores lunch counters, the eating establishments involved were covered. Therefore, the conduct of Negroes in refusing

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[69] 379 U.S. 306, 309-10 (1964).

to leave the premises upon request cannot subject them to trespass prosecution, either federal or state.

In the case of Blow v. North Carolina,[70] approximately forty Negroes were convicted of violating the state trespass statute by continuing to wait outside a racially discriminatory restaurant, notwithstanding the owner's request to leave. In vacating the convictions, the Court again discussed the fact that the restaurant was situated near an Interstate Highway; it adjoined a motel; the menu and other advertisements were posted in the motel rooms; the restaurant and motel were advertised on billboards for miles up and down the Interstate Highway; and further, it was advertised on radio and in newspapers.

It is submitted that whenever a court is faced with convictions under state law similar to those in the illustrated cases, the first question it should decide is whether the establishment is of the character announced in Title II; if it is, the court should conclude that the state has used its enforcement agents, its judiciary, and its laws to promote discrimination and discourage integration, which is an excellent example of state action

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[70] 379 U.S. 684, 685 (1965).

under the Act.[71] This approach in solving cases of this nature is less difficult because the courts would be free from having to examine the facts in detail to extract all the indicia of interstate commerce. Further, the state action basis for granting injunctions against discrimination is easier for the parties to the cause of action to comprehend.

The issue of state action has been placed squarely before the Supreme Court for its consideration.[72] It is

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[71] See Shelley v. Kraemer, 334 U.S. 1 (1948). The essence of the decision is that the state judiciary can enforce discrimination under the trespass law. The state through its trespass law can make available to individuals the full coercive power of government to deny others the full enjoyment of certain rights on the grounds of race or color.

[72] Briefs of counsels representing petitioners in Hamm v. Rock Hill, 13 L. Ed. 2d 1071, and Blow v. North Carolina, 13 L. Ed. 2d 1111, averred that petitioners' convictions enforced racial discrimination in violation of the fourteenth amendment. Further, the employment of state judicial power, together with state police and prosecutors, to enforce the racial discrimination constituted such application of state power as to bring to bear the fourteenth amendment guaranties. Section 201 of the Civil Rights Act of 1964 was cited in support of their position.

Briefs filed for respondents denied that prosecutions by the states deprived petitioners of any right protected by the fourteenth amendment. They alleged that "The record discloses nothing which can reasonably be argued as constituting state action; there was no city ordinance, no state law, no official or unofficial

difficult to understand the reason the courts have maintained silence or passively ignored the state action theory. One reason might be that the courts are hesitant to expand coverage of the Act to all establishments, even though the Act seems to permit them to do so when discrimination or segregation is supported by state action. Section 202 provides that all persons shall be entitled to be free, at "any establishment or place," from discrimination or segregation of any kind if such practice is or "purports" to be required by law, statute, rule, etc. of a state or political subdivision. It is clear that this provision announces one aspect of state action when considered in conjunction with Section 201(d), which defines the ingredients necessary to constitute state action. The question is whether all establishments that practice discrimination or segregation pursuant to state law are prohibited from doing so or only those places of public accommodations pronounced in Section 201(b).

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proclamation by anyone in authority urging a policy of segregation which would invalidate petitioner's conviction. The decision to discriminate was a purely private decision not proscribed by the fourteenth amendment."

The language in Miller v. Amusement Enterprises,[73] denotes limited coverage. The opinion stated that Title II of the Civil Rights Act is to be liberally construed and broadly read but it can not be read with narrowed eye but with open minds attuned to the clear and strong purpose of the Act; namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public. Though the Act must be given a liberal interpretation, it was not designed to cover all establishments.

The passage of the Act followed extensive hearings. A study of the hearings before the different committees and the debates in Congress illustrate that Congress did not intend to include all establishments to which its constitutional power might extend. The legislation was aimed at aggravated sources of discrimination which affected interstate commerce. Many business establishments were not included within the scope of the Act. It was thought that if the most flagrant and troublesome areas of discrimination were eliminated by law, the less bothersome would disappear through voluntary action and public effort. Senator Humphrey, in

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[73] 394 F.2d 342, 349-50 (5th Cir. 1968).

discussing before the Senate the limitations on the coverage intended in Title II, said:

> The deletion of the coverage of retail establishments generally is illustrative of the moderate nature of this bill and its intent to deal only with the problems which urgently requires solution. Discrimination in retail establishments generally is not troublesome a problem as is discrimination in the places of public accommodations enumerated in the bill. And it seems likely that if discrimination is terminated in restaurants and hotels, it will soon be terminated voluntarily in those few retail stores where it still exists.[74]

When the Attorney General of the United States testified before the House Judiciary Committee on the major problems of racial discrimination in business enterprises with which Congress should concern itself, he said:

> The area of coverage should be clear to both the proprietors and the public.
> That bill specified hotels and motels, restaurants and lunch counters, retail stores and gasoline stations, movie houses, and similar places of public amusement. The coverage was quite explicit. We did not include other establishments which were constitutionally within the reach of Federal regulations, either because they do not customarily discriminate or because we felt that —given a solution to the major problems—

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[74] 110 Cong. Rec. 6533 (1964).

removal of these discriminatory practices could be voluntarily induced.[75]

Another reason why the courts may not have used the state action theory as a basis for determining whether an establishment is a public accommodation facility under the Civil Rights Act is because the federal judiciary and the legislators are aware of the sensitivity of state sovereignty and the Supreme Court of the United States has been reluctant to declare the fourteenth amendment a constitutional basis for Title II in addition to the commerce clause. The opponents to civil rights legislation have always in defense of their position declared that the matter of discrimination or segregation in public accommodations was the exclusive concern of the individual states. The federal government has maintained that the boundaries between the respective powers and immunities of state and national governments should be so drawn as to preserve to each government, within its own sphere, the freedom to carry on those affairs committed to it by the Constitution, without

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[75] Hearings on H.R. 7152 Before the House Comm. on the Judiciary, as amended by Subcomm. No. 5, 88th Cong., 1st Sess., pt. 4 at 2655 (1963) [hereafter cited as 1963 Hearings].

undue interference by the other.[76] The Attorney General of the United States, when testifying on the civil rights bill before the House Judiciary Committee stated, "We are reluctant to extend Federal power beyond those areas where it was clearly needed to meet existing problems."[77]

Whenever the courts declare that an establishment is covered by Title II because discrimination or segregation by the establishment is supported by state action, the courts will have to recognize the fourteenth amendment[78] as a basis for its declaration. With the exception of the commerce clause, the fourteenth amendment is the only other constitutional authority for Congress to regulate the activities of local public accommodations.

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[76] See, e.g., Education Films Corps. v. Ward, 282 U.S. 379, 391-92 (1931); Metcalf v. Mitchell, 269 U.S. 514, 523-24 (1926).

[77] 1963 Hearings, supra note 75, at 2655-56.

[78] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

F. Department of the Army Implementation

Suit by an individual may be brought under the public accommodations title whenever the law has allegedly been violated or when there are reasonable grounds to believe that any person is about to engage in any act or practice which the law forbids. The person bringing suit may seek a temporary or permanent injunction or a restraining or other appropriate court order.[79]

If a state has a statute prohibiting discrimination in public accommodations, the state authorities must be given thirty days notice by registered mail of any alleged violation of the law. Thereafter the aggrieved individual may file a civil suit in federal court, and the court may permit the Attorney General to take part in the trial if he certifies that the case is of general public importance. The court may also appoint an attorney for the individual, and permit suit to be filed without payment of fees, cost or security. The federal court may also stay proceedings pending completion of enforcement proceedings under state or local law.[80]

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[79] 78 Stat. § 204(a) (1964).

[80] Id.

If an alleged violation occurs in a state with no local law prohibiting such actions, a federal civil suit may be begun at once. However, the court is authorized to refer the matter to the Community Relations Service for sixty days in an effort to achieve voluntary compliance on a confidential basis. If the court believes the effort is progressing, it may extend the period another sixty days.[81]

In addition, the Attorney General may seek federal court action himself if he has reasonable cause to believe that a person or group of people is deliberately engaging in practices which will deny equal rights to others in any of the areas covered by the law. He may request the designation of a three-judge federal court if he thinks the case is of general public importance; if he does not, the chief justice of the district is to designate a justice to hear the case promptly.[82] The power of the Attorney General to obtain injunctive relief promptly is an important aid in maintaining public order in cases in which repeated discrimination in public accommodations

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[81] 78 Stat. § 204(d) (1964).

