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ARTICLE

FEDERAL COURT INTERVENTION IN MILITARY COURTS—INTERRELATIONSHIP OF DEFENSES AND COMITY

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In the case of Parisi v. Davidson *the Supreme Court granted habeas corpus relief to a serviceman who was being court-martialed for disobedience to orders issued after he had been denied administrative discharge on a conscientious objector claim. Professor McCormack analyzes* Parisi *and uses it as a vehicle to examine the Court's present notions of comity and abstention.*

THE federal courts have been petitioned repeatedly over the last century for relief on behalf of those who have become enmeshed in other systems of justice.[1] The prevailing response to petitions by defendants in both state criminal proceedings[2] and military courts-martial[3] has been one of noninterference with these other courts. The federal courts have been reluctant to intervene until the other proceedings have run their course on the grounds that courts of equity will not act when there is an adequate remedy at law and that the claims of the petitioner are available as a defense at the state or military court proceeding. With the additional consideration of federalism involved, the Court has allowed intervention into state prosecutions only in the exceptional situation in which it appears that the state prosecution would not result in a fair disposition of the petitioner's objection to the prosecution.[4]

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1 A series of cases arising under federal removal statutes for federal officers and protection of civil rights in 1879 established the proposition that removal would be permitted if any legislative provision of the state denied equal protection in criminal justice but that removal would not be allowed on the sole basis of prejudice in the state courts. *See* Strauder v. West Virginia, 100 U.S. 303 (1879); Virginia v. Rives, 100 U.S. 313 (1879). The distinction has persisted in removal cases. *See* City of Greenwood v. Peacock, 384 U.S. 808 (1966). For an early example of habeas corpus from a military court, see Ex parte Reed, 100 U.S. 13 (1879).

2 *See* Younger v. Harris, 401 U.S. 37 (1971); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 533, 542 (1970).

3 Orloff v. Willoughby, 345 U.S. 83 (1953); Gusik v. Schilder, 340 U.S. 128 (1950).

4 Dombrowski v. Pfister, 380 U.S. 479 (1965).

In *Parisi v. Davidson*[5] the Supreme Court granted habeas corpus relief to a serviceman who was being court-martialed for disobedience to orders issued after he had been denied administrative discharge on a conscientious objector claim.[6] This decision presents in a remarkable setting the interrelationship between the reasons for invalidating a prosecution and the notions of comity that have normally been applied to prevent federal court intervention prior to the culmination of a prosecution.

I. PARISI V. DAVIDSON: THE BACKGROUND AND THE ISSUE

A. The Background

Joseph Parisi was a draftee who, after completion of basic training and assignment to duties of psychological social work and counseling,[7] professed to have developed conscientious objections to military service. These beliefs had crystallized after his entry into the military.[8] His application for discharge was supported by the base chaplain, the base psychiatrist, and his immediate supervisor, all of whom attested to his sincerity and to the religious nature of his beliefs. Various officers through whom the application was processed also recommended approval. Nonetheless, Parisi's commanding officer recommended disapproval.[9] The Department of the Army denied Parisi's application on

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5 405 U.S. 34 (1972).

6 This is the Court's phrasing of its holding. *Id.* at 35. The issue could have been phrased much more narrowly. *See* pp. 536-38 *infra.*

7 435 F.2d 299, 300 n.1 (9th Cir. 1970).

8 Parisi professed to have had doubts about military service at the time of his induction and claimed that his subsequent military experience had coalesced with his Christian beliefs into a firm conviction that participation in any form of military activity was insupportable. Under Ehlert v. United States, 402 U.S. 99 (1971), Parisi would have had no valid claim if his beliefs had crystallized into conscientious objector status prior to receipt of his notice to report for induction. The miltary had established procedures for administrative discharge of in-service conscientious objectors and sought to limit that relief to those whose status arose after induction. Department of Defense Directive 1300.06; Army Regulation 635-20. In *Ehlert*, the Supreme Court held that the military should hear claims arising at any time after receipt of the notice. 402 U.S. at 107. This holding cleared away a split in the circuits on the so-called "hiatus" problem that had seemed to leave a gap during which claims would not be considered. *Compare* Ehlert v. United States, 422 F.2d 332, 335 n.5 (9th Cir. 1970) *with* United States v. Gearey, 368 F.2d 144, 150 (2d Cir. 1966).

9 The recommendation of disapproval was based on the commanding officer's impression that Parisi's beliefs were essentially political, sociological, or philosophical views, or merely a personal moral code. 435 F.2d at 300 n.1. This standard for rejection of a claim is contained in Army Regulation 635-20(3)(b)(3) and is no longer a sufficient basis of denial. *See* Welch v. United States, 398 U.S. 333 (1970).

two grounds: the pre-induction crystallization of his beliefs,[10] and his lack of opposition to *all* war.[11]

Parisi then applied to the Army Board for Correction of Military Records (ABCMR), a final step in the administrative process required by the exhaustion doctrine then followed by the Ninth Circuit.[12] Before the ABCMR ruled on his case, he petitioned the District Court for the Northern District of California for a writ of habeas corpus, alleging that there was no basis in fact for the Army's denial of his discharge application.[13] The district court stayed the habeas petition pending a decision by the ABCMR, although it did enter a preliminary injunction prohibiting the assignment of duties that would require any greater participation in combat activity or training than Parisi was cur-

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10 In Ehlert v. United States, 402 U.S. 99 (1971), the Supreme Court held that beliefs crystallizing after receipt of the order to report for induction need not be considered by the Selective Service, noting that the military would be required to give relief on the basis of beliefs crystallizing thereafter. There is good reason for questioning whether crystallization prior to induction should not also be a basis for discharge. Administrative convenience is an unsatisfactory reason for keeping conscientious objectors in the service after they enter; waiver seems an unlikely tag for failure to submit a claim prior to induction; exhaustion of Selective Service remedies hardly seems necessary when the same administrative process could be duplicated in the military. Thus no good reason other than expense of basic training exists for denying relief to a serviceman whose beliefs had crystallized into conscientious objector status prior to induction. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 426-28 (1965).

11 The current standards of conscientious objector status include a requirement that the claimant be opposed to *all* war. *See* 50 U.S.C. App. § 456(j) (1970). This standard excludes the so-called selective objector who professes to believe that a certain type of war or war for certain purposes is wrong. The standard has caused a great deal of difficulty with religious sects whose members would support theocratic wars and with conscientious objectors who object specifically to the Vietnam war as immoral. *See* Gillette v. United States, 401 U.S. 437 (1971).

12 The Ninth Circuit had required in Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), *vacated*, 397 U.S. 335 (1970), that habeas corpus petitioners exhaust the remedy of application to the ABCMR. However, it was never clear what jurisdiction the ABCMR might have to order discharges for conscientious objector claimants and the Solicitor General confessed error a year later in the Supreme Court. Craycroft v. Ferrall, 397 U.S. 335 (1970).

13 The "basis in fact" test was first created for review of Selective Service classifications and orders to report for induction. *See* Dickinson v. United States, 346 U.S. 389 (1953); Estep v. United States, 327 U.S. 114 (1946). The standard has been used for review of in-service conscientious objector claims with no apparent change in its meaning. *See* Strait v. Laird, 445 F.2d 843 (9th Cir. 1971). In its present form, the test serves as a vehicle for reviewing all errors of law as well as a limited review of the fact findings. The test has been interpreted as requiring a statement of the reasons for the administrative action so that judicial review may focus on the standards and factual determinations used by the military. Scott v. Commanding Officer, 431 F.2d 1132 (3d Cir. 1970). Presumably, the same requirement is true with military processing of in-service conscientious objector claims.

rently performing.[14] The district court, however, denied a motion for a preliminary injunction against his being transferred outside the jurisdiction of the court.[15]

At this point, Parisi's life became complicated. While his appeal from the denial of the preliminary injunction[16] was pending, he was ordered to report for duty in Vietnam.[17] He refused to board the plane and was charged with failure to obey a lawful order. While court-martial proceedings were pending, the ABCMR denied his application for discharge, prompting the district court to issue an order to show cause why his original habeas corpus petition should not be granted. The Government requested and received an order staying the habeas corpus proceedings pending resolution of the court-martial.[18] The Ninth Cir-

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14 This order corresponds to the military's own practice of assigning, pending decision by the Secretary, duties that have minimal conflict with the serviceman's professed beliefs. AR 635-20(6)(a):

> . . . individuals who have submitted formal applications . . ., will be retained in their units and assigned duties providing the minimum practicable conflict with their asserted beliefs pending a final decision on their applications.

"[F]inal decision" means a decision by the Secretary; and para. 6(d) of the regulation provides that reassignment or duty orders must be obeyed after such decision despite an application to the ABCMR. Thus the district court order extended half of the para. 6(a) protection to the period of time in which the ABCMR decision was pending but refused to extend the protection of retaining Parisi in his unit.

15 It is not entirely clear what the power concept of jurisdiction requires as a basis for habeas corpus. In Ahrens v. Clark, 335 U.S. 188 (1948), the Supreme Court held that both respondent and petitioner must be within the territorial limits of a district court's power for that court to have jurisdiction. This decision has been severely criticized on the ground that jurisdiction over the custodian is sufficient for the court to act. *See* R. SOKOL, FEDERAL HABEAS CORPUS 85-88 (2d ed. 1969). However, this issue may be resolved, it is fundamental that the respondent could not destroy the court's jurisdiction by transferring his prisoner out of the territorial jurisdiction. Ex parte Endo, 323 U.S. 283 (1944); *see* Fed. R. App. Proc. 23(a); Schultz v. United States, 373 F.2d 524 (5th Cir. 1967). The problem arises in military habeas corpus because of the constant shifting of duty posts throughout the world. Although the court would not lose jurisdiction by reason of a transfer in assignments, it has nevertheless been common practice for the district court to issue injunctions holding the serviceman at his present station pending decision on the habeas corpus.

16 He appealed that part of the order which denied the injunctive relief of holding him within the jurisdiction of the court. *See* 28 U.S.C. § 1291(b) (1969).

17 An order to "undergo training preparatory to being transferred to Viet Nam for duty" had been issued to Parisi on August 8, 1969, while his application was still pending in the Department of the Army. The order to report for transport to Vietnam was issued about December 4, 1969, after denial of his application by the Army, after applying to the ABCMR, and after appealing to the Ninth Circuit. A motion for stay of the order was denied by the court of appeals.

18 Meanwhile, Parisi's original appeal to the Ninth Circuit on the preliminary injunction

cuit affirmed the stay order and Parisi ultimately found himself in the Supreme Court.

B. Framing the Issue

One of the most difficult tasks facing the Court in *Parisi* was the framing of the issue for decision. The decision could have been based on the incorrectness of the district court's initial refusal to hear the habeas corpus petition pending review of Parisi's application for discharge by the ABCMR. Indeed, the Government itself now concedes that the ABCMR is an illusory remedy for a conscientious objector and that a serviceman need not exhaust this step of the administrative process before seeking relief from the civilian courts.[19] Parisi, however, had been forced by the Ninth Circuit's position in *Craycroft v. Ferrall*[20] to take his application to the ABCMR as a precondition of habeas corpus. Thus, when *Craycroft* was reversed,[21] the way was clear for the Supreme Court to view the decision of the Adjutant General as ripe for immediate review in a habeas corpus hearing. Indeed, to have withheld habeas corpus relief would have amounted to penalizing Parisi for his fidelity to then controlling Ninth Circuit procedure. Further, immediate direct judicial review of an administrative determination that does not depend upon an enforcement proceeding for clarification of the issues, such as the Adjutant General's decision, should be available at any point.[22]

Yet phrasing the issue in terms of the district court's first stay order would have granted Parisi relief from being court-martialed only if the Court had either assumed that the order to report to Vietnam would not have been issued had the district court proceeded immediately on the habeas corpus petition or found that the preliminary injunction against his being transferred should have been issued.[23]

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was dismissed as moot on his motion because the military no longer threatened to remove him from this country.

19 Craycroft v. Ferrall, 397 U.S. 335 (1970); Dept. of Justice Memo No. 652 (Oct. 23, 1969).

20 408 F.2d 587 (9th Cir. 1969); *see* note 12 *supra*.

21 Enforcement in the sense of court-martial does not clarify in any way the issues involved in the application for conscientious objector discharge. Hammond v. Lenfest, 398 F.2d 705, 711 (2d Cir. 1968).

22 Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administration Law*, 69 MICH. L. REV. 1443, 1501-22 (1971).

23 Deciding the case on these grounds would have required probing into the Ninth Circuit's rule that a serviceman is neither entitled to submit his application while awaiting transport to Vietnam nor entitled to be held in the United States pending decisions.

Under either of these theories, it would have been quite easy for the Supreme Court to have held that Parisi was entitled, regardless of the pending court-martial, to correction of the prior judicial errors that had utimately resulted in his violation of the order to report to Vietnam. Indeed, the Court cited with approval a decision[24] holding that a serviceman need not force a court-martial before challenging his status.[25] Nonetheless the Court chose to phrase the issue as follows: "The question in this case is whether the district court must stay its hand [in habeas corpus] when court-martial proceedings are pending against the serviceman."[26] The Court thus considered the case as if Parisi had not filed for habeas corpus relief until after the court-martial proceedings had been instituted. In so framing the issue, the Court made it necessary to decide two subsidiary issues: (1) whether the principles of comity forestall the entry of a federal court into a good-faith court-martial prosecution,[27] (2) whether a valid, but administratively denied, claim of conscientious objector status invalidates a serviceman's military orders. Answering each of these questions in Parisi's favor, the Supreme Court held that he was entitled to habeas corpus relief despite the pending court-martial charges.

Despite the often remarked inadequacy of the terms "procedure" and "substance", they are useful here to differentiate between two primary aspects of *Parisi*—the holding that habeas corpus relief is available immediately and the holding that conscientious objector status invalidates an otherwise lawful military order. The latter holding is of such significance for the substantive law of military rights and civil

Turpin v. Resor, 452 F.2d 243 (9th Cir. 1971); Kimball v. Commandant Twelfth Naval Dist., 423 F.2d 88 (9th Cir. 1970).

24 Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).

25 The Court also cited In re Kelly, 401 F.2d 211 (5th Cir. 1968), for the same proposition. *Kelly*, however, relied on heavily by the court of appeals in *Parisi*, 435 F.2d at 304, had denied relief to a serviceman who sought habeas corpus while court-martial was pending on a charge of disobedience. The *Kelly* court had in dicta indicated its agreement with the *Hammond* court that the decision to grant habeas relief would "be based on principles of comity" rather than strictly limited by a requirement of exhausting military judicial remedies. The only reported case denying habeas relief prior to the institution of court-martial proceedings was Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1968), a case explicitly disapproved by the Justice Department. Dept. of Justice Memo No. 652 (Oct. 23, 1969).

26 405 U.S. at 35. The Court went on to make its view of the issue even more explicit by noting that "a court-martial charge was pending against the petitioner when he sought habeas corpus *in March 1970*." 405 U.S. at 39 (emphasis added).

27 A further issue was raised regarding the adequacy of the court-martial process as a remedy to be exhausted. This issue was resolved favorably to Parisi in a curious fashion discussed at pp. 556-57 *infra*.

disobedience that it should be temporarily isolated from the less exotic holding as to the procedural niceties of when habeas relief is available. Having served this purpose, the distinction will be dropped because it tends to obscure the interrelationship between substantive defenses and the appropriate points of intervention. It is this interrelationship that lies at the heart of *Parisi* and similar cases.

II. Conscientious Objector Status as an Invalidating Cause of Military Orders

A. United States v. Noyd: *Wrongful Administrative Refusal of Discharge as an Affirmative Defense in Court-Martial Proceedings*

Army Regulation 635-20(6)(a) provides that a serviceman who has submitted a formal application for a conscientious objector discharge shall be retained in his unit and "assigned duties providing the minimum practicable conflict with [his] asserted beliefs pending a final decision" by the administrative process.[28] This provision is in seeming recognition of an obligation not to interfere with the beliefs of a person who may legally be entitled to be free of the military. Nonetheless, the military purports to exercise continuing power to issue orders to this serviceman in much the same way as a court retains power to issue orders to parties over whom it may ultimately be found to have had no jurisdiction.[29]

It has been the traditional rule that a serviceman's conscience or religious scruples can be no defense to a charge of failure to obey an otherwise lawful order.[30] It has been thought that allowing a defense of conscientious objection would break down military discipline by making each man his own judge of the lawfulness of his orders.[31] With the advent of administrative procedures for processing applications for conscientious objector discharges,[32] however, the Court of Military

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28 *See* note 14 *supra.*

29 *See* pp. 544-46 *infra.*

30 W. Winthrop, Military Law and Precedents 576-77 (rev. ed. 1920). Winthrop cites several English military cases but no American authority other than Reynolds v. United States, 98 U.S. 145 (1877).

31 United States v. Stewart, 20 U.S.C.M.A. 272, 276, 43 C.M.R. 112, 116 (1971); Mayborn v. Heflebower, 145 F.2d 864, 866 (5th Cir. 1944).

32 It is only very recently that the military has provided for administrative discharge of conscientious objectors. Congress has from the beginning of military conscription provided exemption for those who have sincere conscientious objection to war prior to being drafted. *See, e.g.,* Selective Service Draft Law of 1917, 40 Stat. 76, 78. Congress, however, has never seen fit to grant a right of discharge to servicemen. The Department of Defense established the system of in-service conscientious objector applications in 1962, providing

Appeals seems prepared, with much vacillation, to acknowledge that an order may be invalid if a conscientious objector claim has been wrongfully denied. This defense first suggested in *United States v. Noyd*[33] and known as the *Noyd* defense involved one of the two[34] most vigorous in-service objectors of recent times.

Captain Noyd, given noncombatant duties pending a determination by the military of his conscientious objector claim, was assigned to train fighter pilots after the rejection of his claim. A court-martial for refusing to obey this order resulted in his conviction. The Court of Military Appeals rejected the Government's contention that the administrative decision on the conscientious objector claim was irrelevant even if wrong. The Government had argued that orders must be obeyed for the sake of military discipline despite the possibility of an erroneous denial of an application for discharge.