[82] 78 Stat. § 206 (1964).

has given rise to demonstrations and public violence. In the past, these were among the most explosive and disruptive instances of discrimination and it was wise for Congress to give the Attorney General the authority to act quickly and decisively in the interest of public peace and harmony.

Two months after the enactment of the 1964 Civil Rights Act, the Department of the Army published Army Regulation 600-22, dated 4 September 1964, in implementation of Department of Defense Instruction No. 5525.2, dated 24 July 1964. The regulation provides for command assistance to military personnel and dependents requesting action by the Attorney General of the United States under Title II (Public Accommodation), Title III (Public Facilities) and Title IV (Public Education) of the Act. The regulation does not prohibit individuals from pursuing their remedies through civilian channels without recourse to the military procedures.

When an individual desires military assistance, his complaint is reduced to writing and immediately a copy is forwarded to the Attorney General with notice that the request is being processed and he will be notified in due course. The commander of the installation then causes a preliminary inquiry to be conducted and if

discrimination or segregation exist in violation of the Act, the commander will seek appropriate assurance from the owner that future practices at the facility involved will provide for nondiscriminatory treatment of military personnel and their dependents. If satisfactory assurance is obtained, the commander will send to the Attorney General and the Deputy Chief of Staff for Personnel a report briefly summarizing the practice giving rise to the complaint, his efforts to obtain assurance concerning future practices, and the terms.

If satisfactory assurance cannot be obtained, a formal inquiry is made with the assistance of a legal officer. If the complainant seeks the initiation of a suit under the provisions of Title II, the inquiry will include the development of evidence bearing on the existence of a pattern or practice of discrimination or segregation. The completed formal report is then reviewed for content and sufficiency by a legal officer, who must attach a statement that the review was performed and any necessary explanatory remarks. The commander will add a memorandum analyzing the (1) impact of discrimination or segregation in the facility involved upon servicemen and their dependents, (2) efforts to obtain voluntary assurance and their results, and (3) favorable or adverse

effect of suit by the Attorney General upon his other efforts to secure equal treatment for servicemen and their dependents in nearby communities.

The request, the formal report of inquiry, the legal officer's statement and the commander's memorandum will be attached to a chronology sheet. The original and one copy of these documents will be forwarded directly to The Judge Advocate General, who will review the report for legal sufficiency and forward the original, with such comments as may be appropriate, to the Attorney General. The third copy will be forwarded through command channels to the Deputy Chief of Staff for Personnel for transmission to the Assistant Secretary of Defense (Manpower). The regulation provides that the processing procedure just described will be completed within thirty days. If the commander determines that further efforts to obtain voluntary assurance are likely to be successful during an additional period, the time may be extended up to sixty additional days. The commander is also required to seek equal treatment and opportunity for his men and their dependents in those instances of discrimination for which the Civil Rights Act does not provide judicial remedy.

G. Recommendations for Improved Implementation

The regulation defines a complainant as a member of the active Army who requests the Attorney General to institute suit because of discrimination or segregation "directed against him or his dependents".[83] It is noted that there is a variance between Title II and the regulation. Title II provides that whenever the Attorney General has:

> . . . reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this Title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint . . . requesting such preventive relief, /emphasis supplied/ including an application for permanent or temporary injunction, restraining order. . . .[84]

The distinct difference between the Army regulation and Title II provisions is that the regulation requires that individuals be personally subjected to discrimination before they are permitted to process requests

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[83] Army Reg. No. 600-22, para. 3c (4 Sep. 1964) /hereafter cited as AR 600-22/.

[84] 78 Stat. § 206(a) (1964).

for action through military channels. Title II does not make such requirement as a condition precedent to initiation of suit by the Attorney General. On the contrary, Title II is designed to grant "preventive relief" and the Attorney General may initiate action as long as he has reasonable cause. Therefore, the commanding officer of an installation or any other officer or enlisted man, who has knowledge that a public accommodation facility is engaged in a pattern or practice of discrimination or segregation may furnish such information to the Attorney General whether or not discrimination or segregation has been directed against him. It is recommended that the Department of Defense issue a directive encouraging commanders to initiate Civil Rights suits. Commanding officers would then be in a position to request assistance from the Attorney General to end discriminatory practices in communities near defense installations in the absence of a complainant as defined by the present regulation. The change would give commanding officers additional authority in meeting their responsibility of fostering equal treatment of military personnel and their dependents in off-post civilian communities.[85]

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[85]Army Reg. No. 600-21, para. 4c (18 May 1965) [hereafter cited as AR 600-21].

Installation commanders are required to seek "appropriate assurance" from owners of public accommodation facilities before a formal report of inquiry is prepared and forwarded to higher headquarters. The regulation does not define the term "appropriate assurance". The military should adopt the practice of the Department of Justice in seeking voluntary assurances. That is, the assurance should be in writing. Commanders have a similar responsibility under the fair housing enforcement program of the Department of Defense. They are required to seek written assurance from the owner or operator of dwellings covered by the Civil Rights Act of 1968 (42 U.S.C.A. §§ 3601-31).[86] The written document should contain an admission by the owner that he has offered goods and services on a discriminatory basis in violation of the law. Although it is not an enforceable agreement, it does have some psychological and legal value. The owner of an establishment that affixes his signature to a document declaring that he will cease and desist all discriminatory treatment of military personnel and their dependents will be hesitant to renege. A written document would also be of evidential value in

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[86] Army Reg. No. 600-4, para. 5e (30 Oct. 1968).

proving bad faith in the event a civil suit is prosecuted.

The present regulation makes no provision for handling situations in which the owner reneges on his promise to comply with Title II; instead, it provides that the action on request for suit may be regarded as completed at the installation level upon the obtaining of satisfactory assurances and notice thereof is given to the complainant. The regulation should provide that if the terms of the assurances are not implemented within a specified period, further action will be taken to request the Attorney General to seek injunctive relief.

It is not sufficient that one agrees to comply with Title II. The owner of public accommodation facilities violates the law when he denies certain persons the full and equal enjoyment of these facilities because of their race, color, religion, or national origin. The owner has the affirmative duty under the fourteenth amendment to bring about integration. By analogy, it is proper to impose such a duty on proprietors of public accommodation establishments. The affirmative duty theory was first recognized in the case of United States v. Jefferson County Board of Education.[87] The court

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[87] 380 F.2d 385, 389 (5th Cir. 1967).

held:

> . . . that the boards and officials administering public schools have the affirmative duty under the Fourteenth Amendment to bring about an integrated unitary school system in which there are no Negro schools and no white school—just schools. Expressions in our earlier opinions distinguishing between integration and segregation must yield to this affirmative duty we now recognize. In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools.

The military should insist that all voluntary assurances be coupled with notice to the community that the establishment has discontinued its discriminatory practices. Too often persons previously excluded from public accommodation facilities do not patronize such places because they are not aware that the facilities have been integrated. The lack of attendance is usually construed as the lack of desire to patronize the establishments.

Pursuant to paragraph 5c(2), Army Regulation 600-22, commanders "will not" process request for suit if the complainant is on order to depart the installation. The reason for this provision is obvious. The request for suit should, whenever possible, be a multiple request so that a class action may be initiated. The advantage

of a class action is that if one or more members are transferred before the court hearing, others will be readily available to testify. The regulation should require that affirmative measures be taken during the preparation of the formal report of inquiry not only to solicit sworn statements from other military personnel and dependents having actual knowledge of the practices of the facility concerned, but to secure consent of such persons to become parties to the suit. The evidence used as a basis for a class action will lend support to the existence of a pattern or practice of discrimination or segregation as set forth in section 206(a) of the 1964 Civil Rights Act.

A report stated that in 1962 there were 27,284 military families that lived at a distance from the military installation which is considered excessive by Department of Defense standards.[88] The regulation provides that commanders will not process requests for suit if

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[88] The President's Committee on Equal Opportunity in the Armed Forces, Equality of Treatment and Opportunity for Negro Military Personnel Within the United States, Initial Report, June 13, 1963, at 75. There are no available current statistics on the percentage of military families residing in civilian communities.

the alleged discrimination occurred beyond normal commuting distance for installation personnel. This provision is highly prejudicial to some servicemen and their dependents. Whether or not complaints should be processed because of distance factor should be left to the discretion of the commander concerned.

H. The Remaining Problems

The military installations within the United States cannot exist in isolation from surrounding civilian communities. A 1962 Department of Defense survey revealed that 487,408 military families do not live on military installations.[89] At a typical base, one half of the married personnel live off the post because of the lack of housing.[90] Military families residing on or off base utilize many of the community facilities for shopping and recreation. The Army has attempted in some degree to provide recreational opportunities on base, i.e., service clubs, swimming pools, theatres, and officer and NCO clubs. The limited and institutional character of these arrangements does not

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[89] Id.

[90] Id. at 42.

satisfy the needs of the military personnel. Apart from the desire to be free from command supervision in private endeavors, many families reside sufficiently far from the base to make on base facilities of limited utility.

The most painful problem for the Negro soldier is going outside the post gate. Accustomed to integrated policies within, he is jarred by the startling contrasts offered by outside civilian life. It is difficult for him to adjust to equality inside and inequality outside.[91] The 1964 Civil Rights Act does not purport to cover all public accommodation facilities located off post that military personnel and their dependents would like to patronize. The Act was intended to desegregate only those establishments enumerated in Section 201(b). The following establishments would, therefore, generally be exempted: barber shops, beauty salons, lawyers, doctors and other professional persons, dance studios, bowling alleys, billiard parlors,[92] retail stores,[93]

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[91] R. Stillman, Integration of the Negro in the U.S. Armed Forces 90 (1968).

[92] 110 Cong. Rec. 7407 (1964).

[93] 110 Cong. Rec. 6533 (1964).

pharmacies, laundromats, craftsmen, certain recreation resorts,[94] taverns or nightclubs not principally engaged in selling food for consumption,[95] and concert halls and sports arenas that feature only local talent. The exclusion of these and similar places of public accommodation could have profound adverse effect upon Negro military personnel that reside in communities where substantial forms of segregation and discrimination are practiced and military recreational facilities are either minimal or do not exist. It is inherently inequitable that certain persons must be subjected to the indignities of racial discrimination because of their assignment to particular geographical areas.

The Department of the Army has processed to date seven (7) requests by military personnel for action by

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[94] A recreation facility for swimming, boating, miniature golfing or dancing was not a covered establishment under the Civil Rights Act, where the facility was located on a country road and was not close to any state or federal highway, operations did not affect commerce, no interstate traveler ever patronized facility, it did not offer to serve interstate travelers, no portion of food served in snack bar moved in commerce, and no exhibits or other sources of entertainment moved in or affected commerce. Daniel v. Paul, 395 F.2d 118 (8th Cir. 1968).

[95] See Cuevas v. Sdroles, 344 F.2d 1019 (10th Cir. 1965); Cf. Robertson v. Johnson, 249 F. Supp. 618 (E.D. La. 1966).

the Attorney General under Title II, Civil Rights Act of 1964. Five of these requests involved taverns or bars not principally engaged in selling food; therefore, no action was taken because such establishments are not covered by the Act.[96] There is no justification for congressional exclusion of some places of public accommodation; all such facilities should be included. It must be said that Congress practiced discrimination when it passed a law against discrimination. President Johnson has stated, "As far as the writ of Federal law will run, we must abolish not some but all racial discrimination."[97]

The Act should be amended by Congress to prohibit discriminatory practices by all public accommodation facilities. The fourteenth amendment guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations.[98]

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[96]Information furnished by the Chief, General Branch, Litigation Division, Office of The Judge Advocate General, Department of the Army /hereafter cited as TJAG Information/.

[97]Statement quoted in a Memorandum dated 7 Jul. 1964 issued by the Deputy Secretary of Defense to the Secretaries of the Military Departments.

[98]See Bell v. Maryland, 378 U.S. 226, 252, 286 (1964) (separate opinion).

Taverns, nightclubs, retail stores and other public accommodation facilities not covered by Title II are all licensed by state law. They undertake to provide for the public under sanction of state law. They are public institutions, regulated if not created by state law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the hotel, restaurant and theatre. For essential reason, the rule should be the same for all. As the hotel can not close its doors, or the restaurant refuse to serve Negro servicemen and their dependents, so must it be for taverns, nightclubs, dance and health studios, and all other public establishments. Prejudice and bigotry in any form are regrettable.

A Negro soldier and a white soldier may together enter a tavern located near a military installation. The Negro may refuse to leave upon the request of the proprietor. He may be arrested by the policeman for his refusal to leave and convicted and punished by the local court. Under the umbrella of the present law, the white soldier may remain in the tavern and enjoy his pursuits. Obviously, the law denies equal protection to the Negro soldier. Discrimination in public accommodation facilities is also the denial of a privilege and immunity of national citizenship. Segregation of Negro servicemen

and their dependents in public facilities not covered by the 1964 Civil Rights Act is a relic of slavery as it was in America. It is a badge of second-class citizenship. When the state police, the state prosecutor, and the state court unite to convict Negroes for renouncing that relic of slavery, the state violates the fourteenth amendment.

The federal government was derelict in the performance of its duties by enacting a law which prohibits discrimination and segregation in prescribed establishments and not all public accommodation facilities.[99]

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[99] Similarly, Senator Pratt in discussing the limitations of the Civil Rights Act of 1875 said:

> No one reading the Constitution can deny that every colored man is a citizen, and as such, so far as legislation may go, entitled to equal rights and privileges with white people. Can it be doubted that for a denial of any of the privileges or accomodations enumerated in the bill /proposed supplement to the Civil Rights Act of 1866/ he could maintain a suit at common law against the inn-keeper, the public carrier, or proprietor or lessee of the theater who withheld them? Suppose a colored man presents himself at a public inn, kept for the accommodation of the public, is decently clad and behaves himself well and is ready to pay the customary charges for rest and refreshment, and is either refused admittance or treated as an inferior guest—placed at the second table and consigned to the garret, or compelled to make his couch upon the floor—does any one doubt that upon an appeal to the courts, the law if justly administered would pronounce the inn-keeper responsible to him in damages for the unjust discrimination? I suppose not. Prejudice in the

Congress should eliminate the restrictive coverage of Title II, and thus assure all servicemen and dependents the equal right to enjoy this aspect of the public life in the community.

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jury-box might deny him substantial damages; but about the law in the matter there can be no two opinions. The same is true of public carriers on land or water. Their engagement with the public is to carry all persons who seek conveyance on their cars or boats to the extent of their facilities for certain established fares, and all persons who behave themselves and are not afflicted with any contagious disease are entitled to equal accommodations where they pay equal fares.

"But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every inn-keeper who, or railroad company which, insults him by unjust discrimination. Practically the remedy is worthless." Bell v. Maryland, 378 U.S. 226, 300 n. 18 (1964).

CHAPTER IV

DISCRIMINATION WITHIN THE MILITARY COMMUNITY

A. Racial Discrimination in Administration of Military Justice

The term "racial discrimination" has a simple definition[100] but wide-spread ugly repercussion when practiced. In recent years it has been the subject of more executive orders, legislation and judicial decisions at the state and federal levels than any other single term. All these governmental agencies have combined their efforts to dismiss racial discrimination from society. In the Army, commanders have the responsibility to ensure that discriminatory practices do not exist in their command. In the administration of military justice, staff judge advocates and legal officers may be termed the action officers to ensure that every

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[100] The term racial discrimination means simply to make a difference in treatment or favor of one as compared with another because of their race or ethnic relation. See City of Highland Park v. Fair Employment Practice Commission, 364 Mich. 508, 513-14, 111 N.W. 2d 797, 799 (1961).

soldier, without regard to race, is treated equally.

Mr. L. Howard Bennett, Director of Civil Rights, Office of the Deupty Assistant Secretary of Defense (Civil Rights and Industrial Relations), has observed that minority groups personnel have complained that they were discriminated against and received prejudicial treatment in the administration of military justice. (See paragraph 15, Appendix E.) An analysis and classification of their complaints falls into three general categories:

a. Advice, counsel and representation by military legal officers.

b. Discrimination in the administration of non-judicial punishment under Article 15, Uniformed Code of Military Justice.[101]

c. Problems of due process in trial by summary, special and general courts-martial.