Yet the court's discussion of the military's broad discretion in granting conscientious objector discharges[35] showed that it considered of extreme importance the need for observance of orders by those already in the military. In a persuasive argument[36] the court noted that the

for discharge on the basis of beliefs that arise after induction. DOD Directive 1200.6, superseded by DOD Directive 1300.6 (May 10, 1968). The regulation promulgated by the services state that claims arising after induction shall be "judged by the same standards" as those made before induction. *See* AR 635-20(3); AFR 35-24(3).

33 United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969).

34 The other to whom reference is made is Capt. Edward Levy, who as an Army doctor refused to train Green Beret medics on the ground that they would put their skills as medics to illegal uses in the interrogation of prisoners. United States v. Levy, 39 C.M.R. 672 (1968). Levy also raised other objections such as the illegality of the war in his defense but was as unsuccessful as every other criminal defendant who has sought to litigate the legality of his orders. *See* Schwartz & McCormack, *Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

35 The processing of conscientious objector applications by the military has been characterized repeatedly as discretionary. *See* 18 U.S.C.M.A. at 490-92, 40 C.M.R. at 202-04 and cases cited therein. The "discretionary" label is perhaps more justifiable in this context than in most situations in which it is used. Congress has provided by law for exemption from the draft of conscientious objectors. 50 U.S.C. App. § 456(j) (1970). Discharge of in-service conscientious objectors, however, was not provided by Congress but by administrative fiat of the Secretary of Defense, DOD Directive 1300.6. The Supreme Court has accepted the proposition that conscientious objector exemption is not required by the Constitution. *See* note 79 *infra*.

36 The court's argument centered around the notion that military service is a status much like parenthood. Once the status is assumed, according to this argument, certain duties and obligations attach that cannot be ignored until the status is dissolved. This analogy has merit particularly when viewed from the point of a commander who needs to know at any time of crisis which of his subordinates may be ordered to perform lawful

military could not function properly if servicemen could decide unilaterally when their obligation to obey orders ceased:

> The obligation to obey a lawful order cannot be, and is not, as a matter of law, terminated on the mere occurence of a condition or circumstance that might justify separation from the service. On the contrary, the obligation to obey continues until the individual is actually discharged in accordance with the provisions of law.[37]

Nevertheless, the court held that the order to Noyd was illegal if the Secretary's decision on Noyd's application was wrong. The only decision cited in support of this proposition was *United States v. Voorhees*,[38] a decision which reversed a court-martial conviction for refusal to obey an order effectuating a superior order. Either order in *Voorhees*, by itself, would have been contrary to a Department of Defense directive.[39]

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tasks. Just as an unemancipated child may justifiably look upon his parents' duty of support as irrevocable, so might the duty of obedience be justifiably viewed as irrevocable by a military commander. The parent-child analogy is an extension of the analogy to martial status first drawn in In re Grimley, 137 U.S. 147, 152 (1890).

37 18 U.S.C.M.A. at 491, 40 C.M.R. at 203.

38 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

39 *Voorhees* involved efforts by the Army to censor manuscripts of servicemen prior to publication. Voorhees had written and submitted for publication a book about his experiences in Korea, portions of which were highly critical of General Douglas MacArthur. He submitted the manuscript for review by the Security Review Branch, Office of Public Information, Department of Defense. Army regulations in effect at the time provided for "deletion of classified matter and review for accuracy, propriety, and conformance to policy." AR 360-5(15)(b). Also extant at the time, however, was a Department of Defense Directive that required review to be "limited to deletion of matter which is classified for security reasons." Memorandum by Secretary of Defense Johnson to all Service Branches, June 7, 1949, quoted at 16 C.M.R. 93. In addition, AR 360-5(15)(d) provided: "Commanders will not impose restrictions other than to prevent public disclosure of classified or erroneous information." The Army reviewers raised several objections of "policy" and "propriety," telling Voorhees to withdraw the book from the publishers until clearance of a corrected manuscript could be obtained. When he refused to withdraw the book, Voorhees was court-martialed for disobedience of a lawful order, among other charges. The U.S. Court of Military Appeals first held that AR 360-5(15)(b) did not mean what it said and that review was limited to security purposes. This construction was apparently designed to bring the regulation into conformity with the Johnson memorandum. The court then found that the order to withdraw the manuscript was unlawful because it conflicted with the Army regulation. 16 C.M.R. at 103.

The court discussed the first amendment claims of the accused but found them mooted by its construction of the statute as limited to security review. This construction prevented the Army from reviewing on the basis of "policy" or "propriety." All parties seemed to concede that an exception to the prior restraint doctrine of Near v. Minnesota, 283 U.S. 697 (1931), was justified for the "exceptional" circumstances of preventing security breaches. This conclusion may be open to serious question following New York Times Co. v. United States, 403 U.S. 713 (1971).

Citing *Voorhees* for the proposition that an order could be unlawful if based on an unlawful superior order,[40] the court held in *Noyd* that "if the Secretary's decision was illegal, the order it generated was also illegal."[41] In making this analogy, the court failed to note that the invalidating cause (the defendant's conscientious objector status) was extrinsic both to the order itself and to the chain of command, whereas the subordinate *Voorhees* order was invalid in its own right because it had been issued in contravention of a controlling Department of Defense directive.[42]

Despite its infelicitous reasoning, *Noyd* seemed to draw a plausible distinction between a duty of absolute obedience prior to a final administrative decision and a privilege of disobedience following a wrongful denial of administrative discharge. This distinction, however, is difficult to square with the court's reasoning, for the serviceman continues in a military status after denial—the very status which the court thought gave rise to an unconditional obligation of obedience prior to an administrative decision. Moreover, since the process of law in the form of a writ of habeas corpus is always available to review the Secretary's decision,[43] it would appear that if the need for discipline truly outweighs regard for the individual's conscience, as the court suggested, an administrative denial would have no effect on that need and hence obedience would still be required.

The anomalies inherent in *Noyd* were not long in surfacing. The Court of Military Appeals wasted no time in holding that post-denial disobedience of an order to wear a uniform could not be excused by

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40 Chief Judge Quinn, who wrote the opinions of the court in both *Voorhees* and *Noyd*, apparently exercised the author's prerogative on reconstruing what he had written. The *Voorhees* order was actually invalidated because it conflicted with the Army regulation. If *Voorhees* had actually been reasoned as it was characterized in *Noyd*, then the reasoning would have been unnecessary and somewhat irrelevant. The invalidating cause of the disobeyed order would have been the DOD directive and not simply the invalidity of the regulation.

41 18 U.S.C.M.A. at 492, 40 C.M.R. at 204.

42 Accepting the court's characterization of the *Voorhees* decision does not cause the *Noyd* reasoning to fare any better. "The validity of the order, therefore, depended upon the validity of the Secretary's decision in much the same way the order to the accused in the *Voorhees* case depended on the validity of the Army's regulation on review of manuscripts by service persons which were intended for civilian publication." 18 U.S.C.M.A. at 492, 40 C.M.R. at 204. It is difficult to imagine in any meaningful sense how the order to Noyd was necessitated by the Secretary's decision on his application. No inconsistency with the Secretary's decision would have arisen by an order assigning Noyd to hospital work, for example.

43 The Supreme Court noted in *Parisi* that "habeas corpus has long been recognized as the appropriate remedy for servicemen who claim to be unlawfully retained in the armed forces. [citations omitted]" 405 U.S. at 39.

the *Noyd* defense.[44] The court held, without any attempt to distinguish *Noyd*,[45] that the order itself was lawful and that the serviceman's conscience and religious scruples were irrelevant. The Army Court of Military Review attempted to justify this distinction on the ground that the order in question in *Noyd* would not have been given had administrative discharge been granted whereas the duty to wear a uniform is a continuing obligation regardless of the administrative decision.[46]

Finally, in *United States v. Stewart*[47] the Court of Military Appeals, the same court that had authored the decision in *Noyd*, found itself split into three separate views.[48] Under these views, the *Noyd* defense

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Various lower courts, cited with approval in *Parisi*, had held that habeas relief was available to review denial of conscientious objector applications by the military administrative process. The existence of this remedy would lend support to the USCMA's assertion in *Noyd* that a severance of the relationship between serviceman and military should come about by process of law rather than as a unilateral decision on the part of the serviceman. If all legal processes had been attempted to no avail, then a sincere conscientious objector would indeed be faced with a dilemma of obedience to the highest law of the land or obedience to the highest law of nature and conscience.

44 United States v. Wilson, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969).

45 *Noyd* was cited and discussed with the simple statement that "if the command was lawful, the dictates of the accused's conscience, religion, or personal philosophy could not justify disobedience." 19 U.S.C.M.A. at 101, 41 C.M.R. at 101.