Minority groups military personnel complained about the inadequacy, commitment and goal of representation by judge advocates appointed to represent them. They asserted they were not getting counsel or advice comparable to that received by white clients. They also complained about the absence of clarity in the explanation given to them about the options available, and the

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[101] 10 U.S.C. § 815 (1964).

consequences flowing therefrom, in their accepting either non-judicial punishment or having the charges determined under the procedures of courts-martial. All too often the accused is led to believe that it would be advisable to accept punishment under Article 15, with its limitations, rather than stand trial under court martial where the punishment would be more severe. To the uninitiated and poorly educated, this often means that the presumption of innocence until found guilty did not exist and that conviction in a court martial was automatic. Therefore, it was to the accused's best interests to accept an Article 15 under circumstances which, in their understanding, was tantamount to an admission of guilt.

Many of the men expressed the view that they were often coerced into electing Article 15 punishment rather than allowed to defend themselves through the courts-martial procedures. The Negro soldiers complained that when they accepted non-judicial punishment, the punishment is more harsh than that meted out to white military personnel whom, to their knowledge and belief, were charged with the same offenses. White Armed Forces personnel, they said, are treated more leniently when involved in serious offenses. See Appendix F.

An article published in Ebony magazine recently was severely critical of inequities in the military justice system.[102] It stated that at one Army division headquarters, twenty-seven of the thirty-two soldiers tried by general court-martial during a one-year period were black and that members of the unit who were considered oldtimers could not recall when a black officer had been appointed to the court. The article purportedly quotes a white "prominent" military lawyer as saying:

> With a predominantly white court, the Negro is generally at a disadvantage. He walks in the courtroom walking his soul walk and talking his soul talk and it's three strikes against him already. He may know his weapons better than any white boy in the platoon, but you get a Kentucky colonel on the board and he automatically figures he's a bum. It is especially difficult to defend a Negro in, say, a 212 elimination proceeding where there are no rules of evidence anyway. Many of the officers who sit on the courts and boards bring their prejudice with them. . . . Look, a Negro GI is accused of raping a German prostitute. OK, I admit a prostitute can be raped. But even if evidence shows she was willing, some court members will vote to convict just because they can't see a Negro trooper sleeping with a white woman.

Those comments may or may not be true, but it must be admitted that racial prejudice is a human element

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[102] Ebony, supra note 2, at 127.

that can influence man's judgment.[103] The Armed Forces are composed of Americans extracted from civilian society and putting on a military uniform does not necessarily change completely one's attitudes toward his fellow man.

B. The Role of the Staff Judge Advocate

The practice of discrimination, per se, is not an offense punishable under the Uniform Code of Military Justice, but it is the policy of the Army to conduct all of its activities in a manner which is free from racial discrimination and provide equal opportunity and treatment of all members irrespective of their race, color, religion, or national origin.[104] It is the responsibility of staff judge advocates when reviewing all records of military justice proceedings to insure that the kind and degree of punishment was not an instrumentality of racial

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[103] Personal Injury Valuation Handbook, published by Jury Verdict Research Corporation of Cleveland, Ohio, is a collection of books designed to assist practicing attorneys in assessing the value of personal injuries in tort cases. According to the publication, the amount of damages that could be anticipated from a jury depends upon the nature of the injury, the section of the United States where the trial is held and the race of the injured party, among other factors. Needless to say, Negroes could expect considerable less damages than whites for the same injury throughout the country.

[104] AR 600-21, para. 3a.

prejudice. It is extremely difficult to make that determination but not impossible. Discrimination can not be presumed, its showing must be clear and intentional.[105] It may appear on the face of the action taken against a particular class or person, or it may be shown by extrinsic evidence establishing a design to favor one class or individual over another.[106] The evidence required to prove discrimination in an individual case is exacting but not so when a pattern or practice of discrimination exist in the administration of military justice.

The problems staff judge advocates encounter with respect to discrimination is analogous to those generated by command influence. Command influence is a form of prejudice. At the time of adopting the Code, Congress attempted to eliminate command influence through

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[105] See also Tarrance v. Florida, 188 U.S. 519,

[106] Thus the denial of equal protection by the exclusion of Negroes from courts-martial may be shown by extrinsic evidence of a purposeful discriminatory administration in the selection of the members. But a mere showing that Negroes were not included in a particular court is not enough; there must be a showing of actual discrimination because of race. See, e.g., Snowden v. Hughes, 321 U.S. 1 (1943); Bailey v. Alabama, 219 U.S. 219 (1910); Gundling v. Chicago, 177 U.S. 186 (1900).

inclusion of an article prohibiting commanders from reprimanding courts-martial personnel or attempting to coerce or influence a court-martial or any convening authority or approving authority with respect to his judicial acts.[107] A related article was adopted providing for punitive sanctions against those found guilty of such unlawful conduct.[108] To date there is not one reported case of conviction under Article 98, and yet the practice of command influence continues.[109] For this reason, it would be useless, although desirable, to suggest that Congress make racial discrimination a specific punishable offense under the Code. Therefore, the burden is upon staff judge advocates to maintain sensitivity to the problem and to take appropriate appellate action wherever it appears to ensure that every accused regardless of race, religion, or nativity is accorded equal protection of the law. Such action may expand the gamut

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[107] Uniformed Code of Military Justice, art. 37 /hereafter cited as UCMJ/.

[108] UCMJ, art. 98.

[109] Byers, The Court-Martial As A Sentencing Agency: Milestone or Millstone, 41 Mil. L. Rev. 81, 88 nn. 29 and 30 (1968).

of corrective measures from recommending to the convening authority that an Article 15 punishment be reassessed, to administrative censure against the perpetrator.

C. Off-Duty Racial Separatism

In their performance of military duties, white and Negroes work together with little display of racial tension. This is not to imply that racial animosity is absent in the military. Racial incidents do occur (paragraphs 5 and 6, Appendix E) but they are reduced by the severe sanctions imposed by the military for such acts. Such confrontations are almost always off-duty, if not off base.[110] Yet, the fact remains that the general pattern of day-to-day relationship "off the job" is usually one of mutual racial exclusivism.

In general, the pattern of racial relations observed in the United States—integration in the military

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[110] Additionally, it must be stressed that conflict situations stemming from non-racial causes characterize most sources of friction in the military establishment; for example, enlisted men versus officers, lower-ranking enlisted men versus non-commissioned officers, soldiers of middle-class background versus those of the working-class, conscriptees versus volunteers, line units versus staff units, rear echelon versus front echelon, combat units versus non-combat units, newly arrived units versus earlier stationed units, etc.

setting and racial exclusivism off-duty—prevails in overseas assignments as well. This norm is reflected in one of the most characteristic features of American military life overseas. A frequent claim of local bar owners is that they discourage racially mixed trade because of the demands of their G.I. clientele. And, indeed, many of the establishments catering to American personnel that ring most military installations are segregated in practice.[111] (See paragraph 20, Appendix E.)

The pattern of off-duty racial separatism is most pronounced in Japan and Germany, and less so in Korea. In certain off-duty areas on Okinawa, on the other hand, racial separatism is complicated by inter-service rivalries and a fourfold ecological pattern shows up: white-Army, Negro-Army, white-Marine Corps, and Negro-Marine Corps. Combat conditions in Viet Nam makes the issue of off-duty racial relations academic for those troops in the field. In the cities, however, racial separatism off-duty is already apparent. It is said that the riverfront district in Saigon, Kanh Hoi, frequented

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[111] C. Moskos, Racial Integration in the Armed Forces, The American Journal of Sociology, Vol. 72, No. 2, at 144 (1966) /hereafter cited as Moskos/.

by American Negro soldiers was formerly patronized by Senegalese troops during the French occupation.[112]

The most overt source of racial unrest in the military community centers in dancing situations. A commentary on American mores is a finding that three-quarters of a large sample of white soldiers said they would notmind Negro couples on the same dance floor, but approximately the same number disapproved of Negro soldiers dancing with white girls. In many non-commissioned officer (NCO) clubs, the likelihood of interracial dancing partners is a constant producer of tension. In fact, the only major exception to integration within the military community is on a number of large posts where there are two or more NCO clubs. In such situations one of the clubs usually becomes tacitly designated as the Negro club.[113] (See paragraphs 8 and 17, Appendix E.)

D. The Dilemma For Commanders

The challenge to commanders with respect to off-duty exclusivism is to promote racial egalitarianism on

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[112] Id.

[113] Id. at 142.

one hand and on the other successfully treat the rising phenomenon of black separatism and nationalism. (See paragraph 9, Appendix E.) At the same time, they must be conscious of the fact that there are limitations on their efforts to influence the private lives of service personnel and dependents. Commanders must also be cognizant of the constitutional right of every American to freedom of association and expression under the first amendment. The danger of paternalistic interference is ever present.

It must first be recognized that civil rights have been distinguished, by law, from social rights or privileges. The purely social intercourse and relations of individuals cannot be enforced by law or military regulation. Civil rights are those guarantees which are enforceable under the law.[114] In dealing with the problem of off-duty racial separation, commanders should adopt the reasoning stated in 1890 by the Supreme Court of Michigan, that is:

> Socially, people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private

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[114] See McFarland v. Goins, 96 Miss. 67, 75, 76, 50 So. 493, 494 (1909); cf. State ex rel. Weaver v. Board of Trustees of Ohio State University, 126 Ohio 290, 292, 185 N.W. 196, 199 (1933).

> grounds; but there can be no separation in public between people on account of their color alone which the law will sanction.[115]

The military regulation provides some guidance by requiring that command attention be given to evidence of unequal treatment, development of undesirable cliques and interracial difficulties within units.[116] The extent to which command attention should be focused is not mentioned. It is clear, however, that off-duty activities by servicemen and their dependents which are determined to be inimical to the mission and effectiveness of the command must be suppressed. The interesting feature of the Army regulation is that it does not require integration of the races, the term has been omitted for obvious reasons. However, it prohibits discrimination and segregation and provides for the equal treatment of all military personnel. The requirement for commanders to maintain order and discipline so as to achieve maximum readiness for military operations is necessarily paramount over right of individuals to off-duty racial separatism.

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[115] Bell v. Maryland, 378 U.S. 226, 313 n. 32 (1964).

[116] AR 600-21, para. 4f.

By analogy, the United States Supreme Court in upholding the First Amendment right of an employee at a defense facility to hold membership in a Communist-action group, also recognized that the Constitution, in protecting an individual's right to association, does not withdraw from the Government the power to safeguard its vital interests.[117] Therefore, commanders may use their authority to prevent and extirpate all hostile conduct and behavior, on or off duty, that tends to or cause divisiveness that weaken and undermine the strength of the Armed Forces.

The demand by black nationalist servicemen for the military to provide separate accommodation facilities is repugnant to the official policy of the Armed Forces and violates the spirit and letter of the Constitution and federal statute. The fifth amendment clause which provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ." forbids discrimination by the federal government against any citizen, white or black, because of his

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[117]United States v. Robel, 389 U.S. 258, 266-68 (1967); accord. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

race. Liberty under law is not confined to freedom from bodily restraint, it extends to the full range of conduct which an individual is free to pursue. The fourteenth amendment prohibits racial discrimination by the several states and it would be unthinkable that the same Constitution would impose a lesser duty on the federal government.[118] The clock can not be turned back to the "separate but equal" doctrine announced in Plessy v. Ferguson.[119] If separate facilities are provided for a particular class of servicemen, the facilities will be inherently unequal.[120]

To grant the demands of black nationalists would be a direct violation of the mandate of Executive Order 9981, which declares that treatment of persons in the Armed Services shall be without regard to race. (See page 15 supra.) Further, military personnel and dependents not sympathetic with the black separatist

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[118] Bolling v. Sharpe, 347 U.S. 497, 499, 500 (1954); see Hurd v. Hodge, 334 U.S. 24, 28, 29 (1948).

[119] 162 U.S. 537 (1896).

[120] See Brown v. Board of Education of Topeka, 347 U.S. 494 (1954).

movement can not be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[121]

The Negro now entering the Armed Forces is a new breed, with attitudes and ideas that are different from Negro soldiers that came on active duty ten years ago. The former is no less patriotic. He does have identity and pride in his heritage. He will not unquestionably accept the age old stereotype thinking of the military as to private matters. He will demand that the Services align with new trends, and commanders, who are accustomed to the old traditions, must re-orient themselves. Commanders must accept the new Afro-American haircuts because the military does not have the authority to insist that Negroes wear closely trimmed hair solely because of its texture. Equal treatment requires that the post exchanges stock Afro-American garments, if there is a demand for them and they can be obtained. Dependent schools will be required to offer studies in

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[121] 78 Stat. § 601 (Title VI of the Civil Rights Act of 1964).

Afro-American history. (See paragraph 19, Appendix E.) The military club system must conduct its activities to accommodate all its patrons. (See paragraph 17, Appendix E.) These are just some of the challenges that military commanders will encounter.

CHAPTER V

WHAT MUST BE DONE

A. Establish A Civil Rights Office

More effective and positive means of implementing the military's policy of equality must be established. A tremendous amount of responsibilities have been placed upon commanders in this area but they have been given little guidance and tools with which to work. It is recommended that a civil rights office be established at every defense installation and within every major military command. Such an office is available to every Department of Defense civilian employee.[122] Civil rights offices are at the Department of Defense and Military Department levels but not in the field where the aggrieved persons are located. This is where they are most needed. The local civil rights office should consist of multi-racial personnel, as representative of various ethnic groups within the command. One distinctive feature of a multi-racial civil rights office is that it

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[122] See Civ. Pers. Reg. E3 (June 1963).

will not appear to be a representative of the "power structure". Its characteristic will be the concern of servicemen, dependents (and civilian employees to a limited extent) whose constitutional rights have been violated. This office should be under the direct control of the Military Departments and not the installation commanders. Its effectiveness can not be subjected to the attitude and caprice of local individual commanders.[123] The civil rights officer relationship to commanders in this respect should be similar to that of the military judge.

B. Duties of the Civil Rights Officer

The civil rights officer will carry out the responsibilities of commanders with regard to civil rights

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[123] There was similarly a breakdown in communications moving upwards from the lowest level of military personnel to commander and senior officers. This was clearly manifested by the repeated experience of having command briefings advise of no problems, no tension, no unrest. There had been few, if any, complaints. We were usually advised that the equal opportunity-equal treatment program was operating effectively. When we met with military personnel, however, it was reported that conditions were not as salutary as previously recited and that there were problems; that complaints were not being transmitted upward; that there were tensions, unrest and interracial conflict and violence. (Extracted from Preliminary Report of Base Visits of Joint DoD - Mil. Dept. Team to Southeast Asia.)

matters. This does not relieve the commanders of their responsibilities because equality of treatment of all personnel exerts direct influence on morale and discipline and as such is related to the primary mission of command. The civil rights officer's duties will be specifically the following:

1. Insure that the Department of Defense policy of equality of opportunity and treatment is implemented in all on-post activities. This will include, but not be limited to, making positive that military personnel, regardless of race, color, or religion, or national origin be accorded equal opportunity for promotion, professional improvement, assignment and utilization and participation in official and social functions.

2. Develop an information program to apprise all service personnel periodically on the military policy regarding equality of treatment of personnel.[124] An

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[124] Information concerning DoD policy and implementing programs are not communicated to the troops and the grievances and concerns of lower echelon personnel fail to reach base commanders and senior officer. Our interviews with the minority group military personnel at all bases in Europe reflects a lack of information concerning the Department of Defense and Military Departments' policies and implementing programs in the areas of equal opportunity and equal treatment. We would ask the men "how many of you have ever heard of our policy on

official notation should be made in each individual's record that the orientation was or was not received. This requirement should be given higher priority than the requirement that all servicemen be periodically oriented on the Geneva Convention Relative to the Treatment of Prisoners of War.[125] Proper treatment of fellow Americans in uniform is more important than the treatment of the enemy.

3. Promote racial harmony and keep the commander informed of the situation; thereby, giving the latter an opportunity to treat any tension or unrest. Periodic reports should be made to the Department of Defense on racial incidents setting forth salient and important facts surrounding the incident or incidents with a later follow-up report of the actions taken to remedy and correct the situation.

4. Process all complaints of on-post discrimination and request for suit under the Civil Rights Acts of

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equality of opportunity and treatment and the McNamara Directive of 1963?" It was rare to find a serviceman who had less than five years in service who had ever heard of these policies and programs. The senior men who had been in as early as 1963 were usually the only ones who would indicate knowledge about it. (Extracted from Memo dated 15 Jan. 1969 prepared by DoD, Director for Civil Rights.)