46 United States v. Goguen, No. 42, 998 (U.S. Army Court of Military Review, Sept. 2, 1970). The majority of the court held that a serviceman must wear his uniform as long as he is in the service, whereas duty assignments are flexible and can be tailored to the individual conscientious objector claimant. The dissenting judge thought that the order was void because the accused was already under a duty to wear his uniform. To the dissenter, this order was generated by denial of the conscientious objector claim and was not really a specific "order" at all. The accused was convicted of disobeying a direct order to put on his uniform following administrative denial of his conscientious objector application. The United States Army Court of Military Review affirmed the conviction after Goguen had secured habeas corpus relief in federal court and been released from custody. *See* Goguen v. Clifford, 304 F. Supp. 958 (D.NJ. 1969). There was no discussion by the Court of Military Review of whether the Army had any continuing jurisdiction following habeas relief. Goguen then appealed to the Court of Military Appeals, which held that the Army had lost jurisdiction and all charges were ordered dismissed. The USCMA noted in its opinion the possible impropriety of federal court intervention into pending court-martial proceedings, citing Younger v. Harris, 400 U.S. 37 (1971). Thus, Goguen had won precisely the same relief later sought by Parisi; and the USCMA had acquiesced to the power of the federal courts.

47 United States v. Stewart, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971).

48 At one extreme, Judge Darden favored ignoring the precedent of *Noyd* and limiting the conscientious objector defense to cases in which orders conflict with Army Regulation 635-20, which specifies that duties will have minimum conflict with the applicant's professed beliefs pending the administrative determinaton. *Id.* at 116. In contrast, Judge Quinn apparently preferred to apply the *Noyd* defense to any order following denial of administrative discharge, *id.* at 117; while Judge Ferguson construed the defense as being

would be available following an administrative denial of the conscientious objector application only in an undefined class of cases involving an order which would be invalid "when considered in the context of the accused's application for discharge as a conscientious objector."[49]

It was against this backdrop of nonreasoning and undifferentiated distinctions that the Supreme Court was required to view the order in question in *Parisi*. Curiously, perhaps, the Government admitted the existence of the *Noyd* defense to this order so that it could argue the existence of an adequate remedy in the military courts.[50] The Government's uncomfortable admission left the Supreme Court free to give Parisi relief without analyzing the reasons why the order should be considered invalid. As a result, two crucial and interrelated questions were left unanswered by the Supreme Court's unquestioning acceptance of the invalidity of the order; (1) What, if any, orders may be valid despite the true conscientious objector status of the defendant? (2) Should relief be available only to a serviceman who has previously been denied conscientious objector status through the administrative process? A discussion of these questions should reveal the truly revolutionary nature of the *Parisi* decision.

B. Parisi v. Davidson: *Invalidity Defined in Terms of Status*

Developing a test for determining which orders a conscientious objector may disobey with impunity embroils the judiciary in a battle over the need for internal military discipline on the one hand and the allowable scope of civil disobedience on the other. That is to say that the test must be fashioned with a due regard both for the sanctity of individual conscience and for the necessity of systematically resolving conflicts between individual and institution. In *Parisi* the Supreme Court phrases the test in terms of a requirement of a "real connection" between the conscientious objector claim and the challenged order.[51] Unfortunately, the Court did nothing to define the parameters of this requisite nexus except to note that a serviceman, even though legitimately entitled to a discharge as a conscientious objector, would not be allowed relief from court-martial proceedings generated by his theft of a fellow soldier's watch.[52]

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available only when the order involved deployment overseas, not when the order was merely to put on a uniform. *Id.* at 118.

49 *Id.* at 117 (Ferguson, J., concurring).

50 Brief for Respondent at 36, Parisi v. Davidson, 405 U.S. 34 (1972).

51 Parisi v. Davidson, 405 U.S. 34, 46 n.15 (1972).

52 *Id.* at 45 n.13.

1. The Government's Position: The Distinction Between Duty Assignments and Normal Military Obligations.—Relying on the need for internal discipline, the Government had argued for a distinction based on whether an order could be characterized as a "duty assignment." Pointing to the military cases that had denied a conscientious objector defense to charges of refusing to wear a uniform,[53] the Government urged that the *Noyd* defense was, and should be, unavailable when "the legality of the questioned military order remains unaffected by the lawfulness of the administrative refusal of discharge . . . ."[54] The Government thus admitted that a wrongful denial of conscientious objector status would invalidate a "duty assignment" but argued that such a denial would leave unimpaired the requirement of conformity to the "general obligations of military life."[55] The Government's argument proves too much. Duty assignments are more fundamental to the preservation of military discipline than are the general obligations of military service. Surely the collapse of the military establishment is more imminently threatened by mass refusals to perform duty assignments than it is by refusals to wear uniforms. A medic in a hospital who has just been informed of the Secretary's negative decision on his conscientious objector claim may jeopardize the lives of others if he refuses to perform his duty assignment. Similarly, servicemen serving as clerk-typists could bring the military's stupendous production of written documents to a grinding halt by refusing to service the paper-mill machinery.[56] On the other hand, it is unlikely that the military

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53 *See* notes 44-48 *supra.*

54 Brief for Respondent at 35.

55 *Id.* at 36-37 n.34. It is not clear what the "general obligations of military life" might be other than the wearing of a uniform. Failure to wear a uniform is apparently punishable under article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934 (1970), as a "disorder or neglect to the prejudice of good order and discipline." *See* Manual for Courts-Martial para. 213(b) (1969 rev. ed.); United States v. Stewart, 20 U.S.C.M.A. 272, 277, 43 C.M.R. 112, 117 (Ferguson, J., dissenting). Other general obligations may be found in the "custom of the service," a term of art referring to practices so long established in the military as to have the force of law. In other words, article 134 enacts a body of common law crimes for military personnel. Specific examples of these general obligations would include straggling, drunkenness, uncleanliness, not giving proper attention to lessons. In 1896, Winthrop was able to state that most usages and customs had been merged into the written regulations of the Army. W. WINTHROP, MILITARY LAW AND PRECEDENTS 41 (rev. ed. 1920). The Manual for Courts-Martial makes the same statement at pp. 28-72 and indicates that violations of these regulations should be charged under article 92, 10 U.S.C. § 892 (1970) on their specific provisions. For present purposes, it can safely be assumed that the phrase "general obligations" was used by the Government to refer to requirements of neatness and cleanliness, such as uniform wearing.

56 The examples given in the text do not involve changes in duty assignments following

would cease to function if people stopped wearing uniforms or making beds.[57] Thus, if a wrongful denial of conscientious objector status constitutes defense to disobedience of a duty assignment, it must perforce provide a defense to any charge based upon disregard for the "general obligations of military life."

Moreover, the Government itself disavowed any reliance upon the relative lack of conflict between the general obligation of military service and a conscientious objector's beliefs. The Government conceded that the requirement of wearing a uniform might be as repugnant to the sincere conscientious objector as any other order.[58] Indeed, it could hardly have done otherwise, for only the conscience of the individual can answer the question of what is beyond the point at which his obligation to the military becomes relatively unimportant. So long as the Government is powerless to plumb the depths of a person's conscience to discover what may not be known even to himself, there can be no measurable standard by which to assess the relative importance of various orders. Moreover, any attempt to determine whether a given order conflicts with an individual's actual beliefs is doomed to failure since his beliefs take on immediate meaning only in the context of a refusal to obey.[59] A person may be able to describe his philosophy on the basis of past experiences, but the description in general terms may apply in quite unexpected ways to new situations.

administrative denial of the conscientious objector claim. The same effect on the military might be felt if every conscientious objector claimant who had been held on noncombatant status under AR 635-20 pending administrative determination on his claim should then refuse to perform his new duties as Parisi did. The impact on the military would be even more severe in the case of a serviceman who was assigned combatant duties.

57 "Today's Army wants to join you." The tendency of the military in the recent past is toward relaxing of the so-called general obligations for the purpose of improving morale and thereby achieving a more meaningful degree of discipline. The use of "Z-grams" by Admiral Zumwalt, Chief of Staff of the Navy, is perhaps the most dramatic illustration of the loosening of rigid trivialities that were once imposed in the name of discipline.

58 Brief for Respondent at 35-36 n.34.

59 In this connection, we are dealing with a person's actual beliefs rather than with the professed beliefs advanced in a conscientious objector form. The statement in the text is not intended as a challenge to the possibility of applying AR 635-20 to minimize conflict between duty assignment and professed beliefs pending decision on the conscientious objector claim. The professed beliefs set out on a conscientious objector form will contain comparatively concrete statements of what duty, if any, would be acceptable. If a dispute should arise, then the process of determining whether an assigned duty conflicts with these beliefs will be the same as what is involved in the familiar process of statutory interpretation. The ultimate question, of course, is whether the assignment comes within the prohibitions contained in the individual's professed beliefs, tempered by a question of reasonableness as to whether this assignment presented the minimum practicable conflict.

In short, the test of obedience to an individual's conscience lies in the impact of an order upon his concept of himself.[60]

In considering the validity of any future order, we must face the difficult question of whether the order in *Parisi* was thought to be invalid because of a defect in the order itself or the order was lawful and a new type of defense created. The rationale of the Court of Military Appeals in *Noyd* certainly does not meet the situation. That rationale was that the order in question was invalid because it was based on an invalid superior order, which it was intended to implement. Yet it is difficult to suppose that an order to report to Vietnam is either designed to effectuate or necessitated by an administrative denial of a conscientious objector claim. Moreover, under the *Noyd* rationale, a court would have no basis on which to distinguish an order to wear a uniform or make a bed from an order to report to Vietnam.