[125] Army Reg. No. 350-216, para. 2 (28 Sep. 1967).

1964 and 1968. The civil rights officer should foster equal treatment of military personnel and their dependents in off-post civilian communities by encouraging and assisting community officials in eliminating discriminatory practices. The civil rights officer will take appropriate measures to prevent reprisal and retaliation against complainants.[126]

C. The Centralization of Civil Rights Functions

The present regulations permit the establishment

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[126] Fear of reprisal and retaliation was voiced at Hanau and Munich, Germany; to a lesser extent at Frankfurt and Weisbaden, Germany, Naples, Italy and Rota, Spain. It was felt and alleged that if an individual complained and sought redress of his grievances, he was a marked man and likely to be punished in some way. At several installations we discovered that the men were at first reluctant to talk with us and on pressing our inquiry as to why the unwillingness to come forward with candor we realized that they were afraid that if it were known that they were making complaints, alleging discrimination and expressing their concerns, reprisal and retaliatory measures would be taken against them. At one base we had to stop taking their names and refer to them only by number (not serial number). At another installation where they had been required to list their names and units when entering a conference room, we had to tear up the sheet containing their names and give it to one of the men in attendance in order to effect a dialogue. Their fear of reprisal and retaliation is more widespread overseas than any such phenomenon we encountered in our 18 base visits in the continental U.S.A. (Extracted from Memo dated 15 Jan. 1969 prepared by DoD, Director for Civil Rights.)

of three separate offices on a single installation to handle civil rights matters. The Inspector General handles complaints by servicemen of discriminatory practices within their units and within the military community.[127] Complaints of discrimination in violation of the 1964 Civil Rights Act may be registered by servicemen and their dependents with the legal assistance officer.[128] The post billeting officer usually handles complaints of discrimination in violation of the 1968 Civil Rights Act that are made by military personnel, their dependents and civilians. The responsibilities of the latter two officers can not be combined because civilian employees are not entitled to legal assistance while assigned to duty in the United States.[129]

All of the civil rights functions should be the responsibility of the proposed civil rights officer. Eventually, the officer will become experienced in cooperating with civilian community relations boards, proprietors of public accommodation facilities, school

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[127] See AR 600-21, para. 11a.

[128] AR 600-22, para. 4b.

[129] See Army Reg. No. 608-50, para. 5c (28 Apr. 1965).

boards, home owners, and state and municipal officials. Experience is an extremely important asset in attempting to obtain voluntary assurances that future practices will provide nondiscriminatory treatment of military personnel, their dependents and civilian employees. The present decentralization of civil rights functions and physical dispersion of offices often discourage a complainant seeking assistance, and lends credence to his opinion that his problem is unpopular and being avoided.

CHAPTER VI

CONCLUSIONS

Racial discrimination is the most pervasive and stubborn, morale-impairing, social evil confronting Negro servicemen and their dependents.[130]

Military personnel are assigned to a community not because of choice or volition but because of the requirements necessary for the security and defense of the nation. Servicemen and their families are constantly in a state of semi-mobility. The search for housing, the locating of needed social institutions and agencies and establishing a myriad of relationships in a new community are but a few of the readjustments that must be made. Normally, civilians establish some measure of stability and relative permanence in the community. Civilians do not experience the hardships caused by frequent reassignment. The rapidity of change in place of

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[130]This analysis was made in a report prepared and submitted by DoD in June 1966 to the Senate and House Judiciary Committees on racial discrimination against Negroes in off-base housing. 112 Cong. Rec. 17096 (1966).

work and residence is unsettling and often difficult for military personnel and their dependents. Add to this segregation and discrimination based on race or color and the difficulty becomes compounded and aggravated.

The frequency of change of duty stations necessarily means that servicemen and their dependents are America's most extensive interstate travelers. They depend upon the civilian community to furnish public accommodations such as hotels, motels, gasoline stations and restaurants during the period of transition. One can only know through experience the abasement, invectiveness and anger felt by minority group military personnel in uniform, traveling from one installation to another pursuant to reassignment orders, when they and their dependents are denied because of racial prejudice a place to rest when they are tired, food to eat when they are hungry, and gasoline for their vehicle when it is needed; even though, the accommodations are available and offered to the public.

The Civil Rights Act of 1964 is an immensely important and historic expression of this nation's commitment to freedom and justice. It has special meaning for the members of the Armed Forces, all of whom have already given a personal commitment to defend freedom

and justice, and some of whom have not always been accorded full freedom and full justice in their own country.[131] Of particular significance are the sections banning discrimination in privately owned facilities of the kind frequently patronized by servicemen and their families. No longer is it necessary for Negro servicemen to travel with brochures on the location of Negro owned hotels, boarding houses and restaurants to avoid humiliation. The reluctance by Negroes to be assigned to certain areas of the country has been reduced.

The Act created new opportunities to gain equal treatment for all servicemen and their families in the civilian community, a goal so just and so compelling. Since its enactment, the military has emphasized that commanders should be sensitively committed to a program of fostering and securing equality off base as well as on. The military has assumed an active role, policy-wise, in assisting personnel seek legal redress when their constitutional guarantees have been infringed upon by the

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[131] Memorandum dated 10 Jul. 1964 from the Secretary of Defense to the Service Secretaries, transmitted to all military commanders. Reference Book, supra note 3, at 660 and n. 151.

civilian community.[132]

There still exists in this country legal discrimination that affect the lives of minority group servicemen, tacitly sanctioned by federal and state governments, in areas of public accommodations, i.e. taverns, nightclubs, certain recreational facilities, etc. Even partial discrimination can not be tolerated, for it denies citizens equal protection and due process of law. For this reason, additional legislation is needed to combat the remaining evils.

Although the military was until recently one of America's most segregated institutions, it has leaped into the forefront of racial equality in the past decade.

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[132] It is interesting to note that as recent as 1944 the policy of DoD was entirely different. "Soldiers, Negro and white, should be instructed that the Army has no authority to alter in any direction the existing community pattern as a matter of social reform, and that it will expect the soldier, when in the community, to abide by its laws. This, it should be emphasized, applies to all sections of the country, and to all soldiers alike. Just as military reservations patterns are the business of the Army, so are community interracial patterns the business of the civilian community, so long as basic constitutional rights of all men in uniform are respected and there is no interference with the necessities of military efficiency." Army Service Forces Manual M-5, Leadership and the Negro Soldiers, 55 (9 Oct. 1944).

Military life is characterized by an interracial equalitarianism of a quality and a kind that is seldom found in the other major institutions of American society. The path of desegregation was relatively easy because its hierarchical power structure, predicated on stable and patterned relationship, need take little account of personal desires and attitudes.[133] Therefore, service personnel intent on violating the law against discrimination cannot be expected to declare or announce their purpose. Far more likely is it that they will pursue their discriminatory practices in ways that are devious, by methods subtle and elusive.[134] These subtle practices of discrimination have evoked racial tension and incidents, and have caused Mr. L. Howard Bennett, Department of Defense Director for Civil Rights to remark:

> I personally consider the deteriorating relations between black and Caucasian military personnel a disturbing and serious situation. This concern is reinforced by our findings in Southeast Asia that revealed serious tensions, severe racial conflict and overt violence that

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[133] Moskos, supra note 111, at 147.

[134] See Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E. 2d 581, 584 (1954); cf. National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 (1941).

in some instances expanded to race riots.[135] On the whole, racial integration works best on-duty vis-a-vis off-duty, on base vis-a-vis off-base, basic training and maneuvers vis-a-vis garrison and combat vis-a-vis non-combat. In other words, the more servicemen are removed from the military environment, the more their behavior resembles the racial separatism of the civilian society.[136] Everyone in the military community, including civilian employees, has superiors and subordinates. Racial prejudice may move from white to black, black to white, white to white and black to black.

The 1964 Civil Rights Act has caused expansion of commanders' responsibilities to include elimination of discrimination in communities near defense installations. Since the passage of the Act, the Army has processed only two requests for suit by the Attorney General against establishments covered by the public accommodation sections.[137] This indicates that either the

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[135]Statement contained in a Memorandum dated 15 Jan. 1969 prepared by Mr. Bennett for the Military Assistant assigned to the Assistant Secretary of Defense (Manpower and Reserve Affairs).

[136]Moskos, supra note 111, at 147.

[137]TJAG Information, supra note 96.

methods employed to carry out these new responsibilities are ineffective, or commanders have secured voluntary assurances and compliances in an unusually high percentage of cases—a feat that is difficult for the Attorney General of the United States to accomplish.

The establishment of civil rights offices at installation level, and the application of firm, vigorous command dedication to the cause of civil rights, are needed to implement and perfect the Department of Defense policy. These, then, are the redefinition of responsibilities and remedies.

The military services were created to defend the freedom of the United States. The denial of the civil rights of members of the Armed Forces is harmful to its effectiveness. This reason alone compels an affirmative commitment by all military personnel to the cause of equal treatment and opportunity.

APPENDIX A

THE WHITE HOUSE
WASHINGTON

June 22, 1962

Dear Mr. Gesell:

The Department of Defense has made great progress since the end of World War II in promoting equality of treatment and opportunity for all persons in the Armed Forces. The military services can take justifiable pride in their outstanding accomplishments in this area over the past ten years.

It is appropriate now, however, to make a thorough review of the current situation both within the services and in the communities where military installations are located to determine what further measures may be required to assure equality of treatment for all persons serving in the Armed Forces.

There is considerable evidence that in some civilian communities in which military installations are located, discrimination on the basis of race, color, creed, or national origin is a serious source of hardship and embarrassment for Armed Forces personnel and their dependents.

In order that I may have the benefit of advice from an independent body of distinguished citizens on the most effective action that can be taken to cope with the problem I am establishing a Committee on Equality of Opportunity in the Armed Forces, and I ask that you serve as Chairman of the Committee.

The Committee will include in its consideration of the general problem the following specific questions:

1. What measures should be taken to improve the effectiveness of current policies and procedures in the Armed Forces with regard to equality of treatment and opportunity for persons in the Armed Forces?

2. What measures should be employed to improve

equality of opportunity for members of the Armed Forces and their dependents in the civilian community, particularly with respect to housing, education, transportation, recreational facilities, community events, programs and activities?

The Secretary of Defense will make all necessary facilities of the Department of Defense available to the Committee for carrying out this important assignment.

Sincerely,

/s/ John F. Kennedy

Gerhard A. Gesell, Esquire
Union Trust Building
Washington 5, D.C.

NOTE: Copy of letter obtained from the Office of the Deputy Assistant Secretary of Defense (Civil Rights and Industrial Relations).

APPENDIX B

THE WHITE HOUSE
WASHINGTON

June 21, 1963

Dear Mr. Secretary:

Because of my concern that there be full equality of treatment and opportunity for all military personnel, regardless of race of color, I appointed a Committee to study the matter in June of 1962. An initial report of my Committee on Equal Opportunity in the Armed Forces is transmitted with this letter for your personal attention and action.

We have come a long way in the 15 years since President Truman ordered the desegregation of the Armed Forces. The military services lead almost every other segment of our society in establishing equality of opportunity for all Americans. Yet a great deal remains to be done.

As the report emphasizes, a serious morale problem is created for Negro military personnel when various forms of segregation and discrimination exist in communities neighboring military bases. Discriminatory practices are morally wrong wherever they occur -- they are especially inequitable and iniquitous when they inconvenience and embarrass those serving in the Armed Services and their families. Responsible citizens of all races in these communities should work together to open up public accommodations and housing for Negro military personnel and their dependents. This effort is required by the interests of our national defense, national policy and basic considerations of human decency.

It is encouraging to note that the continuing effort over the last fifteen years to provide equality of treatment and opportunity for all military personnel on base is obviously having far-reaching and satisfactory results. The remaining problems outlined by the Committee pertaining to on-base conditions, of course, must be remedied. All policies, procedures and conditions under which men and women serve must be free of considerations of race or color.

The Committee's recommendations regarding both off-base and on-base conditions merit your prompt attention and certainly are in the spirit that I believe should characterize our approach to this matter. I would hope your review and report on the recommendations could be completed within 30 days.

I realize that I am asking the military community to take a leadership role, but I believe that this is proper. The Armed Services will, I am confident, be equal to the task. In this area, as in so many others, the U.S. Infantry motto "Follow Me" is an appropriate guide for action.

Sincerely,

s/ John F. Kennedy

Honorable Robert S. McNamara
Secretary of Defense

NOTE: Copy of letter obtained from the Office of the Deputy Assistant Secretary of Defense (Civil Rights and Industrial Relations).

APPENDIX C

THE SECRETARY OF DEFENSE
WASHINGTON

24 July 1963

MEMORANDUM FOR THE PRESIDENT:

On June 21 you sent me a copy of the initial report of your Committee on Equal Opportunity in the Armed Forces and asked that I review the document and report on the recommendations within thirty days. This memorandum responds to that request.

In its year of work the Committee observed racial imbalances and vestiges of racial discrimination within the Armed Forces themselves. Nevertheless, the Committee found that in the main, racial equality is a reality on military bases today. The Department of Defense will eliminate the exceptions and guard the continuing reality.

It is to the Department's off-base responsibilities that the Committee has devoted the bulk of its report. In eloquent terms the Committee has described the nature and pervasiveness of off-base discrimination against Negro servicemen and their families, the divisive and demoralizing impact of that discrimination, and the general absence of affirmative, effective action to ameliorate or end the off-base practices affecting nearly a quarter of a million of our servicemen.

Our military effectiveness is unquestionably reduced as a result of civilian racial discrimination against men in uniform. The Committee report has made this point with great clarity. With equal clarity it demonstrates that the Department of Defense has in the past only imperfectly recognized the harm flowing from off-base discrimination. That imperfect recognition has in turn meant the lack of a program to correct the conditions giving rise to the harm.

The Committee report contained recommendations for such a program. Consistently therewith I have issued a directive explicitly stating Department of Defense

policy with respect to off-base discrimination and requiring:

- preparation of detailed directives, manuals and regulations making clear the leadership responsibility both on and off-base and containing guidance as to how that responsibility is to be discharged.

- institution in each service of a system for regularly monitoring and measuring progress in this field.

We are in the process of establishing a staff element within my office to give full time to such matters.

While the foregoing is in accord with the recommendations of the Committee, the details of the program necessarily will be found in the manuals and regulations to be issued as a result of my directive.

The initial Committee report contained many specific recommendations on recruitment, assignment, promotion, techniques for eliminating on and off-base discrimination, housing, education and recording of racial data. Many of these have been or will be put into effect, but some require more study and on a few we have reservations. These will be discussed further with the Committee.

The recommendations on sanctions do require special comment. The Committee suggests using a form of the off-limits sanction when, despite the commander's best efforts with community leaders, relentless discrimination persists against Negro servicemen and their families.

Certainly the damage to military effectiveness from off-base discrimination is not less than that caused by off-base vice, as to which the off-limits sanction is quite customary. While I would hope that it need never be put in effect, I agree with the Committee that a like sanction against discrimination must be available. It should be applied, however, only with the prior approval of the Secretary of the Military Department concerned.

The Committee also suggested the possibility of closing bases near communities where discrimination is particularly prevalent. I do not regard this as a feasible action at this time.

In your letter transmitting the Committee report you wrote that "Discriminatory practices are morally wrong wherever they occur -- they are especially inequitable and iniquitous when they inconvenience and embarrass those serving in the Armed Services and their families."

Guided by those words and the report of your Committee on Equal Opportunity in the Armed Forces, the military Departments will take a leadership role in combatting discrimination wherever it affects the military effectiveness of the men and women serving in defense of this country.

/s/Robert S. McNamara
/t/Robert S. McNamara

NOTE: Copy of letter obtained from the Office of the Deputy Assistant Secretary of Defense (Civil Rights and Industrial Relations).

APPENDIX D

EXTRACT OF TITLE II OF CIVIL RIGHTS

ACT OF 1964

Public Law 88-352
88th Congress, H.R. 7152
July 2, 1964

AN ACT

To renforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964."

TITLE I

* * * * * * * * *

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other

than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is

carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Sec. 204. (a) Whenever any person has engaged or there are reasonable ground to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States

shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State of local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): Provided, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: Provided further, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Sec. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Sec. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court

of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Sec. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(a) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

APPENDIX E

Consolidated Extracts of Evidence of Discrimination as Reported by Joint DoD - Military Department of Base Visits Conducted in the United States, Europe and Southeast Asia* During the Period February 1967 - October 1968.