On the other hand, the Supreme Court's "real connection" test leaves open the question of what kind of connection is required. There are two possible connections between the orders in question in *Parisi* and *Noyd* and denial of the conscientious objector claims. First, the orders might somehow be deemed to have conflicted with the professed beliefs of the individuals. This concern, however, we have already seen to be inappropriate. Secondly, it may simply be that both were orders which should not have been issued to men entitled to a conscientious objector discharge. This latter distinction seems plausible enough and can be compared to the invalidity of a statute as applied to persons of a certain status. An examination of civil disobedience in cases before the Supreme Court will show that, except in orders necessary for preserving a status quo, the intrinsic nature of an order as it applies to a person has been available as a source of attack. The invalidity in "as applied" cases, however, has flowed from the higher law of the Constitution rather than from the external source of the individual himself. Yet in *Parisi* the Supreme Court has suggested that an order may be invalid on the basis of the wholly extrinsic factor of the individual's beliefs.

2. Civil Disobedience and Intrinsic Invalidity.—Laws that operate

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[60] The paraphrasing of Justice Holmes is intentional albeit amateurish. *See* Abrams v. United States, 250 U.S. 616, 630 (1919). Expressed in extremely simplistic Freudian terms, the proposition is that the superego, or subconscious personality, controls the reaction of the ego, or conscious self-image, to external stimulus. An individual cannot predict how the superego will respond to any given situation and thus cannot guarantee that the self-created image of his ego will require him to act in a certain manner under hypothetical stimuli. In more simplistic terms yet, "You never know until you've tried it."

on people generally, as distinguished from orders tailored by the commanding body to a particular individual, may be invalidated for any of at least four reasons. First, they may be so vague as to be unenforceable.[61] Secondly, they may be beyond the delegated power of the commanding body.[62] Thirdly, they, in their entirety, may have run afoul of a particular provision of the Bill of Rights, as when the legislature decrees that no handbills shall be circulated without the sponsor's name.[63] Fourthly, they may have some permissible purpose but be so broadly drafted as to punish protected conduct or speech, as when the legislature decrees that no person shall advocate overthrow of the government.[64] The latter two methods, the direct approach and the overbreadth approach, most nearly resemble *Parisi.*

These four methods of attacking a statute's facial validity all proceed from the basic notion of *Marbury v. Madison*[65] that the Constitution is the Supreme Law of the Land and that it therefore overrides any law in conflict with it. The direct approach requires demonstration of a conflict between the provisions of the enactment and a provision of the Constitution.[66] The overbreadth type of challenge is similar in that

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61 Winters v. New York, 333 U.S. 501 (1948) (distribution of magazines that massed stories "of bloodshed and lust in such a way as to incite to crimes against the person"); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (membership in a "gang").

62 Oregon v. Mitchell, 400 U.S. 112 (1970); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

63 Talley v. California, 362 U.S. 60 (1960); *see* Golden v. Zwickler, 290 F. Supp. 244 (S.D.N.Y. 1968), *rev'd on other grounds,* 394 U.S. 103 (1969).

64 Brandenburg v. Ohio, 395 U.S. 444 (1969), *overruling* Whitney v. California, 274 U.S. 357 (1927); *see* Younger v. Harris, 401 U.S. 37 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965). This type of attack bears a strong resemblance to the third method in that the statute is found to be in conflict with a specific limitation upon the power of the governing or commanding body. The difference, if any, lies in the recognition that a statute might if differently drafted have a permissible objective. Thus, if a criminal syndicalism statute were narrowly drawn to eliminate advocacy of revolution, then its permissible sweep could be limited to actual fomenting of immediate violence or rebellion. *See* Brandendburg v. Ohio, 395 U.S. 444, 451 (1969).

Criminal trespass laws have presented some clear illustrations of this phenomenon, although the attacks on these laws have usually run more along the lines of due process notice and official discretion. *See* Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). *Compare* Cameron v. Johnson, 390 U.S. 611 (1968), *with* Gunn v. University Committee to End the War, 289 F. Supp. 469 (W.D. Tex. 1968), *rev'd,* 399 U.S. 383 (1970).

65 5 U.S. (1 Cranch) 137 (1803).

66 A statement so simplistic as to be almost meaningless in terms of the judicial decision-making process is Justice Roberts' famous formulation in holding the Agricultural Adjustment Act unconstitutional:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one

the potential effects of an enactment may be considered in determining if they are prohibited by the Constitution but it is different in that a consideration of its impact on different persons and activities is proper. The overbreadth type of challenge necessarily assumes that the enactment could validly be used to achieve some of its purposes but denies the validity of other effects. Thus, the challenge could be made by carving out a portion of the statute and attacking that portion directly, but the result of a successful challenge is invalidation of the entire enactment.

Similar to the overbreadth challenge is a challenge to the validity of the enactment as applied, which leaves the statute in force with respect to people other than the successful challenger. This type of challenge could more felicitously be referred to as a challenge as to whether the statute can be validly applied to persons of a particular status. For example, sanctions for failure to register cannot validly be applied to persons who have no notice of the registration requirement and who have engaged in no activity sufficient to put them on inquiry about possible registration requirements.[67] Even more analogous to the *Parisi* situation is that of governmental regulations that cannot validly be applied to persons with certain religious scruples. For example, the state may not deny unemployment compensation to a Seventh-Day Adventist who refuses to work on Saturday.[68] On the other hand, a statute requiring school children to salute the flag is unconstitutional on its face because it would intrude on the religious scruples of Jehovah's Witnesses, among others.[69]

The difference between statutes held unconstitutional on their face and those held invalid as applied seems to be one of degree and procedure only. An example of this process may be drawn from the line of cases dealing with criminal syndicalism and advocacy of revolution. The first challenge to a criminal syndicalism statute was made directly to the face of the statute itself and failed because the Supreme Court was able to perceive valid purposes of security.[70] Through a series of limiting constructions,[71] the Court evolved the proposition that statutes

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duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936).

67 Lambert v. California, 355 U.S. 225 (1957).

68 Sherbert v. Verner, 374 U.S. 398 (1963).

69 West Virgina State Board of Education v. Barnette, 319 U.S. 624 (1943).

70 Whitney v. California, 274 U.S. 357 (1927).

71 *See* Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494

regulating the content of speech could not validly be applied to someone who was not proved to have engaged in an advocacy of immediate action toward revolution or other violence.[72] Finally, the Court has held that criminal syndicalism statutes are invalid on their face for overbreadth if not limited so as to exclude mere advocacy or teaching of violence without an imminent threat.[73] The degree of concern over the statute's sweep across protected activity and speech seems to control the decision of whether to strike a statute on its face or as applied.

Thus it can be seen that the "as applied" and overbreadth challenges are really nothing other than challenges to the facial validity of a portion of the statute. Whether one of these challenges results in invalidity in part or *in toto*, it is still the conflict between the statute and the higher law of the Constitution that invalidates it just as if the statute had been directed precisely at the protected conduct or individual.

Immunity from prosecution under invalid statutes has never, in American jurisprudence, been extended to immunize conduct proscribed by a valid statute regardless of the motives of the accused. For example, an organized protest attacking a blatantly illegal state action, such as arrest of black civil rights workers, might be illegal if conducted on the grounds of the county jail.[74] Even though the purposes of the protesters may be morally laudable and the content of their speech protected, the need to maintain the jail or courthouse as a haven for detention or rational decision-making is not defeated by the reasons for disobeying the law. If the same law were applied in a discriminatory fashion for an illegal purpose, such as the suppression of all protest against the arrests, then a defense might be available based on the unconstitutional application of the law;[75] but this defense would still be a function of the law and its use rather than a function of the defendant's reasons for violating it. So long as a law is neutral in its scope and application, the defense of invalidity "as applied" has generally been limited to cases in which the law would be invalid if the statute were directed precisely at the particular conduct involved. By contrast,

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(1951); DeJonge v. Oregon, 299 U.S. 353 (1937); Fiske v. Kansas, 274 U.S. 380 (1927) (decided same day as *Whitney*).

72 Noto v. United States, 367 U.S. 290 (1961); *cf.* Scales v. United States, 367 U.S. 203 (1961) (sustaining conviction of "active" Communist Party member).

73 Brandenburg v. Ohio, 395 U.S. 444 (1969).

74 Adderley v. Florida, 385 U.S. 39 (1966); *see* Cameron v. Johnson, 390 U.S. 611 (1968).

75 Cox v. Louisiana (Cox II), 379 U.S. 559, 564 (1965); *see* Edwards v. South Carolina, 372 U.S. 229 (1963).

the order in *Parisi* was not alleged to be a discriminatory use of authority nor in conflict with higher authority.

It could be argued that *Parisi* fits traditional doctrine surrounding the invalidity of statutes affecting persons of a certain status, as that doctrine was described above. For example, the marital status immunizes its members from prosecutions for birth control[76] and perhaps sodomy.[77] For various reasons, however, *Parisi* does not quite fit this mold. First, the marital status is protected by a penumbral right of privacy founded upon the first, fourth, and ninth amendments;[78] relief for in-service conscientious objection, on the other hand, generally has been thought to be founded on the military's definition of and provision for an exemption rather than upon constitutional necessity.[79] Secondly, the existence or nonexistence of both marital status and legal status of conscientious objector[80] are easily recognizable prior to the offense by reference to whether the legal status has been conferred by process of law; conscientious objection as a factual status existing in a vacuum was recognized in *Parisi* as providing a defense although it is not easily recognizable prior to the offense. Until the legal status is conferred, the prior status of serviceman exists. Finally, the change of legal status from serviceman to conscientious objector (c.o.) would relieve the individual from obligations to the extent that the change perhaps should be clear to commanding officers who would then be advised not to rely on this individual for certain functions. It is these final two points that the Supreme Court has rejected by holding that the c.o. defense is available despite a negative decision on the application for change of status. In doing so, the Court has apparently broken with past civil disobedience cases in allowing invalidation of an order

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76 Griswold v. Connecticut, 381 U.S. 479 (1965) (facially invalid).

77 Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970), *rev'd on other grounds subnom* Buchanan v. Wade, 401 U.S. 989 (1971).

78 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

79 United States v. Noyd, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1966); *see* Gillette v. United States, 401 U.S. 437 (1971); *cf.* United States v. Sisson, 297 F. Supp. 902 (D. Mass., 1969). *Sisson* upheld a constitutional right to exemption from induction and it was cited to the Court of Military Appeals in support of a constitutional claim to discharge in United States v. Stewart, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1970), but the claim was squarely rejected.

80 Either administrative process or judicial process by habeas corpus could result in this change of status. Similarly, marital status is acquired by process of law and can be a defense to charges such as rape only if acquired prior to the conduct charged. The duties that marital status imposes can likewise be shed only by process of law in a divorce proceeding.

by the wholly extrinsic factor of a status that had not yet been established by process of law.

At this stage we can only guess at the impact of *Parisi*. The impact on military cases should be extremely significant because the defense appears to be available without any showing of a nexus between the order and the nature of the claimed conscientious objector status. The impact in nonmilitary cases may likewise be significant in creating a new basis of invalidation. The precise nature of this new basis of invalidation is difficult to define. A simple explanation might be found in an overriding freedom of conscience that could be grounded in the Constitution through the first amendment, much like the penumbra of privacy that protects the marital relationship. Any reliance on a freedom of conscience in this context would convert *Parisi* from a seemingly anomalous case into one of rather typical civil disobedience. Under this theory the invalidating cause would flow from a higher command to the order itself which would be invalid insofar as it purported to force a person into an action that conflicted with his conscience. If the question of conflict with one's conscience remained strictly a private decision, then even this analysis is revolutionary and would need to be limited to decisions of a life and death nature to prevent a breakdown of the rule of law. A further possibility may be that the rule of law is simply not the ultimate goal of society in some areas. An appeal to natural law or the law of reason might be made to override human law, of whatever source, in an even more limited class of cases. It is not within the scope of the present article to speculate how narrowly limited this appeal might be. It is sufficient to say that all these considerations show that *Parisi* is not a typical case of civil disobedience unless some extra-legal justification for disobedience is acknowledged.

3. Individual Orders and the Status Quo.—One final explanation of *Parisi* remains to be considered. The decision might be considered unique since it involved an order directed to a specific person. Directions promulgated to specific individuals stand on a different footing than do general mandates which on their face speak neutrally to the world at large. Affirmative directions to an individual cannot be judged on their intrinsic nature alone since they have no meaning without the context of the person to whom directed but may also have a justification beyond their facial validity. For example, orders of a court that does not have jurisdiction over a controversy are generally said

to be void[81] just as the acts of a legislature beyond its power are void. Yet a preliminary court order that is designed to maintain the status quo must be obeyed even though the court might later be held to have no jurisdiction over the controversy in which the order was entered.[82] Similarly, a command that prohibits conduct within the protection of the first amendment should be void just as a legislative enactment prohibiting the same conduct would be void.[83] Yet the court's order must be obeyed until set aside unless there is no adequate process available for having it overturned.[84] These rules are justified as necessary to maintain the ability of a court to function without having the structure of its processes thwarted or changed fundamentally pending decision on litigation. This same approach was argued by the CMA in *Noyd* for the proposition that the military must have its orders obeyed pending decision on whether a serviceman should be discharged. The argument is based on the threatened collapse of the military processes if servicemen were entitled to disobey orders upon the happening of an event entitling them to termination of their status before that status actually ended.

This argument would be extremely persuasive with respect to military orders designed to preserve the status quo, but very few orders are in fact so designed. Orders under the regulations requiring noncombatant service pending administrative review of a c.o. claim may be in this category because they are designed to preserve the legal status of soldier without violating the possible status-in-fact of c.o. On the other hand, an order to report for transfer to Vietnam is not designed to protect the factual status quo because it places the serviceman in a slightly different posture toward the war and removes him from those who could help substantiate his claim, although it in no way changes the legal status of soldier. An order to wear a uniform following administrative denial of the c.o. claim is more difficult to deal with be-

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81 *In re* Sawyer, 124 U.S. 200 (1888); *Ex parte* Fisk, 113 U.S. 713 (1885); *Ex parte* Rowland, 104 U.S. 604 (1881).

82 United States v. UMW, 330 U.S. 258 (1947); United States v. Shipp, 203 U.S. 563 (1906); *cf. In re* Green, 369 U.S. 689 (1962).

83 Thomas v. Collins, 323 U.S. 516 (1945); *see* United States v. UMW, 330 U.S. 258, 352 (1947) (Rutledge, J., dissenting).

84 Walker v. City of Birmingham, 388 U.S. 307 (1967). In *Walker* the Court affirmed contempt citations for violating a state court injunction. The Court did not reach the validity of the parade ordinance on which the injunction was based because the defendants had not attempted to have the injunction vacated before violating it. Convictions for violations of the ordinance itself were later reversed because of the invalidity of the ordinance. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

cause it could be argued that the status to be preserved is that of soldier and a uniform is part of the status of soldier. This would be too facile, however, since obedience to orders is also part of the status of soldier.[85] Moreover, wearing a uniform or making a bed could be as much a change in the factual status quo as an order to transfer since it requires some action on the part of the serviceman in possible repugnance to his beliefs.

The Court's choice of an offsetting hypothetical case is most instructive. Rather than dicta dealing with the charge of refusing to wear a uniform, the Court contrasted its holding with the case of a soldier charged with stealing a watch.[86] Theft is in violation of a prohibition that applies neutrally to all persons,[87] the type of prohibition that normally can be violated with impunity only if it prohibits some conduct that is protected by a constitutional mandate. No affirmative order of the military could be placed in this category because of the personal scope of an affirmative order.[88] Two choices seem available with respect to affirmative directions of the military. First, they could be treated in the same manner as court orders, making their validity depend upon their necessity to preserve the status quo tempered by any propensity to wreak irreparable harm on first amendment freedoms. Secondly, an affirmative order could be treated as void if issued to a conscientious objector whatever its content. The Supreme Court in *Parisi* seems to have adopted the latter approach.

C. The Unexhausted Serviceman

The serviceman who has not yet exhausted administrative remedies is in a slightly more tenuous position. The military has provided a remedy for change of status, attempting to hold the status quo by retaining an applicant for discharge in his present unit and assigning him duties that minimally conflict with his professed beliefs. So long as the civilian courts require exhaustion of administrative remedies,[89]

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85 This interrelationship between "general obligations" of a soldier and obedience to orders forms the crux of arguments put forward to invalidate prosecutions based on disobedience of a direct order to put on a uniform. *See* note 46 *supra.*

86 405 U.S. at 46 n.15.

87 Article 121, UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 921 (1970).

88 Moreover, the offense of theft is one of a class of offenses that would be cognizable in civilian courts if it were held that the military had lost jurisdiction over the "soldier" upon his change of factual status. *See* O'Callaghan v. Parker, 395 U.S. 258 (1969).

89 Exhaustion in this context requires completion of all the steps of review provided within the military up to the denial of discharge by the Secretary of the Army. Prior to completion of this process, the civilian courts have not entertained petitions for habeas

then preservation of the status quo pending decision by the military will be appropriate. Of course, disobedience to an order in this waiting period may be justified and defensible if the order breaches in an irrevocable way the first amendment rights or c.o. status of the individual and there is no adequate remedy for having the order set aside.[90] Cases arising in this gray zone will be inordinately difficult to decide because the criteria for decision are a blend composed of the order's propensity to advance the war effort and the substance of the applicant's professed beliefs. The burden of proof on the serviceman will probably be satisfied by a showing of a direct nexus between the order and his beliefs, an inquiry that was asserted earlier to be inappropriate with respect to the serviceman who had been denied administrative relief. The inquiry must be made in this context because the defendant is here required to demonstrate some irreparable harm. For example, the most basic distinction to the typical c.o. should be that between orders preparatory to combat (*e.g.*, processing of supplies) and those designed to repair the shambles of combat (*e.g.*, hospital work or drug counseling). Relatively neutral orders for the preservation of military discipline (wearing uniform or making a bed) might well be considered valid under this analysis, because the impact of the order on beliefs has now become a subject of proof by the serviceman.