1. A white family complained, with manifest disgust and indignation, that a white housing officer asked whether or not he and his family would object to a Negro serviceman and his family moving into the apartment next door to him. The white serviceman made it plain that he was of the belief and opinion that such irrelevancies were not to be factors in determining assignments in family housing in the military.

2. At one installation along the Atlantic coast the housing officer noted that contiguous residencies were being lived in by the families of Negro military personnel. In reviewing the assignments he discovered that this emerging pattern of "bunching" along racial lines resulted from Negro families, which were acquainted with each other, requesting to live near and adjacent to each other.

3. A frequently recurring complaint of Negro and other minority group military personnel was that they were not being promoted as rapidly as they felt they should. There was an expression in a few instances of the belief that racial prejudice was a factor in their failure to receive a promotion or an assignment commensurate with their education, training and experience. Among Negro enlisted personnel, concern was expressed about their inability to go beyond grades E-5 and E-6.

4. There was one base where there was a complaint about insubordination on the part of military personnel to Negro supervisors and the failure of the officers to support the Negro supervisors in obtaining the respect

*NOTE: Most of the complaints and racial incidents cited herein that occurred in Vietnam were also disclosed in an article written by John T. Wheeler entitled, The Vietnam Race Problem, that was published in The Daily Progress (Charlottesville, Va.), 20 Apr. 1969, at A-6.

due to the authority of the person higher in the chain of command.

5. Visits to bases in Germany, Italy and England indicated that serious problems of interracial conflict and at times overt racial violence were emerging between Caucasian and Negro troops.

6. There were interracial conflicts and violence at the following installations:

Long Binh Stockade
Da Nang
Tiensha Camp
Cam Ranh Bay
199th Light Infantry Brigade
1st Division Support Command
Village of Sattahip
Bangkok, Thailand
Udorn Community
7th Air Force Headquarters, Saigon
USS AMERICA (Aircraft Carrier, Yankee Station)

There was discovered a very tense situation at U-Tapoa.

7. There were repeated reports that white American GIs were spreading U.S. patterns of discrimination in Vietnam and Hawaii and succeeding, and attempting to do the same in Thailand but were meeting with resistance from Thai nationals.

8. There were complaints of discrimination at Enlisted Men's Clubs on the bases in which waitresses were slow to serve Negroes, were indifferent in the manner in which they were served, and in some instances not served at all. Many of these occurrences, it was told, were called to the attention of supervisors or superior officers.

9. There were repeated expressions of black nationalism and the desire for separatism. Negroes at Da Nang were requesting separate barracks. Black nationalism and black separatist ideologies were expressed at Udorn, on the USS AMERICA, at U-Tapao and Da Nang.

10. There were numerous reports of white servicemen hurling the epithet "nigger" at Negro military personnel; the scribbling of the word nigger on the walls in shower and latrine rooms, on bulkheads on the ship and on other conspicuous places.

11. There is a pronounced and disturbing polarization of blacks and whites in rear and support areas with less and less communication and fraternization during after-duty hours and rising animosities and hostile attitudes.

12. At several installations the Confederate flag was being brazenly displayed and the flag was observed on a dump truck at the 1st Division Support Command.

13. We received a report at U-Tapao that white enlisted men talked disrespectfully and disparagingly about a Negro officer stationed at the base.

14. A Negro at U-Tapao complained that he was denied opportunity to become a disc jockey because of his "regional accent" meaning that he spoke like a Negro is supposed to speak.

15. There were several complaints about irregularities in the administration of Military Justice. One Negro alleged that assigned defense counsel was neither competent nor zealous and another reported that Negroes received harsher punishment for the commissions of the same offenses committed by whites. It should be noted, however, that there was not as much of this complaint in Southeast Asia as there was in Europe; but neither was there as many minority group military personnel.

16. Throughout Vietnam and Thailand there were very few instances where the recreational and other services provided by USO and American Red Cross that had in their employ and on their staffs Negro personnel. There were no USO personnel, but there was a Negro with the American Red Cross.

17. A frequently recurring concern and complaint from Negro military personnel was that they did not hear on radio nor see on television enough rock and roll and rhythum music and that there was too much country and western music. They also complained that the NCO and Enlisted Men's Clubs offended their musical tastes and racial pride by the same kind of imbalance. Seldom were there Negro entertainers. There was an over preponderance of western and country music and while certain nights were set aside and billed as western and country night, never was there a billing that the entertainment music would be in the "Soul" musical idiom of the Negro's contribution of jazz to Western culture.

18. There were also complaints that Negro newspapers and magazines were not purchased for reading while browsing in the lounges of the clubs. Some complaints were that they were not available for sale at the PXs. There were Ebony Magazines displayed for sale at some Post Exchanges, even though they were late issues.

19. Another expression of growing concern was in regard to the paucity of dissemination of information about the history of the Negro and the contributions of Africans and black Americans to Western civilization. This was quite pronounced at Frankfurt where the students in the senior high school formed an organization at the Dependent's High School to encourage the study of Negro history and African culture as well as the presentation of programs to the student body representative of Negro music and other art forms.

20. There were complaints from Negro servicemen in all places except Spain that there were some bars and night spots that were patronized predominantly by Negroes and others that were attended by predominantly white servicemen. Base commanders would always say that this semi-segregation was voluntary self-segregation or self-aggregation. This is a euphemism. It is true that Negro servicemen state that there are positive reasons why they congregate at certain "soul" night spots:

a. The music played is the kind they like.

b. It is a place where they meet many of their friends and buddies who might not be in their unit or at their base.

c. It is a place where the prices on the drinks are right.

d. The girls are pleasant, cooperative and responsive.

e. When they are on their off-duty hours, they don't want to be bothered with fighting racial discrimination; they want to relax and have fun.

On the other hand, there are real and negative reasons why there are certain bars and taverns to which Negro servicemen go in small numbers, if at all:

a. They are not treated cordially by the management.

b. Oftentimes the prices of drinks are increased for blacks many times and are extortionate.

c. The girls are cool, indifferent and negative; and at times rude and insulting.

d. It could be dangerous to go into these places. Their white comrades in arms might throw them out or subject them to verbal insults.

Several of the men informed us that the girls who frequented these bars would tell them they personally had no objection to associating with them, but they had been told by white American GIs that if they associated with Negro servicemen they would not associate with the girls. This was a kind of economic sanction. And age old derogatory stereotypes were also circulated about Negroes: that they were really apes; that they had tails; that they were diseased; that they would rape and maim.

APPENDIX F

Department of the Army
Office of the Judge Advocate General
Washington, D.C. 20310

JAGJ 1969/8044

25 March 1969

SUBJECT: Nonjudicial Punishment

TO: ALL STAFF JUDGE ADVOCATES

1. A number of complaints have been brought to the attention of the Department of the Army that some commanders, in imposing nonjudicial punishment, have discriminated against certain soldiers because of their race. A recent study conducted in an overseas command found that these complaints were for the most part unfounded and that there was no discernible pattern of racial discrimination in the imposition of nonjudicial punishment. Unfortunately, the study also revealed that many soldiers believe that, when imposing punishment, commanders have discriminated on the basis of race.

2. I believe this erroneous impression is caused to a great extent by a failure of communication between the commander and the person being punished. In most, if not all, cases it would be appropriate for the commander to explain personally to the person being punished the reason a particular punishment was selected. This is particularly true when another person has received a less severe punishment for what appears to be the same offense. It is axiomatic that offenders should be treated individually. In this connection, paragraph 3-13, Army Regulation 27-10 provides that, whenever practicable, a commander should impose nonjudicial punishment in the presence of the soldier and should explain to him the factors which he considered in determining the punishment imposed and the appellate rights or procedures which are available to him.

3. I cannot emphasize too strongly that racial discrimination has no place in the administration of military justice. To this end, all staff judge advocates should

encourage senior commanders to establish a system of review to insure that subordinate commanders fully understand their responsibility for administering nonjudicial punishment in a fair and impartial manner. Staff judge advocates should also encourage commanders to adopt the personal-approach policy, as exemplified in Army Regulation 27-10, when imposing nonjudicial punishment.

/s/KENNETH J. HODSON
Major General, USA
The Judge Advocate General

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