Finally, there may be some cases of disobedience by those who had not submitted applications for administrative discharge but claim to have become conscientious objectors immediately prior to the disobedience. Assuming a sufficient excuse for not having pursued the administrative process because of time pressures or other factors, this soldier will be in the same posture as one who has been denied discharge after pursuing the administrative process. The holding pattern of the status quo remedies will have never been invoked so there will be no systemic justification for requiring obedience and the validity of the order may be judged solely in light of the validity of the c.o. claim of the person to whom it is directed. This should not be taken to mean that the soldier in this situation can more easily obtain relief than the one who has applied for administrative relief. The excuse

corpus. *See* Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967); *cf.* Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969), *rev'd*, 397 U.S. 335 (1970). Exhaustion of these administrative remedies generally seems appropriate under Professor Jaffe's analysis. There is reason to have the military develop and decide the disputed questions of fact; the military is theoretically part of a coordinate branch of government entitled to some deference. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-26 (1965).

90 *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

for not pursuing administrative remedies will necessarily require a showing that the order had such an extreme impact on his true c.o. status that immediate disobedience was more important than the threat to military discipline.[91]

III. Comity and Abstention

The decision to intervene and grant relief to Parisi despite the pendency of court-martial proceedings portends another squabble in the federal courts over the proper dimensions of that unfortunate doctrine of decision avoidance—abstention.[92] The Court analogized the doctrine of comity to the doctrine of abstention,[93] implying that if *Parisi* had involved a state court prosecution, habeas corpus relief would still have been available.[94] This is a somewhat surprising assertion in light of the Court's hardline stand against intervening in state criminal prosecutions.

In *Younger v. Harris*[95] and its companion cases, the February Sextet,[96] the Court used a broad-brush policy approach to deny various forms of relief to persons embroiled in the state criminal process. The

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91 A particularly hard case may be that of a soldier new to combat who sees a man killed for the first time and realizes that he cannot shoot anyone. In a subsequent prosecution for disobedience, he will face the possibility that his failure to fire as ordered may have jeopardized the lives of others. On the other hand, the same soldier might easily defend against prosecution for disobedience of an order to perform some act that another comrade could have performed.

92 The doctrine was invented to avoid the decision of constitutional issues in cases in which state law might provide an adequate ground of relief in the state courts. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). It has grown into other fields such as avoiding difficult decisions of state law in diversity cases. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). These other uses are described in C. Wright, Federal Courts 196-208 (2d ed. 1970), and they have no application to intervention in criminal prosecutions.

93 405 U.S. at 40 n.6.

94 Justice Douglas in a separate concurring opinion argued vigorously that the question was not one of comity at all but simply protection of a person "claiming his statutory and *constitutional* exemption from military service." 405 U.S. at 48 (emphasis added).

> Comity is "a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation have had an opportunity to pass upon the matter" *Darr v. Burford*, 339 U.S. 200, 204. But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned.

Id. at 51.

95 410 U.S. 37 (1971).

96 Samuells v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 410 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

federal courts had grown accustomed to the proposition under *Dombrowski v. Pfister*[97] of striking down state statutes and providing injunctive relief for persons charged under unconstitutional statutes. The ease with which this relief had become available apparently had never been intended in *Dombrowski,* which was limited[98] to cases in which there was no adequate remedy in the state courts in the form of an immediate limiting construction of the statute to thwart the *abnormal* "chilling effect" occasioned by bad faith enforcement of an overly broad or vague statute.[99] *Younger* and its companion cases reemphasized the unusual nature of intervention by the courts of one sovereign into the criminal prosecutions of another sovereign, reminding the federal courts that they were not to take lightly the decision to intervene. The Court phrased its opinions in terms of comity rather than abstention, implying that comity might bar intervention into situations in which the familiar principles of neither abstention nor equitable remedies would present an obstacle.

The Court's equation of comity, whether for state or military courts, with abstention is tenuous at best. Abstention is theoretically a matter of convenience for the federal courts' avoiding premature decision of constitutional questions. The articulated basis of the doctrine is a desire to prevent solidifying of constitutional doctrine unnecessarily more than a desire to avoid meddling in state affairs.[100] Comity, on the other

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97 380 U.S. 479 (1965).

98 *See* Cameron v. Johnson, 390 U.S. 611 (1968).

> *Dombrowski* is strong medicine. It involves interposition of federal power at the threshold stage of the administration of state criminal laws. *Dombrowski's* remedy is justified only when First Amendment rights, which are basic to our freedom, are imperiled by calculated, deliberate state assault.

Id. at 623 (Fortas, J., dissenting). *See also* Maraist, *Federal Injunctive Relief Against State Court Proceedings,* 48 TEXAS L. REV. 535 (1970).

99 The concurrence of all four factors was emphasized by the Court as being essential to show both (1) irreparable harm and lack of an adequate remedy at law to satisfy equitable principles, and (2) no possibility of avoiding the constitutional question by means of a state law decision to satisfy abstention princples. *See* Maraist, *supra* note 98. The situation was later confused by the Court's holding that declaratory relief was not equitable in nature and might therefore be appropriate when injunctive relief could not be provided. Zwickler v. Koota, 394 U.S. 103 (1969). One of the companion cases to *Younger, Samuells v. Mackell,* 401 U.S. 66 (1971) overturned a declaratory judgment equating that relief with injunctions for purposes of abstention and comity. Interestingly enough *Zwickler* was not even cited in *Samuells.*

100 Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500 (1941):

> The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

hand, is a holdover of the traditional equitable principle that one court system should not intrude when another court system holds out hope of an adequate remedy.[101] Abstention principles would have afforded no basis for denying relief in *Parisi* because no constitutional claim was presented to be avoided. Thus the Court was troubled by comity in a situation in which abstention should not have raised a serious problem.

It is curious that the Court compared comity for the military with abstention [the Court apparently meant comity] for the states but still granted relief despite the possible adequacy of the military remedy. The Court held that the court-martial process was not an adequate remedy at law for the reason that Parisi would not have been guaranteed a discharge even if he had been acquitted on the basis of his *Noyd* defense. When relief is sought by a state prisoner, he has a substantial burden of proving the inadequacy of available state remedies.[102] Even after conviction, he is required to pursue any presently available remedy that offers some hope of success.[103] Prior to conviction, to justify intervention in the normal course of a state prosecution, he would be required under *Dombrowski* and *Younger* to show that the state prosecution would not result in relief from the abnormal chilling effect of threatened prosecutions.

It is difficult to imagine a precisely corollary state prosecution with which to compare *Parisi*. Parisi's c.o. status as an invalidating cause of the order to report to Vietnam is not even comparable to the status of a Jehovah's Witness who is prosecuted in state court for not saluting the flag. The state flag law is unconstitutional on its face if it purports to compel salute by persons with religious scruples.[104] The invalidating cause is intrinsic and based on conflict with the Constitution, although it has religious underpinnings just as does c.o. status. The distinction is important because it alleviates the need for the civilian defendant to prove the sincerity of his objection whereas the invalidating cause of c.o. status must be established in each individual case. Despite the seemingly higher plane of the defendant's objection, *Younger* would

101 Darr v. Burford, 339 U.S. 200, 204 (1950); Covell v. Heyman, 111 U.S. 176, 182 (1884).

102 *See generally* R. SOKOL, FEDERAL HABEAS CORPUS § 23 at 171-77 (2d ed. 1969); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1093-1103 (1970).

103 Fay v. Noia, 372 U.S. 391, 419 (1963). Moreover, remedies that are no longer available may be a ground for a discretionary denial of federal relief if it is found that the petitioner has deliberately bypassed state remedies. *Id.* at 438; Henry v. Mississippi, 379 U.S. 443, 447 (1965). This rule shows rather clearly the interrelationship of comity and equitable principles, for the rule is little other than a requirement that the plaintiff in equity have clean hands. *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

104 *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

apply to our hypothetical case in the absence of any irreparable harm in the form of an *abnormal* chilling effect occasioned by bad-faith prosecution. Yet *Parisi* implies that prosecution alone might be irreparable harm and that the existence of a possibly adequate remedy will not defeat equitable relief.

A more likely analogy would be prosecution of a married couple for sodomy. They might successfully argue that the statute cannot be applied to them constitutionally,[105] but it is questionable whether the invalidating penumbra of privacy would strike the statute on its face or merely as applied to them. The doubt on this point is occasioned by the ease and inoffensiveness of proving their invalidating status coupled with an arguable interest of the state in prosecuting those who cannot claim the sanctity of the marital chamber.[106] Once again, however, the invalidating cause is intrinsic to the statute in the sense that on its face it purports to cover both married couples and others whereas the order to report to Vietnam is given to one individual and there is no attempt to apply it to anyone else. The order would be valid if it were given to another soldier; and thus the invalidating cause is wholly extrinsic. Our hypothetical case apparently would be covered by *Younger's* comity rationale.[107] Of course, it would also be appropriate for abstention unless the state court had already passed on the state law availability of a constitutionally valid limiting construction. *Parisi* again affords relief when the corollary state court prosecution would be subject to comity despite the possibly higher standing of the invalidating cause leveled against the state statute.

One of two conclusions must be reached from the comparison of *Parisi* with state court prosecutions. Either the abominable[108] doctrines of abstention and *Younger*-type comity have been eased or the military courts are not as deserving of comity as state courts. The former seems

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105 *See* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970).

106 *Id.* at 733.

107 Buchanan v. Wade, 401 U.S. 989 (1971); *see* Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971).

108 The avoidance techniques of the federal courts have resulted in some instances of incredibly long delays in adjudicating constitutional rights. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 28 (1959), 389 U.S. 975 (1967) (10 years from beginning to end); Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), 377 U.S. 179 (1964) (7 years); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), 384 U.S. 885 (1966) (9 years). The Supreme Court has recently criticized and restricted the abstention doctrine because of its inevitable delays. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972); Lindsey v. Normet, 405 U.S. 56, 62 n.5 (1972).

too much to be hoped for while the latter raises some interesting possibilities.

Parisi could be read as reflecting a possible softening in the attitude of the Court in the one year that has passed since *Younger*. The only apparent obstacle to this proposition is that principles of federalism may prove to be more important than principles of separation of powers. Comity for the military could be based on the "need for a prompt, ready-at-hand means of compelling obedience and order"[109] and on the inability of civilian courts to understand military law.[110] Neither of these rationales would require treatment of the military as a separate judicial system, for, as Mr. Justice Douglas phrased it, "the Pentagon is not yet sovereign."[111] Thus, the military could be granted only a form of comity usually known as exhaustion of administrative remedies and reserved for those cases[112] reflecting the need for separation of powers.[113]

On the other hand, it is arguable that federalism should not be accorded a superior position in the scheme of federal judicial power. The states as much as the military operate under the strictures of the Constitution.[114] Their courts are just as subject, if not more so, to having their standards of constitutional law revised by the lower federal courts

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109 Toth v. Quarles, 350 U.S. 11, 22 (1944); *see* Orloff v. Willoughby, 345 U.S. 83, 95 (1953); Gusik v. Schilder, 340 U.S. 128 (1950).

110 Noyd v. Bond, 395 U.S. 683, 696 (1969).

111 405 U.S. at 51.

112 Several decisions prior to *Parisi* seemed to imply that separation of powers required full comity for the military regardless of the type of case involved. *See* Orloff v. Willoughby, 345 U.S. 83 (1953); Gusik v. Schilder, 340 U.S. 128 (1950).

113 The extraordinary type of case to which reference is made would be that type in which the principles of exhaustion of remedies were exceptionally strong. For example, the need for prompt military action might in a desertion case preclude intervention by civilian courts. Or a military prosecution might raise such esoteric issues that the civilian courts would need the definition of issues to be gained from building a record in the military courts. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 426 (1965). The Supreme Court has stated that "the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created." McKart v. United States, 395 U.S. 185, 195 (1969); *see* McGee v. United States, 402 U.S. 479, 485 (1971).

114 The principle of "selective incorporation" is employed to apply to the states the guarantees of most of the Bill of Rights. An extensive discussion of this process is found in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See also* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism*, 66 YALE L.J. 319 (1958). The provisions of the Bill of Rights apparently apply to military prosecutions although the content of any particular provision may be altered to conform to the exigencies of the military situation. Burns v. Wilson, 346 U.S. 137 (1953).

in post-conviction relief.[115] There is really no more need to allow an unconstitutional state prosecution to proceed than there is to allow an invalid court-martial to proceed, and the vitality of *Younger* should be continuously questioned.

The Supreme Court has given further indication of a possible shift from the harsh language of *Younger*. In *Mitchum v. Foster*,[116] decided at the end of the 1971 term, the Court held that section 1983 of the Civil Rights Acts[117] was an express exception to the anti-injunction statute.[118] *Mitchum* involved a state injunction against operation of a bookstore, and the Court held that federal courts have the power to enjoin the pending state proceedings.[119] Although paying lip service to the principles of federalism the Court reverted to more ancient language to explain its position:

> The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'[120]

Only the extent to which the states continue to prosecute[121] unconstitutionally can determine how the Supreme Court will view federalism in the future.

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115 *Compare* Townsend v. Sain, 372 U.S. 293 (1963), *with* Burns v. Wilson, 346 U.S. 137 (1953). *See* Weckstein, *Federal Court Review of Court-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities*, 54 MIL. L. REV. 1 (1971).

116 40 U.S.L.W. 4737 (U.S. No. 70-27, June 19, 1972).

117 42 U.S.C. § 1983 (1970).

118 28 U.S.C. § 2283 (1970):

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Prior authority on the precise point had been split. *See* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964) (not an exception); Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950) (is an exception).

119 The three-judge district court had held that it had no power to issue the requested injunction and had not reached the merits of the controversy. 315 F. Supp. 1387 (N.D. Fla. 1970). The Supreme Court dealt with only the issue of power and remanded to the district court for reconsideration. Thus, we have little basis other than the general language of the opinion for assessing the present attitude toward *Younger*.

120 40 U.S.L.W. at 4742, *quoting from* Ex parte Virginia, 100 U.S. 339, 346 (1897).

121 *Mitchum* was concerned with enjoining a state civil action rather than a criminal prosecution. There has been some question whether the principles of federalism and comity would apply with equal force to state civil actions as to criminal prosecutions. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 556 (1971). Of course, the basic

The second proposition upon which *Younger* and *Parisi* could be rationalized is that the military courts are not truly courts at all. The question of the Court of Military Appeals' status was an extremely important part of *Parisi*. If it were a court, then the All Writs Act[122] would have given it power to issue habeas corpus for Parisi's discharge from the Army. The Supreme Court held that the uncertainty of this power rendered the CMA an inadequate remedy. Nevertheless, the ultimate writ-granting power of the CMA was specifically referred in *Parisi* for decision by the CMA itself.[123] In most cases it is solely within the province of article III courts to determine the proper allocation of power among the three branches of government.[124] Why the Supreme Court should refer this question to the military courts is baffling.

The Constitution specifically provides[125] for military punishment of military related offenses so the authority of courts-martial to try cases can hardly be questioned.[126] What might be questioned, however, is the collateral estoppel effect to be given their fact findings. It is apparently the province of civilian courts to establish the standards and content of constitutional principles in the context of military trials, giving preclusive effect to any findings of fact made after a full and fair hearing.[127] This is precisely the same standard by which state court

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requirement for application of § 2283 has been that the state proceeding be a *judicial* litigation. Roudebush v. Hartke, 405 U.S. 15 (1971).

The separate concurring opinion of three justices in *Mitchum* sought to establish a possible distinction between enjoining civil and criminal actions. Any distinction of this nature would show *Younger*-type comity to be an expression of deference to state law enforcement officials rather than of deference to the state courts.

122 28 U.S.C. § 1651(a) (1970).

123 405 U.S. at 44.

124 *See* Baker v. Carr, 369 U.S. 186, 211 (1963). The Supreme Court has had many occasions to determine whether a particular tribunal is an Article III court, and the tests for making this determination have undergone rather kaleidoscopic changes. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); O'Donoghue v. United States, 289 U.S. 576 (1933). The Supreme Court has already held that the military courts are not "unconstitutional" courts invested with the judicial power of the United States. O'Callahan v. Parker, 395 U.S. 258, 265 (1969). This does not necessarily mean, however, that the military could not be covered by the All Writs Act. *See* Noyd v. Bond, 395 U.S. 683 (1969). The Act refers to "all courts established by Act of Congress."

125 U.S. CONST. art 1, § 8 cl. 14; U.S. CONST. amend. V.

126 The extent of the military's power is, of course, limited and subject to review by the civilian courts. O'Callahan v. Parker, 395 U.S. 258 (1969).

127 Burns v. Wilson, 346 U.S. 137 (1953). The statement in this text is the subject of some debate and the proposition has not yet been fully accepted. *See* Bishop, *Civilian Judges and Military Justice: Collateral Review of Court Martial Convictions*, 61 COLUM. L. REV. 40 (1961); Weckstein, *Federal Court Review of Courts-Martial Proceedings: A*

convictions are judged,[128] but the standard must inevitably be questioned if military courts are not true courts. If they are held to be mere administrative tribunals, subject to disruption at an earlier stage than true courts would be, then their findings of fact even after full and fair hearing may be subjected to scrutiny under a "substantial evidence" or "basis in fact" test.

CONCLUSION

It seems only logical that a tribunal created under the article I, section 8 powers of Congress should be treated as an administrative tribunal subject to the restrictions and rules normally applied to other administrative tribunals. The opinion in *Parisi* advances toward this position because of its internal inconsistencies. The Court avows a rationale of comity for the military but proceeds to intervene in a situation in which comity would certainly call for nonintervention. The Court purports to give the CMA power to decide its own jurisdiction to grant habeas corpus but decides that the habeas corpus remedy does not exist.

These questions of power and review may ultimately require litigation. The most immediate prospect certainly seems to be an abundance of habeas corpus petitions seeking federal court relief from courts-martial. It will be surprising if future cases find a distinction upon which to limit the availability of that relief.

Delicate Balance of Individual Rights and Military Responsibilities, 54 MIL. L. REV. 1 (1971); Note, 70 HARV. L. REV. 1043 (1957).

128 *See* Townsend v. Sain, 372 U.S. 293 (1963).

